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

www.lawreform.ie
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 commenced 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

Patricia T Rickard-Clarke