

EDITORIAL

- Anna Krisztián*
Changing Times 1

GENERAL ARTICLES

- Stefaan van der Jeught*
Current Practices with regard to the Interpretation of
Multilingual EU Law: How to Deal with Diverging
Language Versions? 5

- Lalin Kovudhikulrungsri*
Human Rights in the Sky: Weighing Human Rights against
the Law on International Carriage by Air 39

- Ilaria Kutufà*
The Financial Distress of Individual Debtors: Points for a
De Jure Condendo Reflection from a Comparative Perspective 67

- Laura M. Henderson*
Deciding to Repeat Differently: Iterability and Decision in
Judicial Decision-Making 97

BOOK REVIEW

- Timothy Jacob-Owens*
Ayelet Shchar, Rainer Bauböck, Irene Bloemraad, and
Maarten Vink (eds), *The Oxford Handbook of Citizenship*
(Oxford University Press 2017) 129

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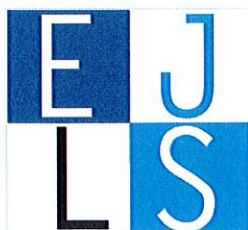
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TABLE OF CONTENTS

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- Stefaan van der Jeught*
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Multilingual EU Law: How to Deal with Diverging
Language Versions? 5
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the Law on International Carriage by Air 39
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THE FINANCIAL DISTRESS OF INDIVIDUAL DEBTORS:
POINTS FOR A *DE JURE CONDENDO* REFLECTION FROM A
COMPARATIVE PERSPECTIVE

Ilaria Kutufa*

The article deals with the issue of over-indebtedness, which is perceived – depending on the regulatory model adopted – either as a social problem or as a market failure. In this context, it is possible to distinguish between the welfare state (debtor oriented) and the liberal (creditors oriented) regulatory models. The comparative study of these paradigms is necessary for the following reasons: the comparison between the regulations of different countries makes it possible to find common rules to draw upon with a view to harmonization, as requested by the European Union; the comparison may reveal some regulatory gaps in those countries where the phenomenon of over-indebtedness appears incessant; there are countries, such as Italy, in which the legislation, apparently hybrid and straddling the two different models, is the subject of current reflection by the legislator for a change. This research suggests that the Italian legislator could be better inspired by the solutions accepted elsewhere and stimulated, at the same time, to overcome the above-mentioned regulatory gaps. This comparison will also show how the original differences are decreasing and allow to imagine meeting points for common rules.

Keywords: Over-indebtedness, welfare state model, liberal model, individual debtor, consumer, credit rating, improvident credit, discharge, responsible lending approach

TABLE OF CONTENTS

I. INTRODUCTION	68
II. THE COMPARATIVE STUDY: THE CONSUMER BANKRUPTCY MODEL AND ITS CONSERVATIVE TREND.....	75
III. THE CONSUMER DEBT ADJUSTMENT MODEL AND ITS PROGRESSIVE TREND.....	79
IV. ITALY'S SPECIAL SOLUTION	82

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V. THE 'ISOLATION' AND 'SPLITTING' OF THE OVER-INDEBTED, NON-BANKRUPTABLE DEBTOR	83
VI. THE KEY ROLE OF THE CONSUMER AS A REMEDY FOR MARKET FAILURE: POSSIBLE INTERPRETATIVE AND EXTENSIVE SOLUTIONS.....	87
VII. THE (RE)AFFIRMATION OF SOCIAL PROBLEMS FROM THE POINT OF VIEW OF FUTURE LEGISLATION: CONCLUSIONS AND PROSPECTS DE JURE CONDENDO	94

I. INTRODUCTION

The persistent incapacity of individual debtors to meet their repayment obligations has generally been identified and interpreted, by legislative provisions designed to regulate the question, as a 'social problem'.¹ In fact, many countries initially dealt with the problem of so-called over-indebtedness not so much as an individual question, but as a collective phenomenon that had to be regulated by each nation's legal system.² This

¹ The social importance of the phenomenon is underlined by the European Economic and Social Committee in its Opinion on 'credit and social exclusion in an affluent society' (2008/C 44/19), published in the Official Journal of the European Union (OJ) of 16 February 2008, C44/74. This aspect has also been emphasised by Enza Pellecchia (ed), *Dall'insolvenza al sovraindebitamento. Interesse del debitore alla liberazione e ristrutturazione dei debiti* (Giappichelli 2012), XIII, who refers to the ancient origins of the phenomenon dating back to the agricultural crisis witnessed in Greece in the 6th century B.C., which represented the opportunity for Solon to adopt social reforms at that time.

² According to the European Economic and Social Committee, *over-indebtedness* is 'a situation where the debtor is permanently incapable of paying his/her debts, or in which there is a real risk of not being able to pay debts when they become due'. According to the European Council (see Recommendation CM/Rec(2007)7 of the Committee of Ministers to Member States on legal solutions to debt problems (Adopted by the Committee of Ministers on 20 June 2007 at the 999-a meeting of the Ministers' Deputies), *over-indebtedness* 'should cover at least the situations where the debt burden of an individual or a family continuously and/or manifestly exceeds its payment capacity, resulting in systematic difficulties, and sometimes in failure, in paying the creditors'. According to the wording adopted by the Italian legislator in Law no. 3 of 27 January 2012 (art. 6), *sovraindebitamento* is 'la situazione di perdurante squilibrio tra le obbligazioni assunte e il patrimonio prontamente liquidabile per farvi fronte, che determina la rilevante difficoltà di adempiere le proprie obbligazioni,

nation-level solution is adopted as an attempt to find a way of settling the financial crisis and designed to avoid the risk of the 'social exclusion' of those persons who finding themselves incapable of paying off their debts, no longer have any access to credit.³

The nature of the problem, which is relevant in various ways, in itself justifies a multidisciplinary approach to the observation and examination of its specific aspects. The question appears not only to involve the non-legal sciences such as sociology, psychology and statistics, but also to be

ovvero la definitiva incapacità di adempierle regolarmente' (a situation of a lasting imbalance between the obligations taken on and the capital that can be promptly converted to cash to deal with those obligations, resulting in considerable difficulty in meeting one's obligations, or the definitive incapacity to meet them regularly). As defined in German Law (§ 19 *Insolvenzordnung*), *Überschuldung* (also linked to business contexts) 'liegt vor, wenn das Vermögen des Schuldners die bestehenden Verbindlichkeiten nicht mehr deckt, es sei denn, die Fortführung des Unternehmens ist nach den Umständen überwiegend wahrscheinlich' (exists if the debtor's assets no longer cover the existing liabilities, unless, under the circumstances, the continuation of the company is largely probable). According to French law (L330-1 *Code de la Consommation*), *la situation de surendettement des personnes physiques* 'est caractérisée par l'impossibilité manifeste pour le débiteur de bonne foi de faire face à l'ensemble de ses dettes non professionnelles exigibles et à échoir. L'impossibilité manifeste pour une personne physique de bonne foi de faire face à l'engagement qu'elle a donné de cautionner ou d'acquitter solidairement la dette d'un entrepreneur individuel ou d'une société caractérise également une situation de surendettement. Le seul fait d'être propriétaire de sa résidence principale et que la valeur estimée de celle-ci à la date du dépôt du dossier de surendettement soit égale ou supérieure au montant de l'ensemble des dettes non professionnelles exigibles et à échoir ne peut être tenu comme empêchant que la situation de surendettement soit caractérisée' ('is characterized by the manifest impossibility for the bona fide debtor to meet all his non-business debts due and falling due. The manifest impossibility for a bona fide natural person to face up to the undertaking he has given to guarantee or jointly pay the debt of an individual entrepreneur or a company also characterizes an over-indebtedness situation. The mere fact of owning one's principal residence and the fact that its estimated value at the date of submission of the over-indebtedness file is equal to or greater than the amount of all non-business debts due and payable cannot be held to prevent the over-indebtedness situation from being characterized as follows'). This and all subsequent translations are the author's own.

³ In this regard, see the expression specifically used by the European Economic and Social Committee (see n 3).

interconnected, in terms of its legal character and its legislative consequences, with various notions of civil and business law.

The strategies adopted by the different countries to govern the phenomenon fall within three different models of regulation:

- 1) the *consumer bankruptcy* model, based, in general, on the debtor's limited liability, on the sharing of risks with creditors, on the social distribution of the cost of debt, and in particular on bankruptcy discharge seen as a means by which the debtor may be reintegrated into the economic world and the market as quickly as possible;
- 2) the *consumer debt adjustment* model, based on the renegotiation of debts with creditors, in view of the approval of an overall repayment plan seen as an integral part of a project for the re-education of consumers and for the re-establishment of 'a morality of compliance';⁴ and
- 3) the *consumer bankruptcy and debt adjustment* model, based on a compromise approach whereby the bankruptcy discharge outcome is provided for, however it is subjected to the occurrence of certain intervening events, or to the debtor meeting certain subjective or objective requirements of 'merit'.

Upon closer examination, the features that distinguish the above-mentioned models from one another reflect the different approaches to the matter adopted by the respective legal systems.

According to the *liberal* model of regulation (on which the consumer bankruptcy model is based, as in the USA), the aim of the system is market efficiency. The creditors and the debtor are treated as individual contracting parties, the bankruptcy discharge (i.e. write-off of prior-period debts) reduces risks and encourages new access to credit facilities and stimulates economically active behavior. This model incites a fresh start for the debtor after the default: hence, the debtor is reintegrated into economic activity and consumption as quickly as possible and his/her conduct is not stigmatized.

In contrast, according to the *welfare state* model of regulation (on which the consumer debt adjustment model is based, as in Spain), the system aims to

⁴ This expression is borrowed from Pellecchia (n 1) 128.

safeguard the debtor against the onset of (further) social risks (illness, unemployment, etc.), albeit with a view to guaranteeing at least the partial settlement of creditors' claims.⁵ In this model, the debtor, if excessively over-indebted, never deserves to be released from his/her obligations, even when they are the result of unforeseen circumstances. According to this model, a rescheduling of debts with creditors is desirable in order to gain the approval of a global repayment schedule. Advice and debt mediation services help debtors not to repeat the same mistakes and to change their consumption and debt patterns: the function of these services is decisive.

Following the European Union's formulation of the urgent need for common rules and the establishment of a uniform paradigm, a comparative investigation appears necessary, because it is important to understand which model (or which alternative) can best balance the interests at stake. As early as the 1990s, the first study, completed in 1994 (Huls-Reifner-Bourgoinie, *Overindebtedness of Consumers in the EC Member States: Facts and Search for Solutions*), highlighted the problem of a lack of legislative harmonization at a European level, resulting in inequality, social injustice and failure to complete the internal market. Subsequently, in 2002, the Economic and Social Committee, in expressing its opinion on the subject *Household over-indebtedness*, made it clear that the issue of over-indebtedness had been included as a priority in the development of consumer protection policy. The studies promoted over time by the European Commission have increasingly highlighted the urgent need for common regulations and have also affirmed the need for a strategy based on the joint use of preventative and subsequent actions.⁶ Furthermore, the 2008 opinion of the European Economic and Social Committee on *Credit and social exclusion in an affluent society* highlighted the need to draw up harmonized measures to anticipate and prevent this phenomenon. In this regard, two directives have recently been issued by the European Parliament and the Council: Directive 2008/48/EC on credit agreements for consumers and Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property. Furthermore, the

⁵ With regard to this dichotomy, see Pellecchia (n 1), XIII.

⁶ Over time, there has been a succession of working groups: see, among others, the working group on *Inclusion, Social Policy Aspects of Migration, Streamlining of Social Policies*.

search for common rules seems important in order to avoid, or at least reduce, the risk of bankruptcy tourism, a particular form of forum shopping, which may result from uneven legislation between the various countries.⁷ EU Regulation 2015/848 of the European Parliament and of the Council, dealing with this subject, has been adopted. In particular, the Regulation governs insolvency proceedings having cross-border effects. The purpose is to establish rules on jurisdiction, recognition and applicable law in this area. This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the center of his/her main interests. Those proceedings have a universal scope and are aimed at encompassing all the debtor's assets. To protect the diversity of interests, this Regulation permits secondary insolvency proceedings to be opened to run in parallel with the main ones. Secondary insolvency proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary insolvency proceedings are limited to the assets located in that State.

In addition, comparative research seems particularly appropriate in view of the fact that there are some countries, such as Italy, in which the discipline on insolvency law is in the process of being amended. At the moment, Italian legislation in this area enshrines a compromise between the models (liberal and welfare state) described above. The Italian legal system seems to move along both trajectories traced by these two models.⁸ In fact, the above-

⁷ *Bankruptcy tourism* is the phenomenon whereby residents of one country move to another jurisdiction in order to declare a personal bankruptcy there, before returning to their original country of residence. This is done in order to facilitate bankruptcy in a new jurisdiction where the insolvency laws are deemed to be more favorable. For a discussion on the phenomenon of bankruptcy tourism see Bob Wessels (ed), *International Insolvency Law* (Kluwer Law Intl. 2012), 349; Alberto Mazzoni, 'Cross-border insolvency of multinational groups of companies: proposals for a European approach in the light of the UNCITRAL approach' [2010] *Diritto del commercio internazionale* 755; Piervincenzo Pacileo (ed), *Il sovraindebitamento del debitore civile. Analisi comparata dei principali modelli europei* (Giappichelli 2018) 49.

⁸ Italian Law no. 3 of 27 January 2012 containing 'provisions governing usury and extortion, and also settlement of the over-indebtedness crisis', as supplemented by Decree Law no. 179 of 18 October 2012, converted, with amendments, by Italian Law no. 221 of 17 December 2012. The law under examination is the result of a debate that went on for some considerable time in the Italian Parliament, and that was triggered

mentioned Italian legislation is based on the distinction between the financial distress of a generalized 'non-bankruptable' debtor (i.e. an individual or business debtor, who is not a bankrupt commercial entrepreneur) and the consumer's financial distress. The consequent provision (see Articles 12-bis and seq. Law no. 3/2012) of separate (further) rules governing the latter may be read in two different ways. On the one hand, this distinction seems to lean towards the *liberal* model: the provision of a specific procedure for consumers suggests that they merit the application of *ad hoc* rules in the event of over-indebtedness, so that they may go back, as quickly as possible, to feeding the system of supply and demand. In fact, there appears to be a correspondence between the consumer and the market, insofar as the former exists, as part of the production and consumption chain that forms the basis for (and is substantiated in) the market.⁹ On the other hand, the distinction appears to lead towards the *welfare state* model: the provision of specific information in the report drafted by the body settling the crisis that accompanies the proposed restructured repayment schedule (see Article 17 Law no. 3/2012), indicates that the legislator pays particular attention to those debtors who find themselves incapable of meeting their financial obligations insofar as they have been victims of events beyond their control. The causes of indebtedness and the diligence employed by the consumer in freely taking on the financial obligations in question, and the reasons for the consumer's incapacity to fulfil such obligations, as well as the report on that consumer's solvency over the last five years must be made explicit. The comparative study is therefore important for at least three reasons.

by the ('Centaro') Bill passed by the Senate on 1 April 2009, then subsequently deposited with the Chamber of Deputies for a considerable time, and prior to that by the so-called 'Trevisanato' Bill of 28 February 2004 regarding the reform of insolvency procedures. On this matter, see Paolo Porreca, 'L'insolvenza civile', in Antonio Didone (ed), *Riforme della legge fallimentare* (Utet 2009), 2081; Fabrizio Di Marzio, 'Sulla composizione negoziata delle crisi da sovraindebitamento (note a margine dell'AC n. 2364)' [2010] *Diritto fallimentare* 659; Fabrizio Maimeri, 'Il quadro comunitario e le proposte italiane sul sovraindebitamento delle persone fisiche' [2004] *Analisi giuridica dell'economia* 421.

⁹ This is what is deduced from the report accompanying Italian Decree Law no. 179/2012, in which the legislator's aim is specifically stated as being to provide an incentive for development in support of consumer demand.

First of all, the comparison between the regulations of different countries makes it possible to find common rules to draw upon with a view towards harmonization. Secondly, the comparison may reveal some regulatory gaps in those countries where the phenomenon of over-indebtedness appears incessant. Thirdly, there are countries, such as Italy, in which the legislation, apparently hybrid and straddling the two different models, is the subject of current reflection by the legislator for a change. In making the required changes, the legislator could be better inspired by solutions accepted elsewhere and stimulated, at the same time, to overcome the above-mentioned regulatory gaps. In other words, the ideas coming from the comparative analysis could lead the legislator to build a discipline that combines the solutions considered more efficient elsewhere and/or that closes the gaps found. For this reason, given that Italy is currently in the process of drafting its new regulatory framework, the Italian example will be the subject of more in-depth analysis in this article. In addition to the Italian model, the regulations of the United States, United Kingdom, Spain, France, Germany, Denmark and Sweden will be briefly analyzed. The choice to examine the regulatory systems of these countries is justified in a twofold perspective. First, it compares traditionally debtor-oriented models (such as the United States and the United Kingdom) with traditionally creditor-oriented models (such as France, Spain, Germany, Denmark and Sweden): this comparison will show how the original differences are decreasing and it will therefore be possible to imagine meeting points for common rules, also in the light of the regulatory gaps that will emerge. Second, the choice made in Italy, while still undergoing reform, encourages the interpreter to verify the adoption of more effective solutions to stem the phenomenon of over-indebtedness. In fact, as will be shown, Italy provides for *ad hoc* rules on consumer's over-indebtedness. However, this legislation seems to provide forms of subsequent protection (*ex post* protection instruments) rather than preventative measures (*ex ante* protection instruments). Moreover, it does not extend, at least explicitly, these remedies to the individual debtor who is not a consumer. This gives rise to two problems: the problem of verifying whether there is, preventively, a duty for the lender to select consumers on the basis of their financial capacity; and the problem of understanding whether there is a possibility for the honest, but unfortunate, debtor (even if not a consumer), to justify his/her default, assigning liability to the lender.

That is why comparative analysis helps also to outline possible interpretative solutions in legal systems, such as the Italian, in which the current regulations appear unclear. In this respect, the cases of the United States and Switzerland, where the principle of improvident credit extension is most strongly felt, will be examined. Furthermore, European Union legislation, which seems to refer to the responsible lending problem, will be analyzed.

II. THE COMPARATIVE STUDY: THE CONSUMER BANKRUPTCY MODEL AND ITS CONSERVATIVE TREND

The US model is illustrative of the *debtor-oriented* system, with its emphasis on offering the debtor in financial distress the opportunity *to make a fresh start in life*.¹⁰ Consumer default is seen as a natural event affecting anyone, regardless of whether or not he/she is an entrepreneur, who acts as a '*homo oeconomicus*',¹¹ and for this reason merits the opportunity to reacquire his/her social dignity so as to be able to re-enter the consumer circuit and feed the demand for goods.¹²

Title XI of the United States Code (the so-called Bankruptcy Code) establishes various crisis settlement processes, which may be grouped into two basic categories: liquidation procedures on the one hand, and composition with creditors procedures on the other. The former type (Chapter 7) involves the entrustment of the debtor's assets to a trustee appointed to sell the assets and distribute the proceeds from the sale among the creditors. The latter type (Chapter 13) is based on the formulation of a plan for the settlement of liabilities within a given period of time. Both categories are characterized by the concept of *discharge*: in the first case, except for a number of exceptions, unpaid debts are immediately cancelled

¹⁰ This principle goes back a long way: it first appeared in the ruling in *Hardy v. Fothergill* (1888), 13 *App. Cas.* 351, 367, mentioned by Guido Rossi (ed), *Il fallimento nel diritto Americano* (Cedam 1956) 144, footnote 40.

¹¹ Stefano Rodotà (ed), *Dal soggetto alla persona* (Editoriale Scientifica 2007), 22, according to whom (also) the consumer – the stereotypical non-business debtor – lives in (and interacts with) a market dimension of production and consumption.

¹² The central role played in the North American system by the idea that each individual has the right to fail and to be given the opportunity to start again is pointed out in Jay W. Ungerman, 'Discharge: the prime mover of Bankruptcy' [1962] *Journal of the National Association of Referees in Bankruptcy* 85 1962 326.

(discharged) after the proceeds from the sale of the assets have been distributed among the debtor's creditors;¹³ in the second case, the discharge of debts is the final outcome of the implementation of the aforementioned plan.

In this way, the bankruptcy of an individual debtor is perceived as an ambivalent instrument. On the one hand, it serves to distribute the burden of insolvency through a collective procedure, in which all the creditors' claims must be evaluated as a whole and the losses involved shared out fairly. On the other hand, it amplifies the value of the debtor's assets, given that the involvement of the group of creditors has the effect of maximizing the price to be achieved through enforcement proceedings. In this model, which serves the market well, the aim of permitting the debtor to reacquire his/her purchasing power rapidly is of key importance, in that it underlies the belief that by doing so, credit and consumption will be promoted and encouraged.

However, in order to avoid opportunistic behavior when admitting (albeit only partially) creditors' claims, the courts may reject applications for admission to insolvency proceedings should the debtor behave in a contestable manner towards the creditors.¹⁴ Furthermore, in deference to the promulgation of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005, a means test has been introduced: a debtor may not have recourse to the procedure referred to in Chapter 7, and thus to the immediate discharge that follows from sale of the debtor's assets, when the debtor's income is higher than the average in the State in which he/she resides. In this case, he/she must necessarily have recourse to the procedure referred to in Chapter 13, whereby, on the contrary, bankruptcy

¹³ Those debts included in the peremptory list provided for by *Sec. 523 of Chapter 5*, cannot be discharged: these include, among others, domestic support obligations, certain tax liabilities, debts deriving from fraud, misappropriation or theft, debts incurred when the debtor willfully causes harm to another or damage to another's property, and debts deriving from fines and other pecuniary penalties. For a broad overview of the various categories, see Lara Modica (ed), *Profili giuridici del sovraindebitamento* (Jovene 2012) 323.

¹⁴ As expressed in *Sec. 707 of Chapter 7* following the amendment of the original wording of the 2005 reform.

discharge is only permitted following implementation of the debt restructuring plan.

It cannot be denied that in the USA, which for a long time has been dominated by the ideological monopoly of pro-debtor arguments, taken on board by *progressive bankruptcy scholars*, persistent discordant voices have emerged that have been strongly supported by *conservative bankruptcy scholarship*.¹⁵ Evidence of this lies in the fact that the aforementioned measures have recently led to a (partial) rethinking of the rule of bankruptcy discharge, in an attempt to (re)convert it from a 'safe harbor' for any debtor, to its original purpose as a 'safety net' for the 'honest, but unfortunate, debtor'.¹⁶ In short, the system remains debtor-oriented, because it is typically aimed at facilitating a fresh start and a rapid reintegration of the debtor into the economic activity, thanks especially to the discharge tool. However, the described novelties reduce the scope of the system.

The position of the United Kingdom, although also characterized by *favor debitoris*, has nevertheless always been a more restrictive one in terms of benefits afforded to debtors. The Insolvency Act and the Insolvency Rules,

¹⁵ According to the *pro-creditors* school of thought, debtors' awareness of the fact that they can easily have recourse to the institution of bankruptcy discharge, constitutes one of the main reasons for consumers' over-indebtedness, creating a situation of moral hazard. See Todd J. Zwicki, 'An Economic Analysis of the Consumer Bankruptcy Crisis' [2005] *Northwestern University Law Review* 1464, which places a critical focus on the distortional effects of an interpretation of discharge as a means of financial planning. For a reconstruction of the progressive/conservative dualism, see among others, Giacomo Rojas Elgueta, 'L'esdebitazione del debitore civile: una rilettura del rapporto civil law-common law' [2012] *Banca, borsa, titoli di credito* I 314.

¹⁶ This ideological shift is underlined in Rojas Elgueta (n 15), 324, where the author nevertheless states that using the instruments of *behavioral law and economics*, the dichotomy in this regard between the *common law system* and the *civil law system* is weakening. With regard to the expansion of the concept of 'unfortunate', which was initially related to the realm of the intervening impossibility of meeting one's obligations for reasons beyond the debtor's control, see, on the other hand, Douglas G. Baird, 'Discharge, Waiver, and the Behavioral Undercurrents of Debtor-Creditor Law' [2006] *University of Chicago Law Review* 17, who, in emphasizing the gradual decline of the rule of personal responsibility, generally linked to the question of blame, remarks that: 'every debtor in dire financial straits is unfortunate'.

with regard to the bankruptcy of individual and business debtors, similarly provide for an insolvency procedure and also for an alternative procedure, aimed at the stipulation of an *individual voluntary arrangement* (IVA). This arrangement can result in – under the supervision of a nominee (generally represented by an Insolvency Practitioner) and subject to an agreement with the creditors representing at least 75% of a debtor's payables – settlement of debt exposure, automatically binding all unsecured creditors to the aforementioned agreement. In the event of bankruptcy, on the other hand, the debtor loses the disposability of his/her assets, which are entrusted to the Official Receiver, first of all, and then to the Trustee. Discharge may be applied by the party in question or may be triggered automatically after a year has elapsed following the opening of bankruptcy proceedings, provided that the debtor has not been convicted for bankruptcy offences and is not in breach of any obligations pending the proceedings.¹⁷

Furthermore, the 2007 Tribunals Courts and Enforcement Act, which actually came into force in April 2009, introduced Debt Relief Orders providing for automatic discharge at the end of a simplified administrative bankruptcy procedure reserved for individuals possessing no assets, and having debts of no more than £15,000. In this way, a solution giving preferential treatment to 'small' debtors is accepted.

This enables a way to deal differently with distinct types of debtors. In other words, without specifically providing rules for consumer over-indebtedness, the United Kingdom offers differentiated solutions according to the size of the debt and the assets owned. This solution can be affected regardless of the debtor's consumer status. In this way, more attention is paid to protecting the debtor, regardless of the role he plays in a market logic.

¹⁷ For a detailed historical survey of English bankruptcy, see Ian P. H. Duffy, 'English Bankrupts' [1980] *American Journal of Legal History* 283, which underlines how, unlike in the North American system, the granting of the benefit of discharge in English law has always been subject to thorough judicial control.

III. THE CONSUMER DEBT ADJUSTMENT MODEL AND ITS PROGRESSIVE TREND

The aforementioned systems are distinguished from the systems of mainland Europe, which are traditionally *creditor-oriented*. However, as will be explained shortly, over time these systems have also weakened the profiles characterizing the creditor-oriented model, taking into account some of the demands favorable to debtors.

Without neglecting the gradual watering-down of the original features of the creditor-oriented model in recent years, the main difference between this model and the consumer bankruptcy model is the traditional codification of a system of the debtor's unlimited financial liability. In fact, the principle whereby the debtor's assets constitute a general guarantee for the creditor, places the emphasis on the need to fulfill obligations insofar as possible, thus rendering discharge theoretically incompatible with the idea that all of the debtor's assets, including future assets, can be used to satisfy creditors' claims.¹⁸

Therefore, the creditor-oriented system generally comprises – albeit with the differences characterizing the heterogeneous rules in force in the different countries – the judicial and extra-judicial renegotiation of debts with creditors, in view of the approval of a global repayment plan, where a key role is played by advisory and intermediation services. The institution of discharge, in the main countries of mainland Europe, is not always available to debtors, and when it is available its application is designed for a different purpose, namely, to rehabilitate the debtor in order to get him/her to meet his/her obligations. In other words, the institution of discharge is used to encourage the debtor to cooperate with the procedure and to comply with

¹⁸ With regard to the historical origins, seen from a comparative viewpoint, of the principle of unlimited financial liability, see Andrea Zoppini, 'Autonomia e separazione del patrimonio, nella prospettiva dei patrimoni separati della società per azioni' [2002] *Rivista di diritto civile* I 552.

the plan, in order to benefit from the 'reward' of freedom from remaining debts. The *fresh start* is thus replaced by the *earned start*.¹⁹

This approach is clearly visible in Spain, where the rules have been brought together, and where just one legal procedure, called *concurso*, governs the default of debtors (both individual and business debtors), regardless of the choice of sub-procedure, be it *liquidación* or *convenio*, it does not result in discharge. The cooperative debtor who has freely applied for admission to the procedure is 'rewarded' simply by the rule that enables that debtor to preserve the possession and administration of his/her assets.²⁰ Upon closure of the *concurso*, due to the insufficient entity of the debtor's assets, '*el deudor quedará responsable del pago de los créditos restantes*' (the debtor is responsible for the payment of the remaining claims).²¹

France, on the other hand, appears more susceptible to progressive influences. Actually, French legislation gives a key role to an external body responsible for administering the procedure.²² It started from rules that were originally based on respect for private autonomy, as a result of which the courts were encouraged to impose, upon those creditors who had originally rejected this choice during the assisted renegotiation procedure, the plan drawn up by the *Commission de surendettement des particuliers*. In that context, the room for maneuver was limited to certain aspects of the original obligation (payment extensions, the reduction or elimination of interest payments, the provision of a deadline, within a given range, for the concession

¹⁹ Udo Reifner, Johanna Kiesilainedn, Nik Huls, and Helga Springeneer (eds), *Consumer over-indebtedness and consumer law in the European Union – Final report to the European Commission*, 2003, 167 <www.ecri.eu>.

²⁰ See art. 40 of the *Ley Orgánica Concursal* 22/2003.

²¹ See art. 178, paragraph 2, of the *Ley Orgánica Concursal* 22/2003: see Pablo Gutierrez de Cabiedes (ed), *El sobreendeudamiento doméstico: prevención y solución* (Cizur Menor 2009), 60, which criticises the tendency to perpetuate over-indebtedness, which is represented as a '*torre del deudor*'. Surprisingly, in the case of legal persons, paragraph 3 of the same provision establishes, on the contrary, '*la cancelación de su inscripción en los registros público*' following liquidation.

²² In Belgium and Luxembourg, an administrative phase is also provided for, during which the financial distress is resolved by means of an amicable settlement. On the similarities with the French model, see Pellecchia (n 1) 130.

of such measures).²³ Starting from there, France has shifted to a system that takes care not to burden debtors and their families excessively.²⁴ Although observing the essential nature of the administrative phase leading up to the formulation of the *Plan conventionnel de redressement*, the French courts have significant discretionary powers when it comes to establishing which revenue is to remain available to the debtor in order that he/she may continue to live in a manner in keeping with human dignity. The courts, as well as the commissions, may establish whether the over-indebted individual merits (or not) admission to the extraordinary procedure of *rétablissement personnel*: if the situation is deemed to be '*irréremédiablement compromise*' (irretrievably compromised) and there is a total absence of *actifs*, the debtor may in fact obtain immediate discharge.²⁵

In Germany too, debtors (both individuals and businesses) are asked to go through a phase of debt renegotiation, which they are free to agree to. In the event of a negative outcome, this may lead to a simplified judicial composition with creditors, or to a simplified insolvency procedure with the assignment to an official receiver for a given period of time of seizable income.²⁶ In accordance with the plan, the debtor must undertake to try to keep a job, and to cooperate with the official receiver, in order not to lose the benefit of discharge otherwise guaranteed to the debtor (*Wohlverhaltensphase*).²⁷

²³ See Law no. 1989-1010 (the *Loi Neiertz*).

²⁴ See the changes introduced by Law no. 2003-710 (the *Loi Borloo*) and by Law no. 2010-737 (the *Loi Lagarde*).

²⁵ Frédéric Ferrière and Pierre-Laurent Chatain (eds), *Surendettement des particuliers* (Dalloz 2006) 240 ff., point out that the aforementioned discretionary power has been widely exercised in favor of debtors in recent years.

²⁶ See the *Insolvenzordnung*, amended on several occasions in order to broaden the range of debtors' non-seizable revenues and assets. Details of the original version of this German insolvency law can be found in Dörte Busch, 'Current Reform Efforts of German Consumer Insolvency Law and the Discharge of Residual Debts' [2006] German Law Journal 6. On the current formulation of the law, see Claus Ott – Mihai Vuia, in *Münchener Kommentar zur InsO*, 3 Aufl., 2014, München, §§ 304-314 InsO.

²⁷ In Austria, whose legislation is very similar to that of Germany, residual debts are automatically discharged following payment by the debtor of the costs of the procedure and of half the unsecured debts. However, should the debtor fail to pay the costs of the procedure in full, and fail to pay at least 10% of unsecured debts, the

In Denmark and Sweden, on the other hand, not only the subsequent granting of discharge, but also the prior admission to the procedure for composition with creditors, are subject to the court's verification of an independent administrative authority (in the first case), and of the causes of the consumer's over-indebtedness (in the second case). As a rule, these systems aim to prevent the positive effects of the procedure benefiting persons who have acted in a financially irresponsible manner with clear speculative intentions and taking on disproportionate risks compared to their financial capacities.²⁸

IV. ITALY'S SPECIAL SOLUTION

A quick view of the comparative analysis of the question reveals a picture where, in terms of the (initially radically different) ways in which different legal systems have treated individual debtors in financial distress, a series of reciprocal influences have more recently emerged. On the one hand, traditionally debtor-oriented countries (such as the United States) currently have mechanisms that make it less easy than before to enjoy the benefit of discharge. Such a change demonstrates the influence of those studies that deny the (totally) positive effect of discharge-oriented legislation on the rate of increase of self-employment, noting that the easier access to discharge is, the higher the cost of credit granted by banks becomes.²⁹ On the other hand, traditionally creditor-oriented countries (such as France, Spain and Germany), whose systems are based on the centrality of the principle of

courts may decide, at their own discretion, whether to grant discharge all the same, or whether to further extend (no more than twice) the deadline set by the payment plan.

²⁸ According to Denmark's *Konkurs lov*, the court must reject the settlement plan proposed by the debtor if the debts were incurred: a) at a time when there was no realistic likelihood of such debts being repaid; b) in the presence of a disproportionate risk in relation to the debtor's financial capacity; c) in view of admission to the procedure for settlement of financial distress. Similarly, Swedish law (*Skuldsaneringslagen (2006:548)*) requires the independent administrative authority to evaluate the reasonableness of the debt restructuring plan.

²⁹ Song Han – Wenli Li, 'Fresh start or Head start? The Effects of Filing for Personal Bankruptcy on Work Effort' [2007] *Journal of Financial Services Research* 123; Kartik Athreya, 'Fresh start or head start? Uniform bankruptcy exemptions and welfare' [2006] *Journal of Economic Dynamics & Control* 30 2051.

unlimited financial responsibility, have taken a more liberal attitude towards the discharge of the individual debtor.

The Italian system is based on the diversification of the legal treatment of individual and business insolvency. The opportunity or rather, the legitimacy of this regulatory choice has been the subject of lengthy debate also at the constitutional level.³⁰ Only recently this system has enacted legislation, which has introduced special procedures for the settlement of 'the over-indebtedness distress' of those persons that cannot be subjected to the insolvency procedures provided for by Bankruptcy Law. In other words, the legislation in question has been concerned with regulating the composition of the crisis of the individual or business debtor, who is not a bankrupt commercial entrepreneur.³¹

An initial evaluation of the situation may be proffered here following the legislative decision to proceed in this direction. Within the framework of the basic approach adopted, the distinction, at the regulatory level, between the business debtor's incapacity to fulfill his/her obligations and the individual debtor's incapacity to do likewise, has been codified by Italian law. Furthermore, the notion of '*sovraindebitamento*' (over-indebtedness) has been introduced, at the factual level, alongside the previously-recognized concepts of '*insolvenza*' (insolvency) and '*crisi*' (financial distress). In other words, Italian legislation has not only kept civil insolvency and commercial insolvency separate, but – in the context of the former – it has also introduced a notion of crisis, 'personalized' for the debtor that cannot be declared bankrupt. This choice is also confirmed in the draft reform under discussion.

V. THE 'ISOLATION' AND 'SPLITTING' OF THE OVER-INDEBTED, NON-BANKRUPTABLE DEBTOR

As pointed out above, Italian Law no. 3/2012 has conformed with the traditional distinction between individual and business insolvency. In doing so, however, it has aimed not only (and not so much) at 'isolating' the case of the non-bankruptable debtor, by establishing a special (diverse) system for the resolution of financial distress, but has also (and above all) been

³⁰ In this regard, see Section 5 below.

³¹ For the definition of this figure see Section 5 below (footnote 30).

concerned with 'splitting' the case in question into two parts, with consequences in terms of the regulation of such cases. In fact, the distinction between the figure of the *business debtor excluded from insolvency procedures*, referred to in the Bankruptcy Law, and that of the *consumer* has been introduced. In particular, Article 6 of that law distinguishes the *debtor who is not subject to insolvency proceedings* (so-called 'non-bankruptable debtor') from the *consumer*. The former is the debtor who is a non-commercial entrepreneur or, even though he is a commercial entrepreneur, does not exceed any of the thresholds established by Article 1 of the Bankruptcy Law.³² The latter is the individual debtor (natural person), who has undertaken obligations exclusively for purposes outside his trade, business or profession. The 'regulatory adjustment' performed in this way is of considerable importance.

As mentioned above, the decision to treat the defaulting business debtor and individual debtor differently is not new: in fact, this option can be found as far back as the business codes of 1865 and 1882 and was already included in the 1942 Civil Code and in the Bankruptcy Law of that same period. Furthermore, more than once it has been brought to the attention of the Constitutional Court, which has reaffirmed the legitimacy of the distinction. Firstly, when pointing out that no violation of the principle of equality has been committed, 'giacché lo svolgere attività commerciale organizzata ad impresa costituisce una situazione obiettivamente diversa da quella di chi svolge un'attività di diverso tipo, e non è irrazionale l'aver limitato alla prima la disciplina concorsuale, né sono arbitrari i motivi di tale limitazione' ('since carrying out a business activity as a firm constitutes an objectively different situation from that of a person carrying out an activity of another kind, and it is not irrational to have limited insolvency law to the former; nor are the

³² Pursuant to Art. 1 of the Bankruptcy Act, commercial entrepreneurs who prove that they fulfil the following conditions are not subject to the provisions on bankruptcy and a composition with creditors:

- a) in the three financial years prior to the date of filing the application for bankruptcy or from the start of the activity, whichever is the shorter, they have had assets totaling no more than € 300,000 in total per year;
- b) have achieved, in any way, in the three financial years prior to the date of filing the application for bankruptcy or from the start of the activity, whichever is the shorter, gross revenues for a total annual amount not exceeding € 200,000;
- c) have an amount of debts, including those not yet due, not exceeding € 500,000.

grounds for such a limitation to be considered of an arbitrary nature').³³ Subsequently, specifying that the arguments underlying the diversification of legal treatment 'sfuggono al giudizio di conformità ai principi costituzionali (...) per rientrare nell'area di scelte proprie del legislatore' ('do not come within the scope of any judgment of compliance with constitutional principles (...) but fall within the scope of the legislator's own decisions').³⁴

Similarly, there is nothing new about the decision to provide for a category of non-bankruptable entrepreneurs, thus removing them from the scope of the application of insolvency procedures: in fact, although remaining within the context of business insolvency, the legislator has chosen, from the drafting of the original wording of the Bankruptcy Law, to identify thresholds below which it is not possible to go bankrupt or be subject to other judicial proceedings provided for therein. Furthermore, the Constitutional Court has also given its opinion on the legitimacy of such a distinction, pointing out that 'anche nel configurare questa discriminazione nell'ambito della categoria dei commercianti, la legge ha tenuto presente una diversità obiettiva di situazioni, in relazione alle dimensioni dell'impresa, diversamente valutando l'interesse pubblico ad applicare la legislazione fallimentare al loro stato di insolvenza' ('also in establishing this distinction within the category of businesses, the Law has kept in mind the objective diversity of situations, in terms of the size of businesses, assessing differently the public interest in applying bankruptcy law to their state of insolvency depending on this criterion'), and reiterating the view that 'l'esclusione dal fallimento del piccolo imprenditore (...) si basa su una valutazione di politica economico-sociale e di opportunità giuridica, che non può essere ripetuta in questa sede' ('the small business' exclusion from bankruptcy (...) is based on an evaluation in terms of socio-economic policy and legal appropriateness that cannot be repeated here').³⁵

On the contrary, the option to provide for a variety of different procedures for the resolution of cases of financial distress (debt-restructuring agreements, restructured repayment schedules, sale of assets), differentiated according to the nature of the non-bankruptable debtor, seems original,

³³ Italian Constitutional Court, 16 June 1970, decision no. 94 [1970] *Foro italiano* I 1857.

³⁴ Italian Constitutional Court, 27 July 1982, decision no. 145 [1982] *Foro italiano* I 3006.

³⁵ See Italian Constitutional Court, 16 June 1970, decision no. 94, *op. cit.*

taking as the selection criterion not the reference to the 'common' individual debtor, but to the consumer. Indeed, while the insolvency procedure can (or must) be triggered by (or in the presence of) any non-bankruptable debtor (including consumers), following rules and methods of implementation that do not provide for any diversification in legal terms, the debt-restructuring agreement and the restructured repayment schedule, on the contrary, are subjectively separate in terms of the submission of the application and in terms of approval thereof.³⁶ Italian Law no. 3/2012, as amended by Italian Decree Law no. 179/2012 (the Decreto Crescita) and its corresponding converting law, establishes that the 'over-indebted debtor' may propose to creditors, with the aid of those bodies appointed to resolve the situation of financial distress, a debt restructuring and claim satisfaction agreement based on a plan. This plan, having ensured due payment of the holders of non-seizable receivables, must foresee deadlines and means of payment, possible guarantees and means for the sale of assets if necessary, or for the direct entrustment of assets to an official receiver. The 'over-indebted consumer', on the other hand, may indeed propose an agreement or plan to creditors that foresees the restructuring of debt obligations and the satisfaction of claims, as described above, but unlike the 'over-indebted debtor', the consumer may do so in any form, including through the transfer of future receivables. Should the debtor's assets and income be insufficient to guarantee the feasibility of the agreement or the plan, the proposal may be underwritten by one or more third parties who agree to the contribution of sufficient income or assets to guarantee implementation thereof. This proposal must be accompanied by a detailed report drawn up by the body responsible for the resolution of the situation of distress in question, containing, among other things, details of the causes of indebtedness, and of the consumer's diligence in voluntarily taking on the obligations, together with a report on the consumer's solvency over the last five years. Furthermore, whereas for the purposes of approval, the 'over-indebted debtor' must reach an agreement with the (unsecured) creditors representing at least 60% of all amounts due, the 'over-indebted

³⁶ It should be pointed out, in fact, that liquidation may also be triggered upon the issuing of an order transforming the procedure for the resolution of distress, based on a debt-restructuring agreement or a restructured payment schedule, in the case of any annulment, revocation or termination of the former, or in the event that the effects of approval of the latter cease, or that the latter is revoked or terminated.

consumer¹ is only subject to an assessment by the court concerning the feasibility of the schedule and the merits of the debtor's conduct leading up to distress.³⁷ The notification of the proposal to all creditors is therefore not designed for voting purposes, but only for challenges that there may be to the advisability of the plan.

The discharge of residual unpaid debts to insolvency creditors, subject to certain important objective and subjective limitations, has been introduced. The objective limitation is that the benefit in question is restricted to cases of liquidation of assets. In terms of subjective limitations, the discharge only operates if: a) the individual debtor has cooperated with the regular, effective carrying out of the procedure; b) he/she has not benefited from any other discharge in the previous eight years; c) he/she has carried out an activity producing income in keeping with that person's skills, or in any case has looked for a job and has not refused any proposed jobs without good cause; and d) the creditors in title and for reasons predating the order opening the liquidation procedure have had their claims satisfied, at least in part. At the same time, based on the evaluation, in terms of the award of the benefit, discharge shall be excluded in cases where over-indebtedness is the consequence of recourse to negligent, disproportionate credit in view of the individual's financial capacities, or when the debtor, in the five previous years, has defrauded creditors.

VI. THE KEY ROLE OF THE CONSUMER AS A REMEDY FOR MARKET FAILURE: POSSIBLE INTERPRETATIVE AND EXTENSIVE SOLUTIONS

So far, the analysis has shown that many of the countries mentioned have protective measures in place in the event of over-indebtedness, but only a few (such as Sweden, Denmark and Italy) pay attention to the causes of over-indebtedness. Furthermore, it seems that the common feature of the latter countries mentioned is that the over-indebted consumer is granted *ex post* protection instruments and not also that of preventing the phenomenon, by

³⁷ According to art. 12-*bis*, paragraph 3, of Italian Law no. 3/2012, in fact, the court must exclude – for the purposes of approval – that the consumer has taken on financial obligations with no reasonable prospect of meeting those obligations, or that the consumer has negligently caused over-indebtedness, also by recourse to credit out of all proportion to that person's financial capacity.

providing *ex ante* protection instruments. Indeed, it seems appropriate to consider that the consumer may not be reasonably prudent. Therefore, the consumer could be unable to make informed choices that would protect him from the risk of over-indebtedness. From this point of view, and overturning the perspective of the creditor, there is a pressing need to make, with clear rules, the lender responsible. In other words, it would be desirable for the legislation to seek to prevent irrational decisions from being taken by lenders.

According to the responsible lending approach, the lender should be obliged to select the applications for financing, evaluating the most suitable product for the applicant. In addition, the lender should assess the consumer's credit rating, in relation to the ability to repay the loan, the level of debt already in place and the risk of over-indebtedness.

In the Italian legal system, the regulation of the sector (Consolidated Banking Law, art. 120-*undecies* and 124-*bis*), although providing for the evaluation of the consumer's credit rating, does not allow for interpretations that may point to an obligation, on the part of professional lenders, to refrain from granting credit to persons who are already financially fragile. In fact, the term 'credit rating' generally means the objective, present capacity to repay debts, measured in terms of income, of the assets that creditors can claim, and of past repayment history.³⁸ Such a provision thus refers to the precept of sound, prudent management designed to ensure the stability of the banking system rather than to meet the need to regulate demand for credit so as to

³⁸ For this interpretation, see, Alessandro Simionato, 'Prime note in tema di valutazione del merito creditizio del consumatore nella direttiva 2008/48/CE' [2010] *Rivista di diritto bancario* 183; Enrico Caterini, 'Controllo del credito, tutela del risparmio e adeguatezza nel finanziamento "finalizzato"' in Vito Rizzo – Enrico Caterini – Luca Di Nella – Lorenzo Mezzasoma (eds), *La tutela del consumatore nelle posizioni di debito e credito* (Edizioni Scientifiche Italiane 2010), 49; Gustavo Minervini, 'Il sovraindebitamento del consumatore e la direttiva 2008/48/CE', in Vito Rizzo – Enrico Caterini – Luca Di Nella – Lorenzo Mezzasoma (eds), *La tutela del consumatore nelle posizioni di debito e credito*, op. cit., 65; Serafina Rosaria Larocca, 'L'obbligo di verifica del merito creditizio del consumatore', in Vito Rizzo, Enrico Caterini, Luca Di Nella, Lorenzo Mezzasoma (eds), *La tutela del consumatore nelle posizioni di debito e credito*, op. cit., 233.

safeguard the financed consumer.³⁹ On the contrary, Italian Law no. 3/2012, as amended, seems to highlight the problem of the debtor, who is in a state of over-indebtedness due to events beyond his control.

The question then arises as to how to interpret this apparent dichotomy: is there a duty for the lender to select the consumers on the basis of their ability to perform and is there the possibility for the honest, but unfortunate, debtor to justify his/her default, assigning liability to the lender? In this case too, comparative analysis helps to outline possible interpretative solutions in legal systems, such as the Italian one, in which the current regulations appear unclear. The US doctrine has affirmed, for years, the principle of improvident credit extension.⁴⁰ This refers to a situation in which it is not reasonable, on the basis of information already in the possession of the creditor, to expect the debtor to be able to repay the loan and meet the required deadlines. Thus, the debtor could justify his/her default or take action to have his/her obligation extinguished or, in any case, the part exceeding the reasonable level of credit. Although this theory has been rarely considered by judges, it is worth remembering the Dodd-Frank Wall Street Reform and Consumer Protection Act, whose title XIV is entitled Mortgage Reform and Anti-Predatory Lending Act. This title imposes strict rules on the disbursement of loans.

The Swiss *Loi Federale sur le credit à la consommation* (artt. 22-31) requires lenders to consult a database with information on borrowers in advance to assess their ability to assume additional obligations and to avoid over-

³⁹ Some authors suggest this interpretation: see Aurelio Mirone, 'L'evoluzione della disciplina sulla trasparenza bancaria in tempo di crisi: istruzioni di vigilanza, credito al consumo, commissioni di massimo scoperto' [2010] *Banca, borsa, titoli di credito* I 592; Antonella Antonucci, 'Credito al consumo e zone limitrofe: una scheda di lettura del d. legis. n. 141 del 2010' [2011] *Nuova giurisprudenza civile commentata* II 301, according to whom the Consolidated Banking Act 'has partly failed to meet expectations regarding the safeguarding of borrowers, by introducing, on the contrary – in the form of the provision concerning credit-worthiness – special protection for lenders, enabling them to utilise structured ways of managing credit risk'; Modica (n 14) 239.

⁴⁰ Vern Countryman, 'Improvident Credit Extension: A New Legal Concept Aborning' [1975] *Main Law Review* 23.

indebtedness as a result of a consumer credit contract. If they do not do so, they risk losing their credit.

Also in the context of the European Union, there seems to be some (albeit modest and indirect) reference to the responsible lending issue. In particular, the issue was mentioned in recital 26 of Directive 2008/48/EC of the European Parliament and of the Council, which states that

'Member States should take appropriate measures to promote responsible practices during all phases of the credit relationship, taking into account the specific features of their credit market. Those measures may include, for instance, the provision of information to, and the education of, consumers, including warnings about the risks attaching to default on payment and to over-indebtedness. In the expanding credit market, in particular, it is important that creditors should not engage in irresponsible lending or give out credit without prior assessment of creditworthiness, and the Member States should carry out the necessary supervision to avoid such behavior and should determine the necessary means to sanction creditors in the event of their doing so'.

Similarly, recital 29 of Directive 2014/17/EU of the European Parliament and of the Council ('on credit agreements for consumers relating to residential immovable property') states that

'in order to increase the ability of consumers to make informed decisions for themselves about borrowing and managing debt responsibly, Member States should promote measures to support the education of consumers in relation to responsible borrowing and debt management in particular relating to mortgage credit agreements. It is particularly important to provide guidance for consumers taking out mortgage credit for the first time. In that regard, the Commission should identify examples of best practices to facilitate the further development of measures to enhance consumers' financial awareness'.

Consequently, Article 6 provides that

'Member States shall promote measures that support the education of consumers in relation to responsible borrowing and debt management, in particular in relation to mortgage credit agreements. Clear and general information on the credit granting process is necessary in order to guide consumers, especially those who take out a mortgage credit for the first time'.

Article 14 states that

'Member States shall ensure that the creditor and, where applicable, the credit intermediary or appointed representative, provides the consumer with the personalized information needed to compare the credits available on the market, assess their implications and make an informed decision on whether to conclude a credit agreement'.

Article 16 lays down that

'Member States shall ensure that creditors and, where applicable, credit intermediaries or appointed representatives provide adequate explanations to the consumer on the proposed credit agreements and any ancillary services, in order to place the consumer in a position enabling him to assess whether the proposed credit agreements and ancillary services are adapted to his needs and financial situation'.

Article 18 establishes that

'Member States shall ensure that, before concluding a credit agreement, the creditor makes a thorough assessment of the consumer's creditworthiness. That assessment shall take appropriate account of factors relevant to verifying the prospect of the consumer to meet his obligations under the credit agreement'.

In the light of this brief investigation, it appears that the Italian legislator wished to intervene with tools of subsequent protection (*ex post* protection instruments) for so-called 'passive over-indebtedness' with a kind of selective discharge of residual debt, while neglecting, on the creditor's side, the possibility of endorsing, preventatively (*ex ante* protection instruments), the obligation to offer select borrowing facilities to 'deserving' debtors.⁴¹

In any case, the new decision (made in the 'Decreto Crescita') to identify a selection principle of the various procedures for the composition of financial distress caused by over-indebtedness from a subjective viewpoint, making the consumer the paradigm of the non-bankruptable individual debtor, would seem to suggest the view, as previously mentioned, that the most worrying

⁴¹ Pellecchia (n 1) 226 ff., enthusiastically greets in the Decreto Crescita *bis* the introduction of the concept of passive over-indebtedness, meaning the situation of over-indebtedness suffered by the 'honest, but unfortunate' debtor perceived as a victim of events beyond his/her control and independent of his/her will.

aspect, in terms of legislative policy, is the market and its state of health.⁴² By accepting the argument that consumers' rights are business rights, given that consumers live and count as such within a market context, it is understandable that the legislator's choice was justified by the need to encourage economic growth, through lending support to consumer demand. In other words, if one starts from the premise that the consumer, as *homo oeconomicus*, expresses him/herself 'in the sphere of production and consumption, and thus in the market',⁴³ the provisions introduced appear to be based on a view of over-indebtedness as a market failure, rather than as a social problem. Therefore, it would seem that the aforementioned additional provisions have diverted the legal profession's attention from the social consequences of over-indebtedness to market efficiency and the encouragement of consumption. Thus, it comes as no surprise to find that the provisions in question only apply, in the productive corporate sphere, to innovative start-ups. For these, the legislators have reserved special 'protective' treatment in order to 'favorire la crescita sostenibile, lo sviluppo tecnologico, la nuova imprenditorialità' ('encourage sustainable growth, technological development and the new entrepreneurship') so as to 'contribuire allo sviluppo di una nuova cultura imprenditoriale ed alla creazione di un contesto maggiormente favorevole all'innovazione' ('contribute to the development of a new entrepreneurial culture and the creation of an environment fostering greater innovation').⁴⁴ With this in mind, the decision to establish a simplified procedure (such as that of the settlement of financial distress caused by over-indebtedness), as an alternative to those solutions offered by the Bankruptcy Law, aims to 'facilitare la ripartenza dello *start-upper* su nuove iniziative imprenditoriali' ('facilitate the start-upper's restart through new business projects').⁴⁵

⁴² See Section 1 above.

⁴³ This expression is borrowed from Rodota (n 11) 22.

⁴⁴ See art. 25, paragraph 1, of the Decreto Crescita *bis*. On the essence of innovative *start-ups*, see, among others, Monica Cossu, 'Le start-up innovative in forma di società a responsabilità illimitata. Profili privatistici' in Mario Campobasso, Vincenzo Cariello, Vincenzo Di Cataldo, Fabrizio Guerrera, and Antonella Sciarrone Alibrandi (eds), *Società, banche, crisi d'impresa*. Liber amicorum Pietro Abbadessa (Utet 2014) 1075.

⁴⁵ See the preface to the Report illustrating the Decreto Crescita *bis*.

It seems then that the current Italian system adopts a liberal model. In short, the legislator is concerned with giving special treatment to the consumer, so that he/she can actively return to consumption as soon as possible. However, it is possible to observe some, albeit timid, signs of welfare issues. The legislator's concern for the consumer's passive over-indebtedness leads to believe that the objective of the regulation could also be that of protecting the debtor from further risks. This observation could lead to interpretative and applicative consequences.

First of all, the lender's duty to assess the consumer's credit rating may be a means of protecting the debtor from insolvency. According to general clauses, the duty must be fulfilled fairly and in good faith. It follows that, when entering into consumer credit contracts, the lender should acquire all the information necessary for an accurate representation of the characteristics of the loan.⁴⁶ In compliance with the rule of pre-contractual fairness and good faith, it could be considered that, in the presence of negative indications on the consumer's credit rating, the lender who, nevertheless, disburses the loan, becomes liable for the damage suffered by the debtor. In other words, even in the absence of an express obligation of abstention on the part of the lender to grant credit to subjects in precarious economic conditions, the interpretation of the current discipline, oriented towards welfare issues, could allow us to believe that the creditor can also be held responsible for having performed an inappropriate and damaging credit contract.⁴⁷ However, it cannot be denied that it would be preferable if such an interpretation was expressed directly by law.

Secondly, the influence of welfare issues leads us to believe that such a regulation can be applied to deal with the over-indebtedness of any individual debtor, even if not a consumer, by paying attention to the reasons for the financial distress and the merit of the debtor. Accordingly, the described

⁴⁶ With reference to the function performed, in these cases, by the principle of fairness, see Pietro Abbadessa, 'Banca e responsabilità precontrattuale: i doveri di informazione', in Salvatore Maccarone – Alessandro Nigro (eds), *Funzione bancaria, rischio e responsabilità della banca* (Milano 1981) 296.

⁴⁷ With reference to Italian doctrine and the need for the financial intermediary to assess the appropriateness of the consumer's request, see Roberto Natoli (ed), *Il contratto 'adeguato'. La protezione del cliente nei servizi di credito, di investimento e di assicurazione* (Giappichelli 2012) 117.

framework would become general. Thus, the debtor could be protected from unforeseen events and traumatic changes in his/her economic situation, regardless of his/her nature as a consumer. In other words, the relevant criteria would be only the causes of over-indebtedness and the conduct of the debtor, but not his/her role as a consumer. This solution seems to be better at treating, also with a view to reducing, the phenomenon of over-indebtedness. What should matter is that the debtor is diligent and the victim of passive over-indebtedness, not the fact that he/she is a consumer.

VII. THE (RE)AFFIRMATION OF SOCIAL PROBLEMS FROM THE POINT OF VIEW OF FUTURE LEGISLATION: CONCLUSIONS AND PROSPECTS *DE JURE CONDENDO*

The current signs of future legislation indicate that it is likely the reform will reinforce the idea that we are moving towards a welfare model. In particular, Italian Law no. 155/2017 (art. 9) (an enabling Act permitting the Government to pass legislation on the wholesale reform of the rules governing the management of business distress and insolvency) establishes that those provisions regulating the question of over-indebtedness be reorganized and simplified in accordance with certain specific guidelines.⁴⁸

More specifically, from the subjective point of view, it requires that: (a) the categories of person who may be subject to the procedure, also on the basis of a principle of prevalence of the different forms of obligations taken on, be specified, including individuals and entities that may not be subject to composition with creditors to avoid bankruptcy, or to winding up by the court, as well as shareholders with unlimited liability; (b) that legal persons also be admitted to the discharge procedure, provided they are not guilty of defrauding creditors or of choosing to default on the plan or the agreement. From the point of view of merit, it: (a) regulates those solutions aimed at promoting the debtor's business continuity, and the manner of his/her conversion to the solution of liquidation, if applicable, also when requested by the debtor, permitting only liquidation without any discharge, in the event that the distress or insolvency is the result of the debtor's bad faith or fraud;

⁴⁸ The enabling Act was published on 19 October 2017 and submitted with no. 155. On November 8, 2018, the outline of the legislative decree introducing the Codice della crisi d'impresa e dell'insolvenza was approved, in implementation of Law 155/2017.

(b) permits the deserving debtor who cannot offer creditors any interest, to be granted discharge of residual debts just once, without prejudice to the obligation to pay off such debts within three years should the necessary resources materialize; (c) precludes access to the procedure to those persons whose debts have already been discharged in the previous five years, or who have already benefitted from discharge twice, or in the case of proven fraud. From the objective viewpoint of procedural formalities, the following are provided for: (a) the introduction of protective measures, albeit of a revocable nature, similar to those provided for in composition with creditors; (b) acknowledgement of the idea of access to liquidation, even pending individual executive procedures, on the part of creditors, and when insolvency regards businesses, on the part of the Public Prosecutor; (c) the granting of the initiative, also to creditors and the Public Prosecutor, to convert the procedure into one of liquidation in cases of fraud or default. From the point of view of penalties, it proposes to establish measures penalizing creditors who have deliberately contributed towards aggravating the situation of indebtedness.

Despite the provisional character of the submitted act permitting the Government to pass legislation, it would appear that the noticeable (re)emphasis on the causes of over-indebtedness, and on the debtor's diligence, which moreover justifies the appeal – from the category of persons subjectable to the procedures referred to in Italian Law no. 3/2012 – not only to business debtors in the form of physical persons, but also to those in the form of legal entities, is in keeping with the welfare state model. While it is true that the aforementioned legislative provisions meet liberal needs, where the object of regulation (and of the consequent protection provided) is the market, it is also true that, should the foreseen reform of the law governing financial distress and insolvency actually follow the guideline principles that the bill formulates with regard to the state of over-indebtedness, a series of purely social expectations would be met, at least in part.

It seems that we are moving towards the (re)affirmation of the archetypal 'honest, but unfortunate, debtor', which at this point may also include not only consumers, as well as business enterprises or individual debtors,

provided that they are characterized by the involuntary, uncontrollable nature of the causes of distress.⁴⁹

In this regard, it seems appropriate to reflect – in legislative terms and, then, in a *de jure condendo* analysis – on the possibility of introducing a discipline that better embodies the responsible lending approach. This comparative study has made it possible to highlight the importance of rules for the protection of the debtor, who, blamelessly, relies on the lender's assessment of the sustainability of the loan. However, most of the countries regulate *ex post* protection instruments, i.e. they are concerned with remedying a situation of already proliferating over-indebtedness. On the contrary, it seems that the phenomenon could be better controlled by also taking an *ex ante* protection perspective. It seems appropriate to consider that the debtor may not be reasonably prudent. The debtor could be unable to make informed choices that would protect him from the risk of over-indebtedness. Therefore, it would be desirable for the systems to adopt, in addition to precepts on the lender's information duties, clear rules on the obligation of abstention on the part of the lender to grant credit to subjects in precarious economic conditions and on the liability of the lender for betraying the debtor's reliability on the sustainability of the loan. From this perspective, a new level of sensitivity would derive with regard to the issue of contracting with the insolvent. This would move away from the exclusive protection of the creditor against the insolvent debtor to the protection of the debtor against the risk of over-indebtedness. In this way, the phenomenon of consumer over-indebtedness could be prevented – or at least reduced – through a discipline that grants instruments of preventative protection.

This logic of preventative protection could pave the way for a possible compensatory remedy: the debtor, betrayed in his/her reliability on the sustainability of the loan, could ask and obtain from the lender compensation for the damage suffered.

⁴⁹ The relevance of this viewpoint has been pointed out, albeit in a period prior to the presentation of the enabling act in question, by Pellicchia (n 1), 226, who interprets the wording of Law 3/2012 as permitting each diligent, innocently over-indebted debtor to submit a restructured repayment schedule.