

Debt Management and Debt Enforcement

Law Reform Commission's Recommendations

Seventh Annual Conference
of the
Law Reform Commission
Dublin Castle
16 December 2010

Towards A Common Operational European Definition of Over-Indebtedness

(European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008)

Legal Responses to Over-Indebtedness: 6 “Essential Building Blocks”:

- Preventative Measures
 - Responsible Borrowing
 - Responsible Lending
 - Responsible Arrears Management

- Remedial Measures
 - Debt Advice and Counselling
 - Personal Insolvency Law
 - Bankruptcy Law
 - Non judicial procedure for debt settlement
 - Holistic Court Procedures

Personal Debt Project

- CP examines all aspects of the 6 'Building Blocks' (September 2009)
 - Suggestions for consideration: implementations by other bodies, e.g. Central Bank
 - Provisional recommendations for reform
- Interim Report - Action Plan (May 2010)
 - Financial Regulation, Codes of Practice, Legal Processes and Information
- Report and draft Personal Insolvency Bill (December 2010)

Existing Personal Insolvency regime

- Debt Repayment Plans
 - Individual arrangements
 - Voluntary
- MABS/IBF Operational Protocol
 - Endeavours to be holistic
 - Voluntary scheme
- Bankruptcy
 - Punitive/restrictive/discharge period
- Enforcement proceedings
 - Chase to the courts/very individualistic
 - Expensive /Ineffective /Inefficient
 - Can't pay v Won't pay

Proposed Personal Insolvency regime

- Debt Repayment Plans
 - individual arrangements
 - Voluntary
- MABS regime
 - Statutory scheme
 - Not voluntary – qualifying criteria
- Non-judicial Debt Settlement Arrangements
- Reformed Bankruptcy regime
- Reformed Enforcement mechanisms
- Regulation of Debt Collection Undertakings

Non Judicial Debt Settlement

- Recommendation
 - A non-judicial debt settlement mechanism known as a Debt Settlement Arrangement should be established under Irish law
 - Primarily a matter for agreement between debtor and creditors with flexibilities to enable appropriate arrangements to be reached
 - A holistic approach to debt management
 - Allow creditors to assert their rights
 - Core mandatory terms of settlement be specified in legislation

Non Judicial Debt Settlement

Rationale and aims

- Provide earned fresh start
- Public interest dimension
- Primarily aimed at insolvent individuals to repay debts in so far as possible over a period
- Provide a balance relieving individuals of over-indebtedness while providing a return to creditors
- Over-indebtedness involves non-legal difficulties
- Most debt claims do not raise justiciable issues
- Costs lower for debtor and creditor
- Saves costs for the State

Debt Settlement Arrangement General Conditions

- Good Faith Test – full disclosure (SFS)
- Insolvency Test
- Threshold Amount
- Once only in a 10 year period unless exceptional factors
- Approval at creditors meeting
 - 60% in value of votes cast
 - If not approved deemed to have come to an end
- Does not include secured debt
- Difficult question of Debtor's home
- Excluded Debts/Liabilities

Debt Settlement Arrangement

Key Principles

- Maximum duration of a DSA will be 5 years
- DSA will provide for performance of obligations over the specified period
- Changed circumstances taken into account
- On completion of obligations specified, debtor will be discharged from remainder of debts covered by arrangement – debt deemed to be repaid in full
- Offences – fraudulent or dishonest conduct

Debt Settlement Arrangement

Key Principles

- DSA shall not contain terms requiring sale of essential business assets
- DSA shall not contain terms requiring repayments as would leave debtor with insufficient income to maintain reasonable standard of living
 - Debt Settlement Office prepare and publish Guidelines
 - Structural framework of the Standard Financial Statement
 - Incentivise debtor to seek and maintain employment
 - Income allowed greater than exempted income for enforcement of judgment debts

Debt Settlement Arrangement Procedures

- Protective Order
 - stay on enforcement proceedings
- Creditors meeting
 - Copy of DSA to Debt Settlement Office / DSO to Cir Ct.
- Registration in Personal Insolvency Register
 - Unless creditor enters objection within 30 days
- Effect of registration
 - No creditor may present a bankruptcy petition
 - No creditor may commence legal proceedings to recover debt covered by arrangement
 - No action may be taken by an enforcement officer to enforce a judgment debt owed by debtor

Role of Court in DSA

- Creditor application to the Circuit Court
- Grounds for challenge limited
 - Procedural requirements not followed
 - Material inaccuracy/omission in debtor's statement
 - Eligibility requirements not satisfied
 - Arrangement unfairly prejudices interests of creditors
 - Debtor commits offence
- Circuit Court upholds objection
 - DSA shall be deemed to come to end
 - Protective Order shall cease to have effect
- Circuit Court rejects objection
 - DSA shall be deemed to have effect

Debt Settlement Arrangement Variation/Termination

- Variation
 - Requires 60% in value of creditors
 - Filing and registration requirements
- Termination
 - (i) Non court termination
 - (ii) Court termination
 - (iii) Deemed failure – 6 month arrears default
- Application for adjudication in bankruptcy on ending, termination or failure of DSA

Structural and Institutional Framework DSA

Personal Insolvency Trustee

- Assigning the role of Personal Insolvency Trustee to same actor
 - Intermediary role – the role before a DSA is agreed
 - Administrator role – the role after a DSA is agreed and is being implemented
- Public Sector v Private Sector
- Functions, powers and duties of Personal Insolvency Trustee
 - Agree to act, SFS, prepare proposal and consider viability/alternatives, arrange creditors meeting
 - Ensure that DSA proceeds in accordance with terms, ensure creditors kept informed, deal with debtors property

Structural and Institutional Framework Personal Insolvency Trustee

- Must hold a Personal Insolvency licence
- Must comply with prescribed conditions
 - General fitness and good character
 - Whether convicted of any offences eg fraud/dishonesty
 - Disclosure of conflicts of interests
 - Education/Training/Skills
 - Level of insurance/security
- Panel of qualified persons/3 year period
- Fees

Structural and Institutional Framework

Debt Settlement Office

- Independent unit in Debt Enforcement Office
- Issue licences to Personal Insolvency Trustees
- Receive and review reports
- Enter and inspect business premises of PIT
- Investigate complaints
 - Powers of investigation and sanction
 - Revoke licence
 - Impose restrictions or conditions or financial sanction
- Develop and publish Codes of Practice on Standards

Debt Settlement Arrangement Debt Relief Order (DRO)

- Low cost 'No Income, No Assets' procedure
- Debt discharge after a short waiting period
- No release from secured debt/excluded debts
- Application for DRO through MABS
- Application to Debt Settlement Office
- Registration DRO in Personal Insolvency Register
- Debt Settlement Office may refuse application
- Effect of DRO

Bankruptcy

- Commission's view - personal insolvency should be resolved outside of court process whenever possible
- Bankruptcy proceedings – a last resort
- *Bankruptcy Act 1988* should be reformed
- Rationale for reform

Bankruptcy

Key reform proposals

- Minimum debt level to bring creditor petition
 - From €1,900 to €50,000
- Removal of precondition requirement of debtor's available estate
- Pre-Action Protocol – creditor petitions
- Stay on proceedings to consider alternative means
- Debtor's petition processed and order of bankruptcy made administratively
- Personal Insolvency Trustee - regulated

Bankruptcy Reforms

Discharge Provisions

- Precondition to realise bankrupt's estate abolished
 - Estate remain vested in the Official Assignee
 - Debtor under duty to cooperate
- Discharge
 - Automatic discharge on expiry of period of 3 years
 - Court discretion to require debtor to make payments to creditors for up to 5 years
 - Official Assignee/Personal Insolvency Trustee can apply to court on specified grounds
 - Court discretion to suspend discharge for 2 years
 - If debtor has previously availed of bankruptcy discharge presumption to apply but can be rebutted

Bankruptcy Reforms

Further issues

- Removal of requirement to pay expenses, costs, fees and preferential payments before discharge
- Priority Debts
 - Revenue debts no longer be given preferential status
 - Others to be considered/significantly reduced
- Excluded debts and liabilities
- Exempt Assets
- Restrictions on bankrupt during bankruptcy

Debt Enforcement

- Court Order necessary
- Debt Enforcement Office
 - Responsible for centralised oversight and management of entire enforcement system nationwide
 - Modelled on Office of Collector General of Revenue
 - Small skilled office capable of supervisory and case management functions
- Enforcement Officers
 - Private sector actors
 - Open and competitive tendering/qualification
 - Geographical areas

Debt Enforcement Office Functions

- Oversee tendering process for Enforcement Officers
- Prepare and publish entrance requirements
- Supervise and co-ordinate activities
 - Monitoring of performance
 - Complaints handling
- Prepare and publish Code of Practice
- Obtain information on Debtor's means
- Determine whether enforcement possible/choose appropriate mechanism
- Establish and maintain internal appeal mechanism
- Maintain a register of judgments and enforcement proceedings

Holistic Debt Enforcement

- Information from Debtor (SFS)
- Enforcement Information Disclosure Request
- Reasonable standard of living
- Reform of Enforcement mechanisms
- Imprisonment

Regulation of Debt Collection Undertakings

- Recommend a system for licensing and regulation of debt collection undertakings be introduced
- Definition of Debt Collection Activities includes
 - Collecting, directly or indirectly, debts
 - Soliciting accounts for collection
 - Communicating debt collection demands to debtors by post, telephone or electronic means
 - Collecting a debt using a name that indicates that another party is attempting to collect the debt or
 - Collecting a debt when debt purchased at a time it was already in default

Regulation

- Regulatory body
 - Power to refer suspected crime to Garda
 - Set out condition for licences – fit and proper person
 - Take into account any circumstances that appear relevant/contravention of CPC/offences/deceitful business practices
 - Prepare statutory codes – to include as specified
 - Regulate fees charged
- Applicant
 - Demonstrate capacity to comply with obligations
 - Provide Revenue tax clearance certificate
 - Registered as a data controller
- Exemptions from licensing requirements
- Offences/Civil liability

Thank You

- To all we consulted
- For the very many submissions
- To members of the Working Group
- To all who allowed us participate in seminars, conferences and engaged with us in the debate