



LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

CONSULTATION PAPER

PERSONAL DEBT MANAGEMENT AND DEBT ENFORCEMENT

(LRC CP 56 - 2009)

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Law Reform Commission

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LAW REFORM COMMISSION'S ROLE

The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law. Since it was established, the Commission has published 150 documents (Consultation Papers and Reports) containing proposals for law reform and these are all available at www.lawreform.ie. Most of these proposals have led to reforming legislation.

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TABLE OF CONTENTS

Table of Legislation	xiii
Table of Cases	xvii
INTRODUCTION	1
A Background to this Project	1
B The Law on Personal Indebtedness in Context	1
C The Commission's General Approach to this Project	2
D Categorisation of Issues Used in this Consultation Paper	3
E Outline of the Consultation Paper	3
(1) Chapter 1: Debtors and Creditors: Putting the Law of Debtors into Context	3
(2) Chapter 2: A Framework for Reform	3
(3) Chapter 3: Debt and Over-indebtedness: the Current Law	4
(4) Chapter 4: Debt Management: Suggestions for Further Research	5
(5) Chapter 5: Personal Insolvency Law: Provisional Recommendations for Reform	6
(6) Chapter 6: Enforcement Procedures: Provisional Recommendations for Reform	6
CHAPTER 1 DEBTORS AND CREDITORS: PUTTING THE LAW OF DEBTORS INTO CONTEXT	9
A Indebtedness and Over-Indebtedness	9
(1) Over-Indebtedness	9
(2) Negative Social Consequences of Over-indebtedness	12
(3) The Extent of the Problem	15
B Causes of Debt – Why are debts unpaid? Why are legal enforcement mechanisms needed?	22
(1) Attitude of the Law to Debt Enforcement – The Delinquent Debtor	22
(2) The Main Causes of Debt	22
C Debtors Who Cannot Pay and Debtors Who Refuse to Pay	30
(1) The Importance of this Distinction	30
(2) Those Who Can't Pay	31
(3) Those Who Won't Pay	31
(4) An Intermediate Category: Those Who Could Pay	32
(5) Conclusions: An Individualised, Debtor-Specific Approach	33
D Creditor Practices	33
(1) The Different approaches of Creditors to Debt Collection	34
(2) Industry Guidelines	37
(3) Conclusions	37
CHAPTER 2 A FRAMEWORK FOR REFORM	39
A Rights of the Creditor	39

	(1) Access to the Courts/Right to Litigate	40
	(2) Property Rights	42
B	Rights of the Debtor	44
	(1) Fair Procedures	44
	(2) The right to liberty	46
	(3) Privacy	47
	(4) The Property Rights of Debtors	52
C	Interests of Society	55
	(1) The Rule of Law	55
	(2) Efficiency of the Economy	57
	(3) Fundamental Principles of Contract Law	59
	(4) Prevention and Alleviation of Over-Indebtedness	60
D	Key Principles for Reform	61
	(1) A Balanced Approach to Debt Enforcement	61
	(2) A Proportionate Approach to Debt Enforcement	62
	(3) Legal Solutions to the Problem of Over-Indebtedness	63
	(4) Can't Pay and Won't Pay	65
	(5) The Crucial Need for Greater Debtor Information	65
	(6) The Non-Judicial Resolution of Debt Disputes	66
	(7) Streamlining of the Law on Debt Enforcement	67
CHAPTER 3	DEBT AND OVER-INDEBTEDNESS: THE CURRENT LAW	69
A	Responsible Borrowing	70
	(1) The Current Position in Ireland	70
	(2) Issues for Consideration	78
B	Responsible Lending	85
	(1) Responsible Lending Under the Current Law	86
	(2) Issues for Consideration	98
C	Responsible Arrears Management	100
	(1) The Current Position in Ireland in Relation to Responsible Arrears Management	101
	(2) Issues for Consideration	106
D	Debt Counselling	107
	(1) The Money Advice and Budgeting Service (MABS)	108
	(2) Other debt counselling services	109
	(3) Issues for Consideration	109
E	Holistic Legal Procedures: Personal Insolvency	110
	(1) Judicial Rehabilitative Processes	111
	(2) Non-Judicial Rehabilitative Processes	122
F	Debt Enforcement Procedures	129
	(1) Judgment and the Process of Execution	129
	(2) The Process of Execution	135
	(3) Enforcement Mechanisms	138
	(4) Problems of the Current Law	164
CHAPTER 4	DEBT MANAGEMENT: SUGGESTIONS FOR CONSIDERATION	181
A	Responsible Borrowing	181
	(1) Financial Education	182
	(2) Consumer Credit Law	185
B	Responsible Lending	188
	(1) EU Rules on Responsible Lending	188

(2) The Content of the Principle of Responsible Lending	190
(3) Creditworthiness and suitability assessments: Credit Register	192
(4) Regulatory Enforcement of Responsible Lending Rules	208
(5) Private Law Remedies against Irresponsible Lending	214
(6) Specialist lenders: Credit Unions and Moneylenders	224
(8) Financial Exclusion	228
C Responsible Arrears Management	230
(1) Code of Conduct on Mortgage Arrears	231
(2) Responsible Arrears Management Rules in Cases of Non-Mortgage Arrears	233
(3) Private Debt Collection	235
D Debt Counselling	245
(1) Problems arising in the commercial debt advice sector	245
(2) Comparative Analysis	246
(3) Conclusion	250
CHAPTER 5 PROVISIONAL RECOMMENDATIONS FOR REFORM: PERSONAL INSOLVENCY LAW	253
A Justifications for Consumer Insolvency Procedures	253
(1) Debt Collection	254
(2) A Functional Economic Theory of Discharge	255
(3) Entrepreneurship	255
(4) Economically Efficient Allocation of Risk	255
(5) Social Welfare	256
(6) Rehabilitation and Humanitarianism	256
(7) Consumer Protection	257
B Comparative Debt Settlement Systems	258
(1) Anglo-Saxon Model	258
(2) Non-Judicial Debt Settlement in the National Enforcement Office: Sweden	263
(3) France: Non-Judicial Over-Indebtedness Commissions	265
(4) Netherlands: Traditional Debt Counselling and a New Judicial Debt Settlement System	266
C Key Principles of a Consumer Debt Settlement Regime	269
(1) The Need for Consumer Insolvency Law and the Discharge of Debts	269
(2) A Preference for Non-Judicial Debt Settlement	270
(3) Statutory Debt Settlement v Voluntary Debt Settlement	275
(4) The Structure of a Debt Settlement System: Debt Counselling and a Supervisory Agency.	276
(5) Earned Start	279
(6) Open Access	281
(7) Restrictions on Multiple Debt Settlements: Once in a Lifetime?	287
(8) Debtor Participation	287
(9) Reasonable Standard of Living	288
(10) Reasonable Time Frame	293

	(11) Non-Discrimination	294
CHAPTER 6	PROVISIONAL RECOMMENDATIONS FOR REFORM: ENFORCEMENT PROCEDURES	297
A	Comparative Models of Enforcement Systems	297
	(1) Centralised Enforcement System	297
	(2) Court-Based Enforcement	301
	(3) Privatised Enforcement	305
	(4) Conclusions: A Dedicated, Centralised System	306
B	A New Model of Enforcement System	307
	(1) A Centralised Enforcement System under a Dedicated Enforcement Office	307
	(2) Organisational Structure of the Proposed Enforcement Office	310
	(3) Access to Information on the Means of Debtors	314
	(4) The Enforcement Procedure: Interaction of the Courts, Enforcement and Debt Settlement	323
	(5) Debtor Participation	336
	(6) Balanced and Proportionate Enforcement: How to Choose the Appropriate Method of Enforcement	343
	(7) Register of Judgments	345
C	Individual Enforcement Mechanisms	346
	(1) A Single Enforcement Application	346
	(2) Instalment Orders	348
	(3) Garnishee Order/Attachment of Debts	353
	(4) Attachment of Earnings	361
	(5) Execution against Goods	383
	(6) A Continued Role for Imprisonment as a Last Resort for “Won’t Pay” Debtors?	407
	(7) Other Enforcement Mechanisms	409
CHAPTER 7	SUMMARY OF PROVISIONAL RECOMMENDATIONS AND SUGGESTIONS	413

TABLE OF LEGISLATION

Attachment of Earnings Act 1971	1971 c. 32	Eng
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005	Pub. L. No. 109-8	USA
Bankruptcy Act 1988	No. 27/1988	Irl
Bankruptcy and Diligence etc. (Scotland) Act 2007	2007 asp 3	Scot
Bankruptcy and Insolvency Act	RSC ch B-3	Can
Canada Labour Code	R.S.C. 1985 c. 9 (1st Supp.)	Can
Central Bank Act 1942	No. 22/1942	Irl
Central Bank Act 1989	No. 16/1989	Irl
Central Bank Act 1997	No. 8/1997	Irl
Central Bank and Financial Services Authority of Ireland Act 2004	No. 21/2004	Irl
Charging Orders Act 1979	1979 c. 53	Eng
Civil Procedure Act 1997	1997 c.12	Eng
Collection Agencies Act	RSO 1990, Chapter C.14.	Ont.
Common Law Procedure Amendment Act (Ireland) 1856	1856 c. 102	Irl
Companies Act 1963	No. 33/1963	Irl
Consumer Credit Act 1974	1974 c. 39	UK
Consumer Credit Act 1995	No. 24/1995	Irl
Consumer Credit Directive 2008	2008/48/EC	EC
Consumer Credit Protection Act 1968	15 USC	USA
Consumer Protection Act 2007	No. 19/2007	Irl
Council Regulation on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters	(EC) No 1206/2001	EC
County Court Act 1984	1984 c. 28	Eng
County Officers and Courts (Ireland) Act 1877	40 & 41 Vic. c. 56.	GB
Court Officers Act 1945	No. 25/1945	Irl
Courts (Supplemental Provisions) Act 1961	No. 39/1961	Irl
Courts Act 1991	No. 20/1991	Irl
Courts Act 2003	2003 c. 39	Eng
Courts and Court Officers Act 2002	No. 15/2002	Irl
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Order 2006

Criminal Justice Act 1993	No. 6/1993	Irl
Data Protection (Amendment) Act 2003	No. 6/2003	Irl
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Employment and Assistance Act 2002	SBC 2002 c. 40	BC
Enforcement of Court Orders (Amendment) Bill 2009	Bill No. 47/2009	Irl
Enforcement of Court Orders Act 1926	No. 18/1926	Irl
Enforcement of Court Orders Act 1940	No. 23/1940	Irl
Enforcement of Court Orders Bill 1998 (PMB)	Bill No. 31/1998	Irl
Enforcement of Court Orders Bill 2004 (PMB)	Bill No. 36/2004	Irl
Enforcement of Court Orders Bill 2007 (PMB)	Bill No. 1/2007	Irl
Enterprise Act 2002	2002 C 40	UK
European Communities (Civil and Commercial Judgment) Regulations 2002	S.I. No. 52/2002	Irl
European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995	S.I. No. 27/1995	Irl
Fair Credit Reporting Act 1970	15 U.S.C. § 1681 et seq	US
Family Home Protection Act 1976	No. 27/1976	Irl
Family Law (Maintenance of Spouses and Children) Act 1976	No. 11/1976	Irl
Family Law Act 1995	No. 26/1995	Irl
Gas (Interim) (Regulation) Act 2002	No. 10/ 2002	Irl
Human Rights Act 1998	1998 c.42	UK
Insolvency Act 1986	1986 c. 45	UK
Insurance Act 2000	No. 42/2000	Irl
Investment Intermediaries Act 1995	No. 11/1995	Irl
Judgment Enforcement Fees (Amendment) Order (Northern Ireland) 2004	2004 No. 341	NI
Judgment Enforcement Fees (Amendment) Order (Northern Ireland) 2007	2007 No. 380	NI
Judgment Enforcement Fees Order (Northern Ireland) 1996	1996 No. 101	NI

Judgment Mortgages (Ireland) Act 1850	1850 c. 29	Irl
Judgment Mortgages (Ireland) Act 1850	13 & 14 Vict c 29	Irl
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Judgments Enforcement (Northern Ireland) Order 1981	1981 No. 226 (N.I. 6)	NI
Judgments Enforcement Rules (Northern Ireland) 1981	SR 1981/147	NI
Land and Conveyancing Law Reform Act 2009	No. 27/2009	Irl
Loi relative à la prévention et au règlement des difficultés liées au surendettement des particuliers et des familles	n°89-1010	Fr
Loi relative au recouvrement amiable des dettes du consommateur	20 décembre 2002	Be
Markets in Financial Instruments and Miscellaneous Provisions Act 2007	No. 37/2007	Irl
Moneylenders Act 1900	63 & 64 Vict. c. 51	UK
Non-Fatal Offences against the Person Act 1997	No. 26/1997	Irl
Recovery of Debts due to Banks and Financial Institutions Act 1993	No. 51/1993	Ind
Register of County Court Judgment Regulations 1985	S.I. 1985/1807	UK
Registration of Title Act 1964	No. 16/1964	Irl
Sale of Goods Act 1893	No. 71/1893	Irl
Sheriffs (Ireland) Act 1920	(10 & 11 Geo. 5.) c.26	Irl
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Supreme Court Act 1986	No. 110/1986	Vict
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Unfair Dismissals (Amendment) Act 1993	No. 22/1993	Irl
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Uniform Consumer Credit Code		Aus

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Belfast Telegraph Newspapers Ltd v Blunden	[1995] NI 351	NI
Butterly v Cumming	[1898] 1 IR 196	Irl
Chestvale Properties v Glackin	[1993] 3 IR 35	Irl
Davis Contractors Ltd v Fareham UDC	[1956] AC 696	Eng
Deaton v Attorney General	[1963] IR 170	Irl
Deighan v Hearne	[1986] IR 603	Irl
Foley v Bowden	[2003] 2 IR 607	Irl
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Grace v Ireland and the Attorney General	[2007] IEHC 90	Irl
Haughey v Moriarty	[1999] 3 IR 1	Irl
Hornsby v Greece	(1997) 24 EHRR 250	ECHR
James (Duke of Westminster) v United Kingdom	Application No. 00008793/79, ECtHR	ECHR
James and Others v The United Kingdom	[1986] ECHR 2	ECHR
Jamil v France	Application No. 11/1994/458/539	ECHR
Janosevic v Sweden	Application No. 34619/9	ECHR
Jones Bros. (Holloway) Ltd v Woodhouse	[1923] 2 KB 117	Eng
K v Sweden	Application No 13800/88	ECHR
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Stokoe v Cowan	29 Beav. 637	Eng
Tournier v National Provincial and Union Bank of England	[1924] 1 KB 461	Eng
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W(P) v Coras Iompar Éireann	[1967] IR 137	Irl
Walsh, Re:	96 P 3d 1 (Wyo 2004)	Wyo
Ward of Court (No 2), In Re a	[1996] 2 IR 79	Irl
Wilson v First County Trust Ltd (No. 2)	[2003] UKHL 40	UK

INTRODUCTION

A Background to this Project

1. This Consultation Paper forms part of the Commission's *Third Programme of Law Reform 2008-2014*,¹ and involves an examination of the law related to personal debt, in particular the relevant debt-related enforcement processes. In 2007, during the public consultation process that preceded the drafting of the *Third Programme of Law Reform*, the Commission received a significant number of submissions which drew attention to the need for reform in this area of Irish law. The Commission's decision to include it in the Third Programme, and to give priority to it, reflected the widespread view expressed in these submissions that this area of law required examination.

2. The submissions received by the Commission in 2007 suggested in particular that current legal procedures concerning personal debt claims and the enforcement of judgment debts against consumers required a major review. The core subject matter of this Consultation Paper, therefore, is on the law concerning the enforcement of money judgments and the pre-judgment procedures in claims for the recovery of a contract debt. While the Commission recognises that procedures for the enforcement of judgments other than money judgments could also be examined, this Consultation Paper concentrates on the enforcement of money judgments because high-volume, low-value personal debt claims account for the majority of enforcement proceedings. The Commission also emphasises that this Consultation Paper deals primarily with the enforcement of judgments obtained against individual debtors, rather than corporate debtors. This reflects the concerns raised during the public consultation which preceded the Commission's *Third Programme of Law Reform* on the need to review debt enforcement procedures involving consumers.

B The Law on Personal Indebtedness in Context

3. The Commission was also aware, when drafting the *Third Programme of Law Reform*, that important work by other bodies in this area of the law and the wider context of personal indebtedness had already been undertaken, or was planned. This included work by the Free Legal Advice Centres (FLAC) on the existing law of debt enforcement.² In the wider context within which this project must be considered, the Commission was aware that, in 2006, the Government had already initiated a major review of financial services legislation, which would include a review of the relevant regulatory framework in Ireland.³ For these reasons, the Commission noted that there was a specific need to be aware of the work of these other bodies and to consult with them in carrying out this project.⁴

4. The Commission also recognises that the Consultation Paper's focus on debt enforcement involving individuals raises the wider context of personal indebtedness generally. In this respect, the Commission has had the benefit of the analysis of the Commission of the European Communities⁵ and of the Committee of Ministers of the Council of Europe⁶ outlining overarching approaches to personal over-indebtedness. These approaches have identified the need to review legal proceedings concerning debt recovery and procedures for the enforcement of judgments as part of a wider approach to addressing

¹ *Report on the Third Programme of Law Reform 2008-2014* (LRC 86-2007), Project 2. In accordance with the *Law Reform Commission Act 1975*, the contents of the *Third Programme of Law Reform* were approved by Government in December 2007 and placed before both Houses of the Oireachtas.

² In particular Joyce, *An End Based on Means?* (Free Legal Advice Centres, Dublin 2003).

³ In December 2006, the Government announced the establishment of an expert advisory group to modernise and consolidate financial services legislation, referred to in the Commission's *Report on Vulnerable Adults and the Law* (LRC 83-2006), at paragraph 1.26.

⁴ *Report on the Third Programme of Law Reform 2008-2014* (LRC 86-2007), p.11.

⁵ *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008).

⁶ *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* (Council of Europe CM/Rec(2007)8, 2007)

over-indebtedness. Notably, the European Commission has highlighted the following six key “building blocks” as forming part of an effective response to consumer over-indebtedness:

- Responsible borrowing
- Responsible lending
- Responsible arrears management
- Debt counselling
- Personal insolvency law, and
- Holistic court procedures.

5. The six-point framework is based on the twin goals of preventing the problem of over-indebtedness and alleviating the problem for those households who are already over-indebted. This framework provides an authoritative and extremely helpful basis on which to analyse the reform of debt recovery and judgment debt enforcement procedures, and the Commission has used it as a reference point throughout this Consultation Paper. The Commission fully appreciates, however, that not all of the six “building blocks” contain subject-matter that are appropriate for review by the Commission; this is because some involve very broad questions of economic and social policy. While the Commission describes the extent to which, and whether, Irish law currently corresponds to international best practice in these six major areas, the Commission has made provisional recommendations for law reform in only some of these areas. The Commission now turns to explain how it has approached this.

C The Commission’s General Approach to this Project

6. In preparing this Consultation Paper, the Commission is fully aware of the importance of having in place a modern and comprehensive legal framework to deal with personal indebtedness; it is a vital matter of interest for many individuals in Ireland who face pressing financial worries. The Commission, in carrying out its statutory mandate to keep the law under review, is conscious that some projects, such as this one, require it to engage in a wide-ranging examination of the existing legal setting in order to place any recommendations for reform in a proper context.

7. Indeed, as is clear from the length of this Consultation Paper, the range of issues that need to be addressed are exceptionally wide and varied. They include: preventative measures to address personal indebtedness at an early stage; interventions to resolve debt problems in an efficient way; the need to bring debt enforcement processes into line with international best standards; to question the utility of imprisonment as a means of enforcement; and to place this in the context of relevant changes to the financial services regulatory framework.

8. It is clear that, since 2008, a number of important initiatives have already been put in place under the existing regulatory framework, such as the *Code of Practice on Mortgage Arrears* developed by the Irish Financial Services Regulatory Authority. In the context of debt enforcement, the *Enforcement of Courts Orders (Amendment) Act 2009* was enacted in response to unconstitutional procedural defects in the legislation that authorises imprisonment for those who “won’t pay” (as opposed to “can’t pay”) their debts. In approaching the need to recommend further – and wide-ranging – reform in this area, the Commission is therefore mindful of the responses already made to the pressing problems arising from personal indebtedness.

9. In addition, the Commission is conscious that a number of legislative solutions to indebtedness will arise in the context of the planned reform of the financial services legislation. Many of these involve choices of a regulatory nature to which the Commission draws attention in this Consultation Paper but which are either required by EC law, such as the requirements in the 2008 *Consumer Credit Directive*,⁷ or are more appropriately considered in the overall context of the new financial services legislation. Thus, while the Commission highlights these matters here, it considers that these should primarily be brought to final decisions by other bodies and, ultimately, the Government and the Oireachtas. This is in keeping with the Commission’s statutory mandate under the *Law Reform Commission Act 1975* to identify, where

⁷ Directive 2008/48/EC.

appropriate, the elements of a law reform project that can be carried out by the Commission and those that could suitably be carried out by another body.⁸

10. As a result, the Commission has prepared this Consultation Paper on the basis that it should provide, to the greatest extent possible, a wide-ranging examination of the current law on personal indebtedness. The Commission has also had the benefit of hearing the insights and views of many key organisations and individuals with an interest in this area, and has had regard to the wide literature that exists. In approaching the question of legislative and other solutions, the Commission has attempted to identify those which should be addressed by other bodies and those which could suitably be dealt with by the Commission. It will be apparent from a number of matters addressed in this Paper that the line between these two categories is not always completely clear, and the Commission will particularly welcome views and submissions on this in the consultation period after the publication of this Consultation Paper.

D Categorisation of Issues Used in this Consultation Paper

11. As already mentioned, the Commission has adopted the categorisation of issues concerning indebtedness developed by the European Commission.⁹ This involves six major areas: responsible borrowing and money management; responsible lending; responsible arrears management; debt counselling services; personal insolvency laws; and legal debt enforcement proceedings. It is clear from these headings that the Commission's primary focus in the Consultation Paper is on the fifth and sixth areas, personal insolvency laws and legal debt enforcement proceedings. Nonetheless, as already mentioned, proposals for reform in these areas can only be understood in the wider setting of the other four areas, while it must equally be borne in mind that many of the solutions may need consideration by bodies other than the Commission.

E Outline of the Consultation Paper

12. The Commission now turns to outlining briefly the main contents of the Consultation Paper.

(1) Chapter 1: Debtors and Creditors: Putting the Law of Debtors into Context

13. In Chapter 1, the Commission discusses some of the important issues raised by the problem of debt and over-indebtedness so as to place the law on debt enforcement in its proper context. Part A of the Chapter outlines the role of debt and credit in modern economies and societies, before describing the consequential problem of over-indebtedness. The causes of debt difficulties are then explored in Part B, with a view to illustrating the approach which the law should take to questions of debt enforcement. Part C continues by illustrating the crucial distinction between debtors who cannot pay their debts and those who refuse to pay (the important distinction between those who "can't pay" and those who "won't pay"). Part D then outlines the various attitudes and approaches of creditors to debt management and enforcement. As this Consultation Paper concentrates on the legal aspects of personal debt, a detailed study of the causes and effects of over-indebtedness is outside its scope. Thus, when considering the options for reform of the law on debt enforcement, this Consultation Paper does not extend to the social and political measures which might assist in alleviating the problem of over-indebtedness.

(2) Chapter 2: A Framework for Reform

14. In Chapter 2, the Commission discusses the principles that have informed its approach in making provisional recommendations for the reform of the law on personal debt. This has involved an analysis by the Commission of the respective rights of creditors and debtors, as well as the interests of

⁸ Section 4(2)(a) of the *Law Reform Commission Act 1975* empowers the Commission to indicate that reforms arising from some aspects of a project should be made by the Commission, while other reforms from other aspects should be made by another body. See also *Report on the Third Programme of Law Reform 2008-2014* (LRC 86-2007), pp.6-7, explaining why certain projects were excluded from the *Third Programme of Law Reform* for this reason.

⁹ *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008).

society, which are at issue in this area of the law. The analysis pays particular attention to the rights and interests recognised by the Constitution of Ireland and the European Convention on Human Rights.

15. Part A of the Chapter discusses the rights of creditors. These include the right of access to a court and property rights. Part A concludes that these rights must be adequately respected by providing effective mechanisms for enforcing court judgments, while noting that these rights are not absolute. Part B outlines the rights of debtors, which equally must be protected, including the rights to fair procedures, liberty, privacy and property. Part B draws two important conclusions: the law on debt enforcement must strike an appropriate balance between the rights of creditors and debtors; and the law on debt enforcement must be based on the principle of proportionality, so that while restrictions on debtors' rights are necessary they must always be appropriate.

16. Part C discusses the general interests of society that must be considered by the law in this area. In this Part the Commission notes that the rule of law, the protection of basic principles of contract law, and the objective of an efficient economy all demand that the mechanisms for the enforcement of judgment debts should operate efficiently. The public interest in the prevention and alleviation of over-indebtedness is also recognised as a legitimate aim which may justify restrictions on the rights of creditors.

17. Part D of Chapter 2 draws conclusions from this discussion and presents a list of fundamental principles that have guided the Commission's provisional recommendations for reform in the Consultation Paper. The Commission notes that the law on debt enforcement must be balanced, proportionate and clear. It is also fundamental that the law recognises the distinction between debtors who cannot pay and those who refuse to pay (those who "can't pay" and those who "won't pay"), and that procedures must be introduced to obtain more information about the means of debtors so that this distinction can be made in individual cases. Finally, the Commission concludes that those who cannot pay should not be subject to enforcement proceedings and that a system of debt settlement must be introduced to provide a solution to the difficulties of the over-indebted.

(3) Chapter 3: Debt and Over-indebtedness: the Current Law

18. In Chapter 3, the Commission outlines the current legal position concerning personal debt and over-indebtedness in Ireland, in order to identify the areas that are appropriate for reform. The Commission's suggestions and recommendations as to the problem of over-indebtedness should be seen within the context of its primary focus on reform of the law on debt enforcement. As already indicated, Chapter 3 follows the framework proposed by the European Commission, which is based on the twin goals of preventing the problem of over-indebtedness and alleviating the problem for those households who are already over-indebted.

19. In response to an analysis of the causes of over-indebtedness, the European Commission has proposed that the law should focus on three main areas in seeking to prevent this social problem.¹⁰ The law must thus ensure responsible practices in lending, borrowing and arrears management. This Chapter discusses the position in Irish law under each of these subject headings, and identifies some problems (possible solutions are suggested for further consideration in Chapter 4).

20. Part A of Chapter 3 discusses the subject of responsible borrowing. It identifies two aspects to this subject: financial education and the provision of information to consumers under consumer credit law. Part A examines how financial education is currently provided, and discusses how, through a variety of instruments, the law requires that certain information be provided to consumers about credit agreements. The Commission then discusses the limitations of the current Irish position on financial education and the provision of information to consumers. Part B discusses the subject of responsible lending. It first outlines the justification for the principle of responsible lending, and describes its importance in preventing over-indebtedness. The Commission then describes the current legal measures which seek to ensure that responsible lending standards are observed, before continuing to highlight certain issues for consideration in this area. Part C discusses the principle of responsible arrears management, and

¹⁰ *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 58ff.

describes how this principle is advanced both through legislation and through voluntary codes of practice. The need to consider mechanisms to reinforce the principle is then discussed.

21. It is widely recognised that, in addition to legal measures which seek to prevent over-indebtedness from arising, further measures are also needed to provide relief and rehabilitation for those individuals who have become over-indebted.¹¹ It is unrealistic to think that preventive measures, no matter how successful, can eradicate over-indebtedness completely, especially when the need to protect the supply of credit is considered.¹² It must be recognised that one consequence of a credit society is that some individuals (admittedly a minority of those who use credit facilities) will become over-indebted, so that some method of what is often described as debtor rehabilitation must be put in place.

22. Chapter 3 therefore also describes the position in Irish law concerning debtor rehabilitation methods. This begins in Part D with a discussion of debt counselling. The current state of debt counselling in Ireland is outlined, and issues which should be considered in this area are identified. Part E presents an outline of the law on personal insolvency. The Irish bankruptcy system, based on the *Bankruptcy Act 1988*, is discussed and flaws in this system are highlighted. The Commission also discusses various methods, outside the terms of the 1988 Act, which are used to remedy the difficulties of over-indebted individuals in Ireland.

23. Part F of Chapter 3 describes current debt enforcement procedures under Irish law, some of which are based on legislation from the 19th Century, such as the *Debtors (Ireland) Act 1872*. Indeed, even the legislation enacted in the 20th Century required amendment, through the *Enforcement of Courts Orders (Amendment) Act 2009*, because of unconstitutional procedural defects in the provisions that authorise imprisonment for those who “won’t pay” (as opposed to “can’t pay”) their debts. This is a key area of focus for this Consultation Paper and Part F provides, therefore, a detailed account of the various methods of enforcing a judgment debt, and describes the procedural steps involved in each method. The Commission describes the general process for the execution of a debt in the courts system. The Commission also identifies the specific enforcement mechanisms, notably: execution against goods by Sheriffs and County Registrars; instalment orders; garnishee orders; judgment mortgages; possession orders; and the appointment of a receiver by way of equitable execution. The Commission identifies and discusses several failings of the system of debt enforcement as a whole and of the specific enforcement procedures in particular. It is clear that this system and the specific processes involved are in need of comprehensive reform.

24. In Chapter 4 of the Consultation Paper, the Commission turns to make suggestions for further consideration (primarily by other bodies) concerning the wider setting of indebtedness, while Chapters 5 and 6 make provisional recommendations for reform of the law, especially the law on debt enforcement. In Chapter 4, the Commission deals with the first four areas identified by the European Commission in its analysis of indebtedness. In Chapter 5, the Commission addresses personal insolvency law and provisionally proposes a non-judicial debt settlement system for Ireland. In Chapter 6 the Commission deals with provisional recommendations for the reform of judgment debt enforcement procedures.

(4) Chapter 4: Debt Management: Suggestions for Further Research

25. As indicated, Chapter 4 discusses the subjects of responsible borrowing, responsible lending, responsible arrears management and debt counselling services. In Part A, the Commission notes that the issue of financial education is largely one of social policy, which in general does not fall within the Commission’s law reform remit. This Part therefore describes the reforms to the system of financial education which are currently being made in Ireland and at European Union level. The Commission also notes the reforms which are due to be made to Irish consumer credit law when the 2008 *Consumer Credit Directive* is implemented.

26. Part B discusses the subject of responsible lending. The Commission refers to developments under EU law and analyses the credit reporting systems in a number of countries. The Commission

¹¹ See *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* (Council of Europe CM/Rec(2007)8, 2007) Explanatory Memorandum paragraph 31.

¹² *Ibid.*

suggests that consideration be given to whether the system of credit reporting in Ireland should be expanded or otherwise improved. Part B also suggests some measures which could be adopted to curb irresponsible lending practices, and examines whether the law of contract (notably the principles concerning unconscionable contracts) could provide remedies for cases of irresponsible or unjust lending practices. Finally, consideration is given to whether special rules on responsible lending are needed for specialist lenders and to the impact of any proposed reforms in this area on the problem of financial exclusion.

27. Part C of Chapter 4 discusses the question of responsible arrears management. The reform of existing rules on arrears management in relation to mortgage loans is considered, followed by a discussion of the possible introduction of legislation to regulate arrears management practices in cases of non-mortgage loans. The Commission also considers whether a system for the regulation of debt collection agencies should be introduced into Irish law. Part D discusses debt counselling, and the Commission recognises that this is primarily a matter of social policy, but nonetheless identifies some specific matters that warrant law reform, notably, the possibility of introducing a system for regulating commercial debt advice agencies.

(5) Chapter 5: Personal Insolvency Law: Provisional Recommendations for Reform

28. In Chapter 5 the Commission makes provisional recommendations for the creation of a new system of personal insolvency law in Ireland. In particular, the Commission proposes that a statutory non-judicial debt settlement scheme should be introduced, which would supplement (though not necessarily replace completely) the court-based scheme in the *Bankruptcy Act 1988*. The section examines comparative models of personal insolvency law, and uses these to present a detailed model of the proposed debt settlement system. The key principles which should inform this system are also discussed, notably the concepts of: earned debt discharge; open access for honest and long-term insolvent debtors; legally binding debt settlements as opposed to voluntary debt rescheduling arrangements; the preservation of a reasonable standard of living for debtors; and a discharge period of reasonable duration.

(6) Chapter 6: Enforcement Procedures: Provisional Recommendations for Reform

29. In Chapter 6, the Commission sets out a number of detailed provisional recommendations for reform of debt claim and judgment enforcement procedures in Ireland. The Commission examines systems of debt enforcement in a number of other countries, and provisionally recommends that the Irish system needs fundamental reform. The proposed new system would be based on the introduction of a central Debt Enforcement Office (which could build on the current arrangements) and the removal of much (but not all) of debt enforcement proceedings from the courts. The key principles which should underpin this new system are then identified, in particular: proportionate, balanced and appropriate enforcement in each individual case; improved access to information on the means of debtors; clear and simplified enforcement procedures; increased efficiency and accountability in enforcement; a holistic approach to enforcement through interaction with the proposed debt settlement system; and the encouragement of increased participation of debtors in enforcement proceedings. The Chapter concludes by discussing potential reforms of the individual enforcement methods, and by considering how these individual enforcement methods could operate under the proposed new system.

30. Chapter 7 contains a summary of the *suggestions for consideration* made in the Consultation Paper (primarily those matters which would most likely be dealt with by bodies other than the Commission) and a summary of the *provisional recommendations* (those matters which the Commission will deal with in the Report which will follow from this Consultation Paper).

31. This Consultation Paper is intended to form the basis for discussion and therefore all the recommendations made are provisional in nature. The Commission will make its final recommendations on the subject of personal debt management and debt enforcement following further consideration of the issues and further consultation with interested parties. This will include, in particular, further consideration of those areas which other bodies are best placed to address and those which the Commission should address in the Report which will follow from this Consultation Paper. Submissions on the provisional recommendations included in this Consultation Paper are welcome. To enable the Commission to proceed with the preparation of its final Report, those who wish to do so are requested to make their

submissions in writing by post to the Commission or by email to info@lawreform.ie by **31 December 2009**.

CHAPTER 1 DEBTORS AND CREDITORS: PUTTING THE LAW OF DEBTORS INTO CONTEXT

1.01 This chapter discusses some of the important issues raised by the problem of debt and over-indebtedness so as to place the law on personal debt management and enforcement in its proper context. Part A outlines the role of debt and credit in modern economies and societies, before describing the consequential problem of over-indebtedness. The causes of debt difficulties are then explored in Part B, with a view to illustrating the approach which the law should take to questions of debt enforcement. Part C continues by illustrating the crucial distinction between debtors who cannot pay their debts and those who refuse to pay. Part D then outlines the various attitudes and approaches of creditors to debt management and enforcement. A detailed study of the causes and effects of over-indebtedness is beyond the scope of this Consultation Paper, which aims to concentrate on the legal aspects of personal debt.¹ Thus, when considering the options for reform of the law on debt enforcement, this Consultation Paper does not suggest social, political and regulatory measures which could assist in alleviating the problem of over-indebtedness.

A Indebtedness and Over-Indebtedness

1.02 The following section seeks to outline some key issues in relation to the role of debt in society and the problem of over-indebtedness.

(1) Over-Indebtedness

1.03 It has been stated that the people of Europe now live in the era of the “Credit Society”.² In a 2007 *Recommendation*, Member States of the Council of Europe acknowledged that the use of credit has become an essential part of their economies.³ The provision of consumer credit has become a vital tool in the promotion of economic growth,⁴ and the development of the consumer credit market also benefits the well-being of private individuals.⁵ This has the consequence that any reforms of the law on debt enforcement must respect the important and beneficial role which credit, and so debt, plays in the economy of a society.⁶ The majority of credit agreements are beneficial to all parties involved and do not end in default. In 2008-2009, while the total level of private sector credit in the economy was

¹ For a deeper discussion of the problem of over-indebtedness, see for example Ramsay (ed.) *Debtors and Creditors* (Professional Books Limited 1986); Ashlee *Money Problems of the Poor: A Literature Review* (Heinemann Educational Books 1983); *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008).

² Niemi-Kiesiläinen and Henrikson *Report on Legal Solutions to Debt Problems in Credit Societies* CDCJ-BU (2005) 11 rev at 4.

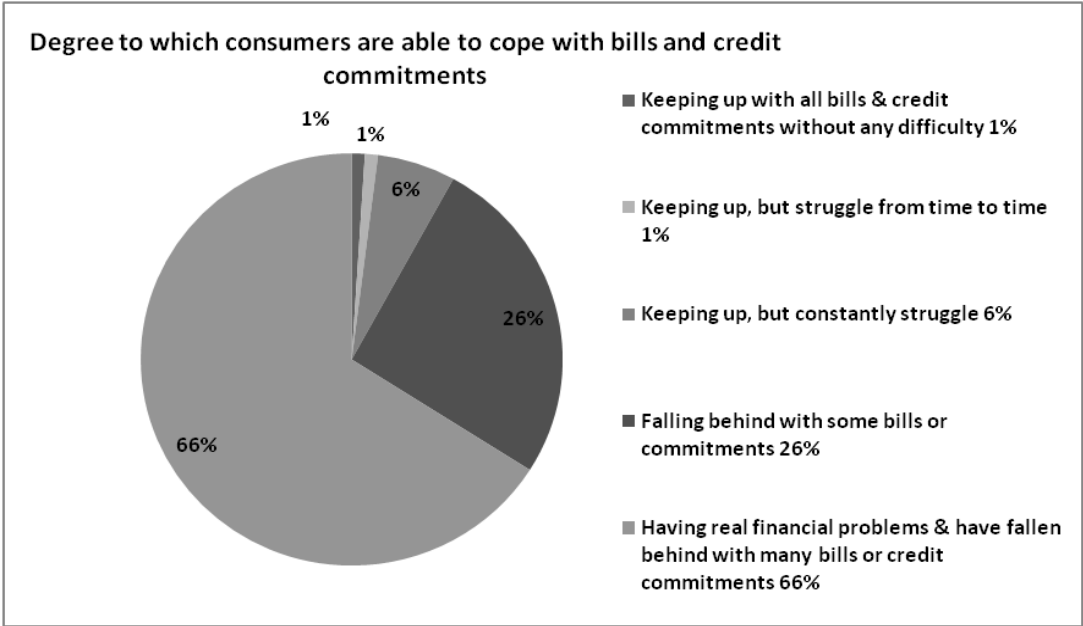
³ *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* (Council of Europe CM/Rec (2007)8, 2007).

⁴ *Ibid.*

⁵ *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* (Council of Europe CM/Rec (2007)8, 2007).

⁶ See e.g. Ramsay “Debtors and Creditors: Themes and Issues” in Ramsay (ed.) *Debtors and Creditors* (Professional Books Limited 1986) at 8.

approximately €395 billion,⁷ only approximately €350 million of unpaid civil debt was pursued through court proceedings.⁸ The pie-chart below, based on statistics from the UK⁹, illustrates this point that the majority of credit agreements are repaid without difficulty.



1.04 In this context it is important to distinguish between a situation of indebtedness and one of over-indebtedness.¹⁰ Indebtedness can be said to refer to a commitment to repay moneys which a debtor has borrowed and used.¹¹ In this regard indebtedness can be seen as a necessary and healthy consequence of the provision of credit which is beneficial to society as a whole and to individuals.¹² The majority of credit agreements are repaid without difficulty and result in benefits for all parties to the agreement.

1.05 In contrast, a situation of over-indebtedness arises where the borrowing commitments of a debtor cannot be satisfied from the debtor’s income within a reasonable time in the future.¹³ Over-indebtedness leads to negative economic and social consequences, which will be outlined in more detail below.¹⁴

⁷ *Irish Economic Statistics 2009: Compendium of Irish Economic Statistics* (Central Bank and Financial Services Authority of Ireland 2009).

⁸ McBride, *Sunday Independent*, August 2 2009, citing statistics supplied by Business Pro.

⁹ Department for Business, Enterprise and Regulatory Reform *Tackling Over-Indebtedness Annual Report 2007* (BERR 2008) at 23.

¹⁰ See Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 12; O’Loughlin *Credit Consumption and Debt Accumulation among Low-Income Consumers: Key Consequences and Intervention Strategies* (Combat Poverty Agency Research Working Paper 06/03 2006) at 4.

¹¹ Joyce *op cit*.

¹² See *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* (Council of Europe CM/Rec (2007)8, 2007).

¹³ See Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 12; See Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented by the Institute for Financial Services e.v. Erasmus University Rotterdam/School of Law University of Helsinki/Helsinki Collegium for Advanced Studies to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 18.

¹⁴ See paragraphs 1.11 to 1.15 below.

1.06 There has been a huge growth in the provision of personal credit in Ireland in recent years. During this time, lending to the personal sector grew at rates much faster than the increase in personal disposable income over the same period.¹⁵ While the majority of credit contracts operate without difficulty, and while studies show that a high level of consumer credit use does not necessarily lead to debt problems,¹⁶ this rise in consumer borrowing has led to serious financial difficulties for some individuals and families, as the problem of over-indebtedness has emerged.¹⁷ The increased marketing of and easy access to credit, over-commitment by borrowers and unforeseen adverse economic events have resulted in the problem of over-indebtedness becoming an increasingly widespread phenomenon.¹⁸ This has raised concerns that many households and individuals are arriving at a situation of indebtedness whereby they are unable to repay sums borrowed. Such a situation arose in the past, at least in the UK, at the end of the 1980s, following a credit boom similar to that which has been witnessed in Ireland in recent times.¹⁹

1.07 There is no single standard definition of what conditions satisfy the term “over-indebtedness”, nor on how this should be measured.²⁰ Various studies of the problem at European level have however attempted to propose a workable definition of the characteristics of over-indebtedness. Thus, the Council of Europe has proposed a non-exhaustive definition whereby over-indebtedness includes, but is not limited to:²¹

“the situations where the debt burden of an individual or a family manifestly and/or on a long-term basis exceeds the repayment capacity, resulting in systematic difficulties, and sometimes in failure, in paying creditors.”

1.08 A recent study conducted by the European Commission has sought to establish a single European definition of over-indebtedness.²² This report notes that in economics, the term over-commitment (which is used interchangeably with over-indebtedness) describes a situation of a temporary or permanent disequilibrium in the budget of a household resulting from expected or unexpected expenditure increases or from the household’s income decreases. Having discussed the conceptions of over-indebtedness in the various Member States, the report draws together crucial elements which are commonly present in the majority of definitions of over-indebtedness. These are:

- i) Household: The household is the primary unit by which over-indebtedness is measured and discussed.
- ii) Contracted Financial Commitments: Most definitions of over-indebtedness take into account all contractual commitments into which the household has entered, including mortgage repayments, consumer credit commitments, rent payments as well as utility and telephone bills. Informal commitments, such as those entered into within families, are excluded.

¹⁵ Kelly and Reilly *Credit Card Debt in Ireland: Recent Trends* (2005) 1 Quarterly Bulletin at 85. This now stands at 176% of disposable income: see paragraph 1.16 below.

¹⁶ Niemi-Kiesiläinen and Henrikson *Report on Legal Solutions to Debt Problems in Credit Societies* CDCJ-BU (2005) 11 Rev at 7.

¹⁷ *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* Explanatory Memorandum (Council of Europe CM/Rec(2007)8, 2007) at paragraph 2.

¹⁸ *Ibid.*

¹⁹ Kempson *Over-Indebtedness in Britain; A Report to the Department of Trade and Industry* (Personal Finance Research Centre 2002) at 1.

²⁰ See *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) and Niemi-Kiesiläinen and Henrikson *Report on Legal Solutions to Debt Problems in Credit Societies* CDCJ-BU (2005) 11 Rev at 5.

²¹ *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* Explanatory Memorandum (Council of Europe CM/Rec(2007)8, 2007) at paragraph 16.

²² *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008)

- iii) **Payment Capacity:** This refers to the ability of the household to meet the expenses associated with the contracted financial commitments. The core element of over-indebtedness is that there is an inability on the part of the household to meet recurring expenses.
- iv) **Structural Basis:** This factor requires the existence of a time dimension in any definition of over-indebtedness. This means that an assessment of over-indebtedness should consider only persistent and ongoing financial problems and ignore exceptional occasions of indebtedness that may arise due to forgetfulness or other once-off occurrences.
- v) **Standard of Living:** This criterion means that for a household to be classed as over-indebted, it must be unable to meet its contractual commitments without reducing its minimum standard of living.
- vi) **Illiquidity:** This element recognises that an over-indebted household is unable to remedy the situation by recourse to assets and other financial sources such as credit.²³

Following this approach, the Combat Poverty Agency proposed a definition of over-indebtedness for Ireland which stated that:

“People are over-indebted if their net resources (income and realisable assets) render them persistently unable to meet essential living expenses and debt repayments as they fall due.”²⁴

1.09 As the above statements illustrate, households which fit the over-indebtedness description have fallen into debt and have no way of escaping their problems.²⁵ A situation of over-indebtedness will usually involve multiple debts, with one Irish study showing that approximately 84% of the debt counselling clients surveyed possessed two or more debts.²⁶ Generally such households will not owe large amounts, but will possess insufficient surplus income after essential expenses to make repayments to their creditors. Also, often such debtors will not possess assets of value which could be sold to meet their debts.²⁷

1.10 The over-indebted debtor poses particular problems for the law of debt enforcement. As such debtors simply lack the means to repay monies owed, traditional enforcement mechanisms are wasted if applied to such debtors. Also, as enforcement proceedings are brought by one creditor to recover payment of one debt, they fail to deal with the overall over-indebtedness of the debtor. For this reason, this Consultation Paper advocates a nuanced approach and advances recommendations which seek to provide solutions to the problematic situation of the over-indebted individual.

(2) Negative Social Consequences of Over-indebtedness

1.11 Over-indebtedness can generate significant social problems for households.²⁸ As well as long-term economic difficulties, these can include the social exclusion of families and a risk of jeopardising

²³ *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 37.

²⁴ *Stamp A Policy Framework for Addressing Over-Indebtedness* (Combat Poverty Agency 2009) at 7.

²⁵ See *The Insolvency Service Relief for the Indebted – An Alternative to Bankruptcy* (The Insolvency Service 2005) at 12.

²⁶ *Women, Debt and Health* (Joint Report of The Women’s Health Council and the Money Advice and Budgeting Service 2007) at 9.

²⁷ See *The Insolvency Service Relief for the Indebted – An Alternative to Bankruptcy* (The Insolvency Service 2005) at 12.

²⁸ See e.g. *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* Council of Europe CM/Rec (2007)8; Joyce *An End Based on Means?* (Free Legal Advice Centres 2003) at 13.

children's basic needs.²⁹ Other negative social consequences for the lives of debtors and their households can include psychological and physical health problems.³⁰

1.12 Recent research based on data from the European Community Household Panel has outlined the adverse long-term effects of over-indebtedness on households, showing how over-indebtedness can have a negative effect on home-ownership, employment, self-employment and health.³¹ Over-indebtedness was shown to have a very significant impact on employment, with arrears increasing the likelihood of unemployment even up to four years after arrears first occurred.³² The study showed both that householders who are currently employed are much less likely to remain employed if they have recently incurred arrears and that repayment arrears increase the difficulty of finding a job for those workers not currently employed. The existence of arrears also has a negative effect on a household's chance of owning its own home. While the study surprisingly indicated that indebtedness does not have a significant effect on the likelihood of an individual starting a business and becoming self-employed, the existence of debt problems among those already self-employed was shown to make such entrepreneurs less likely to remain self-employed.³³

1.13 Indebtedness has also been shown to have a detrimental impact on health, with debt problems almost doubling a household's likelihood of experiencing health difficulties within the next year.³⁴ Irish research has highlighted both the negative mental and physical implications of debt.³⁵ Over-indebtedness was shown to lead to intense pressure and stress. This burden was shown to lead to sleeping problems and mental health difficulties such as depression. In a joint study by the Women's Health Council and MABS, two-thirds of the women surveyed suffered from stress and 38% experienced depression. Of those surveyed, 19% reported insomnia and 8% had experienced panic attacks.³⁶ Other Irish research has also highlighted how the stress of debt difficulties can even increase the risk of suicide in some cases.³⁷

1.14 The following tables, taken from the MABS/Women's Health Council study, serve to indicate the impact of debt difficulties on a debtor's health³⁸.

²⁹ See e.g. *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* Council of Europe CM/Rec (2007)8 Explanatory Memorandum at paragraph 36.

³⁰ See e.g. Joyce *An End Based on Means?* (Free Legal Advice Centres, Dublin 2003) at 13; Niemi-Kiesiläinen and Henrikson *Report on Legal Solutions to Debt Problems in Credit Societies* CDCJ-BU (2005) 11 rev at 10-11.

³¹ Duygan-Bump and Grant *Household Debt Repayment Behaviour: What Role do Institutions Play?* Federal Reserve Bank of Boston Working Paper No. QAU08-3, (The Quantitative Analysis Unit of the Federal Reserve Bank of Boston, 2008) available at: <http://www.bos.frb.org/bankinfo/qau/index.htm> at 7.

³² *Ibid* at 8.

³³ Duygan-Bump and Grant *Household Debt Repayment Behaviour: What Role do Institutions Play?* *op cit.* at 9.

³⁴ *Ibid.*

³⁵ O'Loughlin *Credit Consumption and Debt Accumulation among Low-Income Consumers: Key Consequences and Intervention Strategies* (Combat Poverty Agency Research Working Paper 06/03 2006) at 44.

³⁶ *Women, Debt and Health* (Joint Report of The Women's Health Council and the Money Advice and Budgeting Service 2007) at 12.

³⁷ O'Loughlin *op cit* at 44.

³⁸ *Women, Debt and Health* (Joint Report of The Women's Health Council and the Money Advice and Budgeting Service 2007) at 13.

Figure 15. Emotional health problems mentioned during consultation

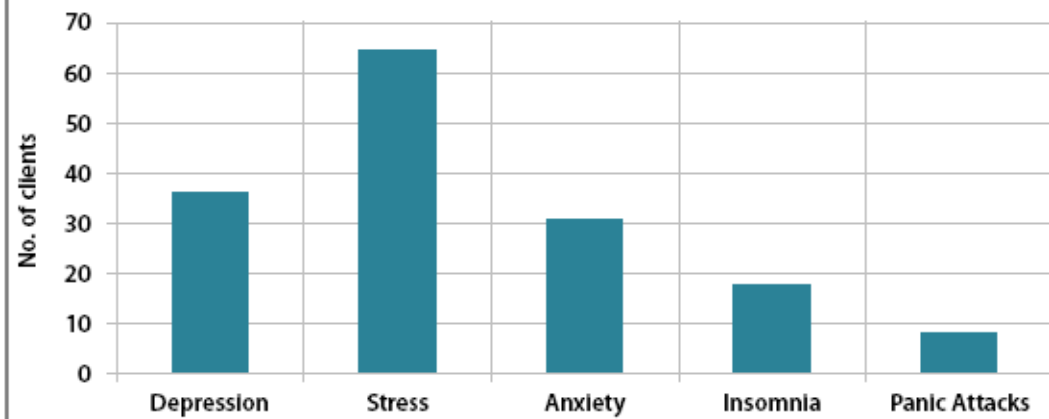
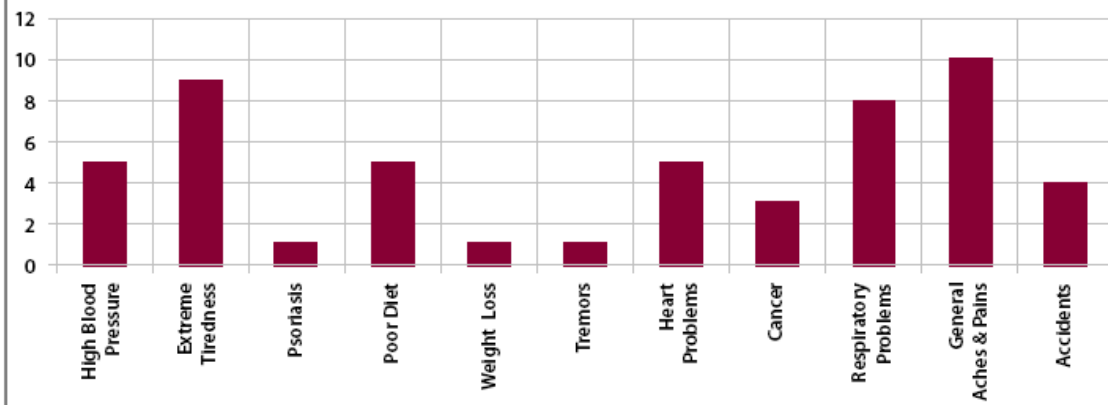


Figure 16. Physical health problems mentioned during consultation



1.15 The negative effects of over-indebtedness are not only detrimental to indebted households themselves, but also to society in general, which suffers financial loss. The cost to society includes increased social welfare expenses, losses in income tax receipts, higher medical costs, and the costs of accommodating evictees.³⁹ Furthermore, it was estimated in the early 1990s in the UK that debt-related stress and mental health problems cost approximately £5bn in lost work days alone, a figure which undoubtedly has risen significantly in line with inflation.⁴⁰ The decline of productivity resulting from over-indebtedness in the UK has been conservatively estimated to be 30% of salary, which could translate to costs of up to 1% of GDP when figures for the total number of the population experiencing debt difficulties are considered.⁴¹ Furthermore, the economy suffers from reduced participation by over-indebted individuals, with studies illustrating that the over-indebted household presents a lower consumption/income ratio than other comparable households.⁴² This drop in spending among the over-

³⁹ See e.g. *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* Council of Europe CM/Rec (2007)8 Explanatory Memorandum at paragraph 36.

⁴⁰ *Fair, Clear and Competitive: The Consumer Credit Market in the 21st Century* (Department of Trade and Industry White Paper December 2003) at 137.

⁴¹ *Ibid* at 138.

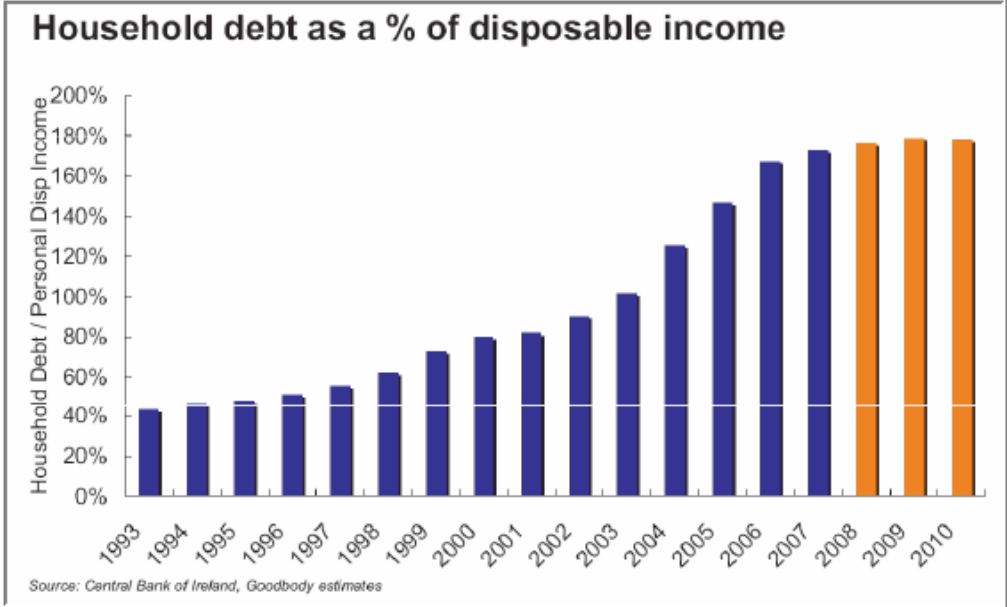
⁴² Niemi-Kiesiläinen and Henrikson *Report on Legal Solutions to Debt Problems in Credit Societies* CDCJ-BU (2005) 11 rev at 10.

indebted can be attributed to fact that these debtors tend to make sacrifices and reduce consumption in order to repay their debts.

(3) The Extent of the Problem

(a) Recent Surges in the Level of Borrowing

1.16 Recent years have seen huge increases in the levels of personal debt in Ireland.⁴³ Credit has become much more widely available, and has been aggressively marketed. Thus while in 1995 the ratio of household debt to income stood at 48%, in 2004 this figure jumped to 113%⁴⁴ and had grown to approximately 176% in 2009. This is illustrated in the following table⁴⁵.



Household Debt / Disp income ratios - Ireland is moving up the league table

	1995		2005 -08	Year	% increase in ratio 1995-2008
1 Denmark	188	1 Denmark	260	2005	38%
2 Japan	130	2 Netherlands	246	2005	118%
3 Norway	119	3 Norway	195	2006	64%
4 Netherlands	113	4 Ireland	176	2008	267%
5 UK	106	5 UK	173	2008	63%
6 Canada	103	6 Australia	171	2006	106%
7 Germany	97	7 New Zealand	160	2007	67%
8 New Zealand	96	8 Sweden	139	2006	54%
9 US	93	9 US	138	2007	48%
10 Sweden	90	10 Canada	130	2008	26%
11 Australia	83	11 Spain	130	2008	120%
12 France	66	12 Portugal	120	2005	123%
13 Finland	64	13 Japan	109	2007	-16%
14 Spain	59	14 Finland	102	2006	59%
15 Belgium	57	15 Germany	100	2006	3%
16 Portugal	54	16 Austria	88	2006	159%
17 Ireland	48	17 Belgium	75	2006	32%
18 Austria	34	18 France	72	2008	9%

⁴³ See Kelly and Reilly "Credit Card Debt in Ireland: Recent Trends" (2005) 1 *Quarterly Bulletin* at 85.

⁴⁴ Kelly and Reilly "Credit Card Debt in Ireland: Recent Trends" (2005) 1 *Quarterly Bulletin* at 88.

⁴⁵ *The Debt of the Nation: How we Fell in and out of Love with Debt* (Amárach Research 2009), 4-5, available at <http://www.amarach.com> (Accessed 15 September 2009).

1.17 The greatest part of this increase in borrowing can be attributed to the increased number of households taking residential mortgages, but other consumer borrowing for consumption has also risen at a steady pace.⁴⁶ The combination of this increased level of debt and straitened economic conditions has in turn led to an increased level of over-indebtedness among Irish households in recent times. This growth in the levels of credit present in the economy coupled with recent changes in economic conditions has led to increases in the level of debt difficulties and default in Ireland. As is discussed below, the primary causes of debt difficulties include job loss, and the growing levels of unemployment in Ireland have meant that the level of default and over-indebtedness is growing rapidly.⁴⁷ This is reflected in the fact that as the seasonally adjusted annual average standardised unemployment rate rose from 4.6% in 2007 to 6.3% in 2008,⁴⁸ the level of debt enforcement proceedings in Irish courts increased, as can be seen from the following statistics.⁴⁹

High Court	2008	2007
Execution Orders	1, 601	1, 208
Renew Execution Order	71	52
Default judgment	1, 186	881
Judgment Mortgage Affidavit	643	471
Judgment on Foot of Master's Order	241	196
Registered High Court Judgments	419	296
Circuit Court	2008	2007
Execution Orders	6, 844	4, 911
Judgment Mortgage Affidavits	1, 571	1, 266
Judgments Marked in the Office	10, 244	8, 291
District Court	2008	2007
Summary Judgments	24, 873	23, 389
Summons for attendance of debtor	13, 079	13, 459
Instalment Orders	9, 271	10, 842
Committal Orders	4, 620	6, 425

⁴⁶ Kelly and Reilly "Credit Card Debt in Ireland: Recent Trends" (2005) 1 *Quarterly Bulletin* at 85. Here it is stated that approximately 80% of lending to households is for housing purposes; 2% is for investment purposes and the remainder is classified as consumer credit, which describes lending to households for personal use in the consumption of goods and services.

⁴⁷ The latest Central Statistics Office statistics available at the time of publication showed that the seasonally adjusted standardised unemployment rate for July 2009 was 12.2%, a sharp increase from a level of 4.5% in July 2007: these statistics are available online at: <http://www.cso.ie/statistics/sasunemprates.htm>

⁴⁸ Central Statistics Office, available online at: <http://www.cso.ie/px/pxeirestat/Dialog/Saveshow.asp>

⁴⁹ *Annual Report 2008* (The Courts Service 2009) at 71.

1.18 Figures provided by the Money Advice and Budgeting Service also indicate the rising levels of over-indebtedness in recent times, showing a rise in the number of new clients contacting the service from 14, 551 in 2006 to 19, 041 in 2008. Also, the amount of total initial arrears owed by new clients rose from €92million in 2006 to €210million in 2008.⁵⁰ A 2009 report of the Combat Poverty Agency notes that a European study in 2005 found that 8% of Irish households reported arrears on at least one commitment, and concludes from this study and others that approximately 7-10% of Irish households were over-indebted in the years up to 2007.⁵¹ The report also notes that this figure is likely to have increased substantially due to recent economic conditions, a view which is supported by the statistics discussed above. This personal debt takes many forms and affects many different groups in society, as is shown from the following discussion.

(b) **Types of Borrowing**

1.19 The following statistics compiled by the Money Advice and Budgeting Services provide an insight into the types of credit used by Irish consumers, and the types of debt difficulties experienced. This in turn illustrates the types of debts with which this Consultation Paper is primarily concerned.⁵²

Active Debt Types	Q1	Q2	Q3	Q4
Personal loans with financial institutions	1999	2287	2581	2286
Utilities	1675	1968	1886	1632
Credit Card	823	959	1161	994
Money Lender	429	460	440	341
Mortgage	258	328	409	347
Hire Purchase Loan	193	224	315	250
Rent	243	313	286	248
Overdraft	132	178	230	168
Fine	96	101	89	58
Sub Prime	11 ⁵³	46	78	77
Catalogue	74	65	77	65
Waste Charges	34	40	53	41

1.20 Studies have shown that for low-income households, one of the main sources of debt will be the running up of arrears on utility bills.⁵⁴ One survey showed this to account for up to 40% of the debt

⁵⁰ Statistics provided to the Commission by the Money Advice and Budgeting Service, January 2009.

⁵¹ Stamp *A Policy Framework for Addressing Over-Indebtedness* (Combat Poverty Agency 2009) at 10.

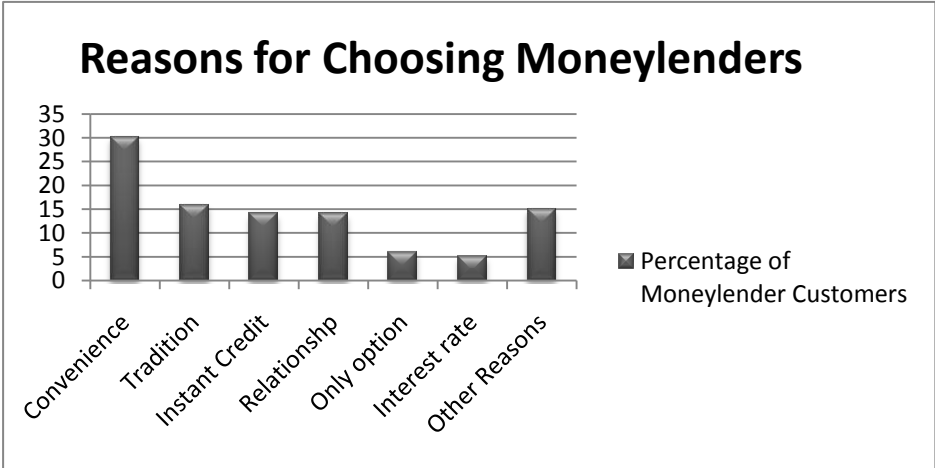
⁵² Statistics for Q1, Q2, Q3, Q4 2008 (The Money Advice and Budgeting Service) at 5, available at: <http://www.mabs.ie/publications/STATS/MABS%20stats%20Q1%20Q2%20Q3%20Q4%202008.pdf>

⁵³ New category added late Q1 2008.

⁵⁴ See O'Loughlin *Credit Consumption and Debt Accumulation among Low-Income Consumers: Key Consequences and Intervention Strategies* (Combat Poverty Agency Research Working Paper 06/03 2006) at 47; *Women, Debt and Health* (Joint Report of The Women's Health Council and the Money Advice and Budgeting Service 2007) at 10.

difficulties presented by women whose only income was from social welfare payments.⁵⁵ Delaying the payment of bills is the primary manner in which low-income families tend to borrow in times of need.⁵⁶

Moneylenders provide another source of credit to low-income households. Moneylenders usually provide credit at rates far exceeding those of other mainstream lenders, and for this reason some debtors seek alternative less expensive forms of credit where possible.⁵⁷ Nonetheless, moneylenders remain popular due to a variety of factors. These include the fact that a borrower may have difficulties obtaining credit elsewhere due to a past default on a loan owed to another institution such as the credit union; the fact that a borrower’s family may traditionally have used a local moneylender; and the lack of formalities and scrutiny involved in obtaining a loan from a moneylender as opposed to a mainstream lender.⁵⁸ Thus ease of access is a major advantage of the moneylender as a source of credit. A survey of the moneylending industry conducted by the Irish Financial Services Regulatory Authority in 2007 provided the following statistics on the reasons why Irish consumers use licensed moneylenders, and the purposes for which moneylending loans are used.⁵⁹



1.21 Those households in receipt of higher incomes tend not to incur arrears on bills, but instead incur debt difficulties in relation to personal bank loans and credit card borrowings.⁶⁰ Debt outstanding on credit cards has increased significantly over recent times due to an increase in the number of credit cards issued and the amount of debt outstanding per card.⁶¹ This growth has been generated by an increased market penetration of credit cards across Europe and a move towards electronic retail payment methods.⁶² There has also been a connection between increasing affluence and the growth of credit card use, and credit cards are linked to increased consumption.⁶³ These developments of increased affluence

⁵⁵ *Women, Debt and Health* (Joint Report of The Women’s Health Council and the Money Advice and Budgeting Service 2007) at 10.

⁵⁶ O’Loughlin *Credit Consumption and Debt Accumulation among Low-Income Consumers: Key Consequences and Intervention Strategies* (Combat Poverty Agency Research Working Paper 06/03 2006) at 7, citing McKay “Envy, Debt: Penury or Necessity in *Seven Deadly Sins: A New Look at Society through an Old Lens* (ESRS 2005) at 28-31.

⁵⁷ *Ibid* at 37.

⁵⁸ O’Loughlin *Credit Consumption and Debt Accumulation among Low-Income Consumers op cit.* at 27-28, 37-38.

⁵⁹ *A Report on the Licensed Moneylending Industry* (Irish Financial Services Regulatory Authority 2007) at 4.

⁶⁰ *Women, Debt and Health* (Joint Report of The Women’s Health Council and the Money Advice and Budgeting Service 2007) at 10.

⁶¹ Kelly and Reilly “Credit Card Debt in Ireland: Recent Trends” (2005) 1 *Quarterly Bulletin* at 99.

⁶² *Ibid.*

⁶³ Kelly and Reilly *op cit.* at 87.

and consumption in Irish society over recent years has seen “lifestyle-related” debt rise also among both middle and low-income households, as households struggle to satisfy the pressure to live at a standard of living which may be beyond their means, particularly in the context of child-related expenditure.⁶⁴

1.22 Personal bank loans were traditionally more associated with those in employment and on relatively higher incomes, while credit unions were the main personal loan provider for those on low-incomes. While this largely remains true,⁶⁵ recent developments have shown changes in these trends. Thus mainstream banks remain perceived as primarily focused on middle and higher-income borrowers, but prime as well as sub-prime lenders have developed to increasingly target low-income groups.⁶⁶ At the same time, there are indications that credit unions may have begun moving towards a middle-income market, which would raise concerns as to access to credit for those on low incomes due to the recent reduction in credit supply.

Category of Loan Amount	% of Total Loans
€1 - €1,000	32.35%
€1,001 - €5,000	43.53%
€5,001 - €10,000	14.05%
€10,001 - €25,000	1.38%
€50,001 - €100,000	0.26%
€100,000+	0.06%

1.23 The above table illustrates that the largest categories of credit union loans are for small amounts, with over 75% of loans for less than €5000.⁶⁷ This suggests that credit unions continue to primarily lend comparatively small amounts. This may indicate that the role of credit unions in serving the needs of low-income, small scale borrowers remains significant.

1.24 Residential mortgage lending grew at a rapid pace over recent years. Statistics released by the Central Bank in 2008 show that the total value of residential mortgages provided to Irish residents rose from approximately €34 billion in December 2001 to over €120 billion in June 2008. The increased availability of mortgages can explain to a certain extent the huge increases in the total amount of debt being presented by those now facing debt difficulties when compared to the situation of the traditional over-indebted debtor of the past. The following table of mortgage lending statistics published by the Central Bank in June 2009 provides a clear illustration of the growth in mortgage borrowing and lending during the years 2004 to 2008, with levels of mortgage credit only beginning to fall during late 2008 and 2009.⁶⁸

⁶⁴ O’Loughlin *Credit Consumption and Debt Accumulation among Low-Income Consumers: Key Consequences and Intervention Strategies* (Combat Poverty Agency Research Working Paper 06/03 2006) at 23-24, 48-50.

⁶⁵ See O’Loughlin *Credit Consumption and Debt Accumulation among Low-Income Consumers: Key Consequences and Intervention Strategies* (Combat Poverty Agency Research Working Paper 06/03 2006) at 49; *Women Debt and Health* (Joint Report of The Women’s Health Council and the Money Advice and Budgeting Service 2007) at 10.

⁶⁶ O’Loughlin *op cit* at 50.

⁶⁷ The table is drawn from lending statistics for 2007 supplied to the Commission by the Irish League of Credit Unions.

⁶⁸ *Breakdown of Outstanding Residential Mortgages* (Central Bank 2009), available at: http://www.centralbank.ie/frame_main.asp?pg=pub_msta.asp&nv=pub_nav.asp

Month	Principal Dwelling Houses		Buy-to-Let Residential Properties		Second Homes		Total House Mortgage Finance	
	€million	% Year-on-Year Rise	€million	% Y-on-Y Rise	€million	% Y-on-Y Rise	€million	% Y-on-Y Rise
June 2004	49,839		11,196		801		61, 837	
June 2005	65,108	30.6	16,212	44.8	910	13.5	82, 230	33
June 2006	79,026	21.4	24,071	48.5	1,206	32.6	104,303	26.8
June 2007	84,108	6.4	30,329	25.6	1,358	12.5	115,704	10.9
June 2008	86,646	3	32,440	7.3	1,483	9.2	120,569	4.2
June 2009	81,728	-5.7	30,667	-5.5	1, 254	-15.4	113,649	-5.7

(c) **Typical Debtor Descriptions**

1.25 Traditionally, credit use has been highest among families with children, especially among lone parents.⁶⁹ The most prevalent group affected by debt remain young families from mid-20s to mid-40s.⁷⁰ In terms of gender, women appear to be more vulnerable to debt problems than males, with women contributing to over 60% of the client base of the MABS.⁷¹ A study of female clients of the MABS described the typical woman presenting debt problems as a forty-year-old single parent with two financially dependent children, living in local authority housing. Her income is a weekly social welfare payment and her main debt issue is utility bills, with rent or mortgage arrears, bank loans and credit union loans also problematic. Living on a low income is the main contributory factor to her debt difficulty.⁷² The results of this study have been supported by a recent report of the Irish Financial Regulator, which states that those individuals surveyed who had difficulties in keeping up with bills and commitments were more likely to be lone parents with dependent children.⁷³ It must however be emphasised that not all individuals fitting this typical debtor profile will experience debt difficulties. Issues of money management

⁶⁹ See e.g. Kempson *Over-Indebtedness in Britain; A Report to the Department of Trade and Industry* (Personal Finance Research Centre 2002) at 10. Studies in Ireland indicate that one parent households have the highest rates of consistent poverty at 31%, which shows a marked contrast to the national average of 7%. See *EU Survey on Income and Living Conditions* (Central Statistics Office 2005).

⁷⁰ O'Loughlin *Credit Consumption and Debt Accumulation among Low-Income Consumers: Key Consequences and Intervention Strategies* (Combat Poverty Agency Research Working Paper 06/03 2006) at 25.

⁷¹ O'Loughlin *op cit.* at 24; *Women, Debt and Health* (Joint Report of The Women's Health Council and the Money Advice and Budgeting Service 2007) at 5.

⁷² *Women, Debt and Health op cit* at 10.

⁷³ *Financial Capability in Ireland: An Overview* (Irish Financial Services Regulatory Authority 2009) at 8.

skills and responsible conduct on the part of both debtor and creditor mean lead to different outcomes in different cases, and it is important not to categorise debt situations too widely. It should be recalled in this regard that the majority of consumer debts are repaid without difficulty, even by those sharing characteristics with the average debtor profile.⁷⁴

1.26 The increase in recent years in the availability of credit has led to growth consumer borrowing and in the number of residential mortgages granted by both prime and sub-prime lenders. This has in turn led to a newer type of client presenting at the MABS, whose borrowings were not incurred in order to provide for necessities, but instead were lifestyle-related.⁷⁵ This client is employed or has only recently lost his or her job, and his or her debts include a mortgage and “middle-class” forms of credit such as personal loans, credit cards, overdrafts and mortgage top-ups. This type of client may possess multiple debts in each of these categories, especially multiple credit cards due to the difficulty for credit card lenders of identifying those potential borrowers who have previous borrowings with other companies.⁷⁶ The causes of debt in the case of a client such as this can be attributed to either a sudden change in income, over-commitment or irresponsible lending, or a combination of some or all of these factors. The recent economic downturn and accompanying surge in unemployment has increased the number of debtors of this category. The following statistics of the MABS illustrate that while “traditional” debt problems such as utilities and moneylender loans have remained at fairly constant rates from 2008 to 2009, the number of clients presenting difficulties with mortgage loans and credit card debts has increased⁷⁷.

Debt Categories	Q1 2008	Q1 2009	Q2 2008	Q2 2009
Personal loans with financial institutions	1999	3132	2287	2544
Utilities	1675	2115	1968	1916
Credit Card	823	1520	959	1348
Money Lender	429	424	460	360
Mortgage	258	531	328	425
Hire Purchase Loan	193	483	224	334
Rent	243	259	313	205
Overdraft	132	308	178	278
Fine	96	109	101	64
Sub Prime	11 ⁷⁸	100	46	107
Catalogue	74	122	65	97
Waste Charges	34	74	40	38

⁷⁴ See paragraph 1.03 above.

⁷⁵ O’Loughlin *Credit Consumption and Debt Accumulation among Low-Income Consumers: Key Consequences and Intervention Strategies* (Combat Poverty Agency Research Working Paper 06/03 2006) at 50.

⁷⁶ O’Loughlin *op cit* at 30.

⁷⁷ Statistics for Q1, Q2, Q3, Q4 2008 at 5; Statistics for Q1 2009 at 5; Statistics for Q2 2009 at 5 (The Money Advice and Budgeting Service), available at: http://www.mabs.ie/publications/STATS/Stats_index.html.

⁷⁸ New category added late Q1 2008.

B Causes of Debt – Why are debts unpaid? Why are legal enforcement mechanisms needed?

(1) Attitude of the Law to Debt Enforcement – The Delinquent Debtor

1.27 It has been noted that any system of debt enforcement will mirror the view of a society towards debt and the role of credit in society.⁷⁹ In particular, the law in this area reflects assumptions about the characteristics of those involved. If society regards defaulters as immoral or dishonest it will create a strongly coercive system of debt enforcement. In contrast, if society views defaulters as “inadequate” or as having insufficient means to deal with debt problems, a less coercive and more rehabilitative system will be preferred.

1.28 In the past, the debtor was traditionally viewed by the law as feckless, immoral or inadequate.⁸⁰ Indeed, it is the assumption of willing and active default by debtors that necessitates a system of enforcement, which is designed to extract money from those able but unwilling to pay.⁸¹ The idea of the “cunning” debtor, dishonestly evading his or her obligations was a major factor in the retention of imprisonment for debt in many jurisdictions,⁸² and is most likely the reason for the retention of the power of the court to commit a debtor under s6 of the *Enforcement of Court Orders Act 1940* (re-enacting with modifications s18(a) of the *Enforcement of Court Orders Act 1926*).⁸³ This is reflected in some of the language used in the Dáil debates on the 1940 Act, which called for the proposed Bill to “penalise” “professional defaulters”.⁸⁴

1.29 Recent research has, however, subjected this traditional view to scrutiny, and the analysis below will show that in the majority of cases the failure to repay monies owed can be attributed to factors other than the debtor’s misconduct.⁸⁵

(2) The Main Causes of Debt

1.30 Research has consistently shown that the large majority of people who fall into arrears with their contractual commitments do so because they are in financial difficulty.⁸⁶ Only a minority of debts go unpaid as a result of a refusal to pay by a debtor who possesses the means to do so, with some research suggesting the number of deliberately evasive debtors may be as low as one in twenty.⁸⁷ Greater awareness of this fact is now prevalent among creditors, and several industry codes of practice refer to the principle that creditors should assume that non-payment arises from financial difficulty rather than from an unwillingness to pay.⁸⁸

⁷⁹ Ramsay “Debtors and Creditors: Themes and Issues” in Ramsay (ed.) *Debtors and Creditors* (Professional Books Limited 1986) at 2.

⁸⁰ *Ibid* at 3.

⁸¹ See Wilson and Ford “Recovering Debt: The Effectiveness of Attachment of Earnings?” (1992) *CJQ* 363 at 375.

⁸² *Ibid*, citing Rubin “Law, Poverty and Imprisonment for Debt, 1869-1915” in Rubin and Sugarman (eds.) *Law, Economy and Society: Essays in the History of English Law* (Abingdon: Professional Books 1984) at 289.

⁸³ This section provides that a court shall not order the arrest and imprisonment of a debtor who has not complied with an instalment order if that debtor can prove that this non-compliance was due neither to his or her wilful refusal nor culpable neglect.

⁸⁴ Dáil Debates 28 May 1940. *Dáil Debates* Vol 80 at 1079, per Mr Henry Morgan Dockrell T.D.

⁸⁵ Ramsay “Debtors and Creditors: Themes and Issues” in Ramsay (ed.) *Debtors and Creditors* (Professional Books Limited 1986) at 3.

⁸⁶ See e.g. Dominy and Kempson *Can’t Pay or Won’t Pay? A Review of Creditor and Debtor Approaches to the Non-Payment of Bills* (Personal Finance Research Centre, University of Bristol, No. 4/03 2003) at 5.

⁸⁷ See *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 77.

⁸⁸ *Ibid* at 77, citing as an example the provisions of the UK (Water Services) Supply Licence Code.

1.31 It is now generally accepted by research conducted in this area that changes in circumstances or adverse events are the most common cause of arrears.⁸⁹ Such changes in circumstances can, for example, involve unemployment, relationship breakdown or ill health. As well as such financial shocks, other factors which contribute to the accrual of debt include irresponsible borrowing, irresponsible lending practices and poor money management skills. It must be noted when discussing these factors that it is unlikely that there will be one single cause of a given debtor's inability to meet his or her commitments, and the factors below should be seen as a mixture of risk factors which combine with each other and with certain triggering events to cause financial problems.⁹⁰ This has been confirmed by a recent Irish study conducted by the Women's Health Council and MABS, where 84% of the MABS clients surveyed attributed their debt difficulties to two or more contributory factors.⁹¹

(a) **Change in Income**

1.32 A change in income is consistently cited as one of the principal reasons why debtors become unable to make repayments, both in Ireland and in other jurisdictions.⁹² Almost half of debtors surveyed in a relatively recent UK study named a drop in income, usually due to redundancy, as the main cause of financial difficulty.⁹³ For this reason, large increases in debt problems are almost always related to economic downturns.⁹⁴

1.33 Research drawn from the data of the European Community Household Panel shows that a household which has recently suffered a redundancy or loss of employment is significantly more likely to be in arrears over the next year, with the figures for Ireland illustrating that almost 16% of households in this category fall into arrears.⁹⁵

1.34 Other causes of a drop in income are the breakdown of relationships, and the giving up of work due to ill health.⁹⁶ Nonetheless these individual circumstances trail well behind unemployment as the

⁸⁹ See Dominy and Kempson *Can't Pay or Won't Pay? A Review of Creditor and Debtor Approaches to the Non-Payment of Bills* (Personal Finance Research Centre, University of Bristol, No. 4/03 2003) at 5; Niemi-Kiesiläinen and Henrikson *Report on Legal Solutions to Debt Problems in Credit Societies* CDCJ-BU (2005) 11 rev at 8; O'Loughlin *Credit Consumption and Debt Accumulation among Low-Income Consumers: Key Consequences and Intervention Strategies* (Combat Poverty Agency Research Working Paper 06/03 2006) at 43.

⁹⁰ *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 27.

⁹¹ *Women, Debt and Health* (Joint Report of The Women's Health Council and the Money Advice and Budgeting Service 2007) at 12.

⁹² See e.g. Kearns *Mortgage Arrears in the 1990s: Lessons for Today* (2003) (Autumn) *Quarterly Bulletin* 97 at 109; *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 23; Kempson *Over-Indebtedness in Britain; A Report to the Department of Trade and Industry* (Personal Finance Research Centre 2002) at 31.

⁹³ Kempson *Over-Indebtedness in Britain; A Report to the Department of Trade and Industry* (Personal Finance Research Centre 2002) at 31.

⁹⁴ Niemi-Kiesiläinen and Henrikson *Report on Legal Solutions to Debt Problems in Credit Societies* CDCJ-BU (2005) 11 rev at 8.

⁹⁵ Duygan-Bump and Grant *Household Debt Repayment Behaviour: What Role do Institutions Play?* Federal Reserve Bank of Boston Working Paper No. QAU08-3, (The Quantitative Analysis Unit of the Federal Reserve Bank of Boston, 2008) available at: <http://www.bos.frb.org/bankinfo/qau/index.htm> at 13.

⁹⁶ Kempson *Over-Indebtedness in Britain; A Report to the Department of Trade and Industry* (Personal Finance Research Centre 2002) at 31

main cause of over-indebtedness, with some studies stating that these factors are responsible for approximately ten per cent of the cases of over-indebtedness.⁹⁷

1.35 Overall, a loss of income or “income shock” can make a household over four times more likely to fall into arrears when compared with a household which has experienced an improvement in income.⁹⁸ The table below, drawn from data of the European Community Household Panel, illustrates that the level of households experiencing arrears difficulty is much greater among households which are subject to a negative income shock.⁹⁹

Status of Borrowers	Percentage of Borrowers in Arrears		
	Any arrears	Mortgage arrears	Other arrears
Overall	6.64%	1.39%	1.93%
No job loss	6.44%	1.35%	1.88%
Job loss	12.77%	2.64%	3.39%
No drop in income	6.12%	1.25%	1.81%
Drop in income	7.94%	1.73%	2.25%
No health problems	6.49%	1.36%	1.90%
Health shock	12.81%	2.26%	3.09%

1.36 While this table is useful in illustrating that much higher levels of arrears occur among those who have been subject to an income or health “shock”, the number of debtors within these categories who fall into default still constitutes a minority. Therefore it is important to note that not all individuals who suffer one of the adverse events described above become over-indebted. This indicates that over-indebtedness can be attributed to wide range of factors, and that money management skills on the part of the debtor and responsible arrears management on the part of the creditor have a part to play in preventing or contributing to over-indebtedness.

(b) **Persistently Low Income**

1.37 Studies conducted across the Member States of the European Union have shown that a low income of itself, as opposed to a fall in income, is frequently presented as a reason for financial

⁹⁷ Niemi-Kiesiläinen and Henrikson *Report on Legal Solutions to Debt Problems in Credit Societies* CDCJ-BU (2005) 11 rev at 8.

⁹⁸ Duygan-Bump and Grant *Household Debt Repayment Behaviour: What Role do Institutions Play?* Federal Reserve Bank of Boston Working Paper No. QAU08-3, available at: <http://www.bos.frb.org/bankinfo/qau/index.htm> at 15.

⁹⁹ *Ibid* at 27.

difficulty.¹⁰⁰ Indeed, one recent Irish study named “living on a low income” as the most commonly cited cause of debt difficulties.¹⁰¹

1.38 Households with the lowest incomes are generally most likely to incur financial problems and are significantly more likely to miss scheduled debt payments.¹⁰² There are two main reasons for this link between low income and debt repayment difficulties.¹⁰³ First, as we have seen above, households encounter repayment problems when some unforeseen adverse event occurs. Households with low incomes will be less financially equipped to cope with such adverse events due to a lack of an ability to amass “rainy day” savings. Secondly, since households will only accrue arrears if they have borrowed money in the first place, households with low incomes are more likely to encounter debt difficulties because they are more likely to borrow to aid consumption in times of temporarily low income.¹⁰⁴

1.39 Long-term unemployment (as opposed to job loss) is a risk factor for this reason and when employment status is considered, the greatest percentage of households falling into arrears is the category classed as unemployed.¹⁰⁵

(c) ***Irresponsible Borrowing: Over-Burdensome Borrowing and Consumption***

1.40 Responsible conduct is needed on the part of both creditors and debtors if responsible credit agreements are to be created. Thus it can be seen that some financial difficulties of debtors arise from irresponsible behaviour on the part of the borrower. Three main practices pose particular concern in this regard.¹⁰⁶

1.41 First, the practice of re-financing and borrowing to pay bills can lead to serious financial difficulties. This practice reduces repayments that households have to make on their total credit repayments, but it is often only a short-term solution. The concern caused by this practice is heightened by the fact that this refinancing is often secured on the borrower’s home. Borrowing for these reasons is an indication of financial stress and also occurs in households where a large proportion of income is spent on either consumer credit alone or on consumer credit and a mortgage.

1.42 Secondly, the practice of taking out loans where the borrower has doubts about his or her own ability to meet repayments is a practice which can lead to financial difficulty.¹⁰⁷ Equal concerns arise

¹⁰⁰ See *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 24; Duygan-Bump and Grant *Household Debt Repayment Behaviour: What Role do Institutions Play?* Federal Reserve Bank of Boston Working Paper No. QAU08-3, available at: <http://www.bos.frb.org/bankinfo/qau/index.htm> at 12.

¹⁰¹ *Women, Debt and Health* (Joint Report of The Women’s Health Council and the Money Advice and Budgeting Service 2007) at 12. Here living on a low income was named as the main trigger of debt by 38% of women surveyed.

¹⁰² *Ibid* at 16.

¹⁰³ Duygan-Bump and Grant *Household Debt Repayment Behaviour: What Role do Institutions Play?* Federal Reserve Bank of Boston Working Paper No. QAU08-3, available at: <http://www.bos.frb.org/bankinfo/qau/index.htm> at 12.

¹⁰⁴ Duygan-Bump and Grant *Household Debt Repayment Behaviour: What Role do Institutions Play?* Federal Reserve Bank of Boston Working Paper No. QAU08-3, available at: <http://www.bos.frb.org/bankinfo/qau/index.htm> at 12.

¹⁰⁵ Kearns *Mortgage Arrears in the 1990s: Lessons for Today* (2003) (Autumn) *Quarterly Bulletin* 97 at 109. The source of regular income into the household is also a relevant factor. Households whose income is derived from wages and salaries tend to incur less risk of an inability to repay debts than those whose income is provided by social welfare transfers

¹⁰⁶ Kempson *Over-Indebtedness in Britain; A Report to the Department of Trade and Industry* (Personal Finance Research Centre 2002) at 44.

¹⁰⁷ Kempson *Over-Indebtedness in Britain; A Report to the Department of Trade and Industry* (Personal Finance Research Centre 2002) at 46.

where a borrower does not consider carefully whether or not he or she will be able to repay the monies borrowed. It may be useful to note, however, that studies have shown that only a minority of borrowers are not confident of being able to repay any amounts borrowed.

1.43 A third practice which may lead to financial difficulty is impulsive spending and unplanned purchases on credit.¹⁰⁸ Often this kind of borrowing is “lifestyle” spending, whereby largely, though not exclusively, middle-class borrowers incur debt in order to sustain a certain lifestyle.¹⁰⁹ This practice has been shown to have been influenced by a consumerist society which exerts pressure on consumers to spend. Pan-European studies have shown these links between compulsive shopping, over-borrowing and financial difficulties, with surveys of four European countries illustrating that a third of the adult population could be classed as “addictive spenders”.¹¹⁰

1.44 Studies across Europe have shown this to be a considerable cause of financial difficulty.¹¹¹ Irish studies have shown that the borrowing of large amounts, with high levels of repayment, can leave a household very vulnerable to financial difficulties caused by a change in circumstances such as an increase in interest rates.¹¹² On the other hand, the borrowing of a large amount as part of a single loan agreement does not lead to as high a risk of failure to repay as the entry into multiple loan agreements.¹¹³ The more credit commitments a house must balance and the greater the proportion of its income which it spends on making debt repayments, the greater the risk of debt difficulty.¹¹⁴

1.45 The risk of over-commitment borne of consumerism is particularly acute in relation to borrowing via credit card.¹¹⁵ Credit cards provide a source of credit for instant gratification and allow credit to be accessed more easily than other traditional forms of lender or vendor credit. This may loosen borrower discipline and lead to irrational borrowing behaviour, which can cause temporary or long term over-indebtedness for users.¹¹⁶

¹⁰⁸ Kempson *Over-Indebtedness in Britain; A Report to the Department of Trade and Industry* (Personal Finance Research Centre 2002) at 47.

¹⁰⁹ O’Loughlin *Credit Consumption and Debt Accumulation among Low-Income Consumers: Key Consequences and Intervention Strategies* (Combat Poverty Agency Research Working Paper 06/03 2006) at 43. Such pressure becomes particularly pronounced in relation to expenditure on children, as parents feel obliged to provide their children with fashionable clothes and expensive gifts.

¹¹⁰ Kempson *op cit.* at 47.

¹¹¹ *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 26.

¹¹² Kearns *Mortgage Arrears in the 1990s: Lessons for Today* (2003) (Autumn) *Quarterly Bulletin* 97 at 110.

¹¹³ *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 21.

¹¹⁴ See Kearns *Mortgage Arrears in the 1990s: Lessons for Today* (2003) (Autumn) *Quarterly Bulletin* 97 at 111, where it is shown that a household which must balance repayments of multiple debts has been shown to be more likely to fall into arrears in at least one of them; *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 21.

¹¹⁵ Ramsay “Consumer Credit Society and Consumer Bankruptcy” in Niemi-Kiesilainen (ed), Ramsay (ed) and Whitford (Ed) *Consumer Bankruptcy in Global Perspective* (Hart Publishing 2003) at 22.

¹¹⁶ Despite this danger of over-indebtedness, American studies however show that this hedonistic consumerist use of credit cards does not generally result in consumer bankruptcies, with studies showing that only approximately 5.4% of consumer bankruptcies in the USA were caused by credit card debt: *Ibid*, citing Sullivan, Warren and Westbrook *The Fragile Middle Class: Americans in Debt* (New Haven, Yale University Press 2000), Chapter 4.

1.46 Nonetheless, in practice it is often difficult to judge whether over-commitment has been the result of strategic or irresponsible debtor behaviour or a desperate attempt to overcome difficult times.¹¹⁷ Often a household will borrow as a means of getting through periods of financial difficulty, for example when a member of a household becomes unemployed. By borrowing in this way, debtors use credit as a form of social insurance to compensate for the absence of public support systems in times of crisis.¹¹⁸ Nonetheless, increased borrowing is not the only response of the already-indebted individual to adverse circumstances. Studies illustrate that over-indebted households will also decrease consumption and make sacrifices in order to repay debts.¹¹⁹ Thus, while some credit card debtors are shown to keep their cards for emergencies or use them to pay for bills and necessities, others return them to the lender on entering financial difficulty.¹²⁰

1.47 In general while it is the better off who use credit to finance a consumer lifestyle, it is poorer families who use credit to ease financial hardship.¹²¹ The above discussion makes it clear that the issue of over-commitment is a complicated matter, depending on a variety of factors. Thus it can be said that simple views of debtor abuse or creditor exploitation are unlikely to capture the complexity of the question, and it is difficult to ascertain whether to apportion the blame for over-commitment in any given situation on a lender, borrower, or merely on unavoidable external circumstances.¹²²

(d) **Money Management**

1.48 A similar risk factor to irresponsible borrowing is the absence of money management skills among borrowers.¹²³ Studies in Germany and the UK found that approximately 20% of borrowers who were in arrears attributed their inability to repay to poor money management.¹²⁴ Poor money management skills can manifest themselves in a number of ways, most of which stem from a lack of financial literacy, a disorganised or relaxed approach to managing finances and an inexperience of the operation of credit.

¹¹⁷ Niemi-Kiesiläinen and Henrikson *Report on Legal Solutions to Debt Problems in Credit Societies* CDCJ-BU (2005) 11 rev at 10.

¹¹⁸ See Ramsay "Consumer Credit Society and Consumer Bankruptcy" in Niemi-Kiesiläinen, Ramsay and Whitford (eds.) *Consumer Bankruptcy in Global Perspective* (Hart Publishing 2003) at 23. Since lenders will not readily make loans available to individuals in such strained financial circumstances, it is most often credit cards which debtors facing such difficulties use to pay bills and necessities, or to provide funding in the case of an emergency. *Ibid*, citing Sullivan, Warren and Westbrook *The Fragile Middle Class: Americans in Debt* (New Haven, Yale University Press, 2000) Chapter 4; Rowlingson and Kempson *Paying with Plastic: A Study of Credit Card Debt* (London, Policy Studies Institute, 1995). It must be noted however that some of these findings are drawn from societies in which consumer bankruptcy is much more common than in Ireland, and so adjustments may need to be made to these conclusions in the Irish context, as already-indebted consumers may be less reluctant to incur debts in this manner where the opportunity to discharge such debts under a consumer insolvency scheme is unavailable.

¹¹⁹ Niemi-Kiesiläinen and Henrikson *Report on Legal Solutions to Debt Problems in Credit Societies* CDCJ-BU (2005) 11 rev at 10.

¹²⁰ Ramsay "Consumer Credit Society and Consumer Bankruptcy" in Niemi-Kiesiläinen, Ramsay and Whitford (eds.) *Consumer Bankruptcy in Global Perspective* (Hart Publishing 2003) at 23, citing Rowlingson and Kempson *Paying with Plastic: A Study of Credit Card Debt* (London, Policy Studies Institute, 1995).

¹²¹ See Ramsay "Consumer Credit Law, Distributive Justice and the Welfare State (1995) 15 *Oxford Journal of Legal Studies* 177 at 180, citing Berthoud and Kempson *Credit and Debt: The PSI Report* (London, Policy Studies Institute, 1992).

¹²² Ramsay "Consumer Credit Society and Consumer Bankruptcy" in Niemi-Kiesiläinen (ed), Ramsay (ed) and Whitford (Ed) *Consumer Bankruptcy in Global Perspective* (Hart Publishing 2003) at 25.

¹²³ See *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 25.

¹²⁴ *Ibid*.

1.49 A specific aspect of poor money management skills is the lack of awareness among consumers of the terms and conditions of the credit agreements into which they enter.¹²⁵ This can in part be attributed to a lack of financial literacy, which is a recurring characteristic among individuals experiencing difficulties in making debt repayments. In particular, consumers have been shown to be unaware of cancellation rights and interest rates. Recent Irish research has indicated that many of those experiencing debt difficulties were not originally aware of the level of interest being charged on their loans.¹²⁶ In this regard the findings of the recent study on financial capability conducted by the Irish Financial Services Regulatory Authority are very relevant, and these are discussed further in Chapter 3.¹²⁷

1.50 It must be noted however that advances have been made in the provision of information to borrowers during the pre-contractual stage by the *Consumer Credit Act 1995*, the *IFSRA Consumer Protection Code* and the 2008 EC Consumer Credit Directive¹²⁸ (due to be implemented by May 2010). Nonetheless, the effectiveness of such measures requiring the provision of information to consumers has been questioned, as such information may be of little value to borrowers who do not possess the necessary financial literacy skills to comprehend and use them.¹²⁹

(e) ***Irresponsible Lending***

1.51 As mentioned above,¹³⁰ a sound credit agreement requires appropriately responsible conduct on the part of both the creditor and debtor. In a highly competitive credit market, the most profitable customers may also be those who carry the greatest risk for lenders.¹³¹ Some studies have noted that the range of credit options available to lower-income customers through both the prime and sub-prime markets has rapidly increased, resulting in easier access to credit, particularly of an unsecured nature.¹³² This wider availability of credit has been coupled with aggressive marketing of credit, which though affecting all society, is often particularly aimed at vulnerable lower-income consumers.¹³³ Thus the question arises as to the responsibility of creditors for debts going unpaid when money is lent to high-risk borrowers.

1.52 The most obvious aspect of this problem of irresponsible lending is where lenders advance credit to a borrower without conducting an adequate assessment of a borrower's ability to repay. Lenders may fail to take into account the entirety of a borrower's existing obligations before lending. In addition, lenders may neglect to conduct a "stress test" to ensure that a borrower will remain able to repay the loan in the event of a change in his or her financial circumstances. While it is to be expected that lenders will usually perform a creditworthiness assessment of a borrower in advance of a credit agreement, a number

¹²⁵ See Kempson *Over-Indebtedness in Britain; A Report to the Department of Trade and Industry* (Personal Finance Research Centre 2002) at 49ff.

¹²⁶ O'Loughlin *Credit Consumption and Debt Accumulation among Low-Income Consumers: Key Consequences and Intervention Strategies* (Combat Poverty Agency Research Working Paper 06/03 2006) at 41.

¹²⁷ *Financial Capability in Ireland: An Overview* (Irish Financial Services Regulatory Authority 2009): see paragraphs 3.46 to 3.47 below.

¹²⁸ *Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC.*

¹²⁹ See Donnelly "The Consumer Protection Code: A new departure in the regulation of Irish financial services providers (2006) 13(11) *Commercial Law Practitioner* 271 at 275.

¹³⁰ See paragraph 1.40 above.

¹³¹ Kempson *Over-Indebtedness in Britain; A Report to the Department of Trade and Industry* (Personal Finance Research Centre 2002) at 39.

¹³² O'Loughlin *Credit Consumption and Debt Accumulation among Low-Income Consumers: Key Consequences and Intervention Strategies* (Combat Poverty Agency Research Working Paper 06/03 2006) at 3.

¹³³ *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* Council of Europe CM/Rec (2007)8 Explanatory Memorandum at paragraph 3. See also O'Loughlin *op cit*, citing Griffiths "The Sustainability of Consumer Credit Growth in Late 20th Century Australia" (2000) 24(1) *Journal of Consumer Studies and Home Economics* at 23-33.

of disincentives exist to doing so.¹³⁴ First, lenders may provide a risky loan where the loan is secured against an asset such as the borrower's home, as it retains the option of selling the secured asset in the case of default. Other options available to the lender in such a situation would involve transferring the risk of default to third parties by issuing residential mortgage-backed securities or even selling the loan portfolio.¹³⁵ In addition, as consumer credit markets became ever more competitive in recent years, lenders may have incentives not to undertake thorough creditworthiness assessments to speed up the loan process and gain new clients as quickly as possible.¹³⁶ Similarly, credit intermediaries and the employees of lending institutions may be paid on a commission-basis and may have incentives to issue loans without suitable creditworthiness assessments, or may be encouraged to provide a credit product which is unsuitable to the particular borrower just because a higher commission is paid for sales of that product.¹³⁷

1.53 Some particular practices which have raised concerns include the automatic increase of credit limits by lenders, the transfer of credit card balances from one card to another and the reduction of the minimum payment on credit cards.¹³⁸

1.54 It has been quite common for lenders to raise credit limits on credit cards and overdrafts automatically despite studies showing that the large majority of customers feel that limits should only be raised at the customer's request.¹³⁹ This has raised concerns amongst money advisors and their clients that limits may be raised without adequate checks on the credit risk of customers.¹⁴⁰ Research has supported this by showing a link between raised limits on credit cards and financial difficulties, with households whose credit limits were raised within the last twelve months more likely to be in financial difficulty than households with similar borrowings whose limits had not been raised.¹⁴¹ It must however be noted that this practice is no longer permitted under Irish law. The Irish Financial Services Regulatory Authority's *Consumer Protection Code*, introduced in 2006, now prohibits a regulated entity from increasing a consumer's credit card limit in the absence of an express request from the consumer.¹⁴² Similarly, regulated entities may not offer unsolicited pre-approved credit facilities.¹⁴³ Thus these two practices which had been commonplace have been banned on the basis of evidence showing that they could lead to excessive borrowing and spending by consumers.¹⁴⁴

1.55 The increasing transfer of credit card balances from one credit card account to another has been fuelled by offers of low initial interest rates on balances transferred in this way.¹⁴⁵ This practice can raise problems when people in financial difficulty and with arrears of debts transfer balances to avail of the initial introductory interest rate but without planning how to meet the repayments once this rate

¹³⁴ See European Commission *Public Consultation on Responsible Lending and Borrowing in the EU* (DG Internal Market and Services 2009) at 7.

¹³⁵ *Ibid.*

¹³⁶ *Public Consultation on Responsible Lending and Borrowing in the EU op cit.* at 8.

¹³⁷ *Ibid.*

¹³⁸ Kempson *Over-Indebtedness in Britain; A Report to the Department of Trade and Industry* (Personal Finance Research Centre 2002) at 40ff.

¹³⁹ *Ibid* at 40.

¹⁴⁰ O'Loughlin *Credit Consumption and Debt Accumulation among Low-Income Consumers: Key Consequences and Intervention Strategies* (Combat Poverty Agency Research Working Paper 06/03 2006) at 47.

¹⁴¹ Kempson *Over-Indebtedness in Britain; A Report to the Department of Trade and Industry* (Personal Finance Research Centre 2002) at 40.

¹⁴² Chapter 4 paragraph 2 of the *IFSR Consumer Protection Code*.

¹⁴³ Chapter 4, paragraph 1 of the Code.

¹⁴⁴ See Donnelly "The Consumer Protection Code: A new departure in the regulation of Irish financial services providers (2006) 13(11) *Commercial Law Practitioner* 271 at 278.

¹⁴⁵ Kempson *op cit.* at 41.

expires. This switching of credit card provider to pay off other cards has been shown to be a strong indicator of financial difficulties.

1.56 The reduction in the minimum monthly repayment on credit cards has also been criticised on the ground that it may take decades to clear a large balance.¹⁴⁶ Households in financial difficulties have been found to be three times more likely to be making only the minimum payment, and as these households are attracted to cards with low minimum payment levels it will take them years to reduce any balances accumulated on credit cards.¹⁴⁷

1.57 Recent developments have been made by legislation and statutory codes of practice to ensure responsible lending practices are followed, and these will be discussed in more detail below.¹⁴⁸

(f) **Conclusions**

1.58 This analysis indicates that the reasons why debts go unpaid, and why the enforcement system of the courts is required, are many and varied. Debt agreements can go unperformed due to fault on the part of both debtors and creditors, as well as due to external circumstances. Thus any system of debt enforcement must be capable of dealing appropriately with the circumstances of each case. Any reform of the law in this area must allow the law to take into account the reason why a particular debt is unpaid, and provide mechanisms to deal adequately with each particular scenario. Thus for example a single debt which is unpaid due to the deliberate or negligent fault of the debtor may need to be treated differently from a series of debts owed to multiple creditors by an over-indebted household. The debtor who has just lost his or her source of income and ability to repay may need to be treated differently to the debtor who has consistently over-borrowed for speculative investments when unsure of his or her ability to repay.

1.59 The next part of this chapter continues to discuss this theme, and its relevance to the law on debt enforcement, in relation to the important distinction between debtors who can, but refuse to, pay their debts, and those debtors who are simply unable to meet their contractual obligations.

1.60 *The Commission provisionally recommends that the law on debt enforcement should be drafted to take account of the different circumstances in which over-indebtedness arises.*

C Debtors Who Cannot Pay and Debtors Who Refuse to Pay

1.61 In discussing indebtedness, there is a clear and important difference between those who cannot repay their debts and those who can but refuse to do so; in other words, between those who can't pay and those who won't pay.¹⁴⁹

(1) The Importance of this Distinction

1.62 This distinction is fundamental to any discussion of the reform of the law on debt enforcement.¹⁵⁰ First, creditors should not waste time and money pursuing futile enforcement action against debtors who simply do not have the means to pay a debt. Secondly, it is important that vulnerable debtors who clearly have insufficient resources to pay their debts are protected from being subjected to the rigours of often harsh enforcement measures. Thirdly, the courts system has a strong

¹⁴⁶ *Ibid* at 43.

¹⁴⁷ Kempson *Over-Indebtedness in Britain; A Report to the Department of Trade and Industry* (Personal Finance Research Centre 2002) at 44.

¹⁴⁸ See paragraphs 3.72 to 3.90 below.

¹⁴⁹ For a detailed discussion of this issue, see Dominy and Kempson *Can't Pay or Won't Pay? A Review of Creditor and Debtor Approaches to the Non-Payment of Bills* (Personal Finance Research Centre, University of Bristol, No. 4/03 2003).. See also *Key Principles for a New System of Enforcement in the Civil Courts* (Enforcement Review 2nd Consultation Paper, Lord Chancellor's Department 1999) at Chapter 1; *Striking the Balance: A New Approach to Debt Management* (The Scottish Executive 2001) at 23; Jacob *The Legality of Debt Enforcement* (Justice Discussion Paper 2003) at 17ff.

¹⁵⁰ See *Key Principles for a New System of Enforcement in the Civil Courts op cit* at 1.

interest in keeping “can’t pay” debtors out of the judicial enforcement system for two reasons. The first of these is that court resources are limited, and so the identification of debtors who cannot pay will free up court resources for the pursuit of the “won’t pay” debtors who are seeking to evade payment.¹⁵¹ Next, it is important that the integrity of the courts is not compromised through the making of futile orders which cannot be complied with successfully. It can thus be seen that there are no benefits in allowing a situation where a “can’t pay” debtor is admitted into the judicial debt enforcement system.

1.63 The present legal system does not appear to successfully achieve this task, as it has been noted that the system fails to identify debtors whom have the ability to pay and those which have not.¹⁵² It must be noted however that the distinction between these “can’t pays” and “won’t pays” is not an easy one to draw in practice, and has been variously described as an “over-simplification”¹⁵³ and “crude”.¹⁵⁴

1.64 Nonetheless, research has been carried out which has attempted to explore this distinction in detail and to help to identify the cases which are appropriately dealt with by the judicial enforcement system and those which are not.¹⁵⁵ It is important to recognise that there are two distinct elements to the can’t pay/won’t pay divide. First, there is the *ability* to pay the money owed and secondly there is the *commitment* to paying.¹⁵⁶

(2) Those Who Can’t Pay

1.65 As noted above,¹⁵⁷ most debtors intend to repay their debts as required but are driven by their circumstances into financial difficulties which render them unable to pay. Such debtors are affected by the consequences of low income, sudden drops in income and irresponsible lending or borrowing. These groups can all be considered as “can’t pays”. They demonstrate a commitment to pay but lack the ability to do so.¹⁵⁸ Sometimes these people may resemble “won’t pays” as they somehow manage to produce the money needed to avoid a court order (especially a committal order), but this can often be attributed to borrowing from family, friends or emergency commercial lenders.¹⁵⁹

1.66 On the other hand, there are groups of debtors who demonstrate an ability to repay but who lack the commitment to do so.¹⁶⁰ This group includes several different categories of “won’t pays”.

(3) Those Who Won’t Pay

1.67 First, there are “payment withholders”.¹⁶¹ These people usually pay their bills but either object to the payment of one particular bill on principle or dispute the obligation which the creditor argues they owe. Research shows that this group includes people of all incomes.¹⁶² It is clear that those who object

¹⁵¹ The “active defaulters” for whom the enforcement system was originally designed.

¹⁵² *Enforcement Review: Report of the First Phase of the Enforcement Review* (Lord Chancellor’s Department 2000) at paragraph 19.

¹⁵³ *Enforcement Review: Report of the First Phase of the Enforcement Review* (Lord Chancellor’s Department 2000) at 8.

¹⁵⁴ Jacob *The Legality of Debt Enforcement* (Justice Discussion Paper 2003) at 17.

¹⁵⁵ See Dominy and Kempson *Can’t Pay or Won’t Pay? A Review of Creditor and Debtor Approaches to the Non-Payment of Bills* (Personal Finance Research Centre, University of Bristol, No. 4/03 2003).

¹⁵⁶ *Ibid* at 9.

¹⁵⁷ See paragraphs 1.30ff.

¹⁵⁸ Dominy and Kempson *op cit* at 9.

¹⁵⁹ Dominy and Kempson *Can’t Pay or Won’t Pay? A Review of Creditor and Debtor Approaches to the Non-Payment of Bills* (Personal Finance Research Centre, University of Bristol, No. 4/03 2003) at 9.

¹⁶⁰ *Ibid* at 10.

¹⁶¹ Dominy and Kempson *Can’t Pay or Won’t Pay? A Review of Creditor and Debtor Approaches to the Non-Payment of Bills* (Personal Finance Research Centre, University of Bristol, No. 4/03 2003) at 9.

¹⁶² *Ibid*.

to paying in principle should be exposed to the full rigour of an effective enforcement regime. In contrast, creditors seem to agree that where a situation of a disputed debt is identified, attempts should be made to resolve the dispute first before turning to the courts.¹⁶³ If the dispute persists, recourse to the courts may be the only option for unsatisfied creditors.

1.68 The second group of debtors showing a lack of commitment to repay are those who have been classed as “working the system”.¹⁶⁴ This group is reportedly considered by creditors to be the largest group of delinquent debtors who have the ability to pay, and are generally looked upon as deliberately “playing games” with their creditors. These debtors are identifiable by a pattern of waiting until the last minute to see what action the creditor plans to take against them and then generally paying quickly to avoid a court hearing or the passing of their account to a debt collection agency. These debtors tend to be people who spend freely and have a long history of arrears with multiple debts. While most of these debtors avoid court proceedings by paying at the last minute, some miss the relevant deadlines and so become subject to the enforcement mechanisms of the courts. It is appropriate that such debtors should be the subject of effective and strict enforcement systems.

1.69 The third group of “won’t pays” have been classed as those who “duck responsibility” towards their debts.¹⁶⁵ These people have been identified as spending very freely and running up large credit commitments, before criticising the credit companies for having lent them the money in the first place. This attitude leads this group to feel that the credit companies could wait for repayments. This group has been identified as growing due to the development of fee-charging debt management companies who advertise solutions to debt problems, as well as through irresponsible lending practices on the part of credit providers. Often borrowing by this group is to support an extravagant lifestyle, and some of these people could easily honour their commitments.¹⁶⁶ These people are clearly “won’t pays” and should be treated by the law as such.

1.70 The last group is those debtors which are categorised as “disorganised”.¹⁶⁷ This group is distinguishable from the “won’t pays” in that disorganised people do not deliberately delay payment, but fall into arrears due to poor money management and disorganised bill payment, as described above.¹⁶⁸ This group is composed of people from all income groups.¹⁶⁹ Disorganised bill-payers could, in the majority of cases, solve many of their difficulties through the use of direct debit or standing order mechanisms to pay their bills. Where even these mechanisms have proved unsuccessful and a judgment debt has arisen, specific enforcement mechanisms such as attachment of earnings could target these debtors.

(4) An Intermediate Category: Those Who Could Pay

1.71 The disorganised debtor is placed by some studies into a third category of debtor called the “could pays”.¹⁷⁰ This intermediate category can also include those who cannot pay their debts at present but could pay a proportion of their debts over time if provided with help to negotiate with their creditors. Similarly, among this group are those who are currently “can’t pays” due to a temporary change in

¹⁶³ Dominy and Kempson *op cit.* at 13. The role of the Financial Services Ombudsman in resolving consumer credit disputes in a non-judicial setting is discussed below at paragraphs 4.131 to 4.134 below.

¹⁶⁴ Dominy and Kempson *op cit.* at 15.

¹⁶⁵ *Ibid* at 19.

¹⁶⁶ Dominy and Kempson *Can’t Pay or Won’t Pay? A Review of Creditor and Debtor Approaches to the Non-Payment of Bills* (Personal Finance Research Centre, University of Bristol, No. 4/03 2003) at 20.

¹⁶⁷ *Ibid* at 22.

¹⁶⁸ See paragraphs 1.48 to 1.50 above.

¹⁶⁹ Dominy and Kempson *Can’t Pay or Won’t Pay? A Review of Creditor and Debtor Approaches to the Non-Payment of Bills* (Personal Finance Research Centre, University of Bristol, No. 4/03 2003) at 22.

¹⁷⁰ See *A Choice of Paths – Better Options to Manage Over-Indebtedness* (Department of Constitutional Affairs CP 23/04) at 13.

circumstances but who may be able to pay their debts in future if provided with temporary relief from enforcement.

1.72 Thus it can be seen that various types of debtors exist and that appropriate means of enforcement are needed to deal with each type. However, this is not the end of the matter. First, difficult situations arise in relation to debtors who do not have the means to meet their obligations, but even if they did would not pay and would fall into the “withholding payment”, “working the system” or “ducking responsibility” group. Though it would be desirable to subject such debtors to a rigorous enforcement system, this may be futile since such debtors cannot afford to pay. Thus the best option here may be to subject such debtors to full enforcement mechanisms if and when their circumstances improve.¹⁷¹

(5) Conclusions: An Individualised, Debtor-Specific Approach

1.73 It is important that in a system which is founded on a categorisation of debtors under various headings that sight is not lost of the circumstances of the individual case.¹⁷² Before any enforcement order is made, it is essential to explore the conduct and circumstances of the particular creditor and debtor and to examine how the debt was created and the reasons why it is unpaid. The fact is that often the reason why a debt is unpaid may be a combination of all the reasons discussed so far, and all of these factors must be taken into account in choosing the appropriate means of dealing with a particular case.

1.74 Fundamental to this nuanced approach is the availability of accurate and up-to-date information, both to the creditor and to the enforcing authority. The need for, and possible means of acquiring, such information generally in a reformed system of debt enforcement will be discussed further below.¹⁷³

D Creditor Practices

1.75 Just as the above analysis demonstrates the many different types of debtor to be considered when discussing the issue of debt recovery, so different attitudes and approaches to the debt recovery process can be seen among various types of creditors.¹⁷⁴

1.76 Before the 1990s, if debtors in difficulty did not make contact with creditors, it was almost always assumed that the debtors were deliberately seeking to evade payment. This can be at least partially attributed to the fact that most creditors did not possess mechanisms enabling them to identify the reasons why individual customers had defaulted.¹⁷⁵ This state of affairs in turn led to creditors adopting a hard-line approach to debt recovery, with the first move often being to commence court proceedings as soon as possible against defaulting debtors, with little regard to the reasons for defaults.

1.77 A greater understanding of the causes of arrears and the typical reactions of debtors to financial difficulties has led to a situation where a majority of creditors now appear to acknowledge that many of their clients fall into arrears due to changes in circumstances.¹⁷⁶ Dominy and Kempson argue

¹⁷¹ See Dominy and Kempson *Can't Pay or Won't Pay? A Review of Creditor and Debtor Approaches to the Non-Payment of Bills* (Personal Finance Research Centre, University of Bristol, No. 4/03 2003) at 53.

¹⁷² See Jacob *The Legality of Debt Enforcement* (Justice Discussion Paper 2003) at 17.

¹⁷³ See paragraphs 6.71 to 6.97 below.

¹⁷⁴ Dominy and Kempson *Can't Pay or Won't Pay? A Review of Creditor and Debtor Approaches to the Non-Payment of Bills* (Personal Finance Research Centre, University of Bristol, No. 4/03 2003) at 26.

¹⁷⁵ *Ibid* at 32.

¹⁷⁶ Dominy and Kempson *op cit.* at 26. Dominy and Kempson argue that the typical attitudes of creditors to problems of debt recovery have evolved in recent decades. The authors state that, due to the increased work of researchers and money advisers, creditors have become aware that the main reason why debtors fall into arrears in their repayments is a change in their financial circumstances. Also, further evidence demonstrated that many debtors facing financial problems face considerable stress and, unsure how to deal with their difficulties, often “bury their heads in the sand”.

that this greater understanding has led to the development of industry codes of practice and guidelines on arrears management and debt recovery. The operation of such codes will be examined in more detail in the second part of this section.

1.78 The second consequence of this increased understanding has been the development of different techniques by creditors to deal with debt recovery. While the main causes of over-indebtedness have been shown to be adverse events such as unemployment, ill health, personal difficulties and excessive consumption, it must be noted that these events do not always transform consumers into over-indebted debtors.¹⁷⁷ The process of over-indebtedness goes through several stages, and certain decisions may be made before the debtor is hopelessly indebted, with both the debtor's coping strategies and the creditor's debt management skills being important in preventing such an outcome. In recognition of this, creditors have developed more sophisticated systems for the avoidance of the accrual of arrears in the first place as well as arrears management and debt recovery. These sophisticated business systems have been used by many creditors to adopt a holistic approach to their customers, involving attempts to identify the reasons why a debtor had fallen into arrears and efforts to find appropriate solutions to the individual situation of such a debtor.¹⁷⁸

1.79 It must however be noted that this approach is not adopted by all creditors. Dominy and Kempson argue that three different styles of debt recovery can be observed among creditors, which the authors have described as: the "holistic" approach, the "hard business" approach and the "one-size-fits-all" approach. These various techniques will now be briefly discussed.

(1) The Different approaches of Creditors to Debt Collection

(a) "Holistic" Approach

1.80 The authors use the term "holistic approach" to describe the methods adopted by creditors who found their debt recovery and arrears management strategy on the principles of maintaining a close customer relationship. Thus these creditors take steps to avoid the occurrence of arrears, seek to recover arrears through modifying payment plans to suit individual customers, and avoid legal debt enforcement proceedings if at all possible.¹⁷⁹ Such creditors use sophisticated behavioural scoring techniques, as well as regularly updated customer records, to identify debtors who fall into arrears and place them into categories of debtors similar to those discussed above. Thus creditors can, for example, offer disorganised debtors a more organised means of making repayments by assisting them to pay by direct debit, while offering the option to low-income debtors to pay small amounts at regular intervals.¹⁸⁰ The holistic approach envisages a relationship of two-way communication between creditor and debtor, and customers in financial difficulty are urged by creditors adopting this approach to contact them as soon as possible so that a modified repayment plan can be agreed. When such plans are agreed, holistic approach creditors will always aim to find a realistic agreement by seeking to work out precisely what a customer can afford to pay.¹⁸¹ Such creditors encourage the assistance of money advisors and will work closely with such agencies in seeking to reach such agreements.

¹⁷⁷ Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented by the Institute for Financial Services e.v. Erasmus University Rotterdam/School of Law University of Helsinki/Helsinki Collegium for Advanced Studies to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 15.

¹⁷⁸ Dominy and Kempson *Can't Pay or Won't Pay? A Review of Creditor and Debtor Approaches to the Non-Payment of Bills* (Personal Finance Research Centre, University of Bristol, No. 4/03 2003) at 32.

¹⁷⁹ Dominy and Kempson *ibid* at 35.

¹⁸⁰ Dominy and Kempson *Can't Pay or Won't Pay? A Review of Creditor and Debtor Approaches to the Non-Payment of Bills* (Personal Finance Research Centre, University of Bristol, No. 4/03 2003) at 35.

¹⁸¹ *Ibid* at 38.

1.81 Under the holistic approach, recourse to the legal debt enforcement proceedings is seen as a last resort and can even be viewed as an admission of failure.¹⁸² Legal proceedings are only usually commenced where the creditors' sophisticated systems indicate that the debtor in question is deliberately seeking to evade repayment. Furthermore, the legal enforcement methods will not be used where previous court judgments exist against a debtor, as this is seen as an indication that to bring enforcement proceedings against such a debtor would be a waste of resources. If a dispute arises between lender and customer in relation to a repayment, enforcement proceedings are generally suspended by the lender so that the matter can be resolved without recourse to the courts.

1.82 It will be seen below that the holistic approach to arrears management and debt recovery is widely reflected in the various industry guidelines and codes of practice concerning these issues.¹⁸³

1.83 In conclusion, it can be said that three fundamental principles inform the holistic approach to arrears and debt management.¹⁸⁴ The first is the recognition that the main reason for repayment default by customers is financial difficulty, and that a customer who has fallen into arrears should be presumed to be suffering from such difficulties, rather than deliberately seeking to avoid payment. Secondly, customers who have fallen into arrears should be treated on an individual basis, with creditors making an effort to understand the particular reasons for non-payment and to provide flexible and individualised solutions to payment problems. Thirdly, the holistic approach requires compliance with the spirit and the letter of the rules of good practice in arrears management, which are increasingly to be found in industry guidelines and codes of practice.

1.84 The obvious disadvantage for creditors of adopting such an approach is the expense involved in establishing sophisticated arrears prevention and management and debt recovery systems. A particular difficulty arises in identifying customers who have fallen into debt difficulty.¹⁸⁵ The debt difficulties of many debtors will not be readily visible, particularly where a debtor owes multiple debts, of which one particular creditor may not be aware. Thus from the creditors' point of view, it can take three or four years for a creditor's employee to acquire the level of training and experience necessary to be able to identify and deal with people in debt.¹⁸⁶ Of course, this expense may ultimately be worthwhile for creditors who achieve more success in recovering debts and in retaining customers than those creditors who do not adopt a holistic approach.¹⁸⁷

(b) **"Hard Business" Approach**

1.85 The underlying philosophy of the hard business approach is the recovery of arrears at the lowest possible cost to the creditor.¹⁸⁸ Thus creditors adopting this approach exhibit less concern for the needs of individual customers, and are reluctant to commit resources to advanced arrears management systems. These creditors view codes of practice or guidelines as restrictive, and comply with them only to the extent to which they are obliged. Under the hard business approach, it is seen as the sole responsibility of the customer to contact the lender if he or she is in financial difficulty, and a view exists

¹⁸² Dominy and Kempson *Can't Pay or Won't Pay? A Review of Creditor and Debtor Approaches to the Non-Payment of Bills* (Personal Finance Research Centre, University of Bristol, No. 4/03 2003) at 39.

¹⁸³ See paragraphs 3.117 to 3.120 below.

¹⁸⁴ *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 77.

¹⁸⁵ See O'Loughlin *Credit Consumption and Debt Accumulation among Low-Income Consumers: Key Consequences and Intervention Strategies* (Combat Poverty Agency Research Working Paper 06/03 2006) at 30.

¹⁸⁶ See O'Loughlin *ibid.*

¹⁸⁷ See paragraph 1.91 below.

¹⁸⁸ Dominy and Kempson *Can't Pay or Won't Pay? A Review of Creditor and Debtor Approaches to the Non-Payment of Bills* (Personal Finance Research Centre, University of Bristol, No. 4/03 2003) at 39.

amongst creditors in this category that many debtors will falsely claim to be in difficulty in an attempt to deliberately evade payment.¹⁸⁹

1.86 This approach involves little personal contact with customers, with the obvious consequence of the unavailability of information concerning each debtor's financial circumstances which would enable creditors to create realistic and workable payment plans. This means that payment plans frequently cannot be completed. There is little place for the work of money advice agencies under the hard business approach, with some creditors holding the view that the intervention of such agencies hinders the recovery process by delaying the agreement of a payment plan.

1.87 Creditors adopting this approach do however invest in developing systems for handling the later stages of debt recovery which enable them to choose against which customers legal enforcement proceedings should be brought.¹⁹⁰ The process of "litigation scoring" is often used whereby computer models predict the likely outcome of legal enforcement proceedings so that creditors can estimate in which cases the bringing of court proceedings would be effective and worthwhile. Despite this attempt to distinguish between debtors at the late stage of the arrears management and debt recovery process, hard business creditors remain much more likely to bring formal enforcement proceedings than creditors following the holistic strategy. This is due to the view that customers claiming to be in financial difficulty are merely seeking to evade payment. Also, hard-business creditors lack information on the true financial circumstances of their customers. The result is that proceedings are often still brought where the chances of their effectiveness are unknown.

(c) **"One-Size-Fits-All" Approach**

1.88 Creditors adopting a "one-size-fits-all" approach rely on standard mechanisms for dealing with all aspects of arrears management and debt recovery and do not attempt to categorise their customers into different groups for these purposes.¹⁹¹ Only standard means of billing and accepting payment will be offered, with no provision of individualised payment mechanisms to suit the varying different categories of debtor. Standard arrears management letters and notices are sent to defaulting customers at standard set intervals, with little attempt to obtain further information on the financial circumstances of individual customers. Payment plans will only be formulated at the initiative of the customer, and creditors adopting this approach will rarely be concerned with assuring that offers of payment are realistic.

1.89 For creditors adopting this approach, the institution of legal enforcement proceedings is normally viewed as a natural continuation of arrears management.¹⁹² These creditors issue more court proceedings than the other categories and such proceedings are largely taken indiscriminately, with little regard to whether the debtor being sued is in a position to repay the monies owed. Such creditors prefer to proceed before the courts than to negotiate informal payment plans, as they have witnessed the failure of many involuntary payment plans which have not been court-sanctioned. Evidence suggests that one-size-fits-all creditors use the means examination carried out by the court as their method of obtaining information regarding a debtor's financial circumstances, rather than trying to ascertain such information prior to commencing court proceedings.¹⁹³

1.90 It must be noted that in recent years the more sophisticated approaches to arrears management and debt recovery have grown in popularity, and the use of the one-size-fits-all model has become rare in recent times. This will be shown in the discussion of the codes of practice for lenders below, which all advocate more sophisticated and consumer-friendly strategies.

¹⁸⁹ Dominy and Kempson *Can't Pay or Won't Pay? A Review of Creditor and Debtor Approaches to the Non-Payment of Bills* (Personal Finance Research Centre, University of Bristol, No. 4/03 2003) at 40.

¹⁹⁰ Dominy and Kempson *ibid* at 41.

¹⁹¹ *Ibid* at 44.

¹⁹² Dominy and Kempson *Can't Pay or Won't Pay? A Review of Creditor and Debtor Approaches to the Non-Payment of Bills* (Personal Finance Research Centre, University of Bristol, No. 4/03 2003) at 44.

¹⁹³ *Ibid*.

(2) Industry Guidelines

1.91 The changes described in the attitudes of creditors to arrears prevention and management and debt recovery are now evidenced in the various codes of practice and credit industry guidelines which have been developed in Ireland and in other jurisdictions in recent times. The setting out of both broad principles and detailed guidelines on how to abide by such principles facilitates good practice and assists creditors in adopting a holistic approach to arrears problems, which in turn allows lenders to increase their rates of arrears recovery and customer retention.¹⁹⁴ The fact that such practices are ultimately to the benefit of creditors has led to the voluntary creation of rules of good practice by members of the relevant industries. As a result it has been argued that high levels of compliance with guidelines can be achieved through self-regulation.¹⁹⁵

1.92 A brief description of the provisions of some such industry codes is presented in Chapter 3 below as part of a discussion of the current law on arrears management in Ireland. This discussion illustrates how issues of arrears prevention and management and debt recovery are dealt with by creditors before recourse is had to the legal enforcement procedures which ultimately form the basis of this Consultation Paper.

(3) Conclusions

1.93 The above discussion illustrates the current prevailing attitudes of creditors to the law on debt enforcement. It also describes the place of legal debt enforcement procedures in the overall debt recovery process. It has been shown that while once recourse to legal enforcement would have been the first course of action for an unpaid debtor, in recent years greater understanding of the causes of debt have resulted in the deployment of different arrears management and debt recovery techniques before legal proceedings are commenced.

1.94 The Commission wishes to endorse the holistic approach to debt management described above. The law should reflect an attitude to debt enforcement similar to this approach. An emphasis should be placed on good practice in debt management, non-judicial debt settlement procedures should exist to avoid court proceedings, with the use of court proceedings being reserved as a genuine last resort. While the debt enforcement systems should facilitate and assist creditors in recovering what the law states to be their rightful dues, creditors also have a responsibility to help themselves by engaging in sound arrears management and debt recovery practices.¹⁹⁶

1.95 *The Commission provisionally recommends that the law should reflect and support the holistic approach to debt management and debt enforcement, namely, that legal debt enforcement proceedings should be seen as a last resort to be used when other measures have failed or can be shown to be inappropriate.*

¹⁹⁴ See *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 77.

¹⁹⁵ *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 77, citing the high levels of compliance with the voluntary Banking Code in the UK under the monitoring and enforcement powers of the independent Banking Codes Standards Board,

¹⁹⁶ See *Enforcement Review: Report of the First Phase of the Enforcement Review* (Department of Constitutional Affairs, 2000) at paragraph 22.

CHAPTER 2 A FRAMEWORK FOR REFORM

2.01 This Chapter establishes a set of principles for the reform of the law on debt dispute resolution and the enforcement of judgments. The Commission uses these principles as a guide throughout the Consultation Paper when identifying areas for reform and when making provisional recommendations. The Chapter begins by establishing the key dynamic of the law in this area: the balance of the respective rights of creditors and debtors. Part A begins by discussing the fundamental rights of judgment creditors as recognised by the Constitution of Ireland and the European Convention on Human Rights. These rights include the right of access to a court and property rights. Part A concludes that these rights must be adequately respected by providing effective mechanisms for enforcing court judgments. The part however also emphasises that these rights are not absolute, and must be balanced with the rights of debtors and the public interest.

2.02 Part B outlines the fundamental rights of debtors which must be protected by enforcement procedures, including the rights to fair procedures, liberty, privacy and property. This part recognises that enforcement procedures must by their nature involve an element of coercion and so must restrict the rights of judgment debtors to a certain extent. Part B makes two important conclusions: the law on debt enforcement must strike a fair balance between the rights of creditors and debtors; and the law on debt enforcement must be based upon the principle of proportionality, so that while restrictions on debtors' rights are necessary, such restrictions must always be appropriate.

2.03 Part C discusses the interests of society in general which must be considered by the law in this area. This part notes that the principle of the rule of law, the protection of basic principles of contract law, and the efficiency of the economy all demand that efficient mechanisms for the enforcement of judgment debts exist. The public interest in the prevention and alleviation of over-indebtedness is also recognised as a legitimate aim which may justify restrictions on the rights of creditors.

2.04 Finally, Part D draws conclusions from the above discussion and presents a list of fundamental principles which guide the Commission's provisional recommendations for reform throughout this Consultation Paper. This part notes that the law on debt enforcement must be balanced, proportionate and clear. It also states that the distinction between debtors who cannot pay and those who refuse to pay must be recognised by the law, and that methods must be introduced by which more information about the means of debtors can be obtained so that this distinction may be made in individual cases. Finally, Part D acknowledges that those who cannot pay should not be subject to enforcement proceedings and that a system of debt settlement must be introduced to provide a solution to the difficulties of the over-indebted.

A Rights of the Creditor

2.05 A central aspect of any system of civil justice is that legal rights can be effectively respected, protected and vindicated. Thus, a creditor who has established a legal right to seek payment from a debtor must be provided by the State with the necessary mechanisms to give effect to this right.¹ Indeed for the majority of litigants, the very reason why they initiate civil proceedings is to recover the money

¹ Access to, and the efficiency of, civil justice must be assured and for this to be achieved "it is crucial that creditors who have established a legitimate claim should be able to pursue it through a straightforward and accessible system, and if necessary enforce a judgment by the most appropriate means." See *Effective Enforcement – Improved Methods for Recovery for Civil Court Debt and Commercial Rent and a Single Regulatory Regime for Warrant Enforcement Agents* (Lord Chancellor's Department 2003) at 6.

which they believe their legal rights entitle them to obtain.² In this regard it has been said that “people do not institute civil proceedings to vindicate their rights; they do so to *get* their rights.”³

2.06 Thus, a civil justice system which fails to provide for the effective enforcement of judgments may be failing in its obligation to protect the rights of successful plaintiffs. Any reform of the law of debt enforcement must thus have regard to the rights of creditors protected by the Constitution of Ireland and the European Convention on Human Rights.⁴

(1) Access to the Courts/Right to Litigate

2.07 The first right of the creditor which must be considered in enforcement proceedings is the right of access to the courts or the right to litigate, as protected both by 40.3 of the Constitution of Ireland and Article 6 of the European Convention on Human Rights.

2.08 The right to have access or recourse to the courts and the related right to litigate have been recognised as constituting one of the unenumerated rights of the citizen as protected by Article 40.3 of the Constitution.⁵ In the case of *Macauley v Minister for Posts and Telegraphs*, Kenny J held that this right is a necessary inference from the jurisdiction vested in the High Court by Article 34.3.1^o to determine all matters and questions of law or fact, civil or criminal.⁶ In this regard this right can be seen as protecting the rule of law and integrity of the judicial system as well as protecting individual rights.⁷

2.09 Case law has illustrated that this right of access to a court extends to an entitlement to have any judgment obtained therein enforced. This can be seen from the judgment of Keane CJ in the Supreme Court decision of *Foley v Bowden*. Here the judge describes the right as the:⁸

“right of the plaintiff to have access to the courts and to be in a position, so far as the law can enable him so to do, to execute any judgment he has obtained.”

Here the plaintiff sought to conduct an oral examination of the Garda Commissioner⁹ to ascertain whether the defendant, a participant in the witness protection programme, was owed monies by the State which could be made subject to a garnishee order so as to enforce a judgment previously obtained by the plaintiff against the defendant. The Court held that although the aim of the scheme was to assist in the prosecution of serious crime - and so there was a strong public interest in the non-disclosure of information relating to the scheme - the programme must observe the constitutional right of access to the court and to execute any judgment therein obtained.¹⁰ Thus, the plaintiff’s constitutional right entitled him to conduct an oral examination of the Garda Commissioner.

2.10 The Council of Europe has confirmed that the enforcement of a court judgment is “an integral part of the fundamental human right to a fair trial within a reasonable time, in accordance with Article 6 of

² See Baldwin and Cunnington “The Crisis in Enforcement of Civil Judgments in England and Wales” [2004] *Public Law* 305 at 305. This belief is described by the authors as “one of the great myths that surround civil justice”, due to the difficulties incurred by litigants in the enforcement of judgment debts.

³ Capper *The Enforcement of Judgments in Northern Ireland* (SLS Legal Publications (NI) 2004) at 1.01.

⁴ As incorporated into Irish law by the *European Convention on Human Rights Act 2003*.

⁵ See *The State (Quinn) v Ryan* [1965] IR 70; *Macauley v Minister for Posts and Telegraphs* [1966] IR 345; *Tuohy v Courtney* [1994] 3 IR 1. See Hogan and Whyte *JM Kelly: The Irish Constitution* (4th ed. Lexis Nexis, Dublin 2003) at [7.3.132]ff.

⁶ [1966] IR 345.

⁷ See O’Neill *The Constitutional Rights of Companies* (Thomson Round Hall 2007) at 227. Thus O’Neill argues that the right should apply to companies as well as private individuals.

⁸ [2003] 2 IR 607, 612

⁹ Under Order 42, rule 36 of the *Rules of the Superior Courts 1986*.

¹⁰ [2003] 2 IR 607 at 612.

the European Convention on Human Rights.”¹¹ The object of Article 6 is “to enshrine the fundamental principle of the rule of law,”¹² a principle which can only be realised if citizens can, in practice, assert their legal rights and challenge unlawful acts.”¹³ While the text of the Convention does not expressly guarantee a right of access to a court, this right was recognised as part of the Article 6 scheme in the decision of *Golder v United Kingdom*.¹⁴

2.11 The ECtHR has expressly confirmed that the enforcement of a judgment falls under the protection of the Article 6 guarantee. Plaintiffs should not be prevented from benefitting from the success of litigation.¹⁵ In *Hornsby v Greece*, the court held that the right of access to a court “would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party.”¹⁶ The Court held that it would be inconceivable that Article 6 should ensure fair procedures without guaranteeing the implementation of judicial decisions. A view of Article 6 which limited it to the mere conduct of proceedings would fail to protect the principle of the rule of law enshrined in Article 6. The Court thus concluded that the “[e]xecution of a judgment given by any court must therefore be regarded as an integral part of the “trial” for the purposes of Article 6”,¹⁷ and that obstacles, or even delays, in the enforcement of judgments may render the Article 6 guarantee “devoid of purpose”.¹⁸

2.12 The decision in *Apostol v Georgia*,¹⁹ confirms this approach. Here the ECtHR reaffirmed that “the right to a court is not merely a theoretical right to secure recognition of an entitlement by means of a final decision but also includes the legitimate expectation that the decision will be executed.”²⁰ While this right may be subject to limitations, such restrictions must not impair the very essence of the right, and must pursue a legitimate aim in the public interest and demonstrate a relationship of proportionality between the means employed and the aim sought to be achieved.²¹

2.13 In examining the scope of the right, the Court went so far as to state that the duties imposed on Contracting States by Article 6 “may require the State to take various forms of positive action”.²² The

¹¹ *Recommendation of the Committee of Ministers to member states on enforcement* (Council of Europe Rec(2003)17, 2003). For a general discussion of Article 6, see Ovey and White *Jacobs and White, the European Convention on Human Rights* (Oxford University Press 2006) at 158ff. The relevant text of Article 6 reads:

(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

¹² *Salabiaku v France* (1988) 13 EHRR 379 E Ct HR, paragraph 28.

¹³ *Recommendation of the Committee of Ministers to member states on enforcement* (Council of Europe Rec(2003)17, 2003).

¹⁴ (1975) 1 ERR 524 E Ct HR. See Ovey and White *op cit.* at 170.

¹⁵ *Prodan v Moldova* Application No. 49806/99 18 May 2004 at paragraph 53.

¹⁶ (1997) 24 EHRR 250 ECtHR at paragraph 40.

¹⁷ (1997) 24 EHRR 250 ECtHR at paragraph 40.

¹⁸ *Ibid* at paragraph 41.

¹⁹ Application No. 40765/02 November 28 2006

²⁰ *Ibid* at paragraph 54.

²¹ Application No. 40765/02 November 28 2006 at paragraph 57. While a Contracting State may exceptionally intervene to stay enforcement of a judgment where strictly necessary for reasons of the public interest, such intervention must not prevent, invalidate or unduly delay the enforcement, and should not undermine the substance of the original judgment: *Immobiliare Saffi v Italy* (2000) 30 EHRR 756 ECtHR at paragraph 74. Here the Court held, in the context of Italian legislation which staggered the execution of orders of possession of rented residences, that the execution of a judicial decision cannot be “unduly delayed”.

²² Application No. 40765/02 November 28 2006 at paragraph 64.

facts of the case involved Georgian legislation which required the payment of a fee by the party seeking to enforce a judgment. In this context, the Court decided that by moving the responsibility for financing the enforcement proceedings to private parties, Georgia attempted to evade its “positive obligation to organise a system for enforcement of judgments that is effective both in law and in practice.”²³ The provision of Georgian law thus constituted an excessive burden on the applicant and restricted his right of access to a court to the extent of impairing the very essence of that right.

2.14 Thus, it can be seen that the obligations imposed on Contracting States by Article 6 are quite extensive and far-reaching, to the point of placing a positive obligation on States to organise an effective system of enforcement.²⁴ Enforcement may however be delayed where there is a strong public interest in so doing, and where such an interference with a judgment creditor’s rights is proportionate.

2.15 *The Commission provisionally recommends that the law on debt enforcement should adequately respect creditors’ rights to have access to a court and to be able to enforce any court judgments.*

(2) Property Rights

2.16 Both the Constitution of Ireland and the European Convention on Human Rights provide for the protection of property rights. The expansive interpretation given by Irish and European courts to the concepts of property rights and possessions mean that a judgment debt can fall under such protection. For this reason the law on debt enforcement must provide an efficient and effective enforcement system so as to vindicate the property rights of creditors. It must be noted that both the Irish constitution and the ECHR place several conditions on the enjoyment of property rights. Most notably, these rights are subject to the general interest or common good. A justification for the restriction of these rights may be provided by the general interest in the need to provide a solution to the problem of over-indebtedness, an issue which will be discussed further below.

2.17 The Constitutional protection of property rights in Ireland is provided by Articles 40.3.2^o and 43 of the Constitution.²⁵ A similar protection of property rights is provided by the ECHR. Article 1 of the First Protocol to the ECHR effectively guarantees the right of property.²⁶ The protection of property or

²³ Application No. 40765/02 November 28 2006 at paragraph 64.

²⁴ While the majority of Article 6 cases before the ECtHR have concerned the frustrated enforcement of judgments against defendant states rather than judgments obtained in proceedings between private parties some more recent cases have indicated that the same principle applies in the case of judgments obtained against private defendants. See Baldwin and Cunnington *The Crisis in Enforcement of Civil Judgments in England and Wales* [2004] *Public Law* 305 at 306.

²⁵ See generally Hogan and Whyte *JM Kelly: The Irish Constitution* (4th ed LexisNexis Butterworths 2003) at 1969ff. The text of Article 40.3.2^o reads as follows:

“The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen”.

Article 43 reads:

“(1) 1^o The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.

2^o The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.

(2) 1^o The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.

2^o The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good”.

²⁶ See generally Ovey and White *Jacobs and White, the European Convention on Human Rights* (Oxford University Press 2006) at 345ff. The text of Article 1, Protocol 1 reads as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

possessions has been given a wide scope by the Irish courts²⁷ and the ECtHR. Importantly for the present discussion it was held in the Irish High Court decision in *Chestvale Properties v Glackin*²⁸ that contractual obligations could form property rights for the purposes of the Constitution and that a statute which necessitated a breach of an implied contractual term by one party to a contract constituted an interference with those property rights. The Court found in the circumstances that this statute merely resulted in a limited intrusion on the contractual rights of the parties and thus was justifiable as a means of reconciling the exercise of property rights with the exigencies of the common good as envisaged by Article 43.2.1^o of the Constitution. Applying this decision to the debtor-creditor contractual relationship, it can be relied on as authority for the argument that the law must respect the contractual obligations created between debtor and creditor as constitutionally protected property rights. Creditors thus have a constitutional right to have these obligations enforced, albeit a right which may be subject to interference which does not amount to an unjust attack and which is required by the common good.

2.18 A similar outcome occurred in relation to the protection of the contractual rights of creditors under the ECHR in the House of Lords decision of *Wilson v First County Trust Ltd (No. 2)*.²⁹ This case concerned a challenge to legislation,³⁰ which restricted a creditor's power to enforce a credit agreement where the agreement did not comply with the provisions of the Act. The majority of the House of Lords held that the guarantee of Article 1 Protocol 1 was not engaged as it is the role of national law "to define the nature and extent of any rights which a party acquires..."³¹ If under national law the right to enforce the contractual right "had never in truth [been] validly acquired",³² then there was no interference with the protection of possessions where the agreement, which would otherwise have been valid, was rendered unenforceable due to its failure to comply with the relevant formalities. The non-binding commentary of the Lords also indicated that had an interference with Article 1 Protocol 1 rights occurred, it would have been both a legitimate and proportionate interference due to the important social policy of consumer protection which the relevant legislation sought to achieve.

2.19 The Irish Supreme Court has confirmed that the Constitution's protection of property rights extends to a cause of action. In the case of *In the Matter of Article 26 of the Constitution and in the Matter of the Health (Amendment) (No. 2) Bill 2004*,³³ the Court held that a cause of action under the law of unjust enrichment for the restitution of health charges paid when not due constituted a property right capable of falling under the protection of Articles 40.3.2^o and 43. The Court thus accepted the argument that the legal right to recover charges these charges constituted a debt which was a constitutionally protected property right.³⁴

2.20 By similar reasoning, case law of the ECtHR has shown that a judgment obtained by a plaintiff in judicial proceedings can constitute a possession for the purposes of the guarantee of property rights.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

²⁷ See Hogan and Whyte *JM Kelly: The Irish Constitution* (4th ed LexisNexis Butterworths 2003) at paragraph 7.7.06ff.

²⁸ [1993] 3 IR 35.

²⁹ [2003] UKHL 40, [2003] 3 WLR 568. See Beale et al *Chitty on Contracts: Volume 1 General Principles* (30th ed. Thomson Reuters (Legal) 2008) at 37ff...

³⁰ *Consumer Credit Act 1974* (UK).

³¹ [2003] 3 WLR 568 at [106] per Lord Hope. The claim also failed on grounds relating to the non-retrospective application of the *Human Rights Act 1998*.

³² [2003] 3 WLR 568 at [137] per Lord Hobhouse.

³³ [2005] IESC 7, [2005] 1 IR 105. The Court expressly referred to this property right as consisting of a chose in action at paragraph 82, and later at paragraph 121 stated that the claim for restitution could constitute "a property right consisting of a right of action to recover the monies."

³⁴ [2005] IESC 7, [2005] 1 IR 105 at paragraph 86.

So, in *Stan Greek Refineries and Stratis Andreadis v Greece*,³⁵ the Court held that a judgment or arbitration award which gives rise to a debt that is sufficiently established to be enforceable may constitute a possession for the purposes of Article 1, Protocol 1.³⁶ Therefore, where a defendant State refuses to pay the sum ordered to the applicant the fact that the applicant finds it impossible to obtain execution of the decision constitutes interference in his or her right to property.³⁷

2.21 Subsequent decisions of the ECtHR have further shown that even a temporary delay which prevents a successful plaintiff from obtaining the execution of a judgment as soon as it becomes enforceable³⁸ can constitute an interference with the plaintiff's right to peaceful enjoyment of his or her possessions.³⁹ If a plaintiff is unable to obtain the enforcement of a judgment for a substantial period of time, his or her right will be infringed.⁴⁰

2.22 Both the Irish Constitution and the ECHR recognise that property rights are not absolute. The conditions imposed on the right to property by Article 1 of Protocol 1 mean that interference with property, whether through expropriation or through control of use, will be permissible if it is lawful, pursues the general or public interest, and is proportionate, in that it strikes a fair balance between the demands of the general interest and the protection of the individual interest.⁴¹ The fact that the defendant State in *Prodan v Moldova* could not provide any justification for the delay in the enforcement of the applicant's judgment debt was important to the ECtHR's finding that the applicant's rights had been infringed.⁴² Thus if obstacles to the enforcement of judgment debts arise, they must meet these criteria in order to avoid contravening the Article 1 Protocol 1 guarantee.

2.23 *The Commission provisionally recommends that any reform of the law on debt enforcement must produce an efficient system of enforcement so as to vindicate the property rights of creditors. The Commission also recognises that the property rights of creditors may be subject to limited interferences if justified by the interests of the common good.*

B Rights of the Debtor

2.24 While having regard to the rights of creditors outlined above, and the interest of society in the effective enforcement of legal obligations, it is important that a system of enforcement equally acknowledges the rights of debtors. The law on debt enforcement thus must seek to achieve a balance between the rights of creditors and debtors. The following section outlines the primary constitutional and Convention rights of debtors which are engaged by various enforcement procedures.

(1) Fair Procedures

2.25 The first right of debtors which must be considered is the right to fair procedures, as protected by articles 34, 38 and 40.3 of the Constitution of Ireland, and article 6 of the European Convention on

³⁵ (1995) 19 EHRR 293 ECtHR.

³⁶ *Ibid* at paragraph 59. The ECtHR reached a similar conclusion in *Georgiadis v Greece* (2001) 33 EHRR 22 ECtHR. Here a judgment of a domestic appellate court ordering the payment of a supplementary pension to the applicant was considered to constitute a sufficiently established debt and not purely a potential right where the only appeal lying against the judgment did not have a suspensive effect: paragraph 32.

³⁷ *Georgiadis v Greece* (2001) 33 EHRR 22 ECtHR at paragraph 32.

³⁸ As opposed to rendering enforcement altogether impossible as in *Georgiadis*.

³⁹ See *Prodan v Moldova* Application No. 49806/99 May 2004 ECtHR, at paragraphs 60-61.

⁴⁰ *Konovalov v Russia* Application No. 63501/00 23 March 2006 ECtHR, at paragraph 45. While the above decisions have all been made in the context of judgment debts owed by a Contracting State, they would appear to at least illustrate the fact that a judgment debt falls under the ECHR guarantee to protect property rights.

⁴¹ See e.g. *James and Others v The United Kingdom* Application No. 8793/79 ECtHR [1986] ECHR 2, discussed below at paragraph 2.80.

⁴² *Prodan v Moldova* Application No. 49806/99 May 2004 ECtHR, at paragraph 61.

Human Rights. These articles guarantee certain procedural safeguards which must be provided to parties to legal proceedings. While a detailed discussion of the content of the right to fair procedures is beyond the scope of this Consultation Paper, the following paragraphs present a discussion of how this right was applied to enforcement procedures in the 2009 Irish High Court decision of *McCann v The Judge of Monaghan District Court, the Commissioner of an Garda Síochána, the Chief Executive of the Irish Prison Services, the Minister for Justice, Equality and Law Reform, Ireland and the Attorney General*.⁴³

2.26 In *McCann*, this right was considered in the context of the procedure for the arrest and imprisonment of debtors that existed under section 6 of the *Enforcement of Court Orders Act 1940* until this section was replaced in 2009.⁴⁴ This procedure applied where a debtor failed to comply with an order to pay a judgment debt by instalments, at which point a creditor could seek to enforce the instalment order by seeking an order for the arrest and imprisonment of the debtor. While the debtor could avoid an order for imprisonment being made by proving that the failure to pay the instalment order was not caused by his or her wilful refusal or culpable neglect, the burden of proof fell on the debtor to appear in court and prove this defence. The procedure allowed for such an order to be made in the absence of the debtor, and if the debtor did not appear, the court could proceed to order his or her arrest and imprisonment. The Irish High Court held that this procedure violated the protection of the right to fair procedures under the Constitution of Ireland.

2.27 Here it was argued that the procedure under section 6 was incompatible with the constitutional guarantees of fair procedures under articles 34, 38 and 40.3, and the right to a fair trial under article 6 of the European Convention on Human Rights. Considering this argument, Laffoy J held that for the procedure to be compatible with the Constitution, the same procedural safeguards must exist in committal hearings as are provided in criminal trials.⁴⁵ Having rejected the argument that the wording of section 6 of the 1940 Act could be interpreted in a manner that implied the necessary safeguards to make it compatible with the Constitution, Laffoy J continued to hold that the provision violated the debtor's constitutional guarantee of fair procedures in three principal ways.⁴⁶ First, it conferred jurisdiction on the District Court to order the arrest and imprisonment of a debtor even where the debtor was not present before the Court and even if the District Court Judge was not in a position to decide whether the absence of the debtor was due to a conscious decision. Secondly, the impugned section conferred jurisdiction on the Court to order the arrest and imprisonment of the debtor while not providing any administrative or legal scheme under which the Court was given the power to grant free legal representation to the debtor. Finally, section 6 breached fair procedures guarantees in expressly placing the onus on the debtor to prove that default was not caused by his or her wilful refusal or culpable neglect. Laffoy J noted that if the legislation had created a criminal offence of failing to obey an instalment order, with a possible three month prison sentence, the constitutional requirements of fair procedures and trial in due course of law would have been necessitated. This is because Irish case law has established that the presumption of innocence must be protected and that the prosecution must prove its case beyond all reasonable doubt.⁴⁷ The judge continued to state that

“By analogy, when the Oireachtas considers it appropriate to provide for a party in civil litigation a remedy in the case of contumacy on the part of the debtor, and, if granted, the remedy will result

⁴³ [2009] IEHC 276.

⁴⁴ By section 2(1) of the *Enforcement of Court Orders (Amendment) Act 2009*. The Instalment Order and Order for Arrest and Imprisonment procedure is described in detail in Chapter 3: see paragraphs 3.283 to 3.297 and paragraphs 3.337 to 3.340 below.

⁴⁵ “It is difficult to identify any rational basis for treating a person facing the possibility of imprisonment for three months for non-payment of debt at the suit of a creditor differently from a person facing a criminal charge and the possibility of the imposition of a criminal sanction. In my view, there is none.” [2009] IEHC 276 at 71.

⁴⁶ *Ibid* at 78.

⁴⁷ [2009] IEHC 276 at 71, citing the following statements from the Supreme Court decision in *Hardy v Ireland* [1994] 2 IR 551, 565: “the... well-established criminal law jurisprudence in regard to having trials in due course of law... protects the presumption of innocence; it requires that the prosecution should prove its case beyond all reasonable doubt...” (Per Hederman J).

in the imprisonment of the debtor, fair procedures must require that the burden of proof of contumacy is on the creditor availing of the remedy.”⁴⁸

2.28 This case affirmed the principle that the debtor’s right to fair procedures must be respected in enforcement proceedings, and that it must be reconciled with the rights of the creditor to enforce a judgment. Where an enforcement mechanism carrying the threat of imprisonment exists to compel payment from “won’t pay” debtors, sufficient procedural steps must exist to determine the question of whether the debtor is indeed refusing to pay, or whether he or she is a “can’t pay” debtor. Enforcement mechanisms which are designed for “won’t pay” debtors must therefore not be used indiscriminately against “can’t pay” debtors. The case establishes the principle that the severity of the consequences of enforcement for the debtor must be considered when determining the extent of the procedural safeguards necessary to protect the debtor’s rights.

(2) The right to liberty

2.29 In *McCann v The Judge of Monaghan District Court & Ors*, Laffoy J also found that section 6 of the 1940 Act was contrary to the Irish Constitution’s protection of the right to liberty under Article 40.4.1^o. This article simply provides that “[n]o one shall be deprived of his personal liberty save in accordance with law.”

2.30 The judge first noted that section 6 implicitly recognised that a debtor should not be imprisoned if he or she is unable to pay the debt being enforced, and so the provision did not deprive a person of his or her liberty in a manner which ignores the fundamental norms of the legal order postulated by the Constitution.⁴⁹ The flaw of the provision therefore was that it did not contain sufficient safeguards to ensure that a debtor who cannot pay is not imprisoned. The provision was designed to imprison only those who refuse or neglect to pay, but the judge found that it “also strikes at those who cannot pay and simply fail to prove this at the hearing due to negative circumstances created by the provisions themselves.”⁵⁰

2.31 Having considered this, the judge continued to state that “the core question is whether s. 6 constitutes a disproportionate interference with the right to liberty.” To answer this question, Laffoy J applied the three stage proportionality test as first enunciated in *Heaney v Ireland*⁵¹ which requires that the provision under scrutiny must:

- be rationally connected to a legitimate and important object;
- must impair the right in question as little as possible; and
- must be such that its effect on this right is proportional to the legitimate objective sought to be achieved.

The judge noted that an effective statutory scheme for enforcement of contractual obligations is “unquestionably a reasonable and legitimate objective in the interests of the common good in a democratic society.”⁵² Laffoy J noted that this objective could feasibly justify a mechanism for the imprisonment of defaulting debtors, but such a mechanism would be unconstitutional unless it passed the proportionality test.

2.32 Section 6 of the 1940 Act failed this test on several grounds. First, since the object of imprisonment is to procure the discharge of the arrears of instalments, a statutory scheme which allowed debtors who cannot pay to be imprisoned could not be rationally connected with the objective.⁵³ As the judge continued to state, “[n]ot only would the process have no practical value in securing payment of the

⁴⁸ [2009] IEHC 276 at 79.

⁴⁹ *McCann v The Judge of Monaghan District Court and Others* [2009] IEHC 276 at at 80.

⁵⁰ *Ibid.*

⁵¹ [1994] 3 IR 593.

⁵² *McCann op cit.* at 81.

⁵³ *Ibid* at 82.

outstanding debt or any part of it, but it is difficult to see how it could be said to have any deterrent value.”⁵⁴ Secondly, where the debtor has some resources with which to meet the debt, a statutory scheme which does not require these resources to be attached before an order of imprisonment may be sought does not impair the debtor’s right to liberty as little as possible. The judge here held that the reasoning of the European Court of Human Rights in the case of *Saadi v United Kingdom*⁵⁵ applied equally to protection of the right to liberty under the Constitution as under the ECHR. This decision was interpreted by Laffoy J as illustrating that the detention of an individual is such a serious measure that it may only be justified when used as a last resort where less restrictive measures have been considered and found to be insufficient to safeguard the individual or public interest.⁵⁶ Similarly, the right is infringed more than necessary by the failure of the provision to impose procedural safeguards such as a requirement of personal service of the order for arrest and imprisonment and the inclusion of a penal endorsement on this order. Furthermore, the absence of a mechanism in section 6 for re-entering the application for arrest and committal before the District Court after the order is made, “infects the provision with arbitrariness and unfairness.”⁵⁷ Finally, the judge noted that the view in the *Saadi* case that the duration of the detention is relevant to deciding whether there has been a disproportionate interference with the right to liberty under the ECHR applies by analogy when considering the right to liberty under the Irish Constitution.

2.33 The decision of Laffoy J in *McCann* confirms that the right to liberty of debtors must be respected by the law on debt enforcement, and that imprisonment may only be used as a method of enforcement against debtors who have been proven to have the means to pay and yet refuse to honour their obligations. Imprisonment may only be used as an absolute last resort, where no other method of enforcement is available.

2.34 The reasoning of Laffoy J has significance beyond the context of the right to liberty, and serves to direct the general approach which the law should take to the enforcement of judgments. The decision identifies the enforcement of contractual obligations as a legitimate aim in the public interest which may justify certain interference with the rights of debtors. Enforcement must nonetheless always be proportionate. The method of enforcement used must be rationally connected to its objective, the least restrictive method possible and its effect on the rights of debtors must be proportionate to the objective which it seeks to achieve. This principle of proportionate enforcement will appear as a fundamental principle throughout this Consultation Paper.⁵⁸

(3) Privacy

2.35 Both the Constitution of Ireland and the ECHR provide for the protection of the right to privacy. As is the case in many other countries, the right to privacy is not expressly protected, but Irish courts have found the right to be implicitly guaranteed by the Constitution of Ireland.⁵⁹ In contrast, Article 8 ECHR expressly guarantees the right to respect for private and family life.⁶⁰ The ECtHR has given a very broad interpretation to the concept of “private life” and has refused to provide a single definition of the

⁵⁴ *McCann op cit.* at 82.

⁵⁵ ECtHR Grand Chamber, Unreported, 29th January 2008.

⁵⁶ *McCann v The Judge of Monaghan District Court and Others* [2009] IEHC 276 at 83.

⁵⁷ *Ibid.*

⁵⁸ See paragraphs 2.93 to 2.100 below.

⁵⁹ See generally Delany and Carolan *The Right to Privacy* (Thomson Round Hall 2008) at 35ff.

⁶⁰ The text of Article 8 reads:

“(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

term.⁶¹ The right to privacy under both regimes consists of various elements, and the law on debt enforcement could thus potentially impact on disparate aspects of privacy rights.

(i) Informational Privacy

2.36 One particular element of the right to privacy recognised under both the Constitution of Ireland and the ECHR is the right to informational privacy.⁶² This form of privacy concerns the right to prevent the dissemination of information of a private nature.⁶³ Delany and Carolan note that this form of privacy has been recognised and applied by the Irish courts without demur in the cases in which it has been raised.⁶⁴ Perhaps most relevantly for present purposes, in the case of *Haughey v Moriarty* Hamilton CJ stated that

“[f]or the purpose of this case, and not so holding, the Court is prepared to accept that the constitutional right to privacy extends to the privacy and confidentiality of a citizen’s banking records and transactions.”⁶⁵

The court also recognised that this right to privacy in respect of banking records is protected at common law by the duty of confidentiality owed by a bank to its clients. Similarly, it has been established under the ECHR that Article 8(1) places restrictions on how the State stores, processes and disseminates information about individuals.⁶⁶ The duty of banking confidentiality and data protection rules as aspects of the right to privacy are discussed further in Chapter 4.⁶⁷

2.37 The first problematic issue regarding debtors’ privacy rights arises in relation to the consequences of the potential introduction of a general attachment of earnings mechanism in Ireland.⁶⁸ As will be discussed in more detail below, such a procedure requires the participation of the judgment debtor’s employer in the enforcement process, as the employer must make deductions from the debtor employee’s earnings and forward these to the judgment creditor(s). This process could risk infringing debtors’ rights to informational privacy. Irish legislation, in the form of section 46 of the *Consumer Credit Act 1995*, already exhibits a policy of protecting employees’ informational privacy in respect of their financial circumstances as against their employers. Thus this section prevents a creditor from communicating with a consumer’s employer unless that employer is party to the financial agreement between consumer and creditor. Thus if such a measure is introduced, privacy rights of debtors must be amply safeguarded.

⁶¹ In *Niemietz v Germany*, the Court commented that “[it] does not consider it possible or necessary to attempt an exhaustive definition of the notion of “private life”. However, it would be too restrictive to limit the notion to an “inner circle” in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.” (1993) 16 EHRR 97 at paragraph 29. See Delany and Carolan *The Right to Privacy* (Thomson Round Hall 2008) at 139ff.

⁶² See Delany and Carolan *The Right to Privacy* (Thomson Round Hall 2008) at 55ff.

⁶³ *Ibid.*

⁶⁴ *Ibid.*, citing *Hanahoe v Hussey* [1998] 3 IR 69; *Gray v Minister for Justice, Equality and Law Reform* [2007] IEHC 52.

⁶⁵ [1999] 3 IR 1, 58.

⁶⁶ See Lord Lester and Pannick *Human Rights Law and Practice* (2nd ed Butterworths 2004) at paragraph 4.8.43. *Leander v Sweden* [1987] 9 EHRR 433 ECt HR and *MS v Sweden* (1999) 28 EHRR 313. See also Jacob *The Legality of Debt Enforcement – A Justice Discussion Paper* (Justice 2003) at 44 and *Effective Enforcement – Improved Methods for Recovery for Civil Court Debt and Commercial Rent and a Single Regulatory Regime for Warrant Enforcement Agents* (Lord Chancellor’s Department 2003) at 57-58.

⁶⁷ See paragraphs 4.71 to 4.76 below for a discussion of Irish and European data protection rules, and paragraph 4.90 below for a discussion of the common law duty of banking confidentiality.

⁶⁸ See paragraphs 6.253 to 6.330 below for the Commission’s examination of the possibility of introducing a general attachment of earnings system into Irish law. For a discussion of the potential interference with the rights of employees arising under attachment of earnings orders, and the means by which such rights can be safeguarded, see paragraphs 6.291 to 6.296 and 6.303 to 6.308.

2.38 A second threat to the guarantee of informational privacy is to be found in the possibility of increasing access to data relating to a debtor's financial status as part of creditworthiness assessments and enforcement proceedings. As will be seen below, a fundamental flaw in the current enforcement system is the lack of readily available information concerning debtors' assets and means. This prevents effective and individually appropriate enforcement decisions from being made in each particular enforcement proceedings.⁶⁹ Thus an improved system, whether it is to be creditor-driven or overseen by enforcement body, will require accurate and detailed information concerning a debtor's financial circumstances.⁷⁰ Similarly, the expansion of systems of credit reporting⁷¹ and of registering judgment debts⁷² may facilitate responsible lending practices. This would obviously involve the dissemination of the debtor's financial information to creditors or third parties. Any proposals recommending such reforms must be conscious of the need to respect the informational privacy rights of debtors.

2.39 In this regard it is important to note that the interference with a debtor's privacy rights in this situation may be capable of justification.⁷³ The Irish courts have recognised that the right to privacy is not absolute, and the ECHR outlines specific justifications for interference with the right under Article 8(2).⁷⁴ In particular, the storage and dissemination of such information relating to individual debtors may be "necessary in the interests of a democratic society", for the "economic well-being of the country" and "for the protection of the rights and freedoms of others." In *Meeder v Netherlands*,⁷⁵ a legislative measure requiring a bankrupt to undergo a compulsory psychiatric examination was held to be a justifiable interference with the bankrupt's Article 8 rights as it pursued a legitimate aim of the protection of the rights the bankrupt's creditors, as well as furthering the general interest which exists in ensuring the proper administration of bankrupt estates.

2.40 This would suggest that the dissemination of information relating to a debtor's financial circumstances could be justified by the need to protect the rights of creditors and the common interest in the enforcement of court orders.⁷⁶ Nonetheless, measures which necessitate interference with Article 8 so as to vindicate the rights of creditors "must be accompanied by adequate and effective safeguards which ensure minimum impairment" of the debtor's Article 8 rights.⁷⁷

2.41 *The Commission provisionally recommends that the informational privacy rights of debtors must be respected by the law on debt enforcement.*

⁶⁹ See paragraphs 2.112 to 2.114 below.

⁷⁰ For a discussion of how access to information concerning a debtor's means as part of enforcement proceedings can be improved, see paragraphs 6.71 to 6.97 below.

⁷¹ For a discussion of possible issues which should be considered in relation to the expansion of credit reporting systems in Ireland, see paragraphs 4.41 to 4.97 below.

⁷² The Commission's provisional recommendation for the introduction of a comprehensive judgments register is discussed at paragraphs 6.187 to 6.193 below.

⁷³ Irish legislation concerning the enforcement of revenue debts does currently permit the circulation of the financial information of a debtor between the debtor's bank and the Revenue Commissioners: see section 1002(1)(b) of the *Taxes Consolidation Act 1997*. also Breslin "Revenue Power to Attach Debts under Section 73 Finance Act, 1988: Implications For Credit Institutions" (1995) 2(7) *CLP* 167. The constitutionality of the predecessor to this provision, section 73 of the *Finance Act 1988*, was upheld in the High Court decision of *Orange v Revenue Commissioners* [1995] 1 IR 517. It should however be noted that the provisions were not challenged on the grounds of interference with privacy rights.

⁷⁴ See Jacob *The Legality of Debt Enforcement – A Justice Discussion Paper* (Justice 2003) at 44.

⁷⁵ (1987) 9 EHRR 546 Com HR.

⁷⁶ See Jacob *The Legality of Debt Enforcement – A Justice Discussion Paper* (Justice 2003) at 44.

⁷⁷ *Foxley v United Kingdom* (2001) 31 EHRR 25 ECtHR at paragraph 43. See Ovey and White *Jacobs and White: European Convention on Human Rights* (4th ed. Oxford University Press 2006) at 293.

(ii) Territorial Privacy

2.42 Both Irish law and the Convention also recognise that the right to privacy encompasses a protection of spatial or territorial privacy.⁷⁸ This aspect of the right to privacy is assured in respect of the home by Article 40.5 of Constitution of Ireland, which guarantees the inviolability of the dwelling.⁷⁹ Similarly, Article 8 ECHR obliges contracting States to guarantee respect for the home, including a protection of the physical security of a home and the belongings therein.⁸⁰ Both the Constitution and the Convention also appear to provide to a certain extent a right to territorial privacy in respect of business premises.⁸¹ A typical interference with respect for the home often takes the form of a personal invasion of an individual's home, such as a forcible entry or arrest at home.⁸² Therefore close regard should be had to the potential interference with the privacy rights of the debtor involved under the procedure for the execution against goods by Sheriffs and County Registrars.⁸³

2.43 Generally, what case law exists on the practice of distress against goods has found the mechanism not to infringe the above guarantees of territorial privacy. The validity of execution against goods for the purposes of enforcing a Revenue debt was upheld in *Deighan v Hearne*⁸⁴ Here a challenge was made to legislation⁸⁵ which permitted the County Sheriff, under the authorisation of a certificate of the tax collector, to enter a tax defaulter's premises and distrain goods found therein. The plaintiff argued *inter alia* that such a provision authorising execution by the sheriff otherwise than on foot of an Order of the Court was unconstitutional. This argument was dismissed after little discussion by the Court. Murphy J held that such a power to enter a premises for the purposes of seizing goods therein could be justified by the common good. Since execution as part of private debt enforcement always takes place under a Court Order, the greater protection provided to a debtor in such cases would, in light of *Deighan*, suggest that this mechanism is constitutionally sound.

2.44 The European Commission of Human Rights has previously found the practice of forcible entry to attach and sell moveable goods in a dwelling to be compatible with the Article 8 guarantee. In the decision of *K v Sweden*,⁸⁶ the defendant state did not contest that the enforcement operation in question constituted an interference with the applicant's right to respect for her private life and her home. The question then arose as to whether such interference could be justified. The Commission held that it indeed could be, applying the Article 8(2) justificatory criteria to the facts at hand. First, the interference with the right was "in accordance with law" as the enforcement legislation permitting the bailiff's actions was formulated in a precise manner. Furthermore, the fact that the Swedish courts possessed a power to review the seizure was considered to provide protection to the individual against arbitrary interference by

⁷⁸ See Delany and Carolan *The Right to Privacy* (Thomson Round Hall 2008) at 45, citing *Director of Public Prosecutions v McCreesh*, [1992] 2 IR 239, where the Supreme Court stated that the right to privacy in the home is inherent both in the Constitution and in the common law.

⁷⁹ The text of Article 40.5 reads:

The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law.

⁸⁰ Ovey and White *Jacobs and White: European Convention on Human Rights* (4th ed. Oxford University Press 2006) at 249.

⁸¹ See Delany and Carolan *The Right to Privacy* (Thomson Round Hall 2008) at 46, citing *Hanahoe v Hussey* [1998] 3 IR 69 and *Cogley v RTÉ* [2005] 4 IR 79. See also *Niemietz v Germany* (1992) 16 EHRR 97 ECtHR.

⁸² Lord Lester and Pannick *Human Rights Law and Practice* (2nd ed Butterworths 2004) at 4.8.76, citing *Chappell v United Kingdom* (1990) 12 EHRR 1, ECtHR; *Murray v United Kingdom* (1994) 19 EHRR 193, ECtHR at para 86; *Niemietz v Germany* (1992) 16 EHRR 97 ECtHR.

⁸³ For a discussion of the law on execution against goods, see paragraphs 3.242 to 3.257 and 3.342 to 3.359 below. The Commission's provisional recommendations for the reform of the law in this area are discussed in Chapter 6 at paragraphs 6.331 to 6.424.

⁸⁴ [1986] IR 603.

⁸⁵ Various provisions of the *Income Tax Act 1967*.

⁸⁶ Application No 13800/88 E Com HR

the authorities. Secondly, the Commission held that the measure pursued a legitimate aim, that aim being the protection of the rights of creditors, as covered by the words “for the protection of the rights... of others” in Article 8(2). The Commission then examined whether the interference with the applicant’s rights were necessary in a democratic society, noting that the case law of the ECtHR has described this criterion as requiring an interference with rights to correspond to a pressing social need and to be proportionate to the legitimate aim pursued. The Commission found that in the present case these conditions were met, due to the particular circumstances of the case and the special problems connected with the enforcement of the claims against the judgment debtor in question.

2.45 This decision appears to have been generally accepted as affirming the compatibility of a mechanism of execution against goods with Article 8.⁸⁷ It is nonetheless important to emphasise that the Commission merely affirmed the proportionality of the mechanism in the circumstances of the particular case due to the special enforcement difficulties involved. Thus the procedure may be disproportionate under certain circumstances, where less restrictive enforcement mechanisms are available.⁸⁸ This view is shared by the UK Citizen Advice Bureau, which argues that the interference with the rights of debtors involved in execution against goods represents an excessive and undue burden when compared with the use of other enforcement methods such as attachment of earnings.⁸⁹

2.46 *The Commission provisionally recommends that the law on debt enforcement should respect the territorial privacy of debtors and that such rights should only be subject to proportionate interference where necessary to achieve an important objective.*

(iii) Human Dignity

2.47 The right to privacy under the Constitution of Ireland has been conceptualised as being founded on the Constitution’s protection of the dignity of the individual.⁹⁰ In *Kennedy v Ireland* Hamilton P stated that “[t]he nature of the right to privacy must be such as to ensure the dignity and freedom of an individual in the type of society envisaged by the Constitution...”⁹¹ Similar recognition was given to the constitutional guarantee of human dignity by Denham J in the case of *In Re a Ward of Court (No 2)*. Here the judge stated that the unenumerated rights guaranteed under Article 40.3 include a right to be treated with dignity.⁹²

2.48 Thus the law of debt enforcement must seek to respect and protect the human dignity of debtors while also vindicating the rights of creditors.⁹³ This duty to preserve the basic dignity of the individual should also encourage the law to provide solutions for those suffering from the adverse consequences of over-indebtedness. In this context, regard must also be had to the dignity of the dependents of debtors. The law must be particularly conscious of the detrimental impact of financial difficulties on the lives of children living in over-indebted households.⁹⁴ It should be noted in this regard that the United Nations *Convention on the Rights of the Child* provides that all signatory states recognise

⁸⁷ See The Scottish Law Commission *Pounding and Sale: Effective Enforcement and Debtor Protection* (Discussion Paper No 110 1999) at 40; Beatson *Independent Review of Bailiff Law* (University of Cambridge Centre for Public Law 2000) at 13.

⁸⁸ See the analysis of Jacob in relation to the impact of the procedure on the rights protected by Article 1, Protocol 1 ECHR: Jacob *The Legality of Debt Enforcement – A Justice Discussion Paper* (Justice 2003) at 54. This is discussed below at paragraph 2.54.

⁸⁹ National Association of Citizens Advice Bureaux *Undue Distress* (2000) at 4.26.

⁹⁰ See Delany and Carolan *The Right to Privacy* (Thomson Round Hall 2008) at 36-37; Hogan and Whyte *JM Kelly: The Irish Constitution* (4th ed LexisNexis Butterworths 2003) at paragraphs 7.3.222 to 7.3.223.

⁹¹ [1987] IR 587, 593.

⁹² [1996] 2 IR 79, [1995] 2 ILRM 401.

⁹³ See *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* (Council of Europe CM/Rec(2007)8, 2007) at 3(b).

⁹⁴ See Niemi-Kiesiläinen and Henrikson *Report on Legal Solutions to Debt Problems in Credit Societies* CDCJ-BU (2005) 11 rev at 21.

the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.⁹⁵

2.49 *The Commission provisionally recommends that the law on debt enforcement must at all times have regard to the need to protect the basic human dignity of debtors and their families.*

(4) The Property Rights of Debtors

2.50 The property rights of debtors can potentially be subject to interference in a variety of ways throughout the debt enforcement process. In particular, certain enforcement mechanisms such as the garnishee order procedure and the seizure for sale of a debtor's goods may impact on the property rights of the debtor.

(i) Distress against Goods

2.51 First, the procedure of execution against goods obviously involves an interference with the property of the debtor. This procedure allows a sheriff, under an order of court, to enter upon the premises of the debtor and to seize and subsequently sell the goods of the debtor in satisfaction of a judgment debt.⁹⁶ The court order thus gives the sheriff the authority to commit an act which, without this order, would amount to a trespass to goods.⁹⁷ The question then arises as to whether this interference is capable of justification as a mere control of the use of property or the delimitation of property rights in accordance with the common good.

2.52 Certain decisions of the ECtHR have dealt with the interference with the property rights of debtors which may occur as part of the mechanism of execution against goods. Commentators such as Jacob⁹⁸ have noted that the general legality of execution against goods was assumed by the ECtHR in *Västberga Taxi Aktiebolag and Vulic v Sweden*⁹⁹ and *Janosevic v Sweden*.¹⁰⁰ The Scottish Law Commission argues that the decision of the ECtHR in *Gasus Dosier und Fördertechnik GmbH v The Netherlands*¹⁰¹ shows that domestic legislation which allows tax authorities to seize and sell a third party's assets in certain circumstances so as to satisfy the tax debts owed by another party is not *per se* incompatible with the Convention.¹⁰² The Scottish Law Commission then argues that a system of distress or execution against goods which allows for mere distress of the debtor's goods and not those of a third party is even less likely to be found to be contrary to the Convention.¹⁰³

⁹⁵ *Convention on the Rights of the Child*, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, Article 27.

⁹⁶ See Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 64ff.

⁹⁷ *Ibid* at 64, citing *Lloyds & Scottish Finance Ltd v Modern Cars and Caravans (Kingston) Ltd*. [1964] 2 All ER 732.

⁹⁸ See Jacob *The Legality of Debt Enforcement – A Justice Discussion Paper* (Justice 2003) at 53.

⁹⁹ Application No. 36985/97, ECtHR. Jacob cites paragraph 53 of the judgment in particular.

¹⁰⁰ Application No. 34619/9 ECtHR, especially paragraph 88. Also, *Jamil v France* proceeds on the basis that distress against goods is permissible under Article 1 Protocol 1: application No. 11/1994/458/539 ECtHR.

¹⁰¹ Application No. 15375/89 ECtHR

¹⁰² The Scottish Law Commission *Pounding and Sale: Effective Enforcement and Debtor Protection* (Discussion Paper No 110 1999) at 39. See *Gasus Dosier und Fördertechnik GmbH v The Netherlands* Application No. 15375/89, especially paragraph 66.

¹⁰³ The Scottish Law Commission *Pounding and Sale: Effective Enforcement and Debtor Protection* (Discussion Paper No 110 1999) at 39. While this is true, it must be noted that the Court was keen to emphasise in its decision the particular situation of tax authorities which differs from that of commercial creditors: First, the Court noted that the second paragraph of Article 1 of Protocol 1 expressly allows for the control of the use of property by a state so as to secure the payment of taxes: see paragraph 59. Secondly, the Court stated that the purpose of the legislation authorising seizure was obviously to facilitate the enforcement of tax debts, an aim which in itself is clearly within the general interest: see paragraph 61. Thirdly, the use of such "high-ranking priority rights" allowing a tax authority to seize the property of third parties to satisfy the debts of a tax

2.53 Under Article 1 Protocol 1 ECHR an individual may be deprived of his or her possessions in the public interest and in accordance with the conditions prescribed by law, and a State may control the use of property in accordance with the public interest. The decision of the ECtHR in *James and Others v The United Kingdom* provides a detailed examination of the protection of the right to property under Article 1 Protocol 1.¹⁰⁴ The Court here stated that the compulsory transfer of property from one individual to another may in some circumstances serve a legitimate public interest.¹⁰⁵ The court continued to hold that if this taking of property is part of a policy calculated to enhance social justice then it will be in the public interest. In particular, the court held that the fairness of a system of law governing the contractual or property rights of private parties is a matter of public concern and therefore legislative measures intended to bring about such fairness are capable of being "in the public interest", even if they involve the compulsory transfer of property from one individual to another."¹⁰⁶ This reasoning would suggest that the legitimate objective of the enforcement of contracts is of sufficient public concern to provide justification for the transfer of the property of a debtor to a creditor to satisfy a properly incurred contractual debt. The Court proceeded to state that there must nonetheless be a reasonable relationship of proportionality between the aim sought to be achieved and the means employed to meet that aim, so as to ensure a "fair balance" between the demands of the general interest and the protection of the fundamental rights of the individual.¹⁰⁷

2.54 Jacob cites the above reasoning as indicating that execution against goods may be compatible with the Convention provided the mechanisms used contain sufficient safeguards to protect the individual.¹⁰⁸ The legitimate aims in the public interest at issue in this context are the protection of the sanctity of contract and the protection of the rights and freedoms of creditors. Nonetheless, these aims could in certain cases be achieved through other less restrictive enforcement mechanisms, and so Jacob argues that the procedure of execution against goods is "only proportionate and only ECHR compliant, so long as it is actually the last resort."¹⁰⁹ Where other less restrictive methods of enforcement are available and appropriate, they must be used before the restrictive procedure of execution against goods is deployed.

(ii) Attachment of Debts/Garnishee

2.55 The attachment of debts or garnishee procedure, as discussed below, also involves an interference with the property rights of a debtor. In the case of *Orange v Revenue Commissioners*, Geoghegan J stated that the attachment of a debt, in this case in favour of the Revenue Commissioners, constitutes an attack on the property rights of the individual to whom the attached debt is owed.¹¹⁰ The debt, as a chose in action, constitutes a property right and the effective removal of the chose in action is thus an attack on this right.¹¹¹

payer was partly justified by the fact that tax authorities do not have the same facilities as commercial creditors for protecting themselves against the consequences of the financial problems of their debtors: see paragraph 71.

¹⁰⁴ Application No. 8793/79 [1986] ECHR 2, ECtHR. See Jacob *The Legality of Debt Enforcement – A Justice Discussion Paper* (Justice 2003) at 53.

¹⁰⁵ Application No. 8793/79, [1986] ECHR 2 at paragraphs 40ff.

¹⁰⁶ *Ibid* at paragraph 41.

¹⁰⁷ Application No. 8793/79, [1986] ECHR 2 at paragraph 50. Provided the legislature has acted reasonably and is conscious of the need to strike a fair balance, the Court stated that it will not intervene and decide which means of achieving the social goal which the legislative policy sought to attain is best: paragraph 51.

¹⁰⁸ See Jacob *The Legality of Debt Enforcement – A Justice Discussion Paper* (Justice 2003) at 54.

¹⁰⁹ *Ibid*.

¹¹⁰ [1995] 1 IR 517, 521.

¹¹¹ *Ibid* at 524.

2.56 The judge however cautioned that this did not necessarily mean that the statutory provision authorising this attachment of a debt was an *unjust* attack on property rights.¹¹² In fact, the judge proceeded to state that “there would not appear to be anything inherently unconstitutional in a statutory provision effecting an attachment of a debt.”¹¹³ The decision concluded that on the facts of the case the attachment procedure under s73 of *the Finance Act 1988* was compatible with the requirements of the Constitution. First, the fact that the attachment was effected by the Revenue Commissioners and not by a court did not constitute a violation of Article 34 of the Constitution’s protection of the principle of the separation of powers. The judge held that the enforcement mechanism of attaching the debt was an administrative, rather than a judicial, function. Secondly, the attachment procedure contained sufficient safeguards so as not to constitute an attack on the constitutional property right to earn a livelihood. These took the form of providing notice to the tax defaulter and so providing him or her with the opportunity to enter negotiations and make representations in order to avoid the attachment procedure.¹¹⁴ The responsible conduct of the Revenue Commissioners in engaging in negotiations and attempting to come to a repayment agreement meant that on the facts the procedure in this case could not be regarded as unconstitutional. The judge did nonetheless hold that an attachment of a debt could in certain circumstances constitute an unconstitutional attack on the right to a livelihood, but unfortunately for present purposes did not suggest what such circumstances might involve.¹¹⁵

2.57 This case therefore illustrates that the property rights of debtors must be considered under the garnishee order procedure. Procedural safeguards must be in place so that recourse is only had to this procedure in appropriate cases, where it is necessary and proportionate.

(iii) The Right to Earn a Livelihood and Attachment of Earnings

2.58 The right to earn a livelihood has been recognised by the Irish courts as an unenumerated personal right protected by the Constitution under Article 40.3.1^o, as well as possibly a property right under Article 40.3.2^o.¹¹⁶ This right has also been recognised internationally by such provisions as Article 6 of the *UN Covenant on Economic, Social and Cultural Rights 1966*, which guarantees “the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts”.¹¹⁷ If an attachment of earnings mechanism is introduced into Irish law as part of a reform of the debt enforcement process this right will have to be considered and given appropriate weight.

2.59 First, there is a risk that if the amount of a debtor’s earnings attached is too high, all incentives for that debtor to work will be removed and the debtor may be deprived of all of the advantages of gainful employment.¹¹⁸ Previous studies have argued that a large attachment of earnings order resulting in a low protected earnings rate can act as a major employment disincentive as the employee debtor is left with either a very small income or no income at all once a basic subsistence level is passed.¹¹⁹ The Irish Supreme Court has held that the Constitutional right to earn a livelihood includes associated rights such as the right to a pension, gratuity or other emolument, or the right to the advantages of a subsisting contract of employment, which are all property rights guaranteed by the Constitution.¹²⁰ These rights

¹¹² [1995] 1 IR 517, 521.

¹¹³ *Ibid* at 522.

¹¹⁴ [1995] 1 IR 517, 522-524.

¹¹⁵ *Ibid* at 523.

¹¹⁶ This right has been recognised by the Irish courts as an unenumerated right inherent in the guarantees of Article 40.3.1^o, as well as forming part of the property rights protected by Article 40.3.2^o. See Generally Hogan and Whyte *JM Kelly: The Irish Constitution* (4th ed LexisNexis Butterworths 2003) at [7.3.84] ff.

¹¹⁷ See also Niemi-Kiesiläinen and Henrikson *Report on Legal Solutions to Debt Problems in Credit Societies* CDCJ-BU (2005) 11 rev at 21.

¹¹⁸ For a more detailed discussion of the task of setting the rates of income to be deducted under attachment of earnings orders, see paragraphs 6.274 to 6.282 below.

¹¹⁹ See Joyce *An End Based on Means?* (Free Legal Advice Centres, 2003) at 53.

¹²⁰ *In the Matter of Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321, 342.

must thus be given sufficient weight when balancing the relevant rights and interests at stake in assessing the merits of adopting an attachment of earnings system.

2.60 The second possible interference with a debtor's right to earn a livelihood could arise from the possible detrimental impact caused to the employer/employee relationship by an attachment of earnings procedure.¹²¹ A concern has been raised that the making of an attachment of earnings order could sometimes lead to difficulties for an employee in achieving promotion or advancement at work. This concern is based on the risk that an employer may, either consciously or subconsciously, gain an unfavourable impression of the employee due to his or her knowledge of the employee's debt difficulties.¹²² In the worst case scenario, there is even a risk that the employee may be dismissed from his or her employment entirely. While certain research has indicated that the risk of a detrimental impact on the employee/employer relationship may be sometimes exaggerated,¹²³ the possibility of such a disadvantageous impact must be taken into account in formulating recommendations for reform in this area.

2.61 When discussing the impact of an attachment of earnings mechanism on the debtor's constitutional right to earn a livelihood, it is useful to consider the discussion of this right in the context of the attachment of a debt in the judgment of Geoghegan J in *Orange v Revenue Commissioners*.¹²⁴ The court's findings in relation to the possible infringement of the right to a livelihood have been discussed above. Where the procedure leading to the making of an attachment of earnings order gives the debtor notice of the possibility of such an attachment, and allows the debtor to engage in negotiations and reach an agreement with creditors, no unjustifiable interference with the debtor's rights occurs. The debtor enters such an agreement in the knowledge that should he or she default in the terms of the agreement an attachment order could result. Thus it appears that if the attachment of earnings procedure is used in a proportionate manner where alternative means of resolving the dispute are first attempted, then the constitutional guarantee of the debtor's right to a livelihood will not be disproportionately affected.

2.62 *The Commission provisionally recommends that the property rights of debtors, including the right to earn a livelihood, must be respected by the law on debt enforcement.*

C Interests of Society

2.63 As well as balancing the competing rights of creditors and debtors, the law on debt disputes and the enforcement of judgments must also have regard to the important interests of society in this area of law. This section identifies certain public interests and aims which must be taken into account when considering the law in this area.

(1) The Rule of Law

2.64 The fundamental principle of the rule of law requires that legal rights must be vindicated and that the authority of the courts must be protected.

(a) Legal Rights must be Vindicated

Irish democracy is founded upon the principle of the rule of law. This principle can be given effect only if citizens possess the means to assert and vindicate their legal rights and challenge unlawful acts, so that the precepts of the law can be given real and genuine effect.¹²⁵ As Jacob has noted,

¹²¹ For a discussion of this problem, and the legislative safeguards which could be introduced to provide protection for employees who have been made subject to attachment of earnings orders, see paragraphs 6.291 to 6.296 below.

¹²² See Joyce *op cit.* at 52-53, citing Walls and Bergin *The Law of Divorce in Ireland* (Jordans 1997) at 138-141.

¹²³ *Enforcement of Civil Obligations in Scotland Enforcement of Civil Obligations in Scotland – A Consultation Document (The Scottish Executive 2002)* at 96.

¹²⁴ [1995] 1 IR 517.

¹²⁵ *Recommendation of the Committee of Ministers to member states on enforcement* (Council of Europe Rec(2003)17, 2003).

“[c]ourt orders are the sharp edge of the rule of law: without them the doctrine loses meaning.”¹²⁶

2.65 Therefore, if a court has pronounced on the legal rights of the parties to a dispute, the rule of law demands that this judgment must be effectively enforced so that those rights may be vindicated, and that real effect may be given to the law.

(b) ***Integrity of the Courts Requires Enforcement***

2.66 It is essential to the protection of the constitutional role of the courts as administrators of justice under Article 34 that court orders are enforced. The legitimacy and integrity of the courts would be compromised if judgment debtors could evade court orders. For this reason, enforcement mechanisms must be effective and must not permit deliberately evasive debtors to frustrate court judgments.¹²⁷ As Sir Jack Jacob has commented:¹²⁸

“... the machinery of the enforcement of the judgments and orders of the court constitute the very foundation of the judicial process ... Without the supportive enforcement machinery, the judgments and orders of the court would lose their force and effect and become transformed into mere pious resolutions; with an effective enforcement machinery, they should command unquestioning and unconditional compliance.”¹²⁹

2.67 In a similar manner, it is important that futile orders are not made by the courts. Thus, if a debtor is unable to pay the amount ordered, enforcement of a judgment will be impossible, and the integrity of the court may be compromised by the making of an order which will never be enforced.¹³⁰ This point provides further support for the need to draw a distinction between those debtors who cannot pay and those who will not pay.

2.68 A related concern is the risk that if the law cannot provide an effective system of enforcement, other forms of “private justice” may develop and further compromise the authority of the legal system.¹³¹ If the judicial enforcement system is inefficient, due to high costs or long delays, creditors may resort to other means to collect debts. This would create a danger that dubious intimidating tactics could be employed by creditors or their agents in order to recover monies owed.¹³² Therefore the principle of the rule of law requires effective enforcement mechanisms so as to remove the need for creditors to have recourse to such practices. Furthermore, as long as private debt collection agencies continue to operate, efforts should be made to ensure that their practices are lawful and respect the rights of debtors.

(c) ***Moral Issues***

2.69 Apart from legal arguments, there is also a strong moral interest that judgments be effectively enforced and debts repaid. It is a fundamental common value of our society that promises should be kept and that obligations freely undertaken should be honoured. To this extent, the legal enforcement of

¹²⁶ See Jacob *The Legality of Debt Enforcement – A Justice Discussion Paper* (Justice 2003) at 1.

¹²⁷ See Capper “Taking Enforcement Seriously – Lessons from Northern Ireland” 2006 CJQ 485 at 485.

¹²⁸ Jacob, *The Fabric of English Civil Justice* (Stevens 1987), pp.185-186.

¹²⁹ It was this logic which led to the judicial development of the interlocutory order known as the *Mareva* injunction, which seeks to prevent the intentional dissipation by a judgment debtor of his or her assets in order to avoid paying a sum ordered by the court. See Capper “Taking Enforcement Seriously – Lessons from Northern Ireland” 2006 CJQ 485 at 485. Thus it has been stated that the rationale for this type of injunction is “to prevent the judgment... for a sum of money being a mere ‘brutum fulmen’” or empty threat: *The Siskina* [1979] AC 210, 253, per Lord Diplock.

¹³⁰ See Alberta Law Reform Institute *Enforcement of Money Judgments Volume 1* (Report No. 61, 1991) at 21.

¹³¹ *Recommendation of the Committee of Ministers to member states on enforcement* (Council of Europe Rec(2003)17, 2003).

¹³² See Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 117; *Striking the Balance: A New Approach to Debt Management* (The Scottish Executive 2001) at 9.

judgments aims to support and protect this precept.¹³³ Our legal system would fail in its moral duty if it did not provide the means to give effect to this important value of our society.

(2) Efficiency of the Economy

2.70 Society also has an interest in providing efficient enforcement procedures due to the economic impact of such mechanisms. An effective enforcement system is a condition for a well-functioning credit market.¹³⁴ The results of studies illustrating the impact of debt enforcement procedures on the availability and cost of credit are now presented.

(a) Availability of Credit

2.71 Law and finance theory has illustrated that there is a positive association between legal institutions and financial development and it is now generally accepted among commentators that legal institutions are important to financial markets.¹³⁵ Various studies have illustrated the practical application of this theory, by showing how efficient and effective enforcement mechanisms increase lender confidence and so encourage them to provide credit more readily. On the contrary, banks will be reluctant to lend where they are unsure that their contractual rights will be effectively enforced. Poor legal enforcement mechanisms have been shown to reduce the ratio of credit to GDP and the volume of credit made available.¹³⁶ This has the negative consequence of leaving many households credit-constrained and deprived of access to credit facilities.¹³⁷ Also, studies show that when legal measures are introduced to provide increased protection of creditor rights with the aim of increasing lending levels, such reforms lead to dramatic increases in the availability of credit in legal systems which provide effective enforcement procedures.¹³⁸ In contrast, such reforms are largely ineffectual in systems which do not provide effective mechanisms to enforce such creditor rights.¹³⁹

2.72 It has thus been concluded from such research that the quality of enforcement procedures is linked to the provision of credit and the accompanying entrepreneurial investment and economic growth.¹⁴⁰ For this reason, society has a strong interest in ensuring that legal enforcement mechanisms encourage the provision of credit.

(b) The Cost of Available Credit

2.73 Along with increasing the volume of credit made available by lenders, efficient enforcement mechanisms have also been shown to reduce the levels of interest charged by lenders.¹⁴¹ In fact, one

¹³³ See *Alberta Law Reform Institute Enforcement of Money Judgments Volume 1 op cit.* at 21.

¹³⁴ Niemi-Kiesiläinen and Henrikson *Report on Legal Solutions to Debt Problems in Credit Societies* CDCJ-BU (2005) 11 rev at 20.

¹³⁵ Safavian and Sharma, "When Do Creditor Rights Work?" (World Bank Policy Research Working Paper No. 4296, 2007). Available at SSRN: <http://ssrn.com/abstract=1004651>, citing e.g. La Porta, López-de-Silanes, Shleifer and Vishny, "Legal Determinants of External Finance (1997) 52 *Journal of Finance* 1131; La Porta, López-de-Silanes, Shleifer and Vishny "Law and Finance" (1998) 100 *Journal of Political Economy* 113.

¹³⁶ See Pinheiro and Cabral "Credit Markets in Brazil: The Role of Judicial Enforcement and Other Institutions" in Pagano ed. *Defusing Default: Incentives and Institutions* (Johns Hopkins University Press 2001).

¹³⁷ See Fabbri and Padula *Does Poor Legal Enforcement Make Households Credit-Constrained?* (Research Paper No. 81, International Center for Financial Asset Management and Engineering, 2003) at 3.

¹³⁸ Safavian and Sharma, *op cit* at 15-19.

¹³⁹ Safavian and Sharma, "When Do Creditor Rights Work?" (World Bank Policy Research Working Paper No. 4296, 2007). Available at SSRN: <http://ssrn.com/abstract=1004651> at 15-19.

¹⁴⁰ Visaria "Legal Reform and Loan Repayment: The Microeconomic Impact of Debt Recovery Tribunals in India" (Boston University Department of Economics, The Institute for Economic Development Working Papers Series DP-157 2006) at 1.

¹⁴¹ See e.g. Laeven and Majnoni, "Does Judicial Efficiency Lower the Cost of Credit?" (World Bank Policy Research Working Paper No. 3159. 2003). Available at SSRN: <http://ssrn.com/abstract=636578>.

study has shown that the efficiency of judicial enforcement is, along with the rate of inflation, the main factor influencing interest rate spreads.¹⁴² Thus inefficient enforcement mechanisms extract a significant proportion of money from economies, and thus it is likely that it would be beneficial to the economy in the long term to spend an equivalent amount of resources on reforming enforcement mechanisms. In this way, a greater protection of the legal rights of creditors can be seen to also produce benefits for borrowers, as they gain from the ability to access cheaper credit.

2.74 An example of this theory in operation can be observed in the introduction of Debt Recovery Tribunals in India in the 1990s to facilitate the efficient enforcement of loan contracts by lenders.¹⁴³ Due to concerns over the inefficiency of civil proceedings in India, and in particular the long delays in the hearing of disputes and the execution of judgments, the Indian government introduced the *Recovery of Debts due to Banks and Financial Institutions Act 1993*. This Act aimed to expedite the recovery of debts by Indian banks and financial institutions through the establishment of quasi-judicial Debt Recovery Tribunals throughout the country.¹⁴⁴ Research into the economic impact of this reform has produced significant results. First, loan default rates were reduced by between 3% and 11%.¹⁴⁵ Secondly, interest rates fell considerably after the reform, with lenders charging interest rates 1.4% to 2% lower than those charged on loans before the introduction of the new adjudication and enforcement regime.¹⁴⁶ Thus the introduction of more efficient mechanisms for the enforcement of loan contracts led to cheaper credit becoming available to Indian borrowers.

2.75 It can thus be seen that efficient enforcement mechanisms are necessary to promote the availability of credit at low interest rates. Since the well functioning credit markets are essential to the growth of an economy and are also beneficial to the well-being of the individual,¹⁴⁷ society has a strong interest in ensuring that its legal enforcement system is sufficiently effective to serve the needs of the credit industry and to allow it to fulfil its important role in the economy.

(c) ***Limitations on the Link between Enforcement Procedures and Credit Supply***

Despite these considerations, it must be noted that not all unpaid debt can be attributed to failings in legal enforcement mechanisms. When creditors lend they necessarily take a risk that the loan may be unpaid, and it is this which informs the interest rates they charge. To the extent that there will always be certain debtors who are simply unable to pay, the most efficient enforcement mechanisms can only go so far in facilitating the availability of credit at low interest rates.¹⁴⁸ Thus there will always be a certain amount of unpaid debt in the economy as long as lenders extend credit where there is a risk as to the borrower's ability to repay. This also has the consequence that while enforcement mechanisms should be efficient, they should not be used against over-indebted "can't pay" individuals. For these reasons, creditors are now more open to the settling of debt issues outside the judicial system as they realise that many debts go unpaid due to financial difficulties of debtors rather than attempts of delinquent debtors to evade their obligations.

¹⁴² Laeven and Majnoni *op cit.* at 18.

¹⁴³ See Visaria "Legal Reform and Loan Repayment: The Microeconomic Impact of Debt Recovery Tribunals in India" (Boston University Department of Economics, The Institute for Economic Development Working Papers Series DP-157 2006); Shroff "The Indian Debt Recovery Act" [1995] 1 JIBL 29.

¹⁴⁴ These tribunals were then vested with sole jurisdiction to hear all actions to recover debts due to banks and financial institutions over the threshold amount of one million rupees. They followed a streamlined summary procedure which provided for the faster processing of claims.

¹⁴⁵ Visaria *op cit* at 30.

¹⁴⁶ *Ibid.*

¹⁴⁷ See e.g. Recommendation of the Committee of Ministers to member states on legal solutions to debt problems (Council of Europe CM/Rec(2007)8, 2007).

¹⁴⁸ See Enforcement Review: Report of the First Phase of the Enforcement Review (Department of Constitutional Affairs, 2000) at paragraph 6.

2.76 In addition, there are a range of non-legal incentives and sanctions which assure performance of obligations, such as reputation, the pressure of continuing relationships with lenders and the desire to be a “good citizen”.¹⁴⁹ Thus, while enforcement mechanisms remain importantly linked to credit supply, it has been argued that the sharing of credit histories between creditors through credit reporting systems is more effective than the threat of effective legal enforcement in assuring repayment of debts and thus a steady credit supply.¹⁵⁰ In this way debtor data sharing may be seen to reduce the need for legal enforcement while at the same time ensuring that supply lines of credit remain open.¹⁵¹

2.77 It may also be incorrect to see the role of judicial enforcement mechanisms as formulating micro-economic policy,¹⁵² and this Consultation Paper will for this reason seek to avoid engaging too deeply in the area of economic policy choices relating to credit markets.

2.78 Nonetheless, the importance of efficient enforcement mechanisms to the provision of credit must be emphasised. Thus while it is necessary to remain conscious of the need to protect individual debtors, regard must be had to the general interest in the free supply of credit. This is indicated by Article 45.2.iv of *Constitution of Ireland*, which provides that:

“[t]he State shall... direct its policy towards securing... that in what pertains to the control of credit the constant and predominant aim shall be the welfare of the people as a whole.”

(3) Fundamental Principles of Contract Law

2.79 It is in the common interest that fundamental principles of the law of contract are amply respected by debt enforcement procedures. Commerce is founded on such principles and it is these core rules which govern everyday commercial and consumer relations between members of society. Thus the protection of a fair and effective law of contract is a legitimate aim which may occasionally restrict or qualify the rights of members of society.

2.80 The importance of this principle and the extent to which it justifies restrictions on the rights of debtors was affirmed in the 2009 Irish High Court judgment of *McCann v The Judge of Monaghan District Court and Others*. Here Laffoy J noted that an effective statutory scheme for the enforcement of contractual obligations is “unquestionably a reasonable and legitimate objective in the interests of the common good in a democratic society.”¹⁵³ This principle was recognised by the ECtHR in the case of *James and Others v The United Kingdom*.¹⁵⁴ Here the Court held that an interference with the applicants’ property rights could be justified by the social aim of ensuring a fair system of contract law and property rights. The Court stated that the fairness of a system of law governing the contractual rights of private parties is a matter of public concern and a legitimate public interest for the purposes of the Convention.¹⁵⁵

2.81 In particular, efficient and effective enforcement mechanisms are required in order to protect and vindicate the two fundamental principles of freedom of contract and the binding force of contract.¹⁵⁶ The principle of freedom of contract was described by Lord Diplock when he stated that “A basic principle

¹⁴⁹ Ramsay “Debtors and Creditors: Themes and Issues” in Ramsay (ed.) *Debtors and Creditors* (Professional Books Limited 1986) at 8.

¹⁵⁰ Duygan-Bump and Grant *Household Debt Repayment Behaviour: What Role do Institutions Play?* Federal Reserve Bank of Boston Working Paper No. QAU08-3, (The Quantitative Analysis Unit of the Federal Reserve Bank of Boston, 2008) available at: <http://www.bos.frb.org/bankinfo/qau/index.htm> at 16.

¹⁵¹ Ramsay *op cit* at 9. Similarly, the ability of large lending organisations to reschedule debts and build a certain level of “bad debt” within their portfolios mean that creditors are perhaps not as reliant as they once were on the enforcement mechanisms of the courts.

¹⁵² See Scott “Civil Justice Review: Enforcement of Debt” (1987) 6 *Civil Justice Quarterly* 194.

¹⁵³ [2009] IEHC 276 at 81.

¹⁵⁴ Application No. 8793/79, ECtHR [1986] ECHR 2.

¹⁵⁵ *Ibid* at paragraph 41.

¹⁵⁶ See Beale et al *Chitty on Contracts: Volume 1 General Principles* (30th ed. Thomson Reuters (Legal) 2008) at 10-19.

of the common law of contract... is that parties to a contract are free to determine for themselves what primary obligations they will accept.¹⁵⁷ Freedom of contract has also been described as a general principle of civil law by the European Court of Justice and is protected by Article 16 of the EU Charter of Fundamental Rights under the guarantee of the freedom to conduct business.¹⁵⁸ An equally fundamental rule of contract law is the binding force of contracts or the “sanctity of contract”.¹⁵⁹ The authors of *Chitty on Contract* point to the methods which the courts use to enforce contracts,¹⁶⁰ the refusal of the courts to deny effect to contracts on general grounds of unfairness or inequality, and the development of the law of frustration¹⁶¹ as evidence of this principle.

2.82 While both of these principles have been qualified by jurisprudential and legislative developments in recent times, they remain part of the bedrock of contract law. They reflect the conception of contract as the free expression of the choices of the parties which will then be given effect by the law.¹⁶² They are illustrative of the connection between autonomy, freedom and the binding effect of parties’ bargaining choices.¹⁶³

2.83 Thus it is clear that the fundamental concept that parties should honour the contractual commitments, according to the terms into which they have freely entered, must borne in mind when recommending reforms of the law of debt enforcement. This has the consequence that the vindication of these principles may at times require an element of coercion.¹⁶⁴ It is however important that the law provides for the least coercive methods possible and that any interferences with the rights of debtors are proportionate to the need to vindicate the rights of creditors and protect society’s interest in the fairness of contractual relations. Also, while respecting the principles of contract law, it is necessary not to lose sight of the reality of the over-indebted consumer, and the law must recognise that these principles must be restricted in certain cases where the performance of a contract is impossible.

(4) Prevention and Alleviation of Over-Indebtedness

2.84 The serious negative consequences of over-indebtedness for debtors and their families as well as for society at large have been described above.¹⁶⁵ It is in the common interest both that members of society do not personally suffer from the severe adverse effects of over-indebtedness and that society is not obliged to maintain debtors and their families when their over-indebtedness renders them unable to provide for themselves. Thus the prevention and alleviation of the problem of over-indebtedness is a legitimate aim in which society has a strong interest.

¹⁵⁷ *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 848.

¹⁵⁸ *Beale et al Chitty on Contracts: Volume 1 General Principles* (30th ed. Thomson Reuters (Legal) 2008) at 10-19, citing European Commission, *Explanations Relating to the Charter of Fundamental Rights* [2007] OJ C303/17, 23.

¹⁵⁹ See *Beale et al Chitty on Contracts: Volume 1 General Principles* (30th ed. Thomson Reuters (Legal) 2008) at 16. This principle is well expressed by Article 1134 of the French Civil Code, which states that contracts legally formed have the effect of law as between the contracting parties. See also Basedow “Freedom of Contract in the European Union” (2008) 16(6) *ERPL* at 902.

¹⁶⁰ Specific performance, injunction, action for the agreed contract price.

¹⁶¹ It has been confirmed that the doctrine of frustration allows parties to escape from their bargain if a change of circumstances makes performance radically different from what they agreed, rather than denying effect to the contract simply on the grounds of unfairness. See *Davis Contractors Ltd v Fareham Urban DC* [1956] AC 696, 720-729.

¹⁶² See *Beale et al Chitty on Contracts: Volume 1 General Principles* (30th ed. Thomson Reuters (Legal) 2008) at 10-19.

¹⁶³ Basedow “Freedom of Contract in the European Union” (2008) 16(6) *ERPL* at 902.

¹⁶⁴ See *Striking the Balance: A New Approach to Debt Management* (The Scottish Executive 2001) at 14.

¹⁶⁵ See paragraphs 1.11 to 1.15 above.

2.85 The legitimate social aim of addressing the problem of over-indebtedness has also recently been recognised at European level. Members of the Council of Europe have recently committed themselves to finding legal solutions to debt problems.¹⁶⁶ The Committee of Ministers of the Council of Europe have acknowledged that the use of credit has become an essential part of the economies of Member States and stressed the responsibility of Member States for the consequences of their social and economic policies. Similarly, the European Commission has identified the problem of over-indebtedness and has sought to produce policy guidance on how Member States of the European Union could address this issue.¹⁶⁷

2.86 It is thus clear that society has an interest in preventing and alleviating the problem of over-indebtedness amongst its members. The ECtHR has indicated that when dealing with social and welfare issues, Contracting States have a particularly wide margin of appreciation, and thus the pressing need to address over-indebtedness will permit proportionate interferences with the rights of creditors.¹⁶⁸

D Key Principles for Reform

2.87 Drawing on the above analysis, the Commission concludes that the following key principles should inform the reform of the law of debt management and debt enforcement.

(1) A Balanced Approach to Debt Enforcement

2.88 A fundamental guiding principle in reforming the law must be the need to provide a balance between the rights of creditors and debtors and the interests of society. The above analysis has illustrated the competing rights of debtors and creditors which must be reconciled by the law in this area. As Capper notes:

“any reasonable enforcement system must maintain an even balance between protecting the rights of creditors by enforcing judgments that can be enforced and protecting debtors from possible oppression by identifying those situations where enforcement is impossible.”¹⁶⁹

2.89 Undoubtedly a primary goal of the reform of the law of debt enforcement must be to provide effective and efficient methods for enforcing court judgments. In this light it should be recalled that the ECtHR held in *Apostol v Georgia* that Contracting States are under a “positive obligation to organise a system for enforcement of judgments that is effective both in law and in practice.”¹⁷⁰

2.90 It is equally vital that the law on debt enforcement respects and protects the rights of debtors, especially defending the interests of those debtors who do not have the means to pay. Society’s interest in the alleviation of the social problem of over-indebtedness must also be considered, with the recognition that the law must provide solutions other than enforcement for over-indebted individuals.

2.91 This Consultation Paper therefore seeks to propose recommendations for a system of resolving debts disputes in a manner which achieves a balance between these competing rights and interests.

2.92 *The Commission provisionally recommends that a guiding principle of the law on debt management and debt enforcement should be the need to reach a fair balance between the rights of creditors and debtors.*

¹⁶⁶ See *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* (Council of Europe CM/Rec(2007)8, 2007).

¹⁶⁷ See *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008).

¹⁶⁸ For example, in the case of *Immobiliare Saffi v Italy* the ECtHR held that “in spheres such as housing, which plays a central role in the welfare and economic policies of modern societies, the Court will respect the legislature’s judgment as to what is in the general interest unless that judgment is manifestly without reasonable foundation.” (2000) 30 EHRR 756 ECtHR at paragraph 49.

¹⁶⁹ Capper “Taking Enforcement Seriously – Lessons from Northern Ireland” 2006 CJQ 485 at 495.

¹⁷⁰ Application No. 40765/02 November 28 2006, para 64.

(2) A Proportionate Approach to Debt Enforcement

2.93 In seeking to achieve this balance, this Consultation Paper will aim to ensure that the law adopts a proportionate approach to debt enforcement. The principle of proportionality has long been applied both under Irish law¹⁷¹ and under the ECHR¹⁷² in adjudicating on the legality of interferences with fundamental rights. The principle was affirmed in the context of debt enforcement procedures in the 2009 Irish High Court case of *McCann v The Judge of Monaghan District Court and Others*.¹⁷³ Here Laffoy J described that principle as requiring a measure which restricts rights to:¹⁷⁴

- be rationally connected to a legitimate and important object;
- impair the right in question as little as possible; and
- be such that its effect on this right is proportional to the legitimate objective sought to be achieved.

Each aspect of this principle can thus inform a proportionate approach to shaping the law on debt enforcement.

(a) Appropriate Enforcement: Enforcement Rationally Connected to a Legitimate and Important Object

2.94 First, the debt enforcement mechanisms applied in any given case must be necessary to achieve a legitimate goal and must be rationally connected to that goal. The interests which the law of debt enforcement seeks to achieve - which are outlined above – must be identified and the law must set out the most appropriate means of achieving these aims.¹⁷⁵ Although the interests of society and the rights of creditors demand effective enforcement mechanisms, it is nonetheless arguable that the enforcement mechanisms applied in certain individual cases are not necessary or rationally connected to this aim. In *McCann*, Laffoy J applied this reasoning to the imprisonment of debtors and held that where the legitimate aim of an enforcement mechanism is to compel the discharge of a debt, a procedure which allowed the mechanism to be used against debtors who cannot pay could not be rationally connected to the objective and would so be disproportionate.¹⁷⁶ Similarly, the issuing of a writ of *fiery facias* against a debtor who possesses no assets capable of seizure is not rationally connected to the objective of the effective enforcement of debts. Certain enforcement mechanisms are inappropriate in given cases and the law must provide that such mechanisms cannot then be used.¹⁷⁷

2.95 In the same manner, if the debtor possesses certain assets or income which could be used to repay the debt owed, it is important the law provides appropriate means for these assets to be accessed for the purposes of enforcement.¹⁷⁸

2.96 A fundamental consequence of the principle of appropriate and rational enforcement is that sufficient information concerning the financial circumstances of the debtor must be made available to the

¹⁷¹ See Hogan and Whyte *JM Kelly: The Irish Constitution* (LexisNexis Butterworths 2003 at paragraphs [7.1.56]-[7.1.67].

¹⁷² See Lord Lester and Pannick *Human Rights Law and Practice* (2nd ed Butterworths 2004) at paragraph 3.13.

¹⁷³ [2009] IEHC 276.

¹⁷⁴ *Ibid* at 81.

¹⁷⁵ See The Scottish Law Commission *Pounding and Sale: Effective Enforcement and Debtor Protection* (Discussion Paper No 110 1999) at 10.

¹⁷⁶ *McCann v The Judge of Monaghan District Court and Others* [2009] IEHC 276 at 82.

¹⁷⁷ Capper “Taking Enforcement Seriously – Lessons from Northern Ireland” 2006 CJK 485 at 495.

¹⁷⁸ This reasoning led the Alberta Law Reform Institute to advocate a fundamental principle of “universal exigibility”, whereby the law must provide mechanisms for the enforcement of judgments against any available assets of the debtor, excluding certain “just exemptions”. See *Enforcement of Money Judgments Volume 1* (Alberta Law Reform Institute Report No. 61, 1991) at 24-25.

court and creditors so that accurate decisions can be made as to the most appropriate enforcement mechanism in a given case.

(b) ***Least Coercive Means Possible***

2.97 The doctrine of proportionality requires that any measure which infringes rights must be the least restrictive method of achieving the legitimate aim in question. This principle requires that where a choice is available between different means of achieving the same end, the means which has the least restrictive effect on the rights of the individual must be chosen.¹⁷⁹ While debt enforcement must by its nature involve a degree of coercion, the law must ensure that the methods employed are no more coercive than is necessary to achieve the objectives which enforcement serves in any given case.

2.98 This reasoning was applied by Laffoy J in the 2009 *McCann* decision. Here the judge stated that a statute which did not require all of a debtor's assets to be attached before an order for imprisonment may be sought did not impair a debtor's right to liberty as little as possible.¹⁸⁰ Similarly, the procedure of execution against goods by the sheriff arguably involves a greater intrusion of a debtor's rights than the instalment order procedure, and so the latter option must be chosen where possible. Of course, certain cases will require more coercive methods to deal with "won't pay" debtors, as was illustrated in the case of *K v Sweden*, where the European Commission of Human Rights held that on the facts stringent enforcement means were justifiable when dealing with a deliberately evasive debtor.¹⁸¹

2.99 Sometimes a creditor will possess no more information about a debtor than his or her address, and in such a case the procedure of execution against goods may be the only available enforcement option. For this reason the importance of the availability of accurate information regarding a debtor's circumstances is once again emphasised.

(c) ***Enforcement Means must be Proportionate to the Debt Owed.***

2.100 The enforcement methods provided by the law must also be proportionate in the sense that there must not be a discrepancy between the impact of the enforcement procedure on the debtor and the extent to which the goal of effective enforcement is achieved. Therefore factors such as the severity of the consequences of enforcement on the debtor and the amount of the debt recovered under the enforcement procedure must be considered in ensuring proportionate enforcement.

2.101 *The Commission provisionally recommends that the principle of proportionate enforcement should be a guiding principle of the law on debt enforcement.*

(3) ***Legal Solutions to the Problem of Over-Indebtedness***

2.102 This Consultation Paper takes the view that the law on the enforcement of judgment debts cannot be discussed in isolation from the problem of over-indebtedness in Irish society. As has been shown above, society has a strong legitimate interest in the aim of alleviating the problem of over-indebtedness. Members of the Council of Europe have recently committed themselves to finding legal solutions to debt problems.¹⁸² The Committee of Ministers acknowledged that the use of credit has become an essential part of the economies of Member States and stressed the responsibility of Member States for the consequences of their social and economic policies. Thus the Committee's Recommendation stated that governments of Member States, when creating domestic legislation and procedures should aim to prevent and alleviate over-indebtedness among individuals and families through a variety of political, legal and practical measures. The Commission wishes to follow this Recommendation and proposes that the reform of the law on debt enforcement must seek to address the problem of over-indebtedness.

¹⁷⁹ See Jacob *The Legality of Debt Enforcement – A Justice Discussion Paper (Justice 2003)* at 31; The Scottish Law Commission *Report on Poining and Warrant Sale (Scot Law Com No 177, 2000)* at 8-9; *Striking the Balance: A New Approach to Debt Management (The Scottish Executive 2001)* at 15.

¹⁸⁰ [2009] IEHC 276 at 82.

¹⁸¹ Application No 13800/88 E Com HR.

¹⁸² See *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems (Council of Europe CM/Rec(2007)8, 2007)*.

2.103 This Consultation Paper therefore takes a global approach in considering legal solutions to the problem of over-indebtedness, in the knowledge that all Member States of the Council of Europe have pledged their commitment to this objective.¹⁸³ This Consultation Paper adopts the framework of policy solutions to over-indebtedness advocated by a 2008 report of the European Commission.¹⁸⁴ This framework outlines six steps to be followed in finding policy solutions to over-indebtedness, which contain both preventative and remedial measures. These issues sometimes veer away from the law of debt enforcement, which remains the core concern of this Consultation Paper. Therefore the Commission makes no recommendations in relation to some of these issues, but rather identifies the current position and issues for consideration in relation to these areas.

(a) **Preventative Measures**

2.104 The first three policy steps identified in the European Commission report can be categorised as preventative measures, although they will necessarily involve some overlap with the second category of remedial measures described below. While the prevention of all causes of over-indebtedness is beyond the capabilities of law reform, the European Commission has identified three causes of over-indebtedness to which legal solutions may be found. These preventative steps involve the promotion by the law of responsible borrowing, responsible lending and responsible practices in arrears management and debt recovery. The Commission believes that the recommendations proposed by this Consultation Paper must seek to support such practices, and that the law should require responsible conduct from both debtors and creditors in these areas. Chapters 3 and 4 discuss the contents of these principles and the legal and political methods which may be used to achieve them.

(b) **Remedial Measures**

2.105 The remedial measures advocated by the European Commission are composed of three strands: debt counselling services, personal insolvency procedures and holistic debt enforcement proceedings.¹⁸⁵

2.106 The Commission agrees that legal solutions to over-indebtedness should be informed by a need to provide widespread access for debtors to appropriately qualified money advisors. Money advisors must be given an important role to play in the debt dispute resolution process. Furthermore, the law should ensure that the money advice services offered to consumers are of a sufficient standard and that sound business practices are observed by those operating in this industry.

2.107 As regards the need for personal insolvency procedures and holistic debt enforcement procedures, it is to be noted that the situation of the over-indebted debtor poses a difficult problem for the law of debt enforcement. The law is based on the traditional model of a single debt between a creditor and a debtor, and thus many enforcement mechanisms are unsuited to the situation of a defendant who owes many debts to various different creditors. The traditional model was designed with the “won’t pay” debtor in mind, and its application to the over-indebted “can’t pay” defaulter frustrates the interests of all stakeholders.¹⁸⁶ The Commission believes that the law on debt enforcement needs to be modified to provide solutions to the problem of the over-indebted “can’t pay” debtor. This will involve the introduction of new court procedures and the establishment of a debt settlement scheme. This scheme should operate as a non-judicial alternative and complement to a reform of bankruptcy law. Chapter 5 discusses the Commission’s provisional recommendations for the introduction of a debt settlement system into Irish law. In addition to this new system, enforcement procedures must be modified to facilitate improved access to information which allows the ability of a debtor to pay to be determined. Chapter 6 discusses how this may be achieved, and describes how the proposed debt settlement scheme and proposed enforcement system could interact to adopt a holistic approach to resolving debt disputes.

¹⁸³ *Ibid.*

¹⁸⁴ *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 58ff.

¹⁸⁵ See *Towards A Common Operational European Definition of Over-Indebtedness* at 83-97.

¹⁸⁶ *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 88.

2.108 *The Commission provisionally recommends that the recognition of the need to prevent and remedy personal over-indebtedness should form a guiding principle of the law on debt enforcement and debt management.*

(4) Can't Pay and Won't Pay

2.109 The distinction between debtors who are unable to meet their obligations and those who refuse to do so has been described in detail above.¹⁸⁷ The Commission believes that this distinction is important to informing any proposed reforms of the law on debt enforcement. The law should provide effective and efficient enforcement mechanisms to be used against debtors who refuse to pay, and should provide alternative solutions in the form of measures such as debt settlement schemes for those who cannot pay.

2.110 Distinguishing between these two categories of debtor is undoubtedly a difficult task, and it will be necessary to draft criteria which will be applied in determining whether legal enforcement or debt settlement is more appropriate in a given case. To enable authorities and creditors to take informed decisions as to the appropriate course of action in a given case, it is essential that access is made available to comprehensive and up-to-date information regarding a debtor's ability to repay his or her debts.

2.111 *The Commission provisionally recommends that the law on debt enforcement should distinguish between debtors who cannot pay and debtors who refuse to pay. This will involve an individualised approach to debt enforcement, requiring increased access to accurate information on the circumstances of each debtor.*

(5) The Crucial Need for Greater Debtor Information

2.112 It has been repeatedly emphasised above that improved access to information relating to a debtor's financial circumstances is essential to the reform of the debt enforcement system. This has also been recognised by the Council of Europe as a necessary requirement for effective and efficient enforcement procedures.¹⁸⁸

2.113 Judicial proceedings against "can't pay" debtors would not be brought nor heard if sufficient information was available to indicate that such proceedings would be futile. Furthermore, informed decisions as to the appropriate approach to enforcement cannot be made without knowledge of the debtor's circumstances. For example, a lack of debtor participation in enforcement proceedings under the current system means that the court often cannot conduct an accurate examination of the debtor's means and so cannot make appropriate enforcement decisions. This means that instalment orders can be made which are set at unrealistically high levels.¹⁸⁹ Similarly, a lack of information of a debtor's circumstances leads many creditors to use the procedure of execution against goods even where the debtor may have no assets suitable for seizure and sale.

2.114 Thus, the Commission is of the opinion that the increased availability of information relating to a debtor's financial circumstances is of fundamental importance in both reforming the law on debt enforcement and in seeking to prevent the problem of over-indebtedness.

2.115 The Commission is conscious, however, of the competing need to protect the privacy rights of debtors. Thus a balance must be struck between the vindication of the rights of creditors and the interests of society and the protection of the rights of debtors. In adopting a balanced approach to this issue, the Commission will have regard to the *Data Protection Act 1988*, the *Data Protection (Amendment) Act 2003* and the ongoing work of the Data Protection Review Group. *Directive on Privacy*

¹⁸⁷ See paragraphs 1.61 to 2.111 above.

¹⁸⁸ "Defendants should provide up-to-date information on their income, assets and on other relevant matters." See *Recommendation of the Committee of Ministers to member states on enforcement* (Council of Europe Rec(2003)17, 2003).

¹⁸⁹ See Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 24. The instalment order procedure is described in Chapter 3: see paragraphs 3.283 to 3.297 below.

*and Electronic Communications*¹⁹⁰ Various methods have been proposed in other jurisdictions to allow better information about debtors to be obtained, and this Consultation Paper will discuss the various options for reform below.

2.116 *The Commission provisionally recommends that the need to obtain accurate information relating to a debtor's financial circumstances should be a guiding principle of the law on debt management and debt enforcement.*

(6) The Non-Judicial Resolution of Debt Disputes

2.117 The Commission believes that debt repayment issues should be resolved without recourse to litigation where possible. The coercive force of legal enforcement mechanisms should be reserved for “won’t pay” debtors, in situations where all other attempts to reach a solution acceptable to both creditor and debtor have failed. Court procedures as they currently exist are an inappropriate mechanism to deal with “can’t pay” debtors, and the use of proceedings in such cases does not serve the interests of any of the parties concerned. Legal proceedings are expensive and time-consuming for creditors, who have a strong interest in the early resolution of debt cases. Honest but insolvent debtors also should not be dragged through traumatic legal proceedings, particularly as among this group are some vulnerable members of society. Furthermore, the efficiency and integrity of the courts should not be compromised through ultimately futile proceedings, and the courts should not be used by some creditors as a substitute for responsible arrears prevention and management practices.

2.118 Thus the Commission recommends that the law should achieve a solution whereby the legal debt enforcement system is used as a last resort. The law should require solutions to debt difficulties to be achieved outside the framework of the courts where possible. Debtors and creditors, with the assistance of the intervention of debt counselling services, should be encouraged or even obliged to negotiate repayment arrangements before litigation is commenced. The law should permit recourse to legal enforcement mechanisms only where attempts at reaching such arrangements have failed, or where a “won’t pay” debtor refuses to cooperate. The Commission is however aware of the rights of creditors to have access to a court to vindicate their legal rights, and the Commission has due regard to this right when proposing recommendations.

2.119 The principle of the promotion of the non-judicial resolution of debt disputes recurs throughout this Consultation Paper. Chapter 4 applies this principle in discussing the subject of responsible arrears management and debt counselling.¹⁹¹ Chapter 5 furthermore discusses the Commission’s provisional recommendations for the introduction of a non-judicial debt settlement scheme which would allow debt disputes to be resolved outside of the formal legal system.¹⁹² Chapter 6 discusses methods by which the participation of debtors at earlier stages of the debt collection and enforcement process can be encouraged, and how the early intervention of money advisors can assist in resolving disputes.¹⁹³ Finally, Chapter 6 discusses the possible introduction of measures permitting the suspension of enforcement proceedings while attempts are made to resolve debt disputes through voluntary debt management arrangements or through the proposed statutory debt settlement scheme.¹⁹⁴

2.120 *The Commission provisionally recommends that the promotion of the non-judicial resolution of debt disputes should be a guiding principle of the law on debt management and debt enforcement.*

¹⁹⁰ The requirements of the European Union Directives on the protection of data will also be considered: see *Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data*; *Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)*.

¹⁹¹ See paragraphs 4.174 to 4.194 and 4.235 to 4.254 below.

¹⁹² See Chapter 5 below.

¹⁹³ See paragraphs 6.143 to 6.178 below.

¹⁹⁴ See paragraphs 6.129 to 6.142 below.

(7) Streamlining of the Law on Debt Enforcement

2.121 In its *Recommendation to Member States on Enforcement*,¹⁹⁵ the Committee of Ministers of the Council of Europe stated that enforcement should be defined and underpinned by a clear legal framework which sets out the powers, rights and responsibilities of interested parties and third parties. Similarly, legislation should be sufficiently detailed to provide legal certainty, transparency and predictability.

2.122 The Irish law on debt enforcement is derived from many different sources.¹⁹⁶ The main legislative provisions operating in this area are the *Enforcement of Court Orders Acts 1926-1940* as amended and the *Judgment Mortgage (Ireland) Acts 1850-1858*, with the *Common Law Procedure (Ireland) Act 1853* also of relevance. Legal and equitable execution methods derived from case law are also available. Orders 42-49 of the *Rules of the Superior Courts*, Orders 35A-39 of the *Rules of the Circuit Court* and Orders 53-57 of the *Rules of the District Courts* further lay down the rules of procedure for the enforcement of judgments. Thus the law on debt enforcement is complex and many sources must be consulted in order to fully understand it.

2.123 Furthermore, the origins of much of this law are very old, and certain procedures exist more due to historical reasons than to their status as relevant and regularly used enforcement mechanisms. It must also be remembered that much of the law on enforcement was designed for an environment vastly different from today's "credit society". Thus the law in this area must be re-assessed in light of the changed prevailing attitudes to credit and debt which exist in today's society.

2.124 The Commission therefore takes the view that a basic concern of the reform of the law on debt enforcement should be to clarify, streamline and update the law in this area. The Commission has previously acknowledged the attractiveness of the idea of updating the law on the enforcement of judgments so as to combine all the enforcement mechanisms into a single Act of the Oireachtas.¹⁹⁷ The Commission now wishes to reaffirm this view.

2.125 *The Commission provisionally recommends that the need to consolidate, clarify and simplify the law should be a guiding principle of the reform of debt management and debt enforcement law.*

¹⁹⁵ See *Recommendation of the Committee of Ministers to member states on enforcement* (Council of Europe Rec(2003)17, 2003).

¹⁹⁶ See Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 16ff.

¹⁹⁷ Law Reform Commission *Consultation Paper on Judgment Mortgages* (LRC CP30-2004) at 5.

CHAPTER 3 DEBT AND OVER-INDEBTEDNESS: THE CURRENT LAW

3.01 The goal of this Chapter is to outline the current legal position in relation to personal debt and over-indebtedness in Ireland, in order to identify the areas which are appropriate for reform. The Commission seeks to recommend legal solutions to the problem of over-indebtedness as part of its primary aim of reforming the law on debt enforcement.¹ As noted above, in this regard the Paper follows the framework for legal solutions to over-indebtedness proposed by the European Commission in its recent report. This framework is based on the twin goals of preventing the problem of over-indebtedness and alleviating the problem for those households who are already over-indebted.

3.02 In response to an analysis of the causes of over-indebtedness, the European Commission report has proposed that the law should focus on three main areas in seeking to prevent over-indebtedness.² The law must thus ensure responsible practices in lending, borrowing and arrears management. This Chapter discusses the position of Irish law under each of these subject headings, and identifies areas of the current law which should be considered as part of a review of over-indebtedness law and policy. Chapter 4 discusses further these issues, examines comparative approaches to the problems identified in other countries, and makes suggestions as to how these issues could be addressed. Returning to the present chapter, Part A discusses the subject of responsible borrowing. It identifies two aspects to this subject: financial education and the provision of information to consumers under consumer credit law. Part A examines how financial education is currently being provided, and discusses how, through a variety of instruments, the law requires certain information to be provided to consumers in relation to credit agreements. The limitations of the current Irish position in these two areas are then discussed. Part B discusses the subject of responsible lending. It first outlines the justification for the principle of responsible lending, and describes its importance in preventing over-indebtedness. The part proceeds to outline the current legal measures which seek to ensure that responsible lending standards are observed, before continuing to identify areas which could be considered in order to further advance the principle of responsible lending in Irish law. Part C discusses the principle of responsible arrears management, and describes how this principle is advanced through both legislation and codes of practice. The need for reflection as to how this principle can be further enshrined into law is then discussed.

3.03 It is widely recognised that in addition to legal measures which seek to prevent problems of over-indebtedness from arising, legal provisions are also needed to provide relief and rehabilitation for those individuals who have become over-indebted.³ It is unrealistic to think that preventive measures, no matter how successful, can be capable of eradicating over-indebtedness completely, especially when the need to protect the supply of credit is considered.⁴ In this light, the law must recognise that a consequence of a credit society is that certain individuals will become over-indebted, and thus a means of rehabilitating such debtors must exist. This chapter therefore also describes the position of Irish law in relation to debtor rehabilitation methods, beginning with a discussion of the subject of debt counselling in Part D. The current state of debt counselling in Ireland is outlined, and issues which should be addressed through law reforms are identified. Part E presents an outline of the law on personal insolvency. The Irish bankruptcy system is discussed and flaws in this system are highlighted. This part also discusses

¹ See paragraphs 2.102 to 2.103 above.

² *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 58ff.

³ See *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* (Council of Europe CM/Rec(2007)8, 2007) Explanatory Memorandum paragraph 31.

⁴ *Ibid.*

the various non-legal methods of remedying the difficulties of over-indebted individuals which are used in Ireland. Finally, Part F describes debt enforcement procedures under Irish law. This part provides a detailed account of the various methods of enforcing a judgment debt, and describes the procedural steps involved in each method. Several failings of the system of debt enforcement as a whole and of individual enforcement procedures are discussed. As has been noted elsewhere in this Consultation Paper, the primary focus of the Commission is on the areas of debt enforcement procedures and personal insolvency law, areas which the Commission identifies as most appropriate for examination by a law reform body. Therefore more attention is given to these two areas than the other elements of a holistic over-indebtedness policy, which the Commission believes raise issues of economic and social policy which may lie beyond the scope of this Paper.

A Responsible Borrowing

3.04 As noted above, irresponsible borrowing practices are a recognised cause of over-indebtedness. Over-spending, over-commitment and poor money management skills have been shown to contribute significantly to over-indebtedness, and also to inhibit debtors in emerging from debt difficulties.⁵

3.05 Both the European Commission⁶ and the Council of Europe⁷ have thus advocated measures which seek to achieve responsible borrowing practices among consumers. Two linked approaches are proposed, the first seeking to ensure financial literacy education is provided to consumers, and the second seeking to provide individual consumers with information relating to individual credit transactions. Recital 26 to the EC *Consumer Credit Directive 2008*⁸ reflects this approach by stating that Member States should “take appropriate measures to promote responsible practices during all phases of the credit relationship...” To achieve this aim, the recital states that these 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.”

(1) The Current Position in Ireland

(a) Financial Education: Non-Legal Measures

3.06 It has been shown that poor money management skills are a cause of debt difficulties and that those consumers who budget and save are less likely to encounter such difficulties.⁹ As the European Commission’s *Communication on Financial Education* has stated, financial education allows individuals to improve their financial literacy skills and so develop an awareness of financial risks and opportunities which allows them to make informed choices in relation to financial services.¹⁰

3.07 Until recently, studies had indicated that no national policy response to the question of financial literacy has been produced in Ireland.¹¹ This has changed in recent years however. One of the statutory functions of the Irish Financial Services Regulatory Authority (IFSRA) is to:

⁵ See above paragraphs 1.40 to 1.50.

⁶ *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 60-65.

⁷ See *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* (Council of Europe CM/Rec(2007)8, 2007), paragraphs 2(b) and 2(c), paragraphs 22 and 23 of explanatory memorandum.

⁸ *Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC.*

⁹ See paragraph 1.48 above. See *Towards A Common Operational European Definition of Over-Indebtedness op cit* at 60.

¹⁰ *Communication on Financial Education* (European Commission Com(2007)808) at 1.

¹¹ *Corr Financial Exclusion in Ireland: An Exploratory Study and Policy Review* (Combat Poverty Agency 2006) at 120.

“[t]ake such action as it considers appropriate to increase awareness among members of the public of available financial services and the cost to consumers, risks and benefits associated with the provision of those services.”¹²

As part of this role, IFSRA published a consultation paper in 2004 entitled “Financial Planning Education for Consumers”, the purpose of which was to seek views from stakeholders on the development of an appropriate programme for financial education. Following the success of this document, a National Steering Group on Financial Education was convened by IFSRA in 2006, the members of which were drawn from stakeholder organisations working in the areas of personal finance and education.¹³

3.08 The National Steering Group on Financial Education published its report in 2009.¹⁴ The report outlined the current position of financial education in Ireland, and decided upon a series of commitments and recommendations for the development of a financial education programme in Ireland. While these recommendations and commitments are discussed further in Chapter 4 below,¹⁵ the following paragraphs describe the current position of financial education in Ireland.

3.09 Secondary school curricula currently provide a degree of financial education. In the Junior Certificate cycle, the Business Studies course contains a section entitled “The Business of Living” which provides education on budgeting, general consumer issues and financial services for consumers.¹⁶ Approximately 60% of Junior Certificate students take the Business Studies course. In the Leaving Certificate cycle, the Home Economics – Scientific and Social syllabus contains a section labelled “Resource Management and Consumer Studies” which seeks to provide students with information on money management at the level of the household and on consumer issues such as consumer protection, consumer responsibility and consumer choice. In the academic year 2008/2009 a financial education programme entitled “Get Smart with your Money”, a joint initiative of the Money Advice and Budgeting Services and the Irish Financial Services Regulatory Authority aimed at Transition Year students, was launched on a nationwide basis.¹⁷ This is a personal development programme which seeks to encourage students to explore their attitudes to money and to highlight the practices of budgeting, shopping around, financial planning and saving.¹⁸ This programme was initially provided in 65 schools by 120 teachers.

¹² Section 33C(4) of the *Central Bank Act 1941*, as inserted by section 26 of the *Central Bank and Financial Services Authority of Ireland Act 2003*.

¹³ The full list of the members of the Steering Group is as follows: Consultative Consumer Panel of the Financial Regulator; Department of Education and Science; Department of Finance; FÁS; Financial Regulator (chair, secretary & co-ordination); Institute of Bankers in Ireland; Irish Banking Federation; Irish Insurance Federation; Irish League of Credit Unions; Irish Vocational Education Association; Money Advice and Budgeting Service; National Adult Literacy Agency; National Council for Curriculum and Assessment; The Pensions Board.

¹⁴ *Improving Financial Capability – A Multi-Stakeholder Approach* (Report of the National Steering Group on Financial Education 2009).

¹⁵ See paragraphs 4.13 to 4.14 below.

¹⁶ See Business Studies – Junior Certificate Syllabus on the website of the Department of Education and Science, available at:
<http://www.education.ie/home/home.jsp?maincat=&pcategory=17216&ecategory=17317§ionpage=&subject=17657&language=EN&link=&page=> (last accessed 14 September 2009)

¹⁷ The programme was launched nationally on 25th September 2008. See
http://www.mabs.ie/Media/Stories2008_1.htm. (last accessed 14 September 2009)

¹⁸ See the description of the programme on the European Commission DG Internal Market and Services Financial Services webpage, available at:
http://ec.europa.eu/internal_market/fesis/index.cfm?action=view_scheme_detail&id_scheme=182&version=2. (last accessed 14 September 2009)

The Irish Banking Federation also provides free education on finance to schools at both primary and secondary level.¹⁹

3.10 As regards adult financial education, the Financial Regulator operates a campaign entitled “It’s Your Money” which provides both information through its website (www.itsyourmoney.ie), leaflets and handbooks and a one-to-one guidance service.²⁰ The scheme aims to provide clear, easy to understand resources to help Irish consumers make informed financial choices. It focuses primarily on enabling informed cost comparisons amongst consumers when selecting financial services. The scheme had 560,000 participants in 2007, and was awarded the award of “Best Financial Campaign” by the Health and Consumer Protection Directorate General of the European Commission in 2008.²¹

3.11 EBS Building Society and the National Adult Literacy Agency (NALA) have for several years operated a joint Financial Literacy Programme designed to tackle the problem of financial illiteracy as a barrier to understanding and accessing financial services.²² This programme includes the publication of a leaflet entitled “The A-to-Z Pocket Guide to Financial Terms”, which contains over 500 definitions of terms used in relation to financial products and services.

3.12 At a European level, the European Commission Directorate General for the Internal Market and Services has a dedicated policy on financial education.²³ It was under this policy that the Communication on Financial Education discussed above was published, and this document has outlined basic principles for the provision of high-quality financial education schemes. An Expert Group on Financial Education was established under the policy,²⁴ and a survey of financial literacy schemes in the 27 Member States has also been conducted.²⁵ The European Commission has also established a website, Dolceta,²⁶ which offers consumer education to adults, including a module on financial services. This module includes information on such subjects as budgeting, consumer credit and home loans, payment methods and investments.

(b) Legal Measures – Consumer Protection Legislation

3.13 A second step in seeking to ensure responsible borrowing is to provide consumers entering credit agreements with all relevant information concerning the individual financial products or services which they are acquiring. This approach is a necessary complement to the need to ensure financial literacy among consumers, as the provision of information will only facilitate responsible borrowing practices if consumers are sufficiently skilled to use and understand this information.²⁷ The rationale for

¹⁹ See Corr *Financial Exclusion in Ireland: An Exploratory Study and Policy Review* (Combat Poverty Agency 2006) at 120.

²⁰ See the description of the programme on the European Commission DG Market Financial Services webpage, available at: http://ec.europa.eu/internal_market/fesis/index.cfm?action=view_scheme_detail&id_scheme=70&version=1. (last accessed 14 September 2009)

²¹ http://ec.europa.eu/consumers/e.cd/ireland_en.print.html. (last accessed 14 September 2009)

²² See the National Adult Literacy Agency website description of this programme, available at: http://www.nala.ie/index.cfm/section/Press_releases/ext/A_ZPress. (last accessed 14 September 2009) See also Corr *Financial Exclusion in Ireland: An Exploratory Study and Policy Review* (Combat Poverty Agency 2006) at 120.

²³ Details of this policy can be found on the Financial Education webpage of DG Internal Market and Services, available at: http://ec.europa.eu/internal_market/finservices-retail/capability/index_en.htm (last accessed 14 September 2009)

²⁴ Commission Decision of 30 April 2008 setting up a group of experts on financial education (2008/365/EC).

²⁵ http://ec.europa.eu/internal_market/finservices-retail/docs/capability/report_survey_en.pdf. (last accessed 14 September 2009)

²⁶ Development of On-Line Consumer Education Tools for Adults, www.dolceta.eu.

²⁷ See Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented by the Institute for Financial Services e.v. Erasmus University Rotterdam/School of

legislative requirements on the provision of information to consumers is thus to produce a free and responsible model consumer, who uses the information provided to make rational and responsible borrowing choices.²⁸ While the common law has always to a certain extent regulated consumer transactions by requiring sellers and lenders to disclose various types of information to consumers,²⁹ recent statutory intervention has demonstrated an accelerated development of consumer protection in this regard.

(i) Consumer Credit Act 1995

3.14 The *Consumer Credit Act 1995*, implementing the first EU Directive on Consumer Credit,³⁰ imposes various requirements on credit institutions when providing credit to consumers.³¹ Subject to exceptions, the Act applies to all credit agreements, hire-purchase agreements and consumer-hire agreements to which a consumer is a party.³² This includes agreements involving banks, building societies, moneylenders and certain other finance companies. Consumer credit agreements made by credit unions, pawnbrokers and utility service providers are not however within the scope of the Act.³³ The Act and Directive seek to achieve responsible borrowing through the provision of information by the lender to the consumer³⁴ in the marketing of credit, in the entering of a credit agreement, and throughout the duration of the agreement.

3.15 First, Part II of the 1995 Act imposes requirements on lenders to supply certain information when advertising and offering credit.³⁵ A clear and prominent statement of the “annual percentage rate of charge, being the total cost of credit”³⁶ must be included in the advertisement, with a representative example being provided if no other practical means of providing this information is available.³⁷ If the credit promoted is subject to the payment of charges other than the principal sum borrowed and interest on that amount, those charges must be included in the advertisement.³⁸

3.16 Part IX of the 1995 Act provides additional requirements which must be observed in advertising housing loans. Mortgage agents must ensure that any information document, application form or

Law University of Helsinki/Helsinki Collegium for Advanced Studies to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 54-55.

²⁸ *Ibid* at 51.

²⁹ Through the rule rendering void contract terms which are too vague, the law on misrepresentation and the “ticket” cases in relation to clauses excluding liability. See Whitford “The Functions of Disclosure Regulation in Consumer Transactions” [1973] *Wisconsin Law Review* 400 at 400-1.

³⁰ *Council Directive 87/102EEC of December 22, 1986*, as amended by *Council Directive 90/88/EEC of February 22, 1990*, now repealed by *Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102EEC*.

³¹ See generally Breslin *Banking Law* (2nd ed. Thomson Round Hall 2007) at 109ff.

³² Section 3(1) of the 1995 Act.

³³ Section 3(2) of the 1995 Act.

³⁴ A consumer is defined for the purposes of the Act as “a natural person acting outside his trade, business or profession”, Section 2(1) *Consumer Credit Act 1995*.

³⁵ See Barrett “Financial Services Advertising in Ireland” (2008) 15(7) *Commercial Law Practitioner* 151.

³⁶ The definition of “APR” provided in Section 2(1) of the 1995 Act. See also sections 9-10.

³⁷ Section 21(1) of the 1995 Act. The goal of this provision is to establish a single comparative criterion to assist consumers in conducting price comparisons of financial products and services: see Barrett *op cit* at 152. This policy is furthered by Section 24 of the Act, which states that: “[w]here an advertisement purports to compare the level of repayments or cost under one or more forms of financial accommodation, the advertisement shall contain the relevant terms of each of the forms of financial accommodation referred to in the advertisement.”

³⁸ Section 21(3). This provision however does not apply to advertisements for housing loans.

approval form for a housing loan must include a warning in the specified format cautioning that the borrower's home is at risk if the borrower does not keep up payments.³⁹ Similarly, where the housing loan includes an endowment mortgage, a warning must be included indicating that the proceeds of the relevant insurance policy may not be sufficient to repay the loan in full when repayment is due.⁴⁰ Furthermore, the Financial Regulator may give a direction to any mortgage agent regarding the matter and form of any advertisement relating to a housing loan published or displayed by the agent.⁴¹ A recent direction issued required the inclusion of certain information in advertisements and information documents promoting "debt consolidation housing loans".⁴² The information included warnings that debt consolidation housing loans may take longer to pay off than previous loans, resulting in the repayment of a larger sum by the borrower.

3.17 Any person who contravenes the above provisions by publishing an advertisement which does not comply with the above requirements will be guilty of a summary criminal offence,⁴³ subject to certain defences for professional advertising publishers and lenders who did not consent to the publication.⁴⁴

3.18 Part III of the Act lays down requirements as to the form and content of credit agreements,⁴⁵ as well as the procedural steps to be followed in entering such agreements. Credit agreements must be in writing and must be signed by all the parties to the agreement. A copy of this agreement must be given to the consumer either on entering the contract or within 10 days of so doing.⁴⁶ Information which must be provided in the agreement includes the amount of credit, its true costs and any penalties which may arise in the case of non-compliance with the terms, the number of instalments, date of expiry of the loan and the means of termination.⁴⁷ Importantly under section 50 of the Act, consumers possess a right to a 10-day "cooling-off period" whereby a consumer may withdraw from a credit agreement within 10 days of receiving the written agreement or a copy of it. A consumer may waive his or her right to this cooling-off period, but to do so must sign a separate agreement which contains a prominently-positioned, specifically worded warning indicating that this right is being waived.⁴⁸ It is understood that in practice quite often consumers agree to waive this right.

3.19 As regards the sanction imposed on lenders who fail to comply with the above provisions, the general rule is that the credit agreement will be unenforceable by the creditor.⁴⁹ While this rule is

³⁹ Under Section 128(1) of the 1995 Act. Mortgage agents are also required to include warnings that under a variable interest rate loan, payment rates may be modified by the lender periodically.

⁴⁰ Section 133(1) of the 1995 Act.

⁴¹ Under section 135 of the Act.

⁴² See Barrett "Financial Services Advertising in Ireland" (2008) 15(7) *Commercial Law Practitioner* 151 at 153.

⁴³ See section 12(1)(b) in relation to the contravention of Part II requirements and section 12(1)(h) in relation to Part IX requirements.

⁴⁴ See sections 26 and 27 of Part II CCA, sections 128-135 of Part IX CCA.

⁴⁵ Excluding mortgage loans (s29). Section 30 does not apply to credit card and overdraft agreements (s30(4)).

⁴⁶ Section 30 of the 1995 Act.

⁴⁷ Section 31 of the 1995 Act. This section provides for slightly different information to be provided for various different types of agreement such as cash loans, credit card agreements and overdraft agreements. Agreements other than an overdraft facility, credit-sale agreement or moneylending agreement must, under section 36, contain this information on the front page of the agreement in the manner prescribed in Part I of the Third Schedule to the Act. Similar information must be provided as part of Hire Purchase agreements under sections 57-58 and Consumer Hire Agreements under section 84

⁴⁸ See Section 50(2) of the 1995 Act.

⁴⁹ Section 38 of the 1995 Act.

absolute⁵⁰ in respect of the requirements of section 30,⁵¹ the court possesses a discretionary power to enforce contracts where any of the other requirements of Part II have not been met but it would be just and reasonable to dispense with those requirements. Thus if a court is satisfied that a failure to comply with the requirements was not deliberate and has not prejudiced the consumer, the court may decide that the agreement should be enforced subject to any conditions that it sees fit to impose.

(ii) Consumer Protection Code

3.20 The Irish Financial Services Regulatory Authority *Consumer Protection Code* also seeks to ensure that consumers entering credit agreements are informed and so capable of making rational and responsible borrowing decisions. The Code thus lays down requirements as to both the content of the information which must be provided to consumers and the manner in which this information should be presented. Thus regulated entities⁵² must provide a consumer with information of any charges, including third party charges, which will be passed on to the consumer in advance of providing a service to the consumer.⁵³ Prior to providing a personal (non-mortgage) loan, a regulated entity must explain to the consumer borrower the consequences of missing a repayment, and must highlight these consequences by including a warning taking a prescribed form in the relevant documentation.⁵⁴ Where a regulated lender offers a mortgage to a consumer for the purpose of consolidating other loans, the lender must provide the consumer with a written comparison of the total cost of the consolidating mortgage being offered and the total cost of continuing to repay the various existing credit facilities.⁵⁵ In addition, if payment protection insurance is offered as part of a loan offer, the initial repayment estimate provided to the consumer must exclude the cost of the insurance.⁵⁶

3.21 The Code also contains certain provisions as to the form the information supplied to the consumer must take. All information provided to the consumer must be clear and comprehensible, and key items must be brought to the consumer's attention.⁵⁷ Information must be provided in a timely manner, giving the consumer sufficient time to absorb and react to it.⁵⁸ Regulated entities must ensure

⁵⁰ A similar provision in UK legislation, section 127(3) of the *Consumer Credit Act 1974*, survived a challenge to its compatibility with Article 1 of the First Protocol to the ECHR in the House of Lords' decision in *Wilson v First County Trust Ltd (No. 2)* [2001] 3 WLR 42. See the discussion above at paragraph 2.18.

⁵¹ The requirements that a credit agreement be signed and in writing; that it contain the names of addresses of both parties and the costs of breaching the agreement, that a copy of the agreement be furnished to the consumer and that it contain a statement of the consumer's right to a withdraw within the "cooling-off period".

⁵² The entities to whom this Code applies include credit institutions (banks and building societies), insurance undertakings, investment business firms, insurance intermediaries and mortgage intermediaries. Moneylenders are not bound by the Code, and credit unions are not bound in respect of their "core" activities of savings and loans. Credit unions are however bound by the Code when providing additional services for which they require authorisation from IFSRA.

⁵³ Chapter 2, paragraph 44 of the *Consumer Protection Code*. Any increases in charges during the course of the agreement must then be notified to the consumer at least 30 days in advance.

⁵⁴ Chapter 4, paragraph 9 of the Code. The warning is to take the following form: "Warning: If you do not meet the repayments on your loan, your account will go into arrears. This may affect your credit rating."

⁵⁵ Paragraph 10 of the Code.

⁵⁶ Paragraph 6 of the Code. To further ensure that the consumer is aware of the separate nature of this product, a text box indicating that the payment protection insurance is optional must be included in the application form immediately above where the consumer is required to sign: *Ibid* paragraph 8.

⁵⁷ Chapter 2, paragraph 12 of the *Consumer Protection Code*. It is essential that important information is not disguised, diminished or obscured, and all information provided in print form must be clearly legible: *Ibid* paragraph 22.

⁵⁸ Chapter 2, Paragraph 13 of the Code.

that the terms and conditions relating to a product or service are provided to the consumer *before* the consumer enters an agreement or before the expiry of any relevant cooling-off period.⁵⁹

3.22 The *Consumer Protection Code* is a statutory code, issued by IFSRA under powers conferred on it by various pieces of legislation.⁶⁰ Thus regulated entities can face sanctions under Part IIIC of the *Central Bank Act 1942*⁶¹ if they are found to have contravened provisions of the Code. The sanctions which IFSRA can impose include issuing a regulated entity with a caution or reprimand, ordering the repayment of any money charged or paid for the provision of a financial service, disqualifying a person from being involved in the management of a financial service provider, or ordering a fine of up to €5 million to be paid by the offending institution.⁶²

(iii) Specialist Lenders

3.23 In addition to the above legal obligations applying to mainstream consumer lenders, separate regulatory rules apply to the specialist consumer lending activities of moneylenders and credit unions. These specialist regulatory regimes are now briefly discussed.

(I) Consumer Protection Code for Licensed Moneylenders

3.24 Moneylenders are not bound by the terms of the *Consumer Protection Code*, and instead are subject to the *IFSRA Consumer Protection Code for Licensed Moneylenders*.⁶³ This Code was issued by IFSRA in 2009, and largely follows the policy of the *Consumer Protection Code* in imposing requirements on licensed moneylenders to provide borrowers with certain information as part of a credit transaction. In particular, the high-cost nature of moneylender loans must be communicated to borrowers, and if the APR under a loan is 23% or higher, the moneylender must present a warning as to the high-cost of the loan in a specified form.⁶⁴ Moneylenders are placed under an obligation to assist a customer in understanding the product provided, including the method of repayment and all related interest payments and charges.⁶⁵ Warnings must also be provided to guarantors under moneylending agreements, informing them of the consequences of default by the borrower.⁶⁶ It should be noted that IFSRA recognises that the operations of moneylenders are on a much smaller level than mainstream financial institutions, and so the information obligations contained in the Code are designed to provide flexibility and limit the regulatory burden imposed on moneylenders.

(II) Credit Unions

3.25 Credit unions are recognised as occupying a unique status due to a number of features which distinguish them from banks and building societies.⁶⁷ Credit union membership is based on a common bond, meaning that all members of a union must share something in common, such as living in the same area or a common employer. Credit union operations are also based on a set of unique cooperative principles, such as open membership, democracy, limited interest rates and the promotion of financial education.⁶⁸ It is also recognised that such lenders have traditionally served categories of borrowers who may not be able to obtain credit elsewhere, and so fulfil an important social role. The statistics presented

⁵⁹ Chapter 2, Paragraph 21 of the Code.

⁶⁰ The *Central Bank Acts 1942 to 1998* (including without limitation Section 33S(6) of the *Central Bank Act 1942*); the *Investment Intermediaries Act 1995*; the *Consumer Credit Act 1995*; the *Stock Exchange Act 1995*; the *Insurance Acts 1909 to 2000*; and relevant statutory instruments.

⁶¹ As inserted by s10 *Central Bank and Financial Services Authority Act 2004*.

⁶² The fine payable is limited to €500,000 for natural persons operating as financial service providers.

⁶³ *IFSRA Consumer Protection Code for Licensed Moneylenders* (Financial Regulator 2009).

⁶⁴ Chapter 2, paragraph 3 of the *Consumer Protection Code for Licensed Moneylenders*.

⁶⁵ Chapter 2, paragraph 2 of the Code.

⁶⁶ Chapter 2, paragraph 35 of the Code.

⁶⁷ Ryder "The Credit Crunch – the Right Time for Credit Unions to Strike?" (2009) 29(1) *Legal Studies* 75 at 78.

⁶⁸ *Ibid* at 79.

in Chapter 1 above illustrate that the majority of credit union loans are for relatively small amounts, which highlights this role of credit unions in promoting financial inclusion.⁶⁹

3.26 Therefore these lenders are subject to a regulatory regime which is distinct from that applying to other lenders. Credit unions are primarily regulated by the *Credit Union Act 1997*. When providing some services outside of their “core services” of savings and loans, credit unions must obtain authorisation or registration with the Irish Financial Services Regulatory Authority.⁷⁰ The *IFSRA Consumer Protection Code* only applies to credit unions in respect of these limited activities, and so unions are largely exempt from the requirements of the Code for their core business. In addition, credit unions are not subject to the *Consumer Credit Act 1995*⁷¹ and will possibly be exempted from certain requirements of the *Consumer Credit Directive 2008*.⁷²

3.27 Credit unions are supervised by the Registrar of Credit Unions, a department of the Irish Financial Services Regulatory Authority (IFSRA). The functions, powers and duties of the Registrar are specified in Part VI of the 1997 Act. Notably the Registrar of Credit Unions does not possess the same power to issue codes of conduct having statutory effect in respect of credit unions as IFSRA holds in respect of credit institutions.⁷³ This has been recognised by the Registrar in IFSRA’s consultation paper on a voluntary code of practice for credit unions.⁷⁴ The Registrar noted that there is no legal basis to support the introduction of a mandatory statutory consumer protection code for credit unions in respect of their “core services” of savings and loans. Therefore the Registrar proposed a voluntary code of practice for the present, with a view to including this code in legislation as part of a future general review of credit union legislation.

⁶⁹ See paragraph 1.22 above.

⁷⁰ Section 48 of the *Credit Union Act 1974*, as amended by the *Central Bank and Financial Services Authority of Ireland Act 2003*, provides that a credit union may provide “additional services”, which includes services neither provided for in the remainder of the 1997 Act nor those prescribed by the Central Bank/IFSRA as involving no risk to the assets of the credit union or funds of its members. The provision of such additional services must be approved by the Central Bank/IFSRA and must be provided in accordance with the terms and conditions of the approval.

⁷¹ It appears that credit unions are subject to the *Consumer Credit Directive 1987* however.

⁷² This is because the Department of Finance’s consultation paper on the implementation of the Directive has indicated that credit unions appear to qualify for an exemption from some of its provisions. Article 2(5) of the *Consumer Credit Directive 2008* states that: “Member States may determine that only Articles 1 to 4, 6, 7 and 9, Article 10(1), points (a) to (h) and (l) of Article 10(2), Article 10(4) and Articles 11, 13 and 16 to 32 shall apply to credit agreements which are concluded by an organisation which:

(a) is established for the mutual benefit of its members;

(b) does not make profits for any other person than its members;

(c) fulfils a social purpose required by domestic legislation;

(d) receives and manages the savings of, and provides sources of credit to, its members only; and

(e) provides credit on the basis of an annual percentage rate of charge which is lower than that prevailing on the market or subject to a ceiling laid down by national law, and whose membership is restricted to persons residing or employed in a particular location or employees and retired employees of a particular employer, or to persons meeting other qualifications laid down under national law as the basis for the existence of a common bond between the members.” See Department of Finance *Consultation Paper on the Consumer Credit Directive* (Department of Finance 2009), available at: <http://www.finance.gov.ie/viewdoc.asp?DocID=5707>.

⁷³ Section 117 of the *Central Bank Act 1989*, as amended by section 33 of the *Central Bank and Financial Services Regulatory Authority Act 2004* empowers IFSRA to draw up, amend or revoke codes of practice in relation to “any class or classes of licence holders or other persons supervised by the [IFSRA].”

⁷⁴ Irish Financial Services Regulatory Authority *Consultation Paper: Voluntary Consumer Protection Code for Credit Unions (in respect of their Core Services)* (CP32 2008) at 1.

3.28 The consultation paper issued by the Registrar therefore includes a draft *Voluntary Consumer Protection Code for Credit Unions (in respect of their Core Services)*. This draft Code contains requirements as to certain information which must be provided to credit union members when entering loan transactions. Chapter 2 of the draft Codes lists a series of requirements of this type, including a direction to credit unions to provide each member with the terms of conditions attaching to any product or service, and to ensure that this information is clear, comprehensible and in clearly legible print.⁷⁵ Key information should be brought to the attention of the member, and the method of presentation must not disguise, diminish or obscure important information.⁷⁶ Included amongst the other requirements of the draft Code are obligations to explain to a member the effect of missing any scheduled repayments.⁷⁷ This information must be provided in a warning in a specified form which advises the member of the consequence of default on his or her credit rating. Chapter 5 of the draft Code contains a list of detailed rules relating to the advertising of products by credit unions, including obligations concerning the displaying of information relating to interest rates and the total cost of credit.⁷⁸ Additional information requirements are included in relation to debt consolidation loans.⁷⁹

3.29 Following the initiative of the consultation paper on a *Voluntary Consumer Protection Code for Credit Unions*, in late 2008 IFSRA published a further Consultation Paper on the establishment of voluntary standards for the provision of savings and loans services by credit unions.⁸⁰ The standards proposed in the paper are voluntary, and IFSRA will maintain a register on its website of credit unions that have agreed to adopt and be bound by them. These voluntary standards largely mirror the rules contained in the *Voluntary Consumer Protection Code for Credit Unions*. They include certain provisions which seek to ensure responsible borrowing by providing credit union members with the information necessary to make responsible decisions. Chapter 2 of the proposed draft standards contains the commitments which participating credit unions will make as regards the information they provide to borrowers. These unions will ensure that full disclosure of all relevant material information, including all charges is provided to consumers in a clear and easily understood manner.⁸¹ All information will be presented in a clearly legible font size, and key information will be highlighted. Information will also be provided in relation to any increases in charges,⁸² and certain requirements to provide accurate, clear, comprehensive and unexaggerated information in advertisements are also included in the standards.⁸³

(2) Issues for Consideration

3.30 This section will now assess the responsible borrowing measures existing under the current law with a view to highlighting issues for consideration when reviewing the law and policy relating to responsible borrowing.

(a) Financial Education

3.31 Members of the Council of Europe, in committing themselves to preventing over-indebtedness through legal measures, have listed as one of the means of achieving this goal the introduction and

⁷⁵ Chapter 2, paragraphs 11, 19 and 20 of the draft Code.

⁷⁶ Chapter 2, paragraph 11 of the draft Code.

⁷⁷ Chapter 4, paragraph 8 of the draft Code.

⁷⁸ See Chapter 5, paragraphs 17 and 18 of the draft Code.

⁷⁹ Chapter 5, paragraphs 19 and 20 of the draft Code.

⁸⁰ Irish Financial Services Regulatory Authority *Consultation Paper: Savings and Loans – Our Voluntary Standards* (CP35 2008).

⁸¹ Chapter 2, paragraph 1 of the *Consultation Paper: Savings and Loans – Our Voluntary Standards*.

⁸² Chapter 5, paragraph 4 of the Consultation Paper's draft standards.

⁸³ See Chapter 6 of the *Consultation Paper: Savings and Loans – Our Voluntary Standards*.

development of “financial literacy on the rights of consumers in general, and budget management in particular, as part of the national education system.”⁸⁴

3.32 The Commission of the European Communities has indicated that much work remains to be done across EU Member States to promote financial education. Information asymmetries remain significant among consumers and even relatively straightforward financial products appear complex to an average citizen who has little or no financial education.⁸⁵ A Communication issued by the European Commission expressed several findings as to the widespread problem of a lack of financial literacy among consumer borrowers, stating that individuals generally find financial matters difficult to understand and overestimate their understanding of financial services.⁸⁶ In addition, many individuals fail to plan ahead or choose products that meet their needs. Despite these common failings among consumer creditors, this group illustrates a willingness to learn about financial matters.⁸⁷ The Commission noted that recent surveys conducted across Europe illustrated the problems experienced by consumers in relation to financial products, and recent Irish studies have supported these findings, as discussed below.⁸⁸

3.33 The Commission is conscious that the issue of financial education is one removed from the area of law reform and is an issue of social policy. The Commission also recognises that work is currently being carried out in this area by bodies in Ireland and at a European Union level. Thus it is reluctant to identify areas which could be strengthened or approaches to be adopted in formulating a national financial education strategy. The Commission however believes that the issue of financial education also has implications for legal responses to over-indebtedness. Increased financial literacy is necessary for the information-based provisions of consumer credit legislation to be effective, and improved financial capability skills could also perhaps help over-indebted consumers to cope better with legal debt procedures. Also, other countries have included financial education programmes in their consumer insolvency regimes, and the Commission will examine these models of consumer insolvency in the next chapter. Thus the Commission endorses the European Commission communication and Council of Europe Recommendation in stating that a comprehensive programme of financial education should be developed in Ireland. In Chapter 4 the Commission discusses the current development of a financial education strategy at both a national and European level.⁸⁹

(b) **Consumer Credit Legislation**

3.34 A considerable body of literature exists outlining the limitations of information provision as a form of consumer protection, particularly in consumer credit markets.⁹⁰ These limitations have been identified both by economic theory and empirical studies, and focus principally on the fact that the provision of information to a consumer is largely premised on a view of the consumer as an economically rational actor, which is not always the case.

⁸⁴ See *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* (Council of Europe CM/Rec (2007)8, 2007), paragraph 2(b).

⁸⁵ *Communication on Financial Education* (European Commission Com(2007)808) at 1.

⁸⁶ *Ibid* at 2.

⁸⁷ *Communication on Financial Education op cit.* at 3.

⁸⁸ See paragraphs 3.46 to 3.47 below.

⁸⁹ See paragraphs 4.09 to 4.14 below.

⁹⁰ Whitford “The Functions of Disclosure Regulation in Consumer Transactions” (1973) 2 *Wisconsin Law Review* 400; Ramsay “From Truth in Lending to Responsible Lending” in Howells et al (eds.) *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (Aldershot, 2005) at 47; Block-Lieb et al “Disclosure as an Imperfect Means for Addressing Overindebtedness: An Empirical Assessment of Comparative Approaches” from Whitford, Ramsay and Niemi (eds.) *Consumer Credit, Over-Indebtedness and Bankruptcy: National and International Dimensions* (Hart Publishing 2009) at 153, available online at: <http://ssrn.com/abstract=1150864>; Harris and Albin “Bankruptcy Policy in Light of Manipulation in Credit Advertising” (2006) 7 *Theoretical Inquiries in Law* 431.

(i) Neo-Classical Economics and the Rational Consumer Model of Information-Based Consumer Protection.

3.35 Information disclosure based consumer credit protection was introduced in many countries in the late 1960s and 1970s.⁹¹ The primary aim of such disclosure requirements was to achieve a more transparent and competitive market through the discipline of informed and confident consumers.⁹² In this regard the provision of information to consumers served both a social aim in preventing the problem of over-indebtedness, and an economic aim in promoting a transparent, competitive market. From the point of view of the prevention of over-indebtedness, it is claimed that the provision of information to borrowers provides a warning function by alerting them to the cost of borrowing and the consequences of default; provides a useful synopsis of information for borrowers in the event of a dispute; and facilitates the enforcement of regulatory legislation.⁹³ The provision of information to borrowers as a means of preventing over-indebtedness has also been favoured by policymakers due to the fact that information disclosure requirements have a modest effect on lenders' business practices, are more advantageous to large financial institutions in terms of compliance costs than other measures, and are more widely acceptable than the regulation of credit contract terms.⁹⁴

3.36 The information-based approach to consumer protection is based upon several assumptions which are founded in neo-classical economic theory. Primarily, the information-based model assumes that consumers will act in an economically rational manner,⁹⁵ meaning that they will use the information received to choose outcomes that maximise their benefits and minimise their costs.⁹⁶ While this model acknowledges that consumers will not search for all available information before contracting, it assumes that a consumer will search for information until the costs of the search exceed the benefit to be obtained from such information.⁹⁷ Thus the neo-classical model attributes a consumer's decision not to pay attention to information provided to a conscious form of cost/benefit analysis known as "rational ignorance" that concludes that the information in question is of little benefit in that, for example, it may refer to a later event which is unlikely to occur.⁹⁸ The potential costs and unintended consequences of regulation are also emphasised under this model, which as a result prefers information-based remedies over more intrusive and expensive regulation.

3.37 A further advantage of the classic information-provision approach is that it is said to enhance party autonomy.⁹⁹ In this way information provision rules have been contrasted with other forms of

⁹¹ Ramsay "From Truth in Lending to Responsible Lending" in Howells et al (eds.) *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (Aldershot, 2005) at 48.

⁹² Ramsay "From Truth in Lending to Responsible Lending" in Howells et al (eds.) *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (Aldershot, 2005) at 48.

⁹³ Ramsay "From Truth in Lending to Responsible Lending" in Howells et al (eds.) *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (Aldershot, 2005) at 49.

⁹⁴ "From Truth in Lending to Responsible Lending" *op cit.* at 51.

⁹⁵ See e.g. Donnelly and White "The Effect of Information-Based Consumer Protection: Lessons from a Study of the Irish Online Market" *The Yearbook of Consumer Law 2008* 271, at 283.

⁹⁶ Block-Lieb et al "Disclosure as an Imperfect Means for Addressing Overindebtedness: An Empirical Assessment of Comparative Approaches" from Whitford, Ramsay and Niemi (eds.) *Consumer Credit, Over-Indebtedness and Bankruptcy: National and International Dimensions* (Hart Publishing 2009) at 9: available online at: <http://ssrn.com/abstract=1150864>, at 1.

⁹⁷ Ramsay "From Truth in Lending to Responsible Lending" in Howells et al (eds.) *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (Aldershot, 2005) 48 at 52.

⁹⁸ Ramsay "From Truth in Lending to Responsible Lending" in Howells et al (eds.) *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (Aldershot, 2005) 48 at 52.

⁹⁹ See Ramsay *ibid* at 55, citing e.g. Grundmann, Kerber and Weatherill (eds.) *Party Autonomy and the Role of Information in the Internal Market* (de Gruyter, Berlin, 2001). See also Donnelly and White "The Effect of

intervention such as the introduction of mandatory terms into consumer contracts. It is said that information-provision does not restrict party choice and the freedom to contract and that other more interventionist or paternalistic measures may do so. Counter-arguments to this rationale do however exist and these will be discussed below.¹⁰⁰

(ii) Behavioural Economics, Empirical Research and the Limitations of Information-Based Consumer Provisions

3.38 Considerable theoretical and empirical research has cast doubt on these assumptions and has drawn attention to the limitations of the information-based approach to consumer credit regulation. In general, studies taking this approach do not argue that information provision is inappropriate or to be avoided. Instead it is argued that it is a less effective form of consumer protection than its supporters assume¹⁰¹ and that enhanced disclosure is unlikely on its own to reduce levels of over-indebtedness in society.¹⁰² The main limitations of an information-based approach as identified by commentators will now be discussed.

3.39 A very basic limitation is that the information provided may never actually reach the consumer.¹⁰³ A consumer may be unable to understand and use the information provided, for example due to a lack of financial literacy or money management skills. Similarly, a consumer may not take the time to read the information provided as he or she may simply find the information boring.¹⁰⁴ This decision not to use the information may not always be based on the rational cost/benefit analysis of “rational ignorance” described above. The recognition of this problem is supported by empirical research recently carried out in Ireland and discussed below.¹⁰⁵

3.40 Behavioural economics studies have also identified further limitations of this approach. These limitations largely result from the psychological approaches to decision-making which have been recognised among consumers. It has been shown that due to a variety of such factors consumers’ rationality is “bounded” or limited to the extent that they make decisions which do not correspond to what would constitute economically rational decision-making.¹⁰⁶

3.41 First, individuals suffer from an “optimism bias” in decision-making which makes us overoptimistic and more likely to filter out information on potential risks of credit at the time of entering a credit transaction.¹⁰⁷ Surveys have shown that

Information-Based Consumer Protection: Lessons from a Study of the Irish Online Market” *The Yearbook of Consumer Law 2008* 271, at 282.

¹⁰⁰ See paragraph 3.48 below.

¹⁰¹ See e.g. Donnelly and White “The Effect of Information-Based Consumer Protection: Lessons from a Study of the Irish Online Market” *The Yearbook of Consumer Law 2008* 271, at 283.

¹⁰² Block-Lieb et al “Disclosure as an Imperfect Means for Addressing Overindebtedness: An Empirical Assessment of Comparative Approaches” from Whitford, Ramsay and Niemi (eds.) *Consumer Credit, Over-Indebtedness and Bankruptcy: National and International Dimensions* (Hart Publishing 2009) at 9: available online at: <http://ssrn.com/abstract=1150864>, at 2.

¹⁰³ Donnelly and White “The Effect of Information-Based Consumer Protection: Lessons from a Study of the Irish Online Market” *The Yearbook of Consumer Law 2008* 271 at 283.

¹⁰⁴ *Ibid.*

¹⁰⁵ See paragraphs 3.46 to 3.47.

¹⁰⁶ See e.g. Kilborn “Behavioral Economics, Overindebtedness and Comparative Consumer Bankruptcy: Searching for Causes and Evaluating Solutions” (2005 22 *Bankruptcy Developments Journal* 13. Available at SSRN: <http://ssrn.com/abstract=690826>, at 5.

¹⁰⁷ See e.g. Kilborn, *ibid* at 6; Ramsay “From Truth in Lending to Responsible Lending” in Howells et al (eds.) *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (Aldershot, 2005) 48 at 53; Harris and Albin Bankruptcy Policy in Light of Manipulation in Credit Advertising” (2006) 7 *Theoretical Inquiries in Law* 431 at 434. This bias was initially identified in the context of assessing

“consumers were aware that unexpected events could seriously affect their ability to pay but felt that this was something that happens to others. Most felt losing their jobs, suffering a serious accident or illness were remote possibilities.”¹⁰⁸

This optimism bias has the effect both of preventing consumers from assessing their ability to repay amounts borrowed, as well as causing consumers to borrow more when they suffer an adverse economic event in the belief that their difficulties are merely temporary, which has the effect of worsening their over-indebted positions if these difficulties prove not to be temporary.¹⁰⁹ These theoretical conclusions would appear to find support in recent empirical research carried out by the Irish Financial Regulator. This report found that most consumers do not plan for adverse future events with 59% of those surveyed having made no provision for dealing with a drop in income lasting three months or more.¹¹⁰

3.42 Next, behavioural economic literature has also shown that individuals exhibit “time-inconsistent preferences” which means that they make decisions which are not rational and consistent over time.¹¹¹ Thus consumers demonstrate an unwillingness to delay gratification and will overvalue immediate benefits while significantly undervaluing future costs.¹¹² This trait is particularly relevant in the context of borrowing, as consumers will undervalue more and more the costs incurred as they arise further and further in the future. Behavioural economics has also identified the problem of “information overload”. The provision of too much information may affect an individual’s ability to make decisions, and it has been shown that when the amount of information presented reaches a certain level, the individual’s ability to process it decreases.¹¹³ A related finding of the behavioural economics literature is the “framing effect”.¹¹⁴ This means that the way in which information is presented to an individual can influence an individual’s choices.

3.43 Other factors have been shown to also limit the rationality of consumer decision-making. Empirical research has shown the important roles that emotion and mood play in consumer decision-making.¹¹⁵ This view is supported by information provided to the Commission by organisations advising debtors, who state that over-indebted individuals operating under severe stress often will not make rational decisions.

3.44 Studies have applied these findings of behavioural economics as to the “bounded rationality” of consumers to credit card markets and have found that consumers’ underestimation of their future credit

individuals’ assessment of health risks, before being subsequently recognised in other fields and is now well-established by social and psychological research: Harris and Albin Bankruptcy Policy in Light of Manipulation in Credit Advertising” (2006) 7 *Theoretical Inquiries in Law* 431 at 435.

¹⁰⁸ National Consumer Council *Credit-Choice or Chance* (National Consumer Council, London 2002) at 4.

¹⁰⁹ Ramsay “From Truth in Lending to Responsible Lending” in Howells et al (eds.) *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (Aldershot, 2005) 48 at 54.

¹¹⁰ *Financial Capability in Ireland: An Overview* (Irish Financial Services Regulatory Authority 2009) at 14.

¹¹¹ Ramsay *op cit* at 52.

¹¹² Kilborn “*Behavioral Economics, Overindebtedness and Comparative Consumer Bankruptcy: Searching for Causes and Evaluating Solutions*” (2005) 22 *Bankruptcy Developments Journal* 13. Available at SSRN: <http://ssrn.com/abstract=690826>, at 10.

¹¹³ Donnelly and White “The Effect of Information-Based Consumer Protection: Lessons from a Study of the Irish Online Market” *The Yearbook of Consumer Law 2008* 271 at 283.

¹¹⁴ Ramsay “From Truth in Lending to Responsible Lending” in Howells et al (eds.) *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (Aldershot, 2005) 48 at 53; Harris and Albin Bankruptcy Policy in Light of Manipulation in Credit Advertising” (2006) 7 *Theoretical Inquiries in Law* 431 at 446.

¹¹⁵ Block-Lieb et al “Disclosure as an Imperfect Means for Addressing Overindebtedness: An Empirical Assessment of Comparative Approaches” from Whitford, Ramsay and Niemi (eds.) *Consumer Credit, Over-Indebtedness and Bankruptcy: National and International Dimensions* (Hart Publishing 2009) at 153, available online at: <http://ssrn.com/abstract=1150864>.

card borrowings have led consumers to use high interest forms of credit card borrowing where cheaper alternatives are available.¹¹⁶ As consumers do not initially plan to use credit cards for borrowing purposes, they will not be particularly concerned with the level of interest when first entering a credit card agreement. Similarly, consumers do not react rationally to low introductory rates of interest, overrating the value of the initial low rate while under-estimating the future higher costs. Furthermore, consumer reactions to increased credit limits have been shown not to be economically rational, with the extra credit not just being used by those borrowers who were close to their credit limit, but also by other borrowers who used the additional credit available from their credit card accounts even though they had the option of cheaper credit elsewhere.¹¹⁷

3.45 It has thus been shown that various factors contribute to limit a consumer's ability to act in an economically rational manner. When information concerning loans is provided to borrowers, factors such as optimism biases, illusions of control and time-inconsistent preferences may cause borrowers to believe that additional costs such as late fees and over-limit charges under the loan agreement will not apply to them, and so to proceed with credit agreements which they may later become unable to afford.¹¹⁸ Since such borrowers who generate high default fees provide the most profitable accounts, incentives exist for lenders to thus attract such overoptimistic consumers in the hope of earning higher fees. The use of low introductory fees and the raising of credit limits have been shown in the previous paragraph to also exploit consumer irrationalities, as does the use of the "framing effect" in credit marketing. The combination of these factors means that information alone, though an essential element in protecting consumer borrowers and contributing to the prevention of over-indebtedness, may not be sufficient of itself to prevent this social problem.

(iii) Empirical Research of Financial Capability in Ireland

3.46 In 2009, the Irish Financial Services Regulatory Authority (IFSRA) published a study of financial capability among Irish consumers which further highlights the limitations of information-based consumer protection measures.¹¹⁹ The results of this study may serve to at least partially substantiate the more theoretical concerns in relation to the ability of information-based legislation alone to prevent over-indebtedness. This study showed that consumers carry out remarkable little "shopping around" for financial products and do not actively seek good value or important product features.¹²⁰ This is despite the goal of information provision based consumer protection being to produce an informed and confident consumer capable of ensuring competition between suppliers by shopping around for the best contracting terms. In contrast, this survey found that consumers rely on the (non-professional) advice of family and friends when making important financial decisions.¹²¹ It was also shown that one of the primary sources of information for consumers is their own past experiences, with consumers tending to make more competent decisions as they gain more experience in buying financial products. This could perhaps support behavioural economic reasoning which suggests that people make risk assessment decisions

¹¹⁶ Ramsay *op cit* at 53, discussing the research of Ausubel 'The Failure of Competition in the Credit Card Market', (1991) 81 *American Economic Review* 50.

¹¹⁷ Ramsay "From Truth in Lending to Responsible Lending" in Howells et al (eds.) *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (Aldershot, 2005) 48 at 53, citing Gross and Souleles 'Do Liquidity Constraints and Interest Rates Matter for Consumer Behaviour? Evidence From Credit Card Data' (2002) *Quarterly Journal of Economics* 149

¹¹⁸ Harris and Albin Bankruptcy Policy in Light of Manipulation in Credit Advertising" (2006) 7 *Theoretical Inquiries in Law* 431 at 450.

¹¹⁹ *Financial Capability in Ireland: An Overview* (Irish Financial Services Regulatory Authority 2009). Available at: <http://www.financialregulator.ie/publications/Documents/Financial%20Capability%20An%20Overview.pdf>.

¹²⁰ *Financial Capability in Ireland: An Overview* (Irish Financial Services Regulatory Authority 2009) at 18.

¹²¹ *Ibid.*

based on how easily similar events can be recalled and the salience of the risk to the individual.¹²² This suggests that if a consumer has personally experienced the consequences of an adverse financial product choice in the past he or she will be more cautious of the risk of a similar negative experience occurring in future choices.

3.47 The tendency of consumers not to use price information was particularly pronounced in relation to mortgage loans.¹²³ One-third of those consumers who had recently entered a mortgage agreement had not shopped around for the best value nor checked the best buy recommendations online or in the press.¹²⁴ The vast majority of mortgage-holders surveyed were unaware of the interest rate applying to their mortgage, and one third could not even guess the interest rate they were paying.¹²⁵ This is despite the APR being the most essential piece of information which must be provided to borrowers under current legislation, as outlined above.¹²⁶ This survey thus suggests that the information being made available to consumers does not appear to be reaching them, and that it is not being used by consumers when making financial decisions.

(iv) The Question of Autonomy

3.48 As regards the view that information-provision promotes party autonomy, it can be countered that the above analysis of optimism biases, framing effects, time-inconsistent preferences and the potential limits on information provision in preventing over-indebtedness suggest that mandatory interventionist rules may be justified in order to preserve individual autonomy.¹²⁷ Credit default and over-indebtedness substantially compromise the autonomy of the debtor and thus mandatory interventionist rules which are more effective than information-based rules may be necessary to protect the future autonomy and freedom of the consumer.¹²⁸

(v) Conclusions

3.49 The above analysis raises considerable doubts as to whether the provision of information to consumers may by itself be effective in preventing over-indebtedness. This suggests that an information based approach to consumer credit regulation must be combined with other preventative measures in adopting a thorough approach to preventing over-indebtedness. In particular, lender-sided measures must be adopted which seek to ensure responsible lending practices are observed to counter-balance the above difficulties in ensuring responsible borrowing practices. This need is becoming increasingly recognised, most notably in the creditworthiness assessment requirements introduced in the *EC Consumer Credit Directive 2008* and other similar legal measures targeted at ensuring responsible lending practices.

3.50 The second conclusion which can be drawn from the above analysis concerns the form which the information provided to consumer borrowers should take. Information provision measures should acknowledge consumer irrationalities and seek to provide information of a type and form which first seek to correct these irrationalities where possible and more importantly seek to target and exploit these very irrationalities in a manner similar to their exploitation by credit marketing. Thus it has been argued that “de-biasing” information such as the likelihood that an individual borrower will experience certain adverse life events could be provided to the borrower at the time of contracting to correct his or her optimism

¹²² See e.g. Kilborn “Behavioral Economics, Overindebtedness and Comparative Consumer Bankruptcy: Searching for Causes and Evaluating Solutions” (2005 22 *Bankruptcy Developments Journal* 13. Available at SSRN: <http://ssrn.com/abstract=690826>, at 8.

¹²³ *Financial Capability in Ireland: An Overview* (Irish Financial Services Regulatory Authority 2009) at 19.

¹²⁴ *Ibid.*

¹²⁵ *Financial Capability in Ireland: An Overview op cit.* at 19.

¹²⁶ See paragraph 3.15 above.

¹²⁷ Ramsay “From Truth in Lending to Responsible Lending” in Howells et al (eds.) *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (Aldershot, 2005) 48 at 56.

¹²⁸ *Ibid.*

bias.¹²⁹ Similarly, targeted warnings included in statements of defaulting accounts, framed in a manner emphasising the potential harm to the debtor and so taking advantage of his or her loss aversion, could act as counter-manipulating measures.¹³⁰ Such an approach has been considered by the European Commission's 2009 consultation on responsible borrowing and lending, which invites the views of stakeholders as to whether risk guidelines should be provided to consumers in advance of purchasing a credit product.¹³¹ These guidelines would alert potential borrowers to the risk involved in the credit product they intend to buy and so allow borrowers to better assess which product is suitable to their needs.

3.51 The Commission has indicated above that the subject of financial education lies outside the competence of a law reform body, and therefore no recommendations will be made in this area in Chapter 4. Similarly, consumer credit legislation, while a subject capable of being considered by a law reform body, now lies solely within the competence of the European Union due to the maximum harmonisation effect of the *EC Consumer Credit Directive 2008*.¹³² The reforms taking place in this area through the implementation of this Directive into Irish law will be discussed in Chapter 4.¹³³

B Responsible Lending

3.52 The role of irresponsible lending as a cause of over-indebtedness has been outlined above.¹³⁴ The traditional common assumption of consumer credit law for several years had been that the debtor has the best information about his or her circumstances and willingness to pay and so should be in the best position to avoid the risk of over-indebtedness.¹³⁵ This view has been the dominant view in modern consumer credit law to date, which has focused on seeking to inform consumers in order to assure responsible borrowing practices are observed and so prevent debt difficulties through assuring responsible borrowing. This view of debtor responsibility can even be seen in the traditional "won't pay" conception of the law of debt enforcement, which sought to hold the debtor solely responsible for his or her failure to repay debts owed.¹³⁶

3.53 More recent research has shown that the causes of debt difficulties most often lie outside the control of the debtor, and so it has been increasingly acknowledged that creditors may often be better placed than debtors to assess the risks of over-indebtedness. It has also been demonstrated above that optimism biases, financial incapability and emotional decision-making mean that consumers may not make accurate assessments of their own future ability to repay. Furthermore, while a debtor will make risk assessments on an individual basis, many of the factors which increase the risk of over-indebtedness, such as unemployment or redundancy, are not individual in their nature but depend on

¹²⁹ Harris and Albin *Bankruptcy Policy in Light of Manipulation in Credit Advertising* (2006) 7 *Theoretical Inquiries in Law* 431 at 456.

¹³⁰ Harris and Albin, *ibid*; Ramsay "From Truth in Lending to Responsible Lending" in Howells et al (eds.) *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (Aldershot, 2005) 48 at 54.

¹³¹ European Commission *Public Consultation on Responsible Lending and Borrowing in the EU* (European Commission DG Internal Market and Services 2009) at 6.

¹³² See article 22 of *Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC*.

¹³³ See paragraphs 4.15 to 4.25 below.

¹³⁴ See paragraphs 1.51 to 1.57 above.

¹³⁵ See Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented by the Institute for Financial Services e.v. Erasmus University Rotterdam/School of Law University of Helsinki/Helsinki Collegium for Advanced Studies to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 60.

¹³⁶ See discussion above at paragraphs 1.27 to 1.29.

general economic developments.¹³⁷ Assessments of even more individual risks such as the likelihood of ill health, accidents and family disruptions are based on statistical analysis. Lenders think collectively, calculating risks on a large scale before spreading them and absorbing them as costs.¹³⁸ Professional creditors can forecast the number of borrowers that will become unemployed and the percentage of outstanding credit that will go unpaid. This enables the creditor to make a fairly accurate assessment of the risk involved in lending to a particular category of customer in a manner which an individual debtor cannot.¹³⁹ Since mastering credit risk has for this reason been described as “one of the core competencies of credit providers”,¹⁴⁰ it is thus argued that lenders, possessing the requisite training and skill, are better placed than individual debtors to calculate default risks.

3.54 For these reasons, the role of ensuring responsible lending practices in order to prevent over-indebtedness is becoming increasingly recognised. The Council of Europe¹⁴¹ and European Commission¹⁴² have both acknowledged lender’s responsibility in this regard. Similarly, the privileged position of the lender in assessing default risks is beginning to be recognised judicially, with Lord Hobhouse commenting in the case of *Royal Bank of Scotland v. Etridge (No. 2)* that “[t]he bank is as well placed as anyone to assess the underlying rationality of the debtor’s proposal.”¹⁴³

3.55 Commercial lending is based on maximising profit, not eliminating risk.¹⁴⁴ This means that commercial lenders may accept that certain borrowers will default, and charge higher rates for this. Also, fiercely competitive consumer credit markets and sales-related remuneration systems may mean that disincentives exist for lenders to engage in responsible lending practices.¹⁴⁵ Thus while a certain number of defaults may be simply the cost of doing business for a lender, each case of over-indebtedness can result in personal tragedy for debtors and their families. This provides a further justification for the law to contain measures requiring responsible lending practices to be observed.

(1) Responsible Lending Under the Current Law

3.56 The European Commission report on a common operational definition of over-indebtedness notes that responsible lending practices can be assured through a combination of creditor initiatives and legal obligations.¹⁴⁶ Most important amongst voluntary creditor initiatives are the sharing of borrower data and consequent development of credit scoring systems; and the drafting of voluntary industry codes of practice.¹⁴⁷ Over recent years, the development of legal measures to tackle irresponsible lending has also gained momentum, with provisions ranging from traditional usury laws to obligations to check

¹³⁷ Reifner et al *op cit* at 61.

¹³⁸ Reifner et al *op cit.* at 71.

¹³⁹ See Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented by the Institute for Financial Services e.v. Erasmus University Rotterdam/School of Law University of Helsinki/Helsinki Collegium for Advanced Studies to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 72.

¹⁴⁰ Riestra *Credit Bureaus in Today’s Credit Markets* (ECRI Research Report No. 4 2202) at 3.

¹⁴¹ See *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* (Council of Europe CM/Rec (2007)8, 2007), paragraph 2(b) and paragraph 24 of Explanatory Memorandum.

¹⁴² *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 65-76.

¹⁴³ [2001] UKHL 44, [2001] 2 All ER (Comm) 1061 at [109].

¹⁴⁴ Reifner et al *op cit* at 61.

¹⁴⁵ See European Commission *Public Consultation on Responsible Lending and Borrowing in the EU* (European Commission DG Internal Market and Services 2009) at 7. See also paragraph 1.52 above.

¹⁴⁶ *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 65-76.

¹⁴⁷ See the discussion of “holistic” creditor practices above at paragraphs 1.80 to 1.84 above.

affordability and restrictions on the aggressive marketing of credit being introduced. This section discusses both creditor initiatives and legal measures which seek to ensure responsible lending in Ireland.

(a) **Creditor Initiatives**

(i) **Credit Reference Agencies and Credit Scoring**

3.57 As discussed above,¹⁴⁸ creditors in recent years, aided by technological advances, have developed sophisticated systems for assessing the credit-worthiness of potential borrowers.¹⁴⁹ The following paragraphs present a basic introduction to the practice of credit reporting, before describing the current system of credit reporting in Ireland, which is centred on the Irish Credit Bureau, the largest credit reference agency in the country.

3.58 Databases known as credit registers, credit reference agencies or credit bureaus form primary elements of these systems. These compile relevant information on debtors into a file or credit report which may be consulted by lenders when considering whether to grant credit to a customer.¹⁵⁰ Both public credit registers and commercial credit bureaus are now used to collect and file information on debtors, with private reference agencies most common in Europe.¹⁵¹ In many countries, there is one major credit reference agency which dominates the market; while in some others 2 or 3 major agencies operate in the market.¹⁵² Of the public registers, most are run by the central bank of the relevant state, and the functions of such a register generally include prudential supervision of a national banking system and/or the monitoring of national levels of over-indebtedness. A comparative analysis of credit reporting systems in various different countries is provided in Chapter 4, as issues to be considered in relation to the possible expansion of credit reporting systems in Ireland are presented.

(l) **Advantages of Credit Reporting**

3.59 The sharing of credit data is now considered an essential element of the financial infrastructure which facilitates access to a greater volume of finance for consumers.¹⁵³ Many advantages of credit data sharing have been identified. First, it improves the creditor's knowledge of the borrower's characteristics and permits a more accurate prediction of the likelihood that the borrower will be able to afford a credit product, provided that the information is accurate and up-to-date.¹⁵⁴ Therefore credit reporting can assist creditors in complying with responsible lending obligations. It may lead creditors to shift from collateral-based lending, where loans are advanced on the basis of the security provided, to information-based lending, where loans are advanced based on the borrower's ability to repay. As collateral-based lending may lead to problems of negative-equity and fails to consider whether a loan may push a borrower into over-indebtedness, this development is to be welcomed. Secondly, it enables creditors to access this necessary information more quickly and at a lower cost than had previously been the case, thus reducing the costs of credit. Thirdly, credit reporting can address the problem of moral hazard among debtors and operate as a borrower discipline device, as the risk of harming their credit histories and so limiting their future access to credit may persuade some "won't pay" debtors to keep up their repayments. In the same way, non-defaulting customers will be able to demonstrate their creditworthiness to lenders in order to obtain lower interest rates and better conditions when borrowing. Finally, credit reporting can help

¹⁴⁸ See paragraph 1.80 above.

¹⁴⁹ See *Towards A Common Operational European Definition of Over-Indebtedness op cit.* at 66. See also Niemi-Kiesiläinen and Henrikson *Report on Legal Solutions to Debt Problems in Credit Societies* CDCJ-BU (2005) 11 rev at 13.

¹⁵⁰ Riestra *Credit Bureaus in Today's Credit Markets* (ECRI Research Report No. 4 2202) at 1.

¹⁵¹ Riestra *Credit Bureaus in Today's Credit Markets* (ECRI Research Report No. 4 2202) at 5.

¹⁵² Riestra *op cit.* at 5.

¹⁵³ *Report of the Expert Group on Credit Histories* (European Commission DG Internal Market and Services 2009) at 13.

¹⁵⁴ *Ibid* at 14.

lenders to reduce the risk that borrowers will become over-committed by taking out too many loans simultaneously.

(II) *Limitations and Disadvantages of Credit Reporting*

3.60 Some limitations and disadvantages of credit data sharing also exist however.¹⁵⁵ First, credit reporting does not identify some of the causes of over-indebtedness such as unemployment, relationship breakdown or ill health. These life events may cause a credit history and in particular a credit score¹⁵⁶ to change significantly over a short period of time.¹⁵⁷ In this regard consulting a credit history database is only part of a responsible lending decision. Secondly, consumer associations have often raised the related issue of doubts concerning the ability of credit data to adequately reflect individual situations. This problem is particularly severe where disputes arise as to whether money is owed, and credit reporting systems must properly record such disputes. Thirdly, issues arise as to the protection of the privacy rights of those whose personal data is being shared.¹⁵⁸ This problem is addressed by data protection laws, but concerns still remain amongst those whose information is shared. Finally, problems arise where a borrower's credit history is shared among parties other than financial institutions, such as utility providers, insurance companies or even employers. This can restrict consumers from accessing essential services or may even exclude them from certain employment.¹⁵⁹ It should be noted however that the sharing of credit information with bodies other than financial institutions is very limited in many countries, and for example the Irish Credit Bureau restricts access to its information to its members, who are all financial institutions.¹⁶⁰

(III) *Credit Rating Agencies v Credit Bureaus*

3.61 Credit reference agencies or credit bureaus are to be distinguished from credit rating agencies. Credit rating agencies provide independent opinions on the probability that companies, governments and other financial instruments will not repay their debts.¹⁶¹ The debt being assessed by these agencies usually consists of financial instruments, such as bonds, which borrowers (issuers) offer to investors. The rating agency examines a specific issuer or its instrument and evaluates the likelihood that it will be unable to pay interest or the debt itself. The result of this examination is summarised in a rating attributed to an issuer or its instrument, such as AAA for the lowest risk.¹⁶² Examples of notable credit rating agencies include Moody's Investor Service, Standard and Poor's and Fitch Ratings. The European Commission has recently put forward a proposal for a Regulation on credit rating agencies.¹⁶³ The question of the regulation of credit rating agencies thus lies outside the scope of this Consultation Paper.

¹⁵⁵ See *Report of the Expert Group on Credit Histories* (European Commission DG Internal Market and Services 2009) at 16.

¹⁵⁶ See paragraphs 3.62 to 3.63 below.

¹⁵⁷ See Gross "Expanding the Use of Credit Reports and Credit Scores: the need for Caution and Empiricism" *The Yearbook of Consumer Law 2008* (Ashgate Publishing 2008) 327 at 334.

¹⁵⁸ *Report of the Expert Group on Credit Histories op cit.*

¹⁵⁹ *Report of the Expert Group on Credit Histories op cit.*; Gross "Expanding the Use of Credit Reports and Credit Scores: the need for Caution and Empiricism" *The Yearbook of Consumer Law 2008* (Ashgate Publishing 2008) 327

¹⁶⁰ See paragraphs 4.87 to 4.97.

¹⁶¹ Credit Rating Agencies: Frequently Asked Questions (European Commission DG Internal Market and Services MEMO/08/691 2008) at paragraph 1. Available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/691&format=HTML&aged=0&language=EN&guiLanguage=fr>

¹⁶² *Ibid.*

¹⁶³ *Proposal for a Regulation of the European Parliament and of the Council on Credit Rating Agencies* (Com(2008) 704 Final). Available at: http://ec.europa.eu/internal_market/securities/docs/agencies/proposal_en.pdf

(IV) *Credit Reporting v Credit Scoring*

3.62 The practice of credit reporting must also be distinguished from that of credit scoring. Credit scoring is a technique developed by credit bureaux which seeks to categorise credit applicants according to risk classes in order to identify the probability of repayment.¹⁶⁴ This procedure involves the development of a system of scorecards or “Customer Value Management”¹⁶⁵ models which assign a score to the applicant borrower expressing the odds of that borrower repaying the sum lent. The scoring system will indicate a cut-off point reflecting a particular credit risk, and below this cut-off point the particular loan being considered would generate a financial loss.¹⁶⁶ Credit scoring systems are built upon information from the client base of the lender itself, as well as from “positive” information collected from credit bureaux, meaning that the sharing of data between creditors is essential to this process. Scoring assessments are conducted by lenders themselves as well as by specialist companies such as CRIF and FICO. Also, credit bureaux which traditionally obtained credit scores from these specialist scoring companies are now increasingly providing out scoring services themselves.

3.63 The practice of credit-scoring is of particular use to institutions with a large portfolio of small debtors, such as consumer lenders, and allows lenders to provide a relatively accurate assessment of credit risk per category of borrower, so as to place new applicants into each such category. Prior to the development of credit scoring techniques, loan assessments were conducted by management staff interviewing potential borrowers in bank branches, but this system has now to a large extent been replaced by “instant credit assessments” through credit scoring.¹⁶⁷ This has lowered considerably the cost of credit assessments and has been shown to provide more accurate risk predictions than those based on information gathered from customer applications alone.¹⁶⁸ It may also assist in facilitating non-discriminatory access to credit. This development has however been criticised for depriving consumers of the personal nature of the relationship between customer and bank manager, which also served as a means of providing customers with a valuable and experienced source of debt and money advice.¹⁶⁹

(V) *Negative and Positive Information*

3.64 The information collected by credit bureaux or credit reference agencies consists of two categories, negative information and positive information.¹⁷⁰ Negative information consists solely of data relating to defaults on credit repayments, such as arrears, missed payments and bankruptcies.¹⁷¹ Positive information in contrast contains other data relating to the overall financial standing of a borrower, such as the credit limit on credit accounts, sizes of outstanding balances, maximum balances, sizes of repayments and the full record of the amount and time of payments over a period of time.¹⁷²

(VI) *The Irish Credit Bureau*

3.65 The Irish Credit Bureau (ICB) is the primary credit reporting database in Ireland. Although other commercial credit reference bureaux operate, they are not as widely used as the ICB. This is a private database, to which financial institutions may apply for membership. It is currently composed of over 80 members, almost 40 of which are the traditional financial institutions, with more than 40 of the

¹⁶⁴ Riestra *Credit Bureaus in Today's Credit Markets* (ECRI Research Report No. 4 2202) at 3.

¹⁶⁵ See the Griffiths' Commission on Personal Debt *What Price Credit?* (Centre for Social Justice 2005) at 69.

¹⁶⁶ Riestra *op cit* at 4.

¹⁶⁷ Griffiths' Commission on Personal Debt *What Price Credit?* (Centre for Social Justice 2005) at 69.

¹⁶⁸ See Barron and Staten *The Value of Comprehensive Credit Reports: Lessons from the US Experience* (Credit Research Centre, Georgetown University 2000) at 18.

¹⁶⁹ See the Griffiths' Commission on Personal Debt *What Price Credit?* (Centre for Social Justice 2005) at 69.

¹⁷⁰ See Riestra *Credit Bureaus in Today's Credit Markets* (ECRI Research Report No. 4 2202) at 6-8; Griffiths' Commission *op cit.* at 70.

¹⁷¹ Riestra *op cit.* at 7.

¹⁷² Griffiths' Commission on Personal Debt *What Price Credit?* (Centre for Social Justice 2005) at 70.

remaining members being credit unions.¹⁷³ These members provide data in relation to individual credit agreements to the ICB on a voluntary basis; although upon joining members are subject to a contractual obligation to update their records every month. Data is provided on a wide range of loans including personal loans, mortgages and credit card loans.

3.66 The ICB database contains both positive and negative data. The account holder's surname, forename, date of birth and address are contained for identification purposes. No other data such as a PPS number is included in this regard. In relation to data pertaining directly to a borrower's credit record, the account opening data, lending institution identification code, loan term in months and loan type are stored. The date of the latest available balance and the amount of the balance on that date are also indicated, as well as information in relation to repayment frequency. A borrower's payment history over the most recent 24 months is indicated. Data are retained for 5 years after the date on which a loan is closed, irrespective of whether the loan was fully repaid or not.

3.67 The ICB observes certain rules to protect borrower information. Primarily, the consent of borrowers is required before information is passed to the ICB. The ICB system also provides a footprint procedure which indicates to borrowers when a credit institution has checked his or her credit history. A borrower can obtain a copy of his or her credit record from the ICB on request, and can have any incorrect information rectified or erased. Financial institutions registered with the ICB are required on request to provide the name, address and telephone number of any credit reference agency used during the assessment of a loan application, where such records might have had a bearing on the decision.¹⁷⁴

3.68 It should be noted that while the Irish Credit Bureau is the largest credit reporting agency in Ireland, other commercial credit bureaus also operate in this country. These include Experian Ireland Ltd and CRIF Decision Solutions Ltd. Experian has been trading in Ireland since 1985, and first established an office in Dublin in 1997. In 1998 Experian acquired the Irish Trade Protection Association to form Experian Ireland Ltd. This company then acquired Interface Business Information in 2001, and now claims to be the largest provider of business information in Ireland. The company also provides credit reporting services in relation to consumers, as well as credit scoring, lifestyle profiling and automated decision engine services. CRIF Decision Solutions Ltd is a company in the Italian group CRIF. It operates in the UK and Ireland, where it provides a range of services in the areas of credit assessments, risk control and marketing strategies. It also provides customer database services in the areas of claims management and fraud. Both of these credit bureaus collect both positive and negative information.

(VII) *Credit Reporting and the Consumer Credit Directive 2008*

3.69 The EC *Consumer Credit Directive 2008*¹⁷⁵ contains measures aimed at ensuring responsible lending practices are observed, which specifically refer to the consultation of credit reference databases by creditors. In this regard, Recital 26 of the Directive emphasises as particularly important the need to prevent the practice of lending without first checking the creditworthiness of a borrower, taking the view that creditors should bear the responsibility of checking the creditworthiness of each customer. To this end, Article 8(1) of the Directive requires Member States to introduce measures ensuring that creditors assess the consumer's creditworthiness on the basis of sufficient information before concluding a credit agreement. This "sufficient information" is to be obtained from the consumer "where appropriate" and "where necessary" is to be gathered by consulting a relevant database. Article 8(2) obliges Member

¹⁷³ Mr. Séamus Ó Tighearnaigh, Irish Credit Bureau, speaking before the Joint Oireachtas Committee on Economic Regulatory Affairs, 11 November 2008. Available at:

<http://debates.oireachtas.ie/DDebate.aspx?F=ERJ20081111.xml&Node=H2#H2>. See also *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) Appendix E at 115; Riestra *op cit.* at 9.

¹⁷⁴ Mr. Séamus Ó Tighearnaigh, Irish Credit Bureau, speaking before the Joint Oireachtas Committee on Economic Regulatory Affairs, 11 November 2008. Available at: <http://debates.oireachtas.ie/DDebate.aspx?F=ERJ20081111.xml&Node=H2#H2>.

¹⁷⁵ *Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC.*

States to ensure that, where the parties agree to change the total amount of credit after the conclusion of the credit agreement, the creditor must update its financial information concerning the consumer and must re-assess the consumer's creditworthiness before significantly increasing the amount of credit it makes available to the consumer. Article 9 of the Directive imposes an obligation on Member States to ensure cross-border access for creditors from other Member States to credit reporting databases in their own territories. The conditions for access to these databases must be non-discriminatory. The European Commission made a Decision in 2008 which established an Expert Group on Credit Histories, charged with the task of identifying all legal, regulatory, administrative and other obstacles to the access to and exchange of credit data, as well as presenting proposals on how these obstacles could be addressed.¹⁷⁶ While this report was largely concerned with issues of the cross-border sharing of data, a subject lying outside the scope of this Consultation Paper, some aspects of the report published by this group is nonetheless discussed further in Chapter 4.

3.70 In a similar manner, the European Commission *White Paper on the Integration of EU Mortgage Credit Markets*¹⁷⁷ concluded that mortgage lenders and intermediaries should be required to adequately assess, by all appropriate means, the creditworthiness of borrowers before granting mortgage loans. While both this proposal and the provisions of Article 8 of the *Consumer Credit Directive 2008* require creditworthiness checks to be conducted, they both appear to fall short of requiring a credit reference database to be consulted in all circumstances before making a lending decision.

(ii) Registration of Judgments

3.71 A more basic method of assessing the creditworthiness of potential borrowers exists whereby a judgment obtained against a debtor may be registered in the Central Office of the High Court. Judgments obtained from the District, Circuit and High Courts may be registered by judgment creditors in this manner. The registration of judgments aims to publicise the fact that a judgment debtor has defaulted on a loan, and lists of judgments registered in this manner are published by reference agencies for the benefit of other creditors.¹⁷⁸ The threat of the registration of a judgment in this manner also serves an indirect enforcement purpose, and for this reason is sometimes seen as an enforcement method more than a means of preventing irresponsible lending.

(b) Legal Obligations

3.72 Over recent years, the need to provide legal solutions to the problem of irresponsible lending has been increasingly recognised, with various legal provisions enacted to promote responsible standards in lending.

(i) IFSRA Consumer Protection Code

3.73 The IFSRA *Consumer Protection Code* contains measures designed to prohibit lenders from engaging in known irresponsible lending practices of unilaterally raising credit limits (without a customer so requesting), and offering pre-approved unsolicited credit.¹⁷⁹ In addition to these two prohibitions, the IFSRA *Consumer Protection Code* also imposes a positive obligation on all regulated entities to know their customers. This requires lenders, in advance of providing a product or service to a customer, to "gather and record sufficient information from the consumer to enable it to provide a recommendation or service appropriate to that consumer."¹⁸⁰ Regulated entities are similarly required to gather and record

¹⁷⁶ Commission Decision of 13 June 2008 setting up an Expert Group on Credit Histories (2008/542/EC) at article 2.

¹⁷⁷ COM(2007) 807 final.

¹⁷⁸ See Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 22. Such publishers include Dun and Bradstreet, the publishers of Stubbs Gazette.

¹⁷⁹ See paragraph 1.54 above.

¹⁸⁰ IFSRA *Consumer Protection Code*, Chapter 2, Paragraph 24. This obligation does not apply where the consumer has specified both the product and the product provider and has not received any advice; where the consumer is purchasing or selling foreign currency; or where the consumer is seeking a "basic banking

details of any material changes to a consumer's circumstances before providing a subsequent product or service.¹⁸¹ Having obtained such information, the regulated entity then must ensure that any product or service offered to a consumer is suitable to that consumer and that any product which the entity recommends is the most suitable product for that particular consumer.¹⁸² These requirements are more stringent and require more responsible lending practices than had previously been obliged before the introduction of the Code.¹⁸³

(ii) Aggressive Marketing of Credit

3.74 Irish law also currently seeks to curb irresponsible lending through restrictions on aggressive marketing of credit. Various provisions of Irish law now seek to regulate the advertising of financial products and services.¹⁸⁴ Thus, Part II of the *Consumer Credit Act 1995* imposes certain obligations on lenders in relation to the advertising and offering of financial products, while Part IX contains similar measures in relation to advertisements for housing loans. In particular, the Act includes requirements as to the display of the Annual Percentage Rate (APR) of interest and requires any information documents provided by mortgage lenders to include warnings that the debtor could lose his or her home if repayments are not made. This policy of responsible marketing is furthered by the *Consumer Protection Act 2007*, Part Three of which seeks to prevent misleading, aggressive and prohibited commercial practices.¹⁸⁵ The *IFSRA Consumer Protection Code* also lays down certain requirements which must be observed in advertising credit services. All advertisements must be fair and must not be misleading.¹⁸⁶ Similarly, advertisements must not influence the consumer's attitude through inaccuracy, ambiguity, exaggeration or omission.¹⁸⁷ Specific provisions of the Code relate to loan advertisements, which largely follow and expand upon the requirements of the *Consumer Credit Act 1995*. Thus where an advertisement includes a statement of the APR, it must also indicate if the underlying interest rate is fixed or variable and must state the total cost of the credit.¹⁸⁸

(iii) Excessive Interest Rates

3.75 The 2008 European Commission report on over-indebtedness identifies high interest rates as another issue which must be considered when approaching the issue of responsible lending.¹⁸⁹ The report considers whether usury laws, and in particular interest rate ceilings, are essential requirements of policies to ensure responsible lending practices are maintained, or whether alternative measures are sufficient to address this problem. The many arguments against interest rate ceilings are outlined and the difficulties in calculating the appropriate levels at which to set such ceilings in countries where they do exist are discussed. The report concludes that complicated issues are raised in relation to this subject and that it is best left to Member States to decide on how best to approach them.

product or service", which includes a current account, overdraft, ordinary deposit account or a term deposit account with a term of less than one year.

¹⁸¹ Chapter 2, Paragraph 25 of the *IFSRA Consumer Protection Code*.

¹⁸² Chapter 2, paragraph 30 of the Code.

¹⁸³ See Donnelly "The Consumer Protection Code: A new departure in the regulation of Irish financial services providers (2006) 13(11) *Commercial Law Practitioner* 271 at 277.

¹⁸⁴ See e.g. Barrett "Financial Services Advertising in Ireland" (2008) 15(7) CLP 151; Donnelly "The Consumer Protection Code: A new departure in the regulation of Irish financial services providers (2006) 13(11) *Commercial Law Practitioner* 271 at 280.

¹⁸⁵ See Barrett *op cit.* at 154.

¹⁸⁶ Chapter 7, paragraph 1 of the *IFSRA Consumer Protection Code*.

¹⁸⁷ Chapter 7, paragraph 2 of the Code.

¹⁸⁸ Chapter 7, paragraphs 17 and 18 of the *IFSRA Consumer Protection Code*.

¹⁸⁹ *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 70.

3.76 In this regard, the current legal position in relation to interest rate ceilings in Ireland will now be discussed. Under Irish law, there is no general statutory interest rate ceiling. Nonetheless, interest rate ceilings do exist for certain specialist lenders. Therefore Section 38 of the *Credit Union Act 1997* limits the rate of interest which a credit union may charge on a loan to a member to no more than 12%. This provision provides that if a credit union knowingly exceeds this limit, it will be guilty of an offence and will be deemed to have waived a claim to all the interest agreed to be paid under the loan agreement, with any interest payments already made by the borrower recoverable. While there is no statutory interest ceiling for other lenders, there is in effect a ceiling in practice. Moneylenders must apply to renew their licences annually and there is a policy in place according to which lenders which charge more than 190% APR will not be granted a licence.¹⁹⁰ Furthermore, Section 47 of the *Consumer Credit Act 1995*¹⁹¹ permits a consumer or a person acting on a consumer's behalf to apply to the Circuit Court for a declaration that the cost of credit charged under a credit agreement (other than one provided by a credit institution or mortgage lender) is excessive. In deciding whether or not to make this declaration, the Circuit Court will consider:

- interest rates prevailing at the time the agreement was made or, where applicable, interest rates prevailing at any time during the currency of the agreement,
- the age, business competence and level of literacy and numeracy of the consumer,
- the degree of risk involved for the creditor and the security provided,
- the creditor's costs including the cost of collecting repayments, and
- the extent of competition for the type of credit concerned.

3.77 Where the Circuit Court decides under section 47 that the total cost of credit is excessive, section 48 permits the Court to re-open the credit agreement so as to do justice between the parties. In so doing, the Court may decide to:

- relieve the consumer from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of such total cost of credit;
- set aside, either wholly or in part, the agreement against the consumer;
- revise or alter the terms of the agreement; or
- order the repayment to the consumer of the whole or part of any sums paid.

If the agreement in question is a moneylending agreement, the Court may also under section 48(2) order the Central Bank and Financial Services Authority of Ireland to revoke, suspend or alter the moneylending licence of the holder concerned either immediately or as from such date as the court may decide.

(iv) *Equitable principles of Undue Influence and Unconscionable Bargains*

3.78 Apart from the above statutory provisions, the equitable principles of undue influence and unconscionable bargain may be relevant in holding lenders to responsible lending standards.

3.79 The doctrine of undue influence permits a party to a contract to rescind the contract where he or she has not freely consented to the transaction.¹⁹² The doctrine takes two forms. First, a presumption of undue influence arises where a relationship of trust and dependence exists between the parties

¹⁹⁰ Stamp *A Policy Framework for Addressing Over-Indebtedness* (Combat Poverty Agency 2009) at 26. Section 93(10) of the *Consumer Credit Act 1995* provides that one of the grounds on which the Central Bank (in effect the Financial Regulator) may refuse to grant a moneylender's licence is that the Bank is of the opinion that the cost of credit to be charged by the moneylender is excessive. It is to be noted that under the IFSRA *Consumer Protection Code for Licensed Moneylenders*, moneylenders charging a rate of APR of 23% or higher must indicate the high-cost nature of the loan on all loan information documentation through the use of a warning following a specified statutory form. The disclosure must read: "Warning: This is a high-cost loan." See Chapter 2, paragraph 3 of the Code.

¹⁹¹ As amended by Schedule 1 of the *Central Bank and Financial Services Authority of Ireland Act 2003*.

¹⁹² Clark *Contract Law in Ireland* (6th ed. Thomson Round Hall 2008) at 373ff.

involved and the transaction under scrutiny is not readily explicable except by reason of undue influence.¹⁹³ Secondly, actual undue influence arises where the party seeking to rescind an agreement can prove that he or she was in fact unduly influenced or victimised by a stronger party. The balance of case law appears to suggest that a relationship of trust and confidence sufficient to warrant a presumption of undue influence will not generally arise in a banker-client situation,¹⁹⁴ although under exceptional circumstances it may.¹⁹⁵ Also, a “hard bargain” arranged between a lender and a borrower in financial difficulty will not be such as to raise the presumption if it can be explained as the only means for the borrower to salvage a desperate situation.¹⁹⁶

3.80 It will therefore, in the vast majority of cases, fall upon a party alleging undue influence to prove actual undue influence on the facts of the case, rather than being able to benefit from a presumption of undue influence. A transaction between lender and customer may be vulnerable to being set aside on the grounds of actual undue influence where the transaction is to the disadvantage of the customer, where there is a marked disparity in position between the parties, and where there is positive “victimisation” of the customer by the lender.¹⁹⁷ It is unclear whether any of the irresponsible lending practices identified above could warrant the setting aside of loan agreements on the grounds of undue influence. For example, where a lender offers a financial arrangement for the purposes of salvaging the situation of a heavily-indebted household on such severe terms as a household in such a position could reasonably suspect, undue influence will not be easily established.¹⁹⁸

3.81 Irish courts have traditionally also exercised a power to set aside or amend a transaction which the court finds to constitute an unconscionable bargain.¹⁹⁹ Relief under this doctrine is founded upon a relationship between the parties to a transaction of the kind that allows one party to take undue advantage of the other, and facts showing that the stronger party has indeed taken advantage of the other through unconscionable conduct outside the boundaries of acceptable moral behaviour.²⁰⁰ The cause of the ability of one party to take advantage of the other may be due to “distress, or recklessness or want of care”.²⁰¹ It is important to note that an inequality of bargaining power by itself is not sufficient to warrant relief,²⁰² and it would appear that the bargain made must also be substantially unfair, or “so

¹⁹³ In the decision of the English Court of Appeal in *Bank of Credit and Commerce International v Aboody* [1990] 1 QB 923, the category of relational undue influence was divided into two sub-classes. Under “Class 2A”, the nature of the relationship itself raises a presumption, such as solicitor and client. Under “Class 2B” the presumption arises when the facts prove, *de facto*, that the party seeking to rely on the plea of undue influence placed trust and confidence in the stronger party and the transaction is manifestly disadvantageous to the complainant. While this distinction was removed by the House of Lords in *Royal Bank of Scotland v. Etridge (No. 2)* [2001] 3 WLR 1021, it appears to retain relevance in Ireland. See Clark *Contract Law in Ireland* (6th ed. Thomson Round Hall 2008) at 381.

¹⁹⁴ *National Westminster Bank v Morgan* [1985] AC 686; *RBS v Etridge (No. 2)* [2001] 3 WLR 1021. *Glover v Glover* [1951] 1 DLR 657. See Clark *op cit* at 387; Brown “The Consumer Credit Act 2006: Real Additional Mortgagor Protection?” [2007] 71 *The Conveyancer and Property Lawyer* 316 at 335.

¹⁹⁵ *RBS v Etridge (No. 2) op cit* at paragraph 10, per Lord Nicholls; *Lloyds Bank v Bundy* [1975] QB 326.

¹⁹⁶ See e.g. *Turkey v Awadh* [2005] EWCA Civ. 382, discussed by Clark *Contract Law in Ireland* (6th ed. Thomson Round Hall 2008) at 388.

¹⁹⁷ Clark *op cit* at 387, citing *RBS v Etridge (No. 2)* [2001] 3 WLR 1021 and *Glover v Glover* [1951] 1 DLR 657.

¹⁹⁸ *National Westminster Bank v Morgan* [1985] AC 686. See Clark *op cit* at 384.

¹⁹⁹ Clark *Contract Law in Ireland* (6th ed. Thomson Round Hall 2008) at 391ff.

²⁰⁰ See *Slator v Nolan* (1876) IR 11 Eq. 367. See also Brown “The Consumer Credit Act 2006: Real Additional Mortgagor Protection?” [2007] 71 *The Conveyancer and Property Lawyer* 316 at 332-4.

²⁰¹ *Slator v Nolan op cit.* at 409.

²⁰² *National Westminster Bank v Morgan* [1985] AC 686; *Hart v O’Connor* [1985] 2 All ER 880. See Clark *Contract Law in Ireland* (6th ed. Thomson Round Hall 2008) at 392.

improvident that no reasonable person would enter it.”²⁰³ The English courts have also required unconscionable and morally reprehensible conduct on the part of the stronger party before allowing an agreement to be set aside.²⁰⁴ Irish law however appears not to demand that this requirement be met before a plea of unconscionable bargain may be established.²⁰⁵

3.82 The doctrine of unconscionable bargain has operated to set aside or vary credit agreements containing unfair or oppressive terms, such as excessive interest rates. Thus in the case of *Rae v Joyce*²⁰⁶ a mortgage agreement entered into by a pregnant women with a moneylender was deemed to form an unconscionable bargain by the court. The medical condition and needy circumstances of the borrower meant that she was at a bargaining disadvantage in relation to the commercially aware moneylender, and the interest rate of 60% was deemed to be substantially unfair, with the lender failing to prove that the bargain was fair, just and reasonable. The court remedied the agreement by setting the interest rate at 5%.²⁰⁷ Canadian²⁰⁸ and Australian²⁰⁹ courts have also used this doctrine to re-open bargains concluded by commercial institutions with consumers lacking in business experience.

3.83 It is likely that the doctrine of unconscionable bargain could thus provide some protection against more extreme irresponsible lending practices. A harsh bargain concluded with a consumer who is in a particularly weak bargaining position could be vulnerable to scrutiny in this way, particularly if the stronger party can be shown to have acted in a morally reprehensible manner. It is arguable that certain aggressive and irresponsible lending practices targeting consumers already heavily indebted could, in some circumstances, be held to be unconscionable in this manner.

(v) The Regulation of Specialist Lenders

(I) Moneylenders

3.84 Another method of ensuring responsible lending which Irish law has adopted is to regulate strictly those sources of credit which pose high risks to consumers. Thus, due to the high interest rates charged under moneylending agreements, and the resultant risk of consumer debtors becoming unable to satisfy their obligations, Irish law has long recognised a need to assure responsible lending practices are observed by licensed moneylenders. Traditionally the approach of legislation in this area was similar to that under the common law principles of undue influence and unconscionable bargains described above, with section 1 of the *Moneylenders Act 1900* providing that a loan agreement entered into with a moneylender can be reopened when the Court is satisfied that the transaction is "harsh and unconscionable".²¹⁰

3.85 Subsequently, Part VIII of the *Consumer Credit Act 1995* lays down a regulatory code controlling the conduct of moneylenders. This part of the Act is based upon a licensing system under which a moneylender must comply with specified detailed conditions before he or she may be awarded a licence to operate as a moneylender.²¹¹ Requirements exist as to practices which must be observed by moneylenders in disclosing information relating to the interest rates charged and terms and conditions

²⁰³ Clark *op cit.* at 393, citing *Grealish v Murphy* [1946] IR 35 and *Lyndon v Coyne* (1946) 12 Ir Jur Rep 64.

²⁰⁴ Clark *op cit.* at 392 citing *Hart v O'Connor* [1985] 2 All ER 880 and *Portman Building Society v Dusangh* [2000] 1 All ER (Comm) 221; Brown "The Consumer Credit Act 2006: Real Additional Mortgagor Protection?" [2007] 71 *The Conveyancer and Property Lawyer* 316 at 333.

²⁰⁵ Clark *Contract Law in Ireland* (6th ed. Thomson Round Hall 2008) at 393.

²⁰⁶ (1892) 29 LR (Ir.) 500.

²⁰⁷ Clark *Contract Law in Ireland* (6th ed. Thomson Round Hall 2008) at 392.

²⁰⁸ See e.g. *Doan v Insurance Corporation of British Columbia* (1987) 18 BCLR (2d.) 286; *Hunter Engineering v Syncrude Canada Ltd.* (1989) 57 DLR (4th) 321; *Solway v Davis Moving and Storage Inc.* (2002) 222 DLR (4th) 251.

²⁰⁹ See e.g. *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447; *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395.

²¹⁰ See e.g. *In Re a Debtor* [1903] 1 KB 75.

²¹¹ See section 93 *Consumer Credit Act 1995*.

offered under their moneylending agreements.²¹² A licence will be refused if the applicant has in the past been party to an agreement found to have charged excessive interest rates,²¹³ or if the Irish Financial Services Regulatory Authority finds the cost of credit charged is excessive or any of the terms and conditions are unfair.²¹⁴ Default fees or increased interest rates in the case of default are prohibited, and any moneylending agreement containing a term providing for such charges will be unenforceable.²¹⁵ Certain debt collection practices are prohibited,²¹⁶ and records of loan agreements and repayments must be both maintained by the moneylender,²¹⁷ and supplied to the borrower.²¹⁸ This record must state clearly key information such as the amount of credit being advanced, the amount of each repayment, the rate of interest to be paid, the number of instalments, the amount of any additional charges such as collection charges, and the total amount payable by the borrower.

3.86 Section 98 of the Act provides that it shall be an offence to engage in the business of moneylending without a licence, and the Act gives powers to members of the Garda Síochána to investigate alleged breaches of this section²¹⁹ and to arrest those contravening it.²²⁰

3.87 Additional measures designed to ensure moneylenders lend responsibly are contained in the *IFSCRA Consumer Protection Code for Licensed Moneylenders*. Most notably, moneylenders are required to “know their customers” by acquiring sufficient information on a customer’s circumstances to be able to provide a professional service and to recommend an appropriate product or service for the individual customer.²²¹ Also, moneylenders must make a “suitability” assessment before offering a product or service to a consumer and must provide written reasons why the product or service offered is suitable to that consumer.²²² These requirements however do not apply where the consumer has specified both the product and the moneylender and has not received any advice. The distinct status of moneylenders compared to other lenders is recognised by the fact that moneylenders are not subject to the *Consumer Protection Code*, and by the fact that the provisions of the *Consumer Protection Code for Licensed Moneylenders* seek to provide sufficient flexibility so as not to overburden moneylenders through excessively onerous regulation.

(II) Credit Unions

3.88 The unique position of credit unions when compared with other lenders is discussed above, and the consequent distinct regulatory regime for these lenders is described.²²³ Credit unions are exempt from the responsible lending obligations of the *Consumer Protection Code*, and in response to this

²¹² As to be displayed in a moneylender’s licence: see section 93(8) of the Act.

²¹³ Under s47 *Consumer Credit Act 1995* as described above. See section 93(10)(b) of the 1995 Act.

²¹⁴ Section 93(10)(g) of the 1995 Act. See paragraph 3.76 above, where it is noted that the current practice of the Financial Regulator is to refuse a licence to a moneylender who charges an APR in excess of approximately 190%.

²¹⁵ Section 112 of the 1995 Act.

²¹⁶ Section 110 of the 1995 Act prohibits the collection of repayments during night hours and during early morning hours, except where the borrower has consented in writing.

²¹⁷ Section 101 of the 1995 Act.

²¹⁸ Section 100 of the 1995 Act.

²¹⁹ See section 98(3) (a power to stop and search person in public place suspected of moneylending); section 105 (a power to enter, search and inspect premises suspected of being used for moneylending and to question any person found thereon); section 106 (a power to obtain search warrants to enter and search premises) of the 1995 Act.

²²⁰ Section 109 of the 1995 Act.

²²¹ Chapter 2, paragraphs 10-14 of the *IFSCRA Consumer Protection Code for Licensed Moneylenders* (2009).

²²² Chapter 2, paragraphs 15-16 of the Moneylender Code.

²²³ See paragraphs 3.25 to 3.27 above.

regulatory gap IFSRA and the credit union movement have been working together to establish voluntary lending standards for credit unions. In 2008 IFSRA published a consultation paper on a proposed code of conduct for credit unions.²²⁴ The consultation paper includes a draft Voluntary Consumer Protection Code for Credit Unions, with the proposed final code to be issued in 2009. It should be noted that the draft code includes certain responsible lending principles. First, there is a requirement for credit unions to gather sufficient information about a member to enable them to provide a recommendation or a product or service appropriate to the member in question.²²⁵ Secondly, a “suitability” test is included in the draft code, requiring credit unions to ensure that any product or service offered or recommended to a member is suitable to that member.²²⁶ The credit union must also prepare a written statement indicating the reasons why the product or service offered is suitable to the member in question.

3.89 In addition to this initiative, in 2008 IFSRA published a further Consultation Paper on the establishment of voluntary standards for the provision of savings and loans services by credit unions, as also discussed above.²²⁷ The proposed standards include certain commitments in relation to responsible lending practices, which largely mirror the provisions of the draft Voluntary Code. First, the paper states that participating credit unions will gather sufficient information to enable them to provide a loan that meets the needs of the individual member.²²⁸ This information may be gathered from the potential borrower’s membership application and/or the loan application. Secondly, credit unions signing up to these standards commit to offering a loan which meets the needs of the individual member, and also promise to consider the member’s ability to repay.²²⁹ A written statement setting out the reasons why the loan is being offered will be prepared, and the effects, if any, of missing any of the scheduled repayments will be explained to the member. Thirdly, where a loan is offered for the purpose of consolidating other loans or credit facilities, a written indicative comparison of the total cost of both the continuance of the existing facilities and of the consolidation will be provided.²³⁰ Fourthly, in relation to cases of default and arrears, credit unions commit to advising members of the availability of debt counselling services.²³¹ This advice may take the form of providing the defaulting member with the address of a local branch of the Money Advice and Budgeting Service. Finally, participating credit unions agree to provide certain warnings relating to the effect of default on a borrower’s credit rating, the consequences of default for a guarantor and the potential added cost of debt consolidation loans.²³² These warnings will be displayed prominently by credit unions and placed on the relevant documentation or advertisement in a box in large, bold type.

3.90 Therefore it can be seen from above that IFSRA and the credit union movement are working to introduce voluntary responsible lending standards in credit unions which compensate for the lack of legally binding responsible lending measures regulating credit union practices.

²²⁴ Irish Financial Services Regulatory Authority *Consultation Paper: Voluntary Consumer Protection Code for Credit Unions (in respect of their Core Services)* (CP32 2008): see paragraphs 3.27 to 3.28 above.

²²⁵ Chapter 2, paragraphs 22-25 of the *Draft Voluntary Consumer Protection Code for Credit Unions*, Irish Financial Services Regulatory Authority *Consultation Paper: Voluntary Consumer Protection Code for Credit Unions (in respect of their Core Services)* (CP32 2008) at 12.

²²⁶ Chapter 2, paragraphs 26-27 of the draft Voluntary Code: *ibid* at 13.

²²⁷ Irish Financial Services Regulatory Authority *Consultation Paper: Savings and Loans – Our Voluntary Standards* (CP35 2008). See paragraph 3.29 above.

²²⁸ Chapter 3, paragraph 1 of the draft *Voluntary Standards*.

²²⁹ Chapter 3, paragraph 2 of the draft *Voluntary Standards*.

²³⁰ Chapter 3, paragraph 3 of the Irish Financial Services Regulatory Authority *Consultation Paper: Savings and Loans – Our Voluntary Standards* (CP35 2008).

²³¹ Chapter 3, paragraph 4 of the draft *Voluntary Standards*.

²³² Chapter 3, paragraph 5 of the draft *Voluntary Standards*.

(2) Issues for Consideration

3.91 It has been shown above from the problems identified in the consumer information-based approach to preventing over-indebtedness that additional measures must also be taken to address this problem. In this regard it is becoming accepted that the law must ensure responsible lending practices are observed, just as it seeks to ensure responsible borrowing among consumers. The approach of Irish law to the issue has been illustrated above, and further issues for consideration in relation to the possible expansion of the Irish policies on responsible lending are now presented.

(a) Credit Reporting

3.92 Several limitations have been identified with the current system of credit reporting in Ireland. A first concern of the Commission is that the present credit reference system in Ireland is entirely voluntary. Creditors can decide whether or not to share data, with the only encouragement to do so being the reciprocal nature of these databases, which operate on the basis that only those creditors who contribute information to the database may access the data contained therein. The advantages of credit data sharing in solving the problems of adverse customer selection and debtor moral hazard, as well as this principle of reciprocity and competitive pressures generally encourage creditors to join credit reference agencies.²³³ Against this however is the risk that lenders will be reluctant to share valuable information on their clients with their competitors.²³⁴ Furthermore, it appears that technological limitations and costs may also provide disincentives for the sharing of data by some creditors. The voluntary nature of credit reporting in Ireland therefore contrasts with the mandatory reporting in some countries such as France and Belgium.²³⁵

3.93 As a consequence of the voluntary nature of credit reporting in Ireland, there is no single complete database containing information on all credit agreements. A large number of credit unions are not members of the ICB for example. In addition, other creditors such as utility service providers, retailers and trade creditors are not involved in the data sharing network of the ICB. Thus all credit reference databases in Ireland are incomplete, with the obvious consequence that no single source can be consulted by creditors in order to obtain a thorough view of the indebtedness of a potential customer. The lack of complete data sharing has been noted in other countries as significantly contributing to problems of over-commitment by hampering responsible lending.²³⁶

3.94 It has been argued that incomplete credit reporting can inhibit responsible lending practices. This has particularly been the case in relation to credit card debt, where a consumer making the minimum repayment on several different credit card loans each month may be over-indebted without the knowledge of his or her creditors.²³⁷ Further disadvantages of incomplete credit reporting also exist. Free and fair competition may be impaired. This is because risk-based pricing, facilitated by comprehensive data sharing, enables consumers with good credit records to become eligible for lower interest rates from other lenders.²³⁸ Finally, incomplete data sharing, particularly in relation to credit cards, may assist in

²³³ See *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 69; Barron and Staten *The Value of Comprehensive Credit Reports: Lessons from the US Experience* (Credit Research Centre, Georgetown University 2000) at 2.

²³⁴ Barron and Staten *op cit.* Riestra notes that by maintaining continuous relationships with borrowers and acquiring “proprietary” information about their creditworthiness, lenders obtain a certain degree of informational monopoly about their clients and so gain market power. See Riestra *Credit Bureaus in Today's Credit Markets* (ECRI Research Report No. 4 2202) at 26.

²³⁵ See paragraphs 4.45 to 4.53 below.

²³⁶ *Credit Card Charges and Marketing* (House of Commons Treasury Committee Second Report of Session 2004-5, January 2005) at 24.

²³⁷ *Ibid* at 23.

²³⁸ *Credit Card Charges and Marketing* (House of Commons Treasury Committee Second Report of Session 2004-5, January 2005) at 24.

facilitating fraud. It may be possible to obtain a number of cards over a short period, using one to pay off another, and drawing down on each card to its maximum limit before absconding.²³⁹

3.95 If a more comprehensive credit reference system is established, it is essential that it is not abused. Concerns have been raised that a potential greater sharing of data could be used for purposes of aggressive marketing and predatory lending.²⁴⁰ Certain companies specialise in targeting highly indebted consumers for the purposes of profiting from higher interest rates and arrears fees. Others may seek to persuade over-indebted individuals with unsecured debt to consolidate their debts into loans secured on a home, when the ability to meet repayments on a consolidated loan may be in doubt.²⁴¹ Safeguards must be in place to prevent such practices.

3.96 Another possible problem in relation to credit reporting is that there is currently no legal obligation on creditors to consult a credit reference database before lending. While Article 8 of the *Consumer Credit Directive 2008* includes an obligation to assess the creditworthiness of consumers, where necessary by consulting the relevant database, this appears to fall short of requiring lenders to consult a database before making the decision to lend. Such an obligation is imposed upon lenders in certain other European States.²⁴² The merits of considering such an approach in Ireland will be discussed in the next chapter.

(b) ***Contract law and Irresponsible Lending***

3.97 A problem with the current law in this area is that at present lenders may use the courts to enforce agreements into which they have irresponsibly entered. This means that the law currently places all the costs of over-indebtedness on debtors and on the State's social welfare system, despite at least partial contribution from creditors to the causes of over-indebtedness.

3.98 While sections 47 and 48 of the *Consumer Credit Act 1995* provide some protection against irresponsible or predatory lending, this protection is quite limited. First, it merely refers to excessive interest rates and does not provide protection against other irresponsible or unfair lending practices. It is to be noted that other countries such as the United Kingdom, Australia and South Africa have moved away from an approach which merely renders loan agreements specifying exorbitant interest rates unenforceable to an approach whereby the totality of the relationship between the creditor and debtor may be assessed, and the contract may be unenforceable if the creditor is found to have engaged in irresponsible, reckless or otherwise unfair lending practices.²⁴³ The relevant legal provisions in these countries are discussed in Chapter 4, where the Commission raises the issue of whether a defence against irresponsible, reckless or unfair lending practices should be introduced into Irish law as a means of enforcing responsible lending rules.

(c) ***Qualifications to the Principle of Responsible Lending***

3.99 While the importance of ensuring responsible lending practices has clearly been illustrated above, three qualifications must be made when recommending that the law take further measures to suppress irresponsible lending practices.

3.100 The first is that the law must be conscious of the problem of financial exclusion and must ensure that a stricter lending regime must not stop the supply of credit. The importance of a free supply of credit to the functioning of the economy has already been discussed above. There is a risk that strong prohibitions on irresponsible lending could lead to an unintended consequence of credit rationing, which

²³⁹ *Ibid.*

²⁴⁰ *Credit Card Charges and Marketing op cit.* at 24.

²⁴¹ *Ibid.*

²⁴² Such as Belgium: see paragraphs 4.50 to 4.53 below for a discussion of the mandatory credit reporting system in Belgium and the accompanying obligation to consult the national public credit register in advance of lending.

²⁴³ See Section 19 *Consumer Credit Act 2006 (UK)*, introducing a new section 140A(1) into the *Consumer Credit Act 1974 (UK)*; Sections 80-81 *National Credit Act 2005 (South Africa)*. See paragraphs 4.118 to 4.128 below.

would in turn increase the problem of financial exclusion.²⁴⁴ Excessive caution among mainstream lenders may lead to deserving consumers being refused credit, and in turn raises the risk that such consumers will be required to resort to either high-cost licensed moneylenders or even illegal moneylenders. This in turn raises the issue of a need for basic banking services to be available for all consumers, which enables consumers to avoid higher-risk sources of credit. Arguments have been made that the provision of basic banking services to high-risk consumer groups as part of a financial inclusion programme would be a powerful protection against irresponsible lending practices and so would be of great assistance in preventing over-indebtedness.²⁴⁵ Measures seeking to achieve this aim have been adopted in Italy, the Netherlands and the UK, and these will be discussed in the next chapter.²⁴⁶

3.101 The second concern is that when ensuring responsible lending practices, the law respects the personal autonomy of borrowers, to the extent that borrowers must not be prevented from exercising their own powers of judgment in entering credit agreements. It has, however, been shown above that a lack of financial capability, consumer biases and factors such as making decisions in conditions of high stress mean that barriers exist to the exercise of true autonomy by consumers when borrowing. Also, the prevention of over-indebtedness may be justified as protecting the future autonomy of a consumer borrower by preventing his or her future freedom from being constrained by his or her over-indebtedness.²⁴⁷

3.102 This leads to the third possible problem which must be considered when proposing legal solutions to the problem of irresponsible lending, that of the potential for the creation of moral hazard among debtors. If too much responsibility for the borrower's over-indebtedness is placed upon the lender, there is a risk that "won't pay" debtors, seeking to avoid their obligations, could benefit.²⁴⁸ Thus the law, while taking into account the responsibility of lenders in creating debt difficulties, must be careful to seek a balanced approach to preventing over-indebtedness. Both responsible lending and borrowing practices must be observed, and risks and consequent losses must be shared fairly between lenders, borrowers and society in general.

C Responsible Arrears Management

3.103 The observance of responsible arrears management practices by creditors has been recognised both by the Council of Europe and the European Commission report as an essential element in the prevention of over-indebtedness.²⁴⁹ It is in the interests of both the creditor and debtor that an account is not allowed to fall into arrears and it is even more important for both parties that arrears are not

²⁴⁴ See e.g. Pottow "Private Liability for Reckless Consumer Lending" (2007)(1) *University of Illinois Law Review* 405 at 449.

²⁴⁵ See e.g. Stamp, who notes that the line which policymakers must tread in this regard is a "fine one": Stamp *A Policy Framework for Addressing Over-Indebtedness* (Combat Poverty Agency 2009) at 19-21, 27. See also generally Corr *Financial Exclusion in Ireland: An Exploratory Study and Policy Review* (Combat Poverty Agency 2006).

²⁴⁶ See *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 74-75.

²⁴⁷ See paragraph 3.48 above.

²⁴⁸ See Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented by the Institute for Financial Services e.v. Erasmus University Rotterdam/School of Law University of Helsinki/Helsinki Collegium for Advanced Studies to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 60-61.

²⁴⁹ *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 78ff.; *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* (Council of Europe CM/Rec(2007)8, 2007) at paragraph 2(d).

allowed build-up to the point where debt settlement or debt enforcement procedures are required.²⁵⁰ Thus, both creditor and debtor will benefit from responsible arrears management on the part of the creditor involving measures aiming to avoid arrears, active responses to missed payments, and holistic and responsible debt recovery measures.²⁵¹ Member States of the Council of Europe have for this reason committed themselves to “providing the necessary measures and regulations to ensure responsible practices during all of the credit relationship”²⁵² and to “setting up policies relating to debt management and to treatment of over-indebted individuals and families.”²⁵³ Member States have also agreed to ensure, or at least encourage, “effective participation of lending institutions and other public and private creditors in implementing national policies for debt management.”²⁵⁴

3.104 The principles of responsible arrears management largely correspond to the holistic approach of some creditors described and endorsed above.²⁵⁵ Three key practices form a responsible approach to arrears management.²⁵⁶ The first is “arrears avoidance”, or the prevention of the build-up of unmanageable amounts of arrears. The second practice is “arrears handling” or the actions which creditors should take from the point when a customer first falls into arrears up to and including debt rescheduling undertaken in collaboration with the debtor or money advisors on the debtor’s behalf. Finally, creditors should observe responsible practices in the area of debt recovery. This can include both formal legal debt enforcement proceedings and informal non-judicial recovery measures such as the use by creditors of private debt collection agencies. The legal debt enforcement procedure and its problems are discussed below, and so this section will concentrate on non-judicial debt recovery practices, particularly through the use of private debt collection agencies.

3.105 Irish law has recently sought to follow this policy in both introducing statutory arrears management codes having the force of law and requiring other lenders to prepare voluntary codes of conduct on arrears management. While these developments are to be commended, the following section and the corresponding section of Chapter 4 demonstrate that certain changes to Irish law should be considered in order to ensure high standards of arrears management practices are universally followed.²⁵⁷

(1) The Current Position in Ireland in Relation to Responsible Arrears Management

(a) Arrears Management Codes of Conduct

(i) Code of Conduct on Mortgage Arrears

3.106 The Irish Banking Federation, the representative body for the banking and financial services sector in Ireland, and the Irish Mortgage Council, which is composed of building societies and mortgage lenders, had voluntarily developed a code of practice outlining the procedures which members of these bodies would adopt in managing mortgage arrears and the enforcement of mortgage agreements.²⁵⁸ This code was non-binding and voluntary in nature, with the borrower remaining at all times bound by the original contractual agreement.²⁵⁹ Similarly, lenders reserved their right to have recourse to legal enforcement methods “in circumstances where application of this code is not appropriate, such as in the

²⁵⁰ *Towards A Common Operational European Definition of Over-Indebtedness op cit.* at 76.

²⁵¹ *Ibid.*

²⁵² *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* (Council of Europe CM/Rec(2007)8, 2007) at paragraph 2(d).

²⁵³ *Ibid* at paragraph 5(a).

²⁵⁴ *Ibid* at paragraph 5(c).

²⁵⁵ See paragraphs 1.80 to 1.84 above.

²⁵⁶ *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems op cit.* at 78.

²⁵⁷ See paragraphs 4.174 to 4.234 below.

²⁵⁸ *IBF Code of Practice on Mortgage Arrears* (Irish Banking Federation 2000).

²⁵⁹ Section 1(c) of the Code of Practice.

case of fraud or breach of contract other than the existence of arrears.”²⁶⁰ Nonetheless, the fundamental principle of this code was to adopt flexible procedures for managing cases of arrears, with a strong emphasis on treating each case individually and aiming to assist each borrower in his or her unique circumstances. The code further provided that lenders should recognise the distinction between borrowers who cannot repay the monies owed due to changed circumstance and those who could repay but are seeking to avoid so doing.²⁶¹ In making this assessment on the borrower’s ability to pay, the lender was to consider the borrower’s overall indebtedness. In this sense the code could be seen to embody the holistic approach to arrears management and debt recovery outlined above.

3.107 In 2009, this voluntary code was replaced by a new statutory *Code of Conduct on Mortgage Arrears*. This Code applies to the mortgage lending activities of all regulated entities to consumers in respect of their principal private residences in Ireland. The Code is issued under Section 117 of the *Central Bank Act 1989* and lenders are “required to comply with this Code as a matter of law.” Lenders must also be able to demonstrate their compliance with the Code. This document sets out a framework within which mortgage lenders must operate, with an emphasis on the adoption of flexible procedures aimed at assisting the borrower in his or her individual circumstances.²⁶² In this regard, the Code lays down the steps a lender must take in managing mortgage arrears, but does not deprive lenders of the ability to enforce the mortgage where following the Code would be inappropriate, for example in the case of fraud or a breach of contract other than non-payment.²⁶³ It is thus made clear that the borrower is not relieved of his or her contractual duties by these provisions, unless the lender so consents.²⁶⁴

3.108 The Code does not contain arrears prevention provisions, but begins to operate at the “arrears handling” stage of the debtor-creditor relationship as discussed above.²⁶⁵ For the purposes of the code, a “mortgage arrears problem” arises once a borrower fails to make a repayment on the date on which it falls due.²⁶⁶ When this occurs, communication should begin between the borrower and lender to ascertain the reason for the borrower’s failure to make the payment as scheduled and to attempt to formulate a solution to the relevant situation. The focus in this situation is to tackle the arrears problem at the earliest possible stage, so as to avoid the accumulation of arrears. The Code recognises that it is in the interests of both lender and borrower to address a “missed payment situation” as quickly as possible.²⁶⁷

3.109 If the arrears situation is not resolved, the lender will continue to attempt to engage in communication with the borrower with a view to formulating a viable repayment plan for clearing the arrears. These negotiations will have regard to the repayment capacity and payment history of the individual, as well as the equity remaining in the mortgaged asset.²⁶⁸ In formulating such arrangements, the lender will provide a clear explanation to the borrower of the form of the arrangement being agreed, as well as advising the borrower to obtain independent advice, including possibly referring the client to the local Money Advice and Budgeting Service.

²⁶⁰ Section 1(b) of the Code of Practice.

²⁶¹ Section 4 *IBF Code of Practice on Mortgage Arrears* (Irish Banking Federation 2000).

²⁶² Paragraph 1(a) of the *IFSR Code of Conduct on Mortgage Arrears* (2009).

²⁶³ Paragraph 1(b) of the Code of Conduct.

²⁶⁴ Paragraph 1(c) of the Code of Conduct.

²⁶⁵ See paragraph 3.104 above.

²⁶⁶ Paragraph 3(a) of the Code of Conduct.

²⁶⁷ Paragraph 3(b) of the *IFSR Code of Conduct on Mortgage Arrears* (2009). Thus a quick response to an arrears problem will be in the creditor’s interest by facilitating the recovery of the lender’s debt and assists the debtor by reducing the risk of a deterioration in a creditor’s credit rating and preventing arrears from reaching an unmanageable level, which increases the danger for the debtor of losing his or her home

²⁶⁸ Paragraph 3(b) of the Code of Conduct. The various alternative payment methods which should be considered are listed in paragraph 4 of the code, and include for example an arrangement on arrears whereby the monthly repayment amount may be varied, or an arrangement whereby all or part of the instalment repayment for a period may be deferred (for example where there is a temporary shortfall of income).

3.110 In addressing a mortgage arrears problem, the Code permits lenders to distinguish between borrowers who are unable to pay due to changed circumstances, and those who could pay but refuse to do so. All cases of “can’t pay” debtors must be handled sympathetically and positively by the lender, with the primary aim consisting of helping the borrower to meet his or her obligations.

3.111 The lender’s approach to addressing a mortgage arrears problem is to be informed by three main principles of: assessing each case on an individual basis; considering the totality of a borrower’s indebtedness; and exploring alternative repayment schemes. Thus each borrower’s situation must be individually assessed in proposing a solution to his or her arrears problems. A lender must consider all of a borrower’s indebtedness and details of his or her income and expenditure when assessing his or her ability to repay. Alternatives to the original repayment agreement must also be considered, including modifying the amount of monthly repayments, deferring repayment for a period, and extending the term of the mortgage. Also, the possibility of changing the type of mortgage should be considered where this would lower the amount of monthly repayments and the lender should also consider capitalising the arrears and interest where there is insufficient capacity to clear the arrears over the short term but where the capitalised balance could be repaid over the remaining term of the mortgage.

3.112 The borrower should obtain independent advice before agreeing to any of the above repayment options, with the lender obliged to refer the borrower to the Money Advice and Budgeting Service where appropriate. Once an agreement has been reached, the lender is under an obligation to provide a clear written explanation of the alternative repayment arrangement agreed. The operation of this agreement is then to be monitored by the lender, with a designated contact point established between debtor and creditor.

3.113 The code continues to state that if a third repayment is missed, the lender may issue a formal demand for either the full amount due on foot of the mortgage or for possession of the property. The lender must however first wait six months from the time when arrears first arose before applying to court for enforcement.²⁶⁹ Before doing so, the lender must first advise the borrower of the amount of arrears owing and any interest or charges which may accrue. Also, the lender must explain to the borrower the consequences of a failure on the part of the borrower to respond to this demand. These consist of the commencement of legal proceedings against the borrower and the potential loss of the mortgaged asset as well as the borrower’s liability for any legal costs.²⁷⁰ If the arrears situation has not been rectified at this stage, the code provides that the lender may then avail of legal enforcement mechanisms to enforce the mortgage.

3.114 Nonetheless the code emphasises that “the lender will not seek repossession of the mortgaged asset until every reasonable effort has been made to agree an alternative repayment schedule with the borrower.”²⁷¹ Furthermore, lenders will endeavour to maintain contact with the borrower while legal action to obtain a Court Order for Possession is pending, so that the option of reaching a voluntary repayment plan is to remain open until such an order has been obtained.²⁷² The lender must also explain to the borrower, if it be the case that irrespective of how the property is repossessed and disposed of, the borrower will remain liable for the outstanding debt, interest and costs.

3.115 Finally, the Code imposes an obligation on lenders to keep and maintain adequate records of all considerations and assessments undertaken as required by the Code. Lenders must produce such records to the Financial Regulator when requested.

(ii) Consumer Protection Code

3.116 The *IFSR Consumer Protection Code*²⁷³ also contains certain provisions which seek to ensure responsible arrears management practices are observed by institutions regulated by the Financial

²⁶⁹ Paragraph 4(d) of the *IFSR Code of Conduct on Mortgage Arrears* (2009).

²⁷⁰ Paragraph 4(c)(iii) of the Code.

²⁷¹ Paragraph 6(a) of the Code.

²⁷² Paragraph 6(c) of the Code.

²⁷³ See paragraphs 3.20 to 3.22 above for a brief description of the *IFSR Consumer Protection Code*.

Regulator. Thus the Code imposes basic informational requirements as regards changes in interest rates.²⁷⁴ The Code also imposes a more advanced duty on credit institutions to advise customers who are subject to penalties, including interest surcharges, of the methods by which these penalties may be mitigated.²⁷⁵

(iii) Voluntary Codes of Practice: Irish Commission for Energy Regulation and Good Practice in Housing Management: Guidelines for Local Authorities

3.117 Various other industry codes of practice have been established following a similar approach to that described above. For example, guidelines have been created in relation to arrears management and debt enforcement in the areas of energy supply bills and local authority housing rent collection.

3.118 The *Electricity Regulation Act 1999* established the Commission for Electricity Regulation to regulate the electricity sector in Ireland. Under the *Gas (Interim) (Regulation) Act 2002*, the remit of this body was extended to the regulation of the gas sector and it was renamed the Commission for Energy Regulation. This body has set out guidelines to regulate the relationships between electricity and natural gas providers and their customers, which oblige suppliers to establish codes of practice and customer charters providing for certain guaranteed standards in the services provided by these companies.²⁷⁶ These codes of practice lay down standards for arrears prevention and management, as well as outlining the procedures to be applied in dealing with customer disputes. The codes adopt a holistic approach, with the cutting off of a customer's energy supply seen only as a last resort, after all other debt management procedures have failed.

3.119 In 2001, the Centre for Housing Research, in conjunction with the Department of the Environment and Local Government and The City and County Managers Association, published a document entitled *Good Practice in Housing Management: Guidelines for Local Authorities*²⁷⁷ which was identified by the 2008 EU Commission report as an example of best practice for creditors in the three areas of arrears prevention, arrears management and debt recovery.²⁷⁸ This document provides guidance to local housing authorities as to the practices to follow in rent assessment, collection, accounting and arrears control. The detailed guidelines clearly embody the holistic creditor approach which places primacy on an individualised approach to customer relations and seeks to resolve debt problems in an amicable and personalised manner. In this way, legal enforcement mechanisms are seen

²⁷⁴ Chapter 3, paragraph 3 of the *IFSRA Consumer Protection Code*.

²⁷⁵ Chapter 3, paragraph 5 of the *IFSRA Consumer Protection Code*.

²⁷⁶ See e.g. ESB's *Billing and Payments Code of Practice*; Energia's *Code of Practice for De-Energisation of Customers*, available at: http://www.energia.ie/downloads/cop_de-energisation.pdf; Airtricity's *Customer Charter, Billing Information*, available at: http://www.airtricity.ie/ireland/customer_center/customer_service_charter/billing/; the ESB *Code of Practice for Special Services*, available at: https://www.esb.ie/esbcustomersupply/residential/downloads/coc_special.pdf; Airtricity's *Special Needs Charter*, available at: http://www.airtricity.ie/ireland/customer_center/customer_service_charter/special_needs/; See e.g. the ESB *Code of Practice for Complaints Handling*, available at: https://www.esb.ie/esbcustomersupply/residential/downloads/coc_comp.pdf; and the Airtricity *Complaints Process*, available at: http://www.airtricity.ie/ireland/customer_center/customer_service_charter/complaint_handling_proces/; Energia *Customer Complaints Charter*, available at: <http://www.energia.ie/downloads/energia-roi-forms.pdf>. (All last accessed 14 September 2009)

²⁷⁷ The Housing Unit *Good Practice in Housing Management: Guidelines for Local Authorities* (Centre for Housing Research, 2001). Available at: http://www.housingunit.ie/_fileupload/Publications/GoodPractice-Rent-Assessment.pdf (last accessed 14 September 2009)

²⁷⁸ See *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 82.

as a last resort to be used “only after every reasonable effort has been made to resolve the problem and has failed.”²⁷⁹

3.120 It can be seen that the above voluntary codes and protocols seek to enshrine responsible arrears management practices and are thus to be commended. Such voluntary schemes can provide a model for the introduction of more universal legal provisions which will seek to enshrine the principles of responsible arrears management in all lending relationships.

(b) ***Consumer Credit Act 1995 and EC Consumer Credit Directive 2008***

3.121 Certain responsible arrears management practices are also imposed by consumer credit legislation, namely the *Consumer Credit Act 1995* and the *EC Consumer Credit Directive 2008*. It must be noted however that these requirements are quite limited, with both legislative measures more concerned with providing consumers with information in advance of entering credit agreements than on responsible arrears management.

3.122 Under section 43(1) of the *Consumer Credit Act 1995*, if a consumer submits a written request to the lender, the lender must within 10 days provide a copy of the written agreement or a statement of the amount paid; the amount of arrears (if any) and the dates of the missed repayments; the total amount outstanding and the dates for the repayment of outstanding instalments.²⁸⁰ This policy of responsible conduct in arrears management and particularly in debt recovery is furthered by section 49 of the Act, which prohibits any person making a demand for payment in respect of an agreement which is not enforceable on account of failing to comply with the requirements of the Act, as described above.²⁸¹ The section specifies that any person contravening it will be guilty of an offence. Thus a person may not threaten to bring any legal proceedings; place the consumer borrower’s name on a list of defaulters or threaten to do so; or invoke any other collection procedure or threaten to do so if the agreement is unenforceable under the Act. This seeks to ensure responsible practices in debt recovery and to ensure that the debtor is not subject to unwarranted intimidation in an attempt to force him or her to pay an unlawful debt. Since this section merely refers to “a person” and not just the lender, it appears to also criminalise such conduct if committed by a private debt collection agency.²⁸²

3.123 The *EC Consumer Credit Directive 2008*²⁸³ also provides certain measures which seek to ensure responsible arrears management practices are followed by creditors. Since the Directive is primarily focused on preventing over-indebtedness through responsible borrowing and lending, it does not devote much attention to responsible arrears management. Thus the measures introduced in this area are quite limited in nature and primarily concentrate on providing the consumer with information during the lifetime of an overdraft agreement or a current account with an overrunning facility. Article 12 specifies that in the case of a credit agreement involving an overdraft facility, the consumer must be kept regularly informed by means of a statement of account of information such the transactions made during the course of the period to which the statement applies, the account balance, the interest rate, any

²⁷⁹ The Housing Unit *Good Practice in Housing Management: Guidelines for Local Authorities* (Centre for Housing Research, 2001) at 49.

²⁸⁰ This is especially important since it has been shown that consumers may not use information provided to them on entering the contract when the time to use such information actually arises due to e.g. a change in income. It has been noted that consumers may not even remember the information provided to them at the contracting stage: see Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented by the Institute for Financial Services e.v. Erasmus University Rotterdam/School of Law University of Helsinki/Helsinki Collegium for Advanced Studies to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 128.

²⁸¹ See paragraphs 3.13 to 3.19 above.

²⁸² For a description of other offences which may be committed in the context of debt collection activities see the discussion in paragraphs 3.130 and 4.198 below.

²⁸³ *Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC.*

charges applicable, and the minimum amount to be paid. The consumer must also be informed of any interest rate changes in this manner. Article 18 of the Directive provides that similar information must be provided to the consumer on a regular basis. Article 18(2) goes further in ensuring early arrears handling intervention by stating that in the event of a significant overrunning exceeding a period of one month, the creditor must inform the consumer *without delay* of the overrunning, the amount involved, the applicable interest rate and any penalties, charges or interest applicable. This provision, coupled with the above duty on creditors to advise consumers in similar circumstances under the *IFSRA Consumer Protection Code*, represent the early intervention model which is essential to responsible arrears handling.

(2) Issues for Consideration

3.124 The Commission welcomes recent developments under the *Code of Conduct on Mortgage Arrears, Consumer Protection Code, Consumer Credit Act 1995* and the *EC Consumer Credit Directive 2008* for their roles in enshrining responsible arrears management practices on a legal basis in Ireland. The Commission also welcomes the voluntary codes of practice which demonstrate considerable acceptance of the principles of responsible arrears management among lenders, and can serve as models for future law reform in this area.

3.125 The Commission recognises that some issues of responsible arrears management lie outside the competence of a law reform body and are questions of regulatory supervision and business practice. The Commission nonetheless has identified certain issues which should be considered by the financial services legislation review group and other issues which may be appropriate for law reform. These issues are now discussed.

(a) The Limitations of the Code of Conduct on Mortgage Arrears

3.126 As noted above, the Commission welcomes the introduction of the statutory *Code of Conduct on Mortgage Arrears* as requiring mortgage lenders to respect responsible and holistic arrears management practices throughout all stages of the credit agreement. Certain criticisms can however be made of the code. Primarily, it has been noted that the breaches of the Code are punishable by administrative sanctions issued by IFSRA under the *Central Bank Act 1942*.²⁸⁴ This situation contrasts with the *Consumer Credit Act 1995*, which imposes a sanction of unenforceability on creditors who fail to comply with its provisions.²⁸⁵ The question of whether creditors should be prevented by the Code from obtaining possession orders in court if they have not first attempted to exhaust all other non-judicial alternatives is therefore considered in Chapter 4.²⁸⁶

3.127 Additional issues which arise for consideration under the *Code of Conduct on Mortgage Arrears* include the fact that it only applies to “arrears situations”, and provides no guidance or standards on how pre-arrears situations are to be managed by lenders. This means that the situation of a borrower who is about to fall into default but has not yet missed a payment is not protected by the Code. Also, the Code does not oblige mortgage lenders to refer borrowers to a money advisor in all cases, but leaves discretion to lenders as to when to do so. These issues are discussed further in Chapter 4 below.²⁸⁷

(b) The Need for Similar Rules for Non-Mortgage Arrears

3.128 Secondly, the Commission believes that the principles contained in the *Code of Conduct on Mortgage Arrears* should be applicable in a wider context than mere mortgage loans, and that similar requirements of responsible arrears management should be applicable in relation to other forms of loans.

²⁸⁴ See Part IIIC, section 33AN of the *Central Bank Act 1942*, as inserted by section 10 of the *Central Bank and Financial Services Authority Act 2004*. Alternative sanctions may be issued under section 117 of the *Central Bank Act 1989* in the event of a failure by a regulated entity to provide IFSRA with requested information or a failure to comply with a direction issued under a Code.

²⁸⁵ Section 38 *Consumer Credit Act 1995*. See paragraph 3.19 above.

²⁸⁶ See paragraphs 4.179 to 4.180 below.

²⁸⁷ See paragraphs 4.176 to 4.178 and 4.182 to 4.185 below.

The Commission therefore identifies the options for introducing rules on arrears management for non-mortgage loans in Chapter 4.²⁸⁸

(c) **The Regulation of Private Debt Collectors**

3.129 Finally, a significant cause for concern arises in relation to the non-judicial debt recovery aspect of responsible arrears management. Some lenders' debt recovery practices include selling debts for collection to private collection agencies, or using such agencies as their agents to collect debts on their behalf. At present, private debt collection agencies are unregulated, and no code of practice exists outlining the standards of conduct which must be observed by such agencies. There are now approximately 45 such collection agencies operating in Ireland, ten of which are members of the Irish Institute of Credit Management.²⁸⁹ The Money Advice and Budgeting Service has argued that certain of these agencies have engaged in "deceptive and unfair" practices such as using documents resembling court summonses and presenting information in such a manner as to mislead consumer debtors.²⁹⁰ Reports have been made of private debt collectors collecting at people's homes out of hours, a practice which is prohibited among moneylenders under the *Consumer Credit Act 1995*.²⁹¹ It is understood that unsuccessful efforts have been made to establish a voluntary code of practice among collection agencies, but that such efforts have not yet succeeded.

3.130 It is of concern to the Commission that while credit institutions are subject to close regulatory supervision, debt collection agencies are not similarly controlled. Certain protection for debtors is provided by section 11 of the *Non-Fatal Offences against the Person Act 1997*, which provides that certain practices amounting to persistent harassment of a debtor will constitute an offence.²⁹² The argument has previously been made by both the MABS and the Free Legal Advice Centre that debt collection agencies should be regulated by the Financial Regulator and subject to the *Consumer Credit Act 1995* in a similar manner to moneylenders,²⁹³ and this is a possibility which the Commission examines in Chapter 4.²⁹⁴

D Debt Counselling

3.131 Debt counselling services have long been regarded as an essential remedial response to over-indebtedness, and form a key element of both the European Commission and Council of Europe's

²⁸⁸ See paragraphs 4.186 to 4.195 below.

²⁸⁹ *MABS Submission to the Financial Regulator on Regulation of Debt Collection Agencies* (MABS Social Policy 2009).

²⁹⁰ *Ibid.*

²⁹¹ See section 110 of the *Consumer Credit Act 1995*.

²⁹² The text of section 11 of the 1997 Act reads as follows:

11.—(1) A person who makes any demand for payment of a debt shall be guilty of an offence if—

(a) the demands by reason of their frequency are calculated to subject the debtor or a member of the family of the debtor to alarm, distress or humiliation, or

(b) the person falsely represents that criminal proceedings lie for non-payment of the debt, or

(c) the person falsely represents that he or she is authorised in some official capacity to enforce payment, or

(d) the person utters a document falsely represented to have an official character.

(2) A person guilty of an offence under this section shall be liable on summary conviction to a fine not exceeding £1,500.

²⁹³ *MABS Submission to the Financial Regulator on Regulation of Debt Collection Agencies* (MABS Social Policy 2009); Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 118.

²⁹⁴ See paragraphs 4.196 to 4.234 below.

recommendations on legal solutions to over-indebtedness.²⁹⁵ These services have been provided in Europe since long before other debtor rehabilitation methods such as debt settlement were introduced.²⁹⁶ This is the case in Ireland where, as will be seen below, no consumer debt settlement legislation exists, but where the Money Advice and Budgeting Service provides a first class debt counselling service to over-indebted individuals. The work of MABS will now be briefly outlined.

(1) The Money Advice and Budgeting Service (MABS)

3.132 The Money Advice and Budgeting Service (MABS) was founded in 1992 by the Department of Social and Family Affairs, primarily as a response to the problem of illegal money-lending. Originally, the service began as a pilot programme of 5 services, but it has now grown to 53 services provided by 250 trained staff operating in 65 locations nationwide. Each of these services is an independent company limited by guarantee. In 2004 a new national company MABS National Development Ltd was established to provide support services on a national basis. All funding is provided by the Department of Social and Family Affairs. In 2008 the MABS was given statutory recognition by the *Social Welfare (Miscellaneous Provisions) Act 2008*, which placed the MABS under the remit of the Citizens Information Board.²⁹⁷ Previous European studies which had found MABS to be a model of best practice in Europe had advocated a statutory basis for the service,²⁹⁸ and this development is thus welcomed by the Commission. The MABS has in recent years also been offering a telephone helpline service in addition to its nationwide offices.

3.133 The MABS provides independent, free and confidential debt counselling, money advice and budgeting assistance to over-indebted people on a nationwide basis. It seeks to enhance knowledge and skills of the over-indebted, in order to enable them both to cope with their immediate debt problems and become financially independent in the long term. An aim of the MABS is to facilitate its target client group to develop the knowledge and skills required to avoid getting into debt or to deal effectively with debt situations that arise. The service in this way has both preventative and rehabilitative goals. A key function of the MABS in this regard is to assist clients in preparing a household budget plan analysing the household's income and outgoings. This serves to maximise a household's income, which aids in the payment of "priority debts" such as rent or mortgage arrears and utility bills. The MABS also importantly negotiates on behalf of clients with creditors in order to reach agreement on repayment plans which are satisfactory to both parties, as well as being viable and sustainable. This role of the MABS in facilitating repayment plans is discussed further below.²⁹⁹

3.134 The MABS has significant involvement with the legal debt enforcement process. 51% of the MABS' clients contact the service because they have been threatened with court proceedings in relation to their arrears. The MABS plays a particularly important role in the instalment order procedure in the preparation of a debtor's statement of means.³⁰⁰ The value of money advice in resolving debt disputes is discussed further below.³⁰¹

²⁹⁵ See *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* (Council of Europe CM/Rec(2007)8, 2007) at paragraphs 2(c), 4(a) and 5(c); *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 83ff.

²⁹⁶ *Towards A Common Operational European Definition of Over-Indebtedness op cit.* at 83.

²⁹⁷ See sections 26-28 *Social Welfare (Miscellaneous Provisions) Act 2008*, amending the *Comhairle Act 2000* (which in turn was amended by the *Citizens Information Act 2007*).

²⁹⁸ Korczak *The Money Advice and Budgeting Service Ireland: A Service to Help People with Financial Problems and to Tackle Over-Indebtedness* (Peer Review in the Field of Social Inclusion Synthesis Report 2004) at 13.

²⁹⁹ See the discussion of the role of the MABS in reaching debt repayment plans under the *IBF-MABS Operational Protocol* below at paragraphs 3.182 to 3.188 below.

³⁰⁰ See paragraph 3.286 below.

³⁰¹ See paragraph 0 below.

3.135 At a wider level, the service also seeks to identify sources of credit and supply information on these sources to everyone in society, and to work through partnership with credit institutions and credit unions in finding solutions to the problems of over-indebted customers. The service also seeks to carry out research on over-indebtedness and to highlight changes in policy and practice which could reduce over-indebtedness. In this regard it is to be noted that the MABS produces quarterly statistics analysing information relating to client numbers, client profiles, and the types of arrears problems being experienced.

3.136 The target group of the MABS is individuals or families who need assistance in managing their finances in order to avoid debt difficulties. While the service has primarily been concerned with those on low incomes, who have limited access to financial services or credit, and especially those who must resort to borrowing from expensive moneylenders, recent times have seen changes in the descriptions of clients. Therefore many more individuals who would have been placed in a high-income category and who are multiply-indebted, often with mortgage loan arrears, are availing of the service.

3.137 An essential element of the MABS system is the close partnership relationship between the service and other agencies, both those representing debtors and creditors. Thus the MABS works closely with voluntary organisations such as the Society of Saint Vincent de Paul and the Free Legal Advice Centres (FLAC), as well as industry representative bodies such as the Irish Banking Federation (IBF) and the Irish League of Credit Unions (ILCU). In this regard, the MABS has engaged in a number of specific projects with these bodies. The Protocol arranged between the IBF and the MABS,³⁰² and the Pilot Debt Settlement Scheme which was run jointly by the IBF and the MABS are discussed below.³⁰³ In addition, the financial education programme established by the MABS in conjunction with the Irish Financial Services Regulatory Authority has been described above.³⁰⁴

(2) Other debt counselling services

3.138 In addition to the official State-funded debt counselling service of the MABS, various other private bodies provide debt counselling, advice and management. Charitable organisations providing support to debtors must be distinguished from commercial debt management agencies.

3.139 Charitable organisations such as the Society of Saint Vincent de Paul provide various forms of assistance to people suffering from financial difficulties. These charities provide advice and in some cases financial support, and may provide assistance to debtors in negotiating repayment arrangements with creditors.

3.140 The number of commercial debt management companies operating in Ireland has grown in recent years. Such companies offer a variety of services to those dealing with debt difficulties, such as assisting debtors in making bankruptcy petitions, applying for formal schemes of arrangement under the *Bankruptcy Act 1988*, negotiating and supervising informal debt management plans, and sometimes assisting the debtor in consolidating debts into a single loan. These agencies charge fees to their clients. There is currently no regulatory framework for such agencies, and a licence is not required to operate such a business. This is an issue the Commission highlights for discussion in Chapter 4.³⁰⁵

(3) Issues for Consideration

3.141 As noted above, the MABS has been held to be a model of best practice in a peer review of debt counselling services in the European Union.³⁰⁶ The service has been praised for its “people-oriented style”, centralised funding and coordination, collection of statistics, evaluation methods and private-public

³⁰² See paragraphs 3.182 to 3.188 below.

³⁰³ See paragraphs 3.189 to 3.195 below.

³⁰⁴ See paragraph 3.07 above.

³⁰⁵ See paragraphs 4.236 to 4.254 below.

³⁰⁶ Korczak *The Money Advice and Budgeting Service Ireland: A Service to Help People with Financial Problems and to Tackle Over-Indebtedness* (Peer Review in the Field of Social Inclusion Synthesis Report 2004).

partnership model.³⁰⁷ The service provided to over-indebted individuals is of huge value. The European peer review found that 73% of MABS's clients have paid or are currently paying off their debts, 70% found that they could manage their money better after receiving advice from the MABS, and 82% of them have greater peace of mind. In so far as the MABS succeeds in achieving amicable settlements and increased repayments of debts the service is also of benefit to creditors, as illustrated by the close cooperation of MABS and creditor representatives in recent times. The primary criticisms of the MABS raised in the peer review - that it lacked a statutory basis; required more strategic planning at national level; and needed a greater focus on financial education in order to prevent over-indebtedness - have now been addressed.

3.142 The Commission realises that the provision of debt counselling is largely a subject of social policy and is not an appropriate area for examination by a law reform body. Nonetheless, the Commission wishes to highlight the necessary role of debt counselling in furthering the efficacy of the Commission's proposed reforms and the role of money advice under the proposed debt settlement and debt enforcement systems is discussed in Chapters 5 and 6 below.³⁰⁸ The Commission also wishes to identify one area which may be considered as a subject of further research by an appropriate body. Concerns have been expressed both in Ireland and in other countries in relation to certain misleading practices engaged in by private commercial debt advice agencies.³⁰⁹ Such practices have involved commercial agencies presenting themselves as charitable or non-profit organisations, despite charging fees to consumers. In Chapter 4, the Commission examines the question of whether legislative reform should be considered to regulate such agencies and to ensure that conduct likely to mislead consumers is prohibited.

E Holistic Legal Procedures: Personal Insolvency

3.143 As is discussed in Chapter 1 above, the law has traditionally been modelled on the conception of the "won't pay" debtor, and has sought to take a harsh approach to debt enforcement in order to compel payment from an unwilling debtor.³¹⁰ Similarly, the law tends to view the issue of debt enforcement from the bilateral point of view of a single debt owed by a debtor to one creditor,³¹¹ a view which is outdated in light of the fact that most debtors now owe obligations to several creditors.³¹²

3.144 Thus, the widely accepted view is that the law must change in two ways to reflect the modern realities of consumer debt.³¹³ First, as has been advocated above, holistic court procedures must exist which take into account a debtor's entire indebtedness.³¹⁴ Secondly, the law must seek to address the full extent of a debtor's obligations with the aim of rehabilitating the debtor and relieving his or her over-indebtedness while at the same time aiming to find the best possible solution for creditors. To achieve

³⁰⁷ *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 85.

³⁰⁸ For a discussion of the role of money advisors under the Commission's proposed debt settlement system, see paragraphs 5.98 to 5.104 below. For a discussion of measures aimed at increasing debtor participation under the new enforcement system, including the provision of information to debtors about money advice services, see paragraphs 6.161 to 6.167 below.

³⁰⁹ For an example of such practices, see *OFT Seeks Closure of "Look Alike" Debt Advice Websites* (Office of Fair Trading Press Release 26-09).

³¹⁰ See paragraphs 1.27 to 1.28 above.

³¹¹ See paragraph 2.107 above.

³¹² See paragraph 1.26 above.

³¹³ *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 87-94;

³¹⁴ See paragraph 2.105 to 2.107 above.

these aims, both holistic enforcement mechanisms for debtors who can pay and linked judicial debt settlement or personal insolvency procedures for those who cannot are required.³¹⁵

3.145 This part discusses the rehabilitative measures currently existing in Irish law, while Part F describes the current enforcement mechanisms.

(1) Judicial Rehabilitative Processes

3.146 Irish law does not currently possess a consumer insolvency system. The procedure which most resembles such a scheme is that found in the *Bankruptcy Act 1988*, but for the reasons outlined below it will be seen that this regime differs greatly from the rehabilitative consumer insolvency procedures existing in other European countries and the US. As bankruptcy is not an option for the vast majority of Irish debtors, over-indebted consumers are subject to the full force of the legal debt enforcement regime. In practice, over-indebted consumers will often reach voluntary debt settlement agreements with their creditors,³¹⁶ and the assistance provided by the MABS is of great value in this regard. The Commission believes that there should not be such a discrepancy between the law and practice, and that a legal debt settlement system must be introduced whereby over-indebted individuals and creditors may reach settlements as regards repayment plans for debts which are not recoverable in full.

3.147 This section now describes the procedures under the *Bankruptcy Act 1988* and the reasons why the procedure is ineffective and under-used.

(a) Bankruptcy Act 1988³¹⁷

3.148 The *Bankruptcy Act 1988* and Order 76 of the *Rules of the Superior Courts 1986*³¹⁸ contain the rules relating to personal insolvency law in Ireland. Under these provisions either a creditor or the debtor him or herself may petition the High Court to have the debtor declared bankrupt.³¹⁹ Once declared bankrupt, all the property of the debtor vests in a trustee known as the Official Assignee in Bankruptcy who then becomes responsible for the management of the debtor's estate with the aim of generating income to be distributed among the debtor's creditors.

(i) Creditor's Petition

3.149 A creditor may only petition the Court if the debtor has first committed one of the recognised "acts of bankruptcy" outlined in section 7 of the 1988 Act. The most widely relied upon acts of bankruptcy are the failure of the debtor to pay within 14 days the sum demanded by the creditor in a bankruptcy summons³²⁰ which has been served on the debtor; and the making of a return of "no goods" by a sheriff or

³¹⁵ *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 87ff.

³¹⁶ See paragraphs 3.196 to 3.199 below.

³¹⁷ See generally Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 163ff.

³¹⁸ Inserted by S.I. No. 79 of 1989. In the remainder of this Paper the *Rules of the Superior Courts 1986* will be referred to as "RSC".

³¹⁹ Section 11 of the *Bankruptcy Act 1988*. The petition is filed in the Office of the Examiner of the High Court.

³²⁰ Section 8 lays down the conditions for the granting of a bankruptcy summons to a creditor by the Court, which the creditor will then serve on the debtor. Thus the summons will only be granted if:

(a) a debt of €1900 or more is due to the creditor (or a debt of €1300 or more if two or more debtors are applying for the bankruptcy summons) by the debtor,

(b) the debt is a liquidated sum, and

(c) a notice in the prescribed form, requiring payment of the debt, has been served on the debtor.

Under section 8(3), in advance of applying for a bankruptcy summons, a creditor must send a notice to the debtor specifying the particularities of the debt owed and indicating that payment is required within four days.

county registrar after attempting execution against the debtor's goods.³²¹ In addition, the debtor can commit an act of bankruptcy by conveying all or substantially all of his or her property to a trustee for the benefit of his or her creditors generally, or by filing a declaration of insolvency in the Court.³²² Certain other conditions must be met in addition to the debtor committing an act of bankruptcy before a creditor can petition the Court. Thus section 11(1) requires that:

- (a) the debt owing by the debtor to the petitioning creditor (or, if two or more creditors join in presenting the petition, the aggregate amount of debts owing to them) amounts to €1900 or more,
- (b) the debt is a liquidated sum,
- (c) the act of bankruptcy on which the petition is founded has occurred within three months before the presentation of the petition, and
- (d) the debtor (whether a citizen or not) is domiciled in the State.³²³

In addition, Ord. 76 Rule 29(1) *RSC 1986* provides that the petitioner must initially lodge a deposit of €650 with the Official Assignee and give an undertaking to subsequently lodge such sums as the High Court directs to cover the costs and expenses of the Official Assignee.³²⁴ The petitioner must also undertake at this point to advertise the notice of bankruptcy in various newspapers.³²⁵

3.150 Once the petition is presented, the Examiner of the High Court fixes a time for hearing of the petition. If the requirements of section 11(1) described above are satisfied, the High Court shall adjudicate the debtor bankrupt, with the order of adjudication being signed by the bankruptcy judge.³²⁶ A copy of the order shall then be served on the debtor,³²⁷ which should also indicate that the debtor has three days in which to appeal the validity of the bankruptcy adjudication, a period which may be extended up to a maximum of 14 days. This appeal is provided for under section 16, which permits the debtor to "show cause to the Court against the validity of the adjudication" by demonstrating that the requirements of section 11 described above have not been met. If so, the Court will annul the bankruptcy adjudication. However if the debtor fails to demonstrate that these requirements are unfulfilled the Court may dismiss the debtor's application on such terms as it sees fit.

³²¹ See paragraphs 3.247 to 3.257 below for a description of the procedure of execution against goods by Sheriffs and County Registrars.

³²² The other acts of bankruptcy which may justify the serving of a petition by a creditor are:

- (b) if in the State or elsewhere he makes a fraudulent conveyance, gift, delivery or transfer of his property or any part thereof;
- (c) if in the State or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon, which would under this or any other Act be void as a fraudulent preference if he were adjudicated bankrupt;
- (d) if with intent to defeat or delay his creditors he leaves the State or being out of the State remains out of the State or departs from his dwelling-house or otherwise absents himself or evades his creditors;

³²³ Alternatively, a petition may be presented where a debtor is not domiciled with the State, but meets any of the following criteria:

- Has ordinarily resided or had a dwelling- house or place of business in the State;
- has carried on business in the State personally or by means of an agent or manager; or
- Is or... has been a member of a partnership which has carried on business in the State by means of a partner, agent or manager, within one year of the presentation of the petition.

³²⁴ The creditor must state whether it holds any security in respect of the debt, and must either estimate the value of the security or give up the security for the benefit of other creditors. If the creditor estimates the value of the security, it may be admitted as a petitioning creditor or joint petitioning creditor for the remaining balance of the debt due: section 11(2) of the *Bankruptcy Act 1988*.

³²⁵ Ord. 76, rule 19(e) *RSC 1986*.

³²⁶ Section 14(1) of the *Bankruptcy Act 1988*.

³²⁷ Section 14(2) of the *Bankruptcy Act 1988*.

(ii) Debtor's Petition

3.151 Section 11(3) provides that a debtor may also petition the High Court to be adjudicated bankrupt. Section 15 states that to present such a petition the debtor must prove that he or she is unable to meet his or her credit obligations and that he or she possesses assets capable of raising at least €1900. The debtor must also lodge a deposit of €650 with the Official Assignee and thereafter lodge any further sums as the Court directs from time to time to cover the costs, fees and expenses of the Official Assignee.³²⁸

(iii) Consequences of Adjudication of Bankruptcy

3.152 If the debtor has petitioned for bankruptcy, or if the creditor has so petitioned and the debtor has not shown cause as to why there should not be an adjudication of bankruptcy, the Court will adjudicate the debtor bankrupt. Notice of the adjudication must then be published in *Iris Oifigiúil* and in at least one daily newspaper in circulation in the area in which the debtor resides.³²⁹ The Court will provide a date for a statutory sitting to be held within three weeks of the adjudication at which the debtor will attend to disclose his property to the Court.³³⁰ Creditors may also prove their debts and appoint a creditors' assignee at this sitting. On the date when the debtor is adjudicated bankrupt, all property of the bankrupt vests in the Official Assignee for the benefit of the creditors.³³¹ Certain essential articles of property are however exempted, including certain household necessities and tools of trade not exceeding a value of €3,100.³³² It should be noted that protection is also provided to the debtor's family home, which cannot be sold without a court order.³³³ When an application for the sale of a family home is made by the Official Assignee, the court may order the postponement of the sale of the family home, having regard to the interests of the creditors and of the debtor's spouse and dependents.³³⁴ The court will take into account all the circumstances of the case before making such an order.

3.153 Section 85 of the 1988 Act lists the conditions which must be met before a discharge may be obtained, which are severely onerous by international standards. Under the first method of obtaining a discharge, the debtor will be free of his or her obligations when the expenses, fees and costs due in bankruptcy, together with all debts owed, have been paid, if the creditors consent to the discharge.³³⁵ Alternatively, if a bankrupt has reached a composition with creditors as described below, he or she will be entitled to a discharge.³³⁶ Another route to discharge provides that if the above conditions have not been met, and where the court finds that the estate of the bankrupt has been fully realised, a bankrupt will be entitled to a discharge if all the expenses, fees and costs due in the bankruptcy, including preferential payments, have been paid; and either half of the debts owed to his or her creditors have been received, or 12 years have passed.³³⁷ Where the bankrupt seeks to rely on the expiry of 12 years as a ground for discharge, the court will first examine whether all property acquired after bankruptcy has been disclosed and that it is "reasonable and proper" to grant the application. These conditions for discharge mean that it

³²⁸ Order 76 Rule 29(1) *RSC 1986*.

³²⁹ Section 17(2) of the *Bankruptcy Act 1988*.

³³⁰ Section 17(3) of the *Bankruptcy Act 1988*.

³³¹ Section 44(1) of the *Bankruptcy Act 1988*.

³³² Section 45(1) of the Act provides that "A bankrupt shall be entitled to retain, as excepted articles, such articles of clothing, household furniture, bedding, tools or equipment of his trade or occupation or other like necessities for himself, his wife, children and dependent relatives residing with him, as he may select, not exceeding in value €3,100 or such further amount as the Court on an application by the bankrupt may allow."

³³³ Section 61(4) of the *Bankruptcy Act 1988*.

³³⁴ Section 61(5) of the Act.

³³⁵ Section 85(3)(a) of the *Bankruptcy Act 1988*.

³³⁶ Section 85(3)(b) of the 1988 Act.

³³⁷ Section 85(4) of the *Bankruptcy Act 1988*.

is quite possible that a bankrupt may never become eligible for discharge under Irish law, and may remain subject to a bankruptcy order for the remainder of his or her life, as is discussed below.³³⁸

(iv) Voluntary Debt Settlement Procedures under the Bankruptcy Act 1988: Composition and Arrangement

3.154 The *Bankruptcy Act 1988* also provides two alternative mechanisms which allow settlements to be reached between a debtor and his or her creditors in order to avoid the formal bankruptcy procedure.

3.155 First, sections 38-41 of the Act provide for a composition procedure which allows a debtor who has been adjudicated bankrupt to stay the realisation of his or her estate by reaching a compromise with his creditors.³³⁹ Under section 38, the debtor may apply to the Court for a stay of the realisation of the estate for the purposes of making an offer of composition to the debtor's creditors. Where the Court grants such a stay, the debtor shall call a meeting of his or her creditors before the Court, where the creditors may prove their debts and where a statement of the affairs of the debtor may be provided. Notice of this meeting, and of the precise terms of the offer of composition to be made to creditors, shall be published in *Iris Oifigúil* and posted to each creditor.³⁴⁰ If 60% of the creditors agree to the composition offer, it shall be approved by the Court and becomes binding on all creditors.³⁴¹ Section 41 of the Act provides that if the payments agreed under this composition, whether in a lump sum or in instalments, have been paid to the Official Assignee, the bankrupt may apply to the Court to have the adjudication order discharged.

3.156 Similarly, sections 87-109 of the Act provide an insolvent debtor who has not been adjudicated bankrupt with an opportunity to compromise under the arrangement procedure and so reach a debt settlement while avoiding a declaration of bankruptcy. Under this procedure, a debtor who is unable to meet his or her obligations may apply for the protection of the court with a view to making a proposal to his or her creditors for the composition of the debts owed to him or her.³⁴² The debtor must set out to the Court the reasons for the inability to pay his debts and request that his or her person and property be protected from any action or other process, including the registration of a judgment mortgage. The protection of the Court will not however affect an execution order under which the sheriff or County Registrar has already seized goods of the debtor. If a debtor has been imprisoned under section 6 of the *Enforcement of Court Orders Act 1940*,³⁴³ this procedure permits the Court, on granting protection, to order his or her release. If protection is granted to the debtor in this way, he or she may not dispose of any of his or her property except in the ordinary course of business.

3.157 Upon granting an order for protection, the Court shall direct the debtor to call a preliminary meeting of creditors to state his or her financial affairs,³⁴⁴ after which a private sitting of the Court will take place to consider the debtor's proposal for composition,³⁴⁵ and to examine under oath the debtor and any creditors.³⁴⁶ Creditors are also given the opportunity to prove their debts at this sitting.³⁴⁷ A statement of the debtor's affairs and payment capacity as well as any proposal made at the preliminary creditors' meeting must also be furnished to the Official Assignee in advance of this private sitting.³⁴⁸ If 60% of the

³³⁸ See paragraphs 3.166 to 3.168 below.

³³⁹ See Lynch "The Bankruptcy Act 1988" (1989) 7 *ILT* 300 at 301.

³⁴⁰ Section 39(1) of the 1988 Act.

³⁴¹ Section 39(4) of the *Bankruptcy Act 1988* provides that a creditor whose debt is for an amount less than €130 shall not be entitled to vote on such a proposal.

³⁴² Section 87(1) of the 1988 Act.

³⁴³ As amended by section 2 of the *Enforcement of Court Orders (Amendment) Act 2009*.

³⁴⁴ Section 90(a) of the 1988 Act.

³⁴⁵ Section 90(b) of the 1988 Act.

³⁴⁶ Section 92(3) of the 1988 Act.

³⁴⁷ Section 92(5) of the 1988 Act.

³⁴⁸ Section 91 of the 1988 Act.

creditors in number and value voting at the private sitting approve the proposal, it shall be deemed to be accepted by the creditors, and becomes binding on the debtor and all creditors³⁴⁹ on approval by the Court. The proposal may provide for the realisation of property of the debtor or the use of the debtor's property as security, in which case all or part of the debtor's property vests in the Official Assignee as in the formal bankruptcy procedure.³⁵⁰ The Official Assignee presents to the Court a list of creditors, an account of the debtor's finances, details of expenses and fees, the amount of dividends payable to creditors and a report on the realisation of the debtor's estate.³⁵¹ The Court makes such order as it thinks fit for the distribution of the whole or part of the estate to pay expenses and fees, preferential payments and the creditors' dividends.³⁵² If the proposal does not involve the vesting of the debtor's property with the Official Assignee, the debtor at this stage shall lodge the amount necessary to satisfy the composition and expenses with the Official Assignee.³⁵³ Where the debtor's proposal has been carried into effect, the Court, on receipt of a report from the Official Assignee, shall grant a certificate to the debtor which serves to discharge the debtor from the claims of all creditors who received notice of the arrangement.³⁵⁴ Importantly section 99 provides that the affairs of the arranging debtor and the arrangement proceedings are not to be published without the sanction of the Court except for the publication in a trade journal of the debtor's name, address, assets and liabilities as have been provided to the Official Assignee at the commencement of the arrangement procedure.³⁵⁵

3.158 Section 105 of the Act provides that the debtor may still be adjudicated bankrupt if, among other reasons, he or she fails to comply with the requirements set out under the arrangement procedure, has not acted in good faith, or if the proposal made to creditors is not reasonable and proper to be executed under the direction of the Court. If the Court adjudicates the debtor bankrupt under this mechanism, the formal bankruptcy procedure begins as described above in paragraphs 3.152 and 3.153.

(b) ***Problems with Irish Bankruptcy Law***

(i) ***The lack of a practical consumer insolvency regime in Ireland***

3.159 Irish personal insolvency law is outdated and ineffective. When compared with models in Europe and other countries, Irish law is exposed as unsuitable to providing solutions to the realities of a modern credit society. A leading study on over-indebtedness law in Europe was critical of this aspect of Irish law, and noted that the *Bankruptcy Act 1988* is "totally inappropriate to, and hardly ever used by, debtors or creditors in respect of consumer debt."³⁵⁶ The report did not think that the *Bankruptcy Act 1988* could even be called a consumer insolvency procedure, due to the overly long 12 year discharge period and the prohibitive cost of the procedure.³⁵⁷

3.160 The inappropriateness of the *Bankruptcy Act 1988* to deal with modern consumer over-indebtedness is illustrated by the fact that it is so rarely invoked. In 2007, 20 bankruptcy petitions were

³⁴⁹ Who had notice of the sitting. It is to be noted that creditors owed debts of less than €130 each shall not have the power to vote on such a proposal, as per section 92(2) of the *Bankruptcy Act 1988*.

³⁵⁰ Section 93 of the *Bankruptcy Act 1988*.

³⁵¹ Section 94(1) of the 1988 Act.

³⁵² Section 94(2) of the 1988 Act.

³⁵³ Section 97 of the 1988 Act.

³⁵⁴ Section 98 of the 1988 Act.

³⁵⁵ Section 99(1) of the 1988 Act.

³⁵⁶ See Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented by the Institute for Financial Services e.v. Erasmus University Rotterdam/School of Law University of Helsinki/Helsinki Collegium for Advanced Studies to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 163.

³⁵⁷ *Ibid*

presented to the Irish High Court, with 4 debtors adjudicated bankrupt.³⁵⁸ While the number of bankruptcy adjudications doubled to eight in 2008,³⁵⁹ this figure still remains extraordinarily lower than the insolvency rates in other countries. For example, during 2008 there were 106,544 personal insolvencies in England and Wales, composed of 67,428 bankruptcy orders and 39,116 Individual Voluntary Arrangements.³⁶⁰ This figure for England and Wales approximately corresponds to one official insolvency for every 400 adults,³⁶¹ a frequency of insolvencies which is clearly much higher than that demonstrated by the eight bankruptcies in Ireland in the same year. There are many reasons why Irish bankruptcy law is inappropriate and under-utilised, and these will now be outlined by illustrating disincentives to both creditors and debtors of using the present system.

(ii) The Excessive Cost of Bankruptcy

3.161 Firstly, the bankruptcy procedure is prohibitively expensive. As demonstrated above, proceedings must be commenced in the High Court, where significant costs will be incurred. The procedures involved, be they a straightforward bankruptcy petition and adjudication or a composition or arrangement, involve several court appearances in which considerable costs will accumulate. An example of this complexity can be seen in section 8 of the Act, according to which a creditor must apply to court merely to obtain permission to serve a bankruptcy summons on the debtor, which contrasts with procedures in other types of claims.³⁶² Due to the punitive consequences of a declaration of bankruptcy, the High Court proceedings are frequently appealed to the Supreme Court, again at further great cost to the parties involved. The petitioning creditor must bear its own costs until the statutory hearing described above, at which point the High Court will make an order for the payment of such costs out of the estate of the bankrupt.³⁶³ If considerable expenses have been incurred by this stage it must be doubtful whether they could be satisfied from the insolvent debtor's estate. A petitioning creditor must also provide an indemnity to cover the fees and expenses of the Official Assignee up to the statutory sitting and later provide further indemnity sums as directed by the Court.³⁶⁴ A particular problem is that the costs incurred by the Official Assignee will not be readily ascertainable when proceedings are commenced. It is therefore clear that the bankruptcy procedure requires a considerable amount of expenditure by creditors from the commencement of the process. This deters creditors from using the mechanism, especially in the context of consumer debts where the costs involved could potentially greatly exceed the debt owed.

3.162 The costs involved in procedures under the *Bankruptcy Act 1988* also prevent over-indebted consumers from declaring themselves bankrupt. As has been noted above, a debtor seeking to avail of the Act must petition the High Court at great expense, and must also provide a deposit of €650 to cover the costs of the Official Assignee.³⁶⁵ It is clear that an already over-indebted and insolvent consumer will have considerable difficulty raising a deposit of this amount. Therefore this obstacle prevents consumers from accessing personal insolvency proceedings in Ireland. The requirement that the debtor also possess assets capable of raising €1900 may further exclude certain consumer debtors from the benefit of the Act.

³⁵⁸ *Courts Service Annual Report 2007* (Courts Service 2008) at 100.

³⁵⁹ *Courts Service Annual Report 2008* (Courts Service 2009) at 23.

³⁶⁰ *Statistics Release: 2008 Summary, England and Wales* (The Insolvency Service 2009), available at: <http://www.insolvency.gov.uk/otherinformation/statistics/200902/index.htm>. During 2007 there were 106,645 personal insolvencies in England and Wales, composed of 64,480 bankruptcy orders and 42,165 Individual Voluntary Arrangements. *Statistics Release: Fourth Quarter 2007* (The Insolvency Service 2008), available at: <http://www.insolvency.gov.uk/otherinformation/statistics/200802/index.htm>. See discussion below at paragraphs 5.26 to 5.29 for an explanation of how Individual Voluntary Arrangements operate. (Accessed 14 September 2009).

³⁶¹ *Statistics Release: 2008 Summary, England and Wales* (The Insolvency Service 2009) *op cit*.

³⁶² Section 8 of the *Bankruptcy Act 1988*. See footnote 320 above.

³⁶³ Section 12 of the 1988 Act.

³⁶⁴ Order 76 Rule 19(e) *RSC 1986*.

³⁶⁵ See paragraph 3.151 above.

While the composition and arrangement procedures should in theory provide an alternative to bankruptcy for over-indebted individuals, the numerous court appearances which are involved even under these procedures make them unaffordable for most debtors.

(iii) The Punitive Nature of the Bankruptcy Regime

3.163 The traditional attitude of the law towards debtors warranted a punitive approach to bankrupts. This view remains prevalent among some authors, as expressed in the following extract:

“Bankruptcy represents a repudiation of one’s promises, a decision not to bestow a reciprocal benefit on someone who has given you something of value. As a result, filing bankruptcy traditionally has been treated as a socially shameful act... It is also not surprising that society punishes and stigmatizes an individual’s failure to keep his promises. Personal shame and social stigma go hand-in-hand. Shame is the internal, psychological compass that forces one to keep his word; stigma is the external, social constraint that reinforces this.”³⁶⁶

This rationale would appear to have prevailed in the drafting of the *Bankruptcy Act 1988*. The Act seeks to punish those debtors who cannot or refuse to honour their obligations and aims to discourage debtors from resorting to bankruptcy in the case of insolvency.

3.164 It must be asked whether such a rationale can be reconciled with the discussion of the causes of over-indebtedness in Chapter 1.³⁶⁷ It will be recalled that the primary cause of consumer debt default is a sudden change in financial circumstances, mainly arising from external circumstances such as job loss and ill health. While the law must obviously recognise that debtors have some control over whether or not they default, the role of external circumstances and the biases and financial illiteracies discussed above must also be given due regard.³⁶⁸ In this light, the law should not attribute moral blame to over-indebted consumers who become unable to honour commitments which have subsequently become impossible to keep. When viewed in this manner, the case for a punitive bankruptcy procedure becomes less persuasive. Therefore the punishment of debtors is not generally an aim of modern consumer insolvency regimes.³⁶⁹

3.165 The punitive nature of the *Bankruptcy Act 1988* can be seen in several of its provisions. Firstly, section 7 of the *Act*, in listing the “acts of bankruptcy” upon which a petition for bankruptcy must be founded, illustrate the punitive philosophy of the legislation, as several of these “acts” refer to frauds committed by the debtor and resemble a list of offences committed by the debtor, which does not reflect the realities of the causes of over-indebtedness identified in the first chapter.³⁷⁰ For this reason the “acts of bankruptcy” approach has been abandoned in other legal systems such as the United Kingdom leaving the insolvency of the debtor as the sole basis for the instigation of bankruptcy proceedings.³⁷¹

3.166 Secondly, the discharge period of 12 years under the 1988 *Act*³⁷² is excessively long and contrasts sharply with the fresh start principle which characterises modern consumer insolvency codes.³⁷³

³⁶⁶ Jones and Zywicki “It’s Time for Means-Testing” [1999] *BYUL Rev.* 177 at 216.

³⁶⁷ See paragraphs 1.30 to 1.59 above.

³⁶⁸ See paragraphs 3.35 to 3.47.

³⁶⁹ See Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented by the Institute for Financial Services e.v. Erasmus University Rotterdam/School of Law University of Helsinki/Helsinki Collegium for Advanced Studies to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 169.

³⁷⁰ In this regard the 1988 *Act* fits the model of bankruptcy law as a response to deviancy which dominated the earliest view of bankruptcy law as a form of criminal law intended to provide a highly coercive method of reaching a debtor’s assets in order to repay his or her debts: Ramsay “Models of Consumer Bankruptcy: Implications for Research and Policy” (1997) *Journal of Consumer Policy* (20) 269 at 270.

³⁷¹ See Lynch “The Bankruptcy Act 1988” (1989) 7 *ILT* 300 at 300.

³⁷² Section 85(4)(b) of the *Bankruptcy Act 1988*. See the discussion of the discharge conditions at paragraph 3.153 above.

The most common maximum duration of repayment plans in consumer insolvency schemes throughout European Union Member States is five years, with many regimes also providing for even shorter periods.³⁷⁴ Not only must a debtor who cannot pay half of the debts owed³⁷⁵ wait until 12 years have expired; but such a debtor must also have paid all expenses, fees and costs of the bankruptcy, as well as any preferential payments owing, before a discharge will be considered by the Court. Even if the debtor has complied with all of the above requirements, the grant of a discharge by the High Court is discretionary, and will only be granted if the Court finds it reasonable and proper to do so. The Act views the debtor as being at fault for his or her over-indebtedness, and forces the debtor to undergo a “punitive rehabilitation”.³⁷⁶ In this way, Irish law makes dubious moral assumptions about the debtor and consequently imposes “an unduly restrictive, long and demoralising wait for discharge.”³⁷⁷

3.167 The compatibility of these limitations on discharge with the European Convention on Human Rights and the Constitution of Ireland were challenged in the case of *Grace v Ireland and the Attorney General*.³⁷⁸ Here the applicant particularly objected to the requirement in section 85(4) of the Act that all preferential claims, fees, expenses and costs be paid before discharge could be granted after 12 years, arguing that this provision breached the right to the resolution of an individual’s civil rights and obligations within a reasonable length of time under Article 6(1) ECHR and Article 40.3 of the Constitution of Ireland. The applicant argued that the consequence of section 85(4) was that a debtor could effectively be in a state of permanent bankruptcy if unable to pay the expenses and costs or preferential claims outlined above. The High Court rejected the applicant’s claim as being “utterly misconceived” as Article 6(1) ECHR merely requires civil proceedings to be brought to a conclusion within a reasonable time and it will only be infringed if the “dilatoriness on the part of organs or agents of the State” results in bankruptcy periods being “unduly protracted”. Thus the length of the discharge period may not be challenged on the basis of the reasonable time period under Article 6(1). Despite this finding, the Court did recognise that the effect of section 85(4)

“may be that, because of the requirement to discharge expenses and preferential payments as a precondition to being discharged from bankruptcy, the [debtor] has no prospect of being discharged and will remain a bankrupt for the remainder of [his or her] life unless... [the debtor] wins the lottery.”

³⁷³ See Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union op cit.* at 163, 176.

³⁷⁴ See Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented by the Institute for Financial Services e.v. Erasmus University Rotterdam/School of Law University of Helsinki/Helsinki Collegium for Advanced Studies to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 167. Comparatives rules in relation to the duration of discharge periods are discussed at paragraph 5.175 below. It should be noted in this regard that the MABS/IBF Pilot Debt Settlement Scheme also took five years as the normal repayment period. See the discussion of this scheme below at paragraphs 3.189 to 3.195.

³⁷⁵ The paying of 50 cents in the euro is provided by section 85(4)(a) as an alternative method of discharge to the expiry of 12 years (see paragraph 3.153 above). Very many consumer debtors would be unable to meet this repayment target and would thus be obliged to wait for 12 years to expire before becoming eligible for a discharge. For example, certain studies conducted in EU Member States show that the average outcome to creditors is approximately 15% of the total debt owed. See Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented by the Institute for Financial Services e.v. Erasmus University Rotterdam/School of Law University of Helsinki/Helsinki Collegium for Advanced Studies to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 167.

³⁷⁶ See Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 61.

³⁷⁷ *Ibid.*

³⁷⁸ [2007] IEHC 90.

3.168 While the discharge period under the *Bankruptcy Act 1988* may thus not be challengeable under Article 6 ECHR, it is no less undesirable that a debtor should remain in a state of bankruptcy indefinitely. Even if a debtor satisfies the conditions for a discharge after 12 years, it is arguable that this is too long a period for a debtor to remain subject to the many restrictions and stigmatising status of bankruptcy. It must be noted that Ireland, along with all other Member States of the Council of Europe, has committed to provide effective access to debt adjustment repayment plans which are reasonable both in repayment obligations *and in duration*.³⁷⁹ The *Bankruptcy Act 1988* is likely to require amendment to comply with this Council of Europe recommendation.

3.169 Further punitive sanctions are also imposed by Irish law on bankrupts during the term of the bankruptcy. Thus electoral incapacities are placed upon bankrupts, who are prohibited from sitting as members of the Dáil,³⁸⁰ Seanad,³⁸¹ or European Parliament.³⁸² Furthermore, several restrictions on the professional activities in which a bankrupt may engage are also imposed. Thus under section 183 of the *Companies' Act 1963*, it is an offence for a bankrupt to act as a company director. Furthermore, under section 50 of the *Solicitors' Act 1954*, the practising certificate of a solicitor will be suspended if he or she is adjudicated bankrupt. A bankrupt is prohibited from trading except under his or her own name without informing the party with whom he or she trades of his or her status as a bankrupt;³⁸³ and may not obtain credit of a value of €650 or more without informing the lender that he or she is a bankrupt.³⁸⁴ These restrictions all reflect the view of the *Bankruptcy Act* of debtors as being untrustworthy and incapable, as well as including a punitive element. The restrictions on acting as company director, obtaining credit and trading, particularly when lasting for a 12 year period, are at odds with the promotion of entrepreneurship which lies at the heart of the “fresh start” principle informing personal insolvency regimes such as that existing under the *Enterprise Act 2002* in the United Kingdom.³⁸⁵ Some restrictions, particularly on access to credit, are arguably necessary to prevent an over-indebted consumer from increasing his or her over-indebtedness and to provide protection to creditors in cases where a debtor has in fact acted fraudulently. Nonetheless the other restrictions placed on commercial activities, when lasting for a period as long as 12 years, arguably stifle and deter entrepreneurship.

3.170 Further restrictions are also placed on the bankrupt in a personal capacity. Thus, while the bankrupt is free to travel outside the jurisdiction, he or she is advised to first inform the Official Assignee of such plans. This is because if it is suspected that the bankrupt is attempting to leave the State with the intent to defraud his or her creditors, he or she may be arrested and tried for an offence.³⁸⁶ Any property acquired by the bankrupt must be disclosed to the Official Assignee,³⁸⁷ and the Court may order that all postal correspondence addressed to the bankrupt be redirected and delivered to the Official Assignee, for a maximum period of three months.³⁸⁸

³⁷⁹ See *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* (Council of Europe CM/Rec(2007)8, 2007) at paragraph 4(b).

³⁸⁰ Section 41(k) of the *Electoral Act 1992*.

³⁸¹ Section 57(2)(c) of the *Electoral Act 1992*.

³⁸² Section 11(2)(a) of the *European Parliament Elections Act 1997*.

³⁸³ Section 129(b) of the *Bankruptcy Act 1988*.

³⁸⁴ Section 129(a) *Bankruptcy Act 1988*.

³⁸⁵ See Mann “Optimising Consumer Credit Markets and Bankruptcy Policy” [2006] (7) *Theoretical Inquiries in Law* 395 at 401. For a discussion of the promotion of entrepreneurship as a goal of insolvency law, see paragraph 5.07 below.

³⁸⁶ Section 124 of the *Bankruptcy Act* provides that: “If any person with intent to defraud his creditors leaves the State and takes with him, or attempts or makes preparation to leave the State and take with him, any part of his property to the amount of €650 or upwards, he shall be guilty of an offence.”

³⁸⁷ Section 127 of the *Bankruptcy Act 1988*.

³⁸⁸ Section 72 of the *Bankruptcy Act 1988*.

3.171 The compatibility of a similar provision of UK law³⁸⁹ with the right to respect for an individual's correspondence under Article 8 ECHR was upheld by the European Court of Human Rights in the decision of *Foxley v United Kingdom*.³⁹⁰ Here it was accepted by the defendant State that such a provision constituted an infringement of a bankrupt's Article 8 rights, but it was argued that such an interference could be justified for the protection of the rights of others under Article 8(2). The Court accepted that such a power on the part of the Official Assignee may be necessary to ascertain a bankrupt's income sources where he or she is seeking to conceal assets from his or her creditors.³⁹¹ The Court held that nonetheless safeguards must be in place to ensure that the impairment of the bankrupt's rights is no more than is necessary to achieve the legitimate aim of protecting the rights of creditors. Thus the reading and copying of privileged correspondence between the bankrupt and his legal advisors; and the continued redirection of correspondence to the Official Assignee after the three month period specified in the relevant legislation had expired; were held to constitute violations of Article 8. Thus this power under s72 of the *Bankruptcy Act 1988* must be strictly construed so as not to violate a bankrupt's privacy rights. Even if such a provision is capable of justification in a case such as *Foxley* where the debtor was suspected of concealing offshore assets, the existence of such a measure arguably again demonstrates a general presumption of dishonesty among over-indebted individuals which is not supported by the analysis of the causes of over-indebtedness discussed in the first chapter above.³⁹²

(iv) The Rationale of Deterrence under the Bankruptcy Act

3.172 The harshness of the bankruptcy regime is punitive and provides a strong deterrent to its use by consumer debtors. It is clearly desirable that consumer debtors should not be able to walk away from their obligations without consequence and that in this light debtors should be deterred from using bankruptcy as anything other than a last resort.³⁹³ This rationale has caused recent reforms to bankruptcy legislation in the United States which sought to respond to increasingly widespread recourse to consumer bankruptcy.³⁹⁴

3.173 While this point of view is undoubtedly of merit, the logic of having a system which is so expensive and punitive that it is limited to being used as rarely as eight times per year must be questioned. Furthermore, as shown above, most consumer debt difficulties arise due to a lack of ability to repay debts, largely as a consequence of unintended external circumstances rather than a lack of willingness to honour credit commitments. Thus most consumers who could avail from a consumer insolvency regime are in such situations of financial difficulty that their recourse to such a regime could not realistically be viewed as planned.³⁹⁵ In this regard, the view may be advanced that desperate debtors would avail of an insolvency regime no matter how harsh it may be,³⁹⁶ and that the real limiting factors on the use of such a regime would be consumer awareness of the procedure and the cost of the procedure.³⁹⁷ Furthermore, bankruptcy remains a stigmatising and often humiliating social experience,

³⁸⁹ Section 371 of the *Insolvency Act 1986*.

³⁹⁰ Application No. 33274/96; (2001) 31 EHRR 25.

³⁹¹ Application No. 33274/96; (2001) 31 EHRR 25 at paragraph 43.

³⁹² See paragraphs 1.30 to 1.59 above.

³⁹³ For an example of this argument see e.g. Jones and Zywicki "It's Time for Means-Testing" [1999] BYUL Rev. 177; Zywicki "Why So Many Bankruptcies and What to do About It: An Economic Analysis of Consumer Bankruptcy" (George Mason University School of Law Law and Economics Working Paper Series 03-46). Available at: http://ssrn.com/abstract_id=454121. (Accessed September 14 2009)

³⁹⁴ *Bankruptcy Abuse Prevention and Consumer Protection Act 2005*, (Public Law No. 109-8, 119 Stat. 23, April 20, 2005) (US). See e.g. Pardo "Eliminating the Judicial Function in Consumer Bankruptcy" (2007) 81 *American Bankruptcy Law Journal* 471.

³⁹⁵ Mann "Optimising Consumer Credit Markets and Bankruptcy Policy" [2006] (7) *Theoretical Inquiries in Law* 395 at 407.

³⁹⁶ *Ibid.*

³⁹⁷ Mann *op cit.* at 407-410.

and it is arguable that consumers would not enter into such a procedure lightly in any case.³⁹⁸ Also, the desirability of deterring those “can’t pay” debtors who need to avail of a debt settlement arrangement from so doing must in itself be questioned. If deterrent measures exist in such a scheme, they will in many cases only serve to delay recourse to the scheme, while an already over-indebted consumer’s financial difficulties deteriorate to the detriment of both the debtor and creditors.³⁹⁹ Due to the negative social consequences of over-indebtedness and its cost to the State, solutions to such situations must be found sooner rather than later, and “can’t pay” honest debtors in particular should be encouraged to reach debt settlement arrangements sooner rather than later.

(v) Conclusions on the Bankruptcy Act 1988

3.174 It has been noted that in countries such as Ireland which do not possess a consumer insolvency scheme, consumer credit was traditionally not available in the past.⁴⁰⁰ When consumer credit became widely available, as it has in Ireland over recent years, the equilibrium became out of balance. The need to readdress this balance was recognised by many European countries during the recessions of the early 1990s, a period in which these legal systems adopted debt settlement procedures to provide relief and rehabilitation for the over-indebted consumers. Unfortunately, Irish law did not undergo such reforms at this time, with the *Bankruptcy Act 1988* only recently enacted following an older model inappropriate to a consumer credit society. While levels of over-indebtedness have grown hugely in Ireland, the law provides no means of relieving the debt difficulties of over-indebted individuals, who must simply remain in financial difficulties and continue to suffer from the negative consequences of over-indebtedness. Under Irish law if a consumer gets into financial difficulty, he or she must according to the law remain in such difficulty, possibly indefinitely.

3.175 In practice, however, an over-indebted individual may reach settlements with creditors and succeed in having some or all of his or her debts partially or wholly written off, thus ending his or her over-indebtedness. However, there is no legal basis or framework for this practice, and creditors are not obliged to agree to such settlements. The law must therefore be updated to reflect the realities of over-indebtedness, and provide a means whereby the difficulties of over-indebted individuals may be resolved.

3.176 In light of the inefficiencies of the bankruptcy procedures described above, it is clear that there is no consumer insolvency scheme in Irish law and neither relief nor rehabilitation is provided for over-indebted consumers by the Irish legal system. This is a highly unsatisfactory situation, particularly as Ireland, as a member of the Council of Europe, has committed to “introduce mechanisms necessary to facilitate rehabilitation of over-indebted individuals and families and their reintegration into society in particular by:

- Ensuring that debtors have effective access to... debt adjustment in accordance with the criteria established by national law;
- Establishing extra-judicial settlements and encouraging such settlements between the debtor and creditor...
- Allowing partial or total discharge of the debts of individuals and, where applicable, families in cases of over-indebtedness where other measures have proved to be ineffective, with a view to providing them with a new opportunity for engaging in economic and social activities.”⁴⁰¹

³⁹⁸ *Ibid* at 426.

³⁹⁹ Mann “*Optimising Consumer Credit Markets and Bankruptcy Policy*” [2006] (7) *Theoretical Inquiries in Law* 395 at 417. See also paragraph 2.117 above. The policy of responding to debt difficulties at an early stage is enshrined in paragraph 3(b) of the statutory *Code of Practice on Mortgage Arrears*. See the discussion of this Code at paragraphs 3.106 to 3.115 above.

⁴⁰⁰ See *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* (Council of Europe CM/Rec(2007)8, 2007) at paragraph 4.

⁴⁰¹ See *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* (Council of Europe CM/Rec(2007)8, 2007) at paragraph 4.

3.177 From the above analysis, it is clear that Irish law, and in particular the *Bankruptcy Act 1988*, does not comply with the criteria established in this Council of Europe Recommendation. The Commission therefore recommends that personal insolvency law in Ireland should be reformed in two ways. First, the *Bankruptcy Act 1988* must be comprehensively reviewed and amended to harmonise Irish bankruptcy law with modern international standards. The Commission believes that such a comprehensive review of bankruptcy legislation lies outside the scope of this Consultation Paper. Secondly, the Commission believes that a non-judicial debt settlement system should also be introduced into Irish law. Chapter 5 examines comparative regimes in the area of personal insolvency law, and provisionally proposes a model debt settlement system.

(2) Non-Judicial Rehabilitative Processes

3.178 In Chapter 2, the Commission expressed its preference for extra-judicial debt settlement over court-based procedures where possible.⁴⁰² This principle has been widely recognised by other institutions and it is generally accepted that non-judicial rehabilitative processes can play an important role in alleviating over-indebtedness.⁴⁰³ The Council of Europe Member States have agreed to establish mechanisms encouraging extra-judicial settlements between the debtor and creditor in order to find easier, faster and cheaper solutions to debt difficulties while also limiting the case load of the courts.⁴⁰⁴ As well as reducing the strain on court resources, extra-judicial procedures can be better designed for a more integrated approach to the debt difficulties of the consumer debtor, as the problems experienced are often of a non-legal nature.⁴⁰⁵ For these reasons the preference across Member States of the European Union is for non-judicial institutionalised debt settlement by means of agreement between debtor and creditor.⁴⁰⁶ In Member States such as France, Belgium, Luxembourg and the Netherlands non-judicial procedures are described as the “bed-rock” of debt settlement, while court involvement is seen as a last resort.⁴⁰⁷

3.179 Indeed, it has been shown above that one of the chief failings of the Irish personal bankruptcy system is that it is too formalistic and court-based, which in turn makes bankruptcy procedures prohibitively expensive. Even the composition and arrangement procedures under the *Bankruptcy Act 1988*, which are intended to provide voluntary alternatives to the formal bankruptcy procedure, involve several court hearings and the involvement of the Official Assignee.⁴⁰⁸ While statutory codes of

⁴⁰² See paragraphs 2.117 to 2.118 above.

⁴⁰³ See *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* (Council of Europe CM/Rec(2007)8, 2007) at paragraph 4(d); See Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented by the Institute for Financial Services e.v. Erasmus University Rotterdam/School of Law University of Helsinki/Helsinki Collegium for Advanced Studies to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 42-44; International Federation of Insolvency Practitioners *Consumer Debt Report* (INSOL International 2001).

⁴⁰⁴ See *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* (Council of Europe CM/Rec(2007)8, 2007) Explanatory Memorandum at paragraph 34.

⁴⁰⁵ See Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented by the Institute for Financial Services e.v. Erasmus University Rotterdam/School of Law University of Helsinki/Helsinki Collegium for Advanced Studies to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 42. In regard to this last point, non-judicial debt settlement schemes can operate alongside debt counselling services to address the social and educational problems of the debtor: International Federation of Insolvency Practitioners *Consumer Debt Report* (INSOL International 2001) at 26-27.

⁴⁰⁶ Niemi-Kiesiläinen and Henrikson *Report on Legal Solutions to Debt Problems in Credit Societies* CDCJ-BU (2005) 11 rev at 31.

⁴⁰⁷ *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 96.

⁴⁰⁸ See paragraphs 3.154 to 3.157 above.

practice⁴⁰⁹ encourage debt settlement and the negotiation of debt repayment plans between creditors and debtors before court enforcement proceedings are commenced, Irish law provides for no formal extra-judicial debt settlement scheme. The following paragraphs describe how creditors and debtors currently address situations of insolvency outside of legal system, before highlighting the need for a legal framework for non-judicial debt settlement.

(a) **Current Practices in Non-Judicial Debt Settlement**

3.180 A 2009 European study has noted that the failure of Irish bankruptcy law to remedy cases of consumer over-indebtedness has led to creditors and debtors to attempt to find other solutions for debt difficulties.⁴¹⁰ The report noted that attempts at renegotiating debts between creditors and debtors in Ireland are common, and that renegotiation is promoted by codes of conduct on arrears. The report concluded that consumers may as a result receive favourable treatment from the banking industry when attempting to solve financial difficulties.

3.181 Any systems for renegotiating loans and debt settlement which have operated in Ireland have been instigated by private parties on a purely voluntary basis. In addition to the renegotiation of debts on an informal basis in individual cases of over-indebtedness, some initiatives have established a systematic approach to debt rescheduling and settlement. Initiatives developed through the work of the Irish Banking Federation and the Money Advice and Budgeting Service are now discussed.

(i) **IBF-MABS Operational Protocol: Working Together to Manage Debt**

3.182 In 2009 the Irish Banking Federation⁴¹¹ and the Money Advice and Budgeting Service launched a Protocol outlining the agreed approaches which will be followed by the MABS and creditor members in cooperating to resolve individual cases of debt problems.⁴¹² The protocol outlines the principles and procedures which will be followed both by MABS Money Advisors and IBF creditors in addressing debt problems of IBF customers. It is founded on a partnership approach and the cooperation of IBF Creditors and MABS Advisors to formulate “mutually-acceptable, affordable and sustainable” repayment plans for debtors in difficulty.⁴¹³ The principle of good faith full disclosure and the concept of debt settlement or partial debt discharge are fundamental to the Protocol.⁴¹⁴

3.183 The Protocol will not be applied if in an individual case its application is considered by the MABS Advisor or IBF Creditor to be inappropriate.⁴¹⁵ All IBF creditors subscribing to the Protocol reserve their rights to enforce loans in such circumstances.⁴¹⁶ Debtors are not relieved of their obligations until such time as the debt is settled in full or otherwise agreed by the IBF Creditor.⁴¹⁷

3.184 The following key principles provide the framework for the negotiation of repayment plans under the Protocol:

- The debt/arrears situation should be examined on its individual merits, as each situation is different and likely to require different solutions.

⁴⁰⁹ See the discussion of the *IFSRA Code of Conduct on Mortgage Arrears* at paragraphs 3.106 to 3.115 above.

⁴¹⁰ Gerhardt *Consumer Bankruptcy Regimes and Credit Default in the US and Europe: A Comparative Study* (CEPS Working Document No. 318/July 2009) at 8.

⁴¹¹ The Irish Banking Federation (IBF) is the leading representative body for the banking and financial services sector in Ireland, representing over 70 member institutions and associates, including licensed domestic and foreign banks and institutions operating in Ireland.

⁴¹² *IBF-MABS Operational Protocol: Working Together to Manage Debt* (2009), available at: <http://www.ibf.ie/pdfs/IBF-MABS-Protocol-June09.pdf>. (Accessed 14 September 2009).

⁴¹³ Paragraph 1(b) of the Protocol.

⁴¹⁴ Paragraph 1(e) of the Protocol.

⁴¹⁵ Paragraph 5(b) of the Protocol.

⁴¹⁶ Paragraph 5(a) of the Protocol.

⁴¹⁷ Paragraph 5(c) *IBF-MABS Operational Protocol: Working Together to Manage Debt* (2009).

- Secured debts should be prioritised over unsecured debt due to the consequences to the debtor of non-payment. Unsecured secondary creditors should be treated on a *pro-rata* basis.
- The debtor's overall indebtedness should be considered when establishing his or her ability to repay.
- Alternative repayment measures should be considered, and the debtor should receive a clear explanation of any alternative repayment arrangements being considered, together with any additional interest or administrative charges involved. The provision of further credit facilities to the debtor should be avoided as much as possible.
- The debtor should be informed of the full details of the repayment arrangement as well as the consequences of not adhering to the arrangement and the continued impact on his or her credit rating.
- The mutually-acceptable, affordable and sustainable repayment plan which is put in place should be monitored throughout its duration.
- The debtor should be provided with relevant points of contact.⁴¹⁸

3.185 The Protocol then outlines the procedures for agreeing a repayment plan.⁴¹⁹ The first step involves a MABS Adviser contacting an IBF Creditor on behalf of a customer. The Creditor responds to this contact by indicating how it proposes to proceed and explains the basis for this action. Secondly, within 20 days of the initial contact the MABS Adviser will aim to submit a statement of the debtor's financial affairs, customer authorisation to discuss his or her accounts and a realistic proposal with regard to the payment of the debt. Next the IBF Creditor will respond within 10 working days of the receipt of this documentation and will provide the MABS Adviser with the relevant documentation and statements relating to the debtor's accounts, as obliged under the *Consumer Credit Act 1995*.⁴²⁰ Once an agreement has been reached on a mutually-acceptable, affordable and sustainable repayment plan, the IBF Creditor will accept payments and will monitor the situation on an ongoing basis. The MABS advisor will also hold a review with the debtor every six months to ensure that the repayment agreement is functioning effectively, and the outcome of each review is to be advised to the IBF Creditor. In the event of a default under the arrangement, the IBF Creditor will alert the debtor and the MABS Adviser as to the situation. The Creditor will then work with the Advisor to identify how the schedule can be put back into operation and to consider any new proposals for payment. If no solution can be found to the default situation, the Creditor may have no alternative but to pursue a "more serious course of action". The Creditor will however try to facilitate the debtor as much as possible.

3.186 Throughout the course of the repayment plan, the MABS Adviser will inform the Creditor within 10 days of any changes in the debtor's circumstances and will discuss any agreed review of the arrangement with the debtor so that any new proposals may be submitted to the Creditor in a timely manner.

3.187 Upon the completion of the Protocol process, the information recorded in the Irish Credit Bureau will reflect the closing position of the customer/client account.

3.188 It can be seen from the above description that the IBF-MABS Protocol seeks to provide a framework for the consensual resolution of debt difficulties through the negotiation of mutually-acceptable, affordable and sustainable repayment plans. The Protocol therefore seeks to establish a voluntary scheme to compensate for the lack of a statutory debt settlement system in Irish law.

(ii) Pilot Debt Settlement Scheme

3.189 In 2002, a *Pilot Scheme for Alternative Debt Settlement* was launched by the MABS and the IBF with the assistance of the Free Legal Advice Centres (FLAC). This scheme was created as an

⁴¹⁸ Paragraphs 4(a) to 4(g) of the Protocol.

⁴¹⁹ Paragraph 8(1) to 8(5) of the Protocol.

⁴²⁰ Section 43 of the 1995 Act obliges creditors to provide certain information relating to a credit agreement within 10 days of a written request from a consumer.

alternative to the legal system of debt enforcement and the statutory bankruptcy regime, with both the MABS and the IBF having previously produced submissions advocating reform of these aspects of the law.⁴²¹ While the MABS and the IBF represent different points of view of the debtor-creditor divide, both organisations agreed that current legal practices, such as the Committal Order procedure, were outdated and counter-productive for both creditor and debtor.⁴²² Thus the Pilot Scheme was agreed to provide a system of voluntary, out-of-court arrangements to avoid recourse to ineffective court procedures. The scheme aimed to provide relief for the heavily and multiply over-indebted individual, while seeking to also balance the rights of creditors to recover as much of the money owed as possible, in cases where the legal procedure would be unlikely to benefit either debtor or creditor.⁴²³

3.190 The two key principles of the Settlement Scheme were good faith and fresh start. First, a debtor's eligibility for the scheme depended on his or her making of a good faith full disclosure of all income, assets and obligations.⁴²⁴ The scheme was only available to honest and insolvent "can't pay" debtors who would be unable to pay back their debts in full. The full disclosure principle also allowed all the debt difficulties of the debtor to be addressed in one procedure, and further permitted the negotiation of reasonably affordable and sustainable repayment plans. Secondly, after the completion of such a repayment programme, the debts of the debtor would be discharged and he or she would be provided with a fresh start.⁴²⁵ The scheme thus followed consumer insolvency regimes in other countries by aiming to rehabilitate the debtor and return him or her to the market as a contributing consumer.

3.191 The scheme involved the mediation, through the assistance of MABS personnel, of a voluntary repayment plan between the debtor and creditor. A key guiding principle was that the repayment plan must be realistic and sustainable, as debtors may have previously agreed to unrealistic repayment commitments in an attempt to avoid court proceedings. Therefore a certain proportion of a debtor's income was protected to allow for a basic standard of living for the debtor and his or her family, with exemptions for reasonable work expenses and a small allowance for social expenses.⁴²⁶ The debtor's standard of living was to be preserved above a status of mere survival. The repayment plans were agreed to last for a finite time period of a maximum of 5 years, although the Scheme provided that in certain exceptional cases the repayment period could extend for a longer period.⁴²⁷ Repayment plans were to adopt a holistic approach to an individual's debt difficulties, applying to all debts owed, with creditors being paid on a *pro rata* basis. Secured loans, particularly those secured on the debtor's place of residence, were however given priority status and only after repayments on such loans had been met would the remainder of the debtor's assets and income be pooled in order to pay other creditors.⁴²⁸ This approach was adopted in order to protect the principal private residence of the debtor against enforced sale. Repayments arising under Court Orders such as maintenance orders or instalment orders were given similar priority status in order to prevent the committal of the debtor to prison.⁴²⁹ The Pilot Scheme included a Conciliator to oversee and approve any voluntary settlements under the scheme and to

⁴²¹ See Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 66.

⁴²² See Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 66.

⁴²³ *Ibid.*

⁴²⁴ Paragraph 2(b) of the *Pilot Scheme for Alternative Debt Settlement*.

⁴²⁵ Paragraph 4 of the Scheme. It should be noted that while the principle of fresh start was recognised, the write-off of residual debt on completion of a payment plan was not automatic under the Scheme, and the extent to which an individual repayment programme involved a discharge was to be determined on a case-by-case basis: see paragraph 4(c) of the Scheme.

⁴²⁶ Paragraph 5.4(b) of the *Pilot Scheme for Alternative Debt Settlement* indicated that all parties recognised the principle of income retention, and certain income of the debtor was kept exempt from the repayment plan so that essential expenses could be met: see paragraph 5.4(c).

⁴²⁷ Paragraph 4(b) of the *Pilot Scheme for Alternative Debt Settlement*.

⁴²⁸ Paragraphs 5.2 and 5.3 of the Scheme.

⁴²⁹ Paragraph 5.3(b) of the Scheme.

adjudicate on appropriate payment and protected income levels in the situations where disputes arose as to this issue.⁴³⁰ It is understood that in practice few disputes arose, with creditors and debtors reaching amicable agreements with the assistance of the MABS in the vast majority of cases. The Conciliator's role amounted almost exclusively to approving agreements voluntarily reached at the mediation stage.

3.192 Unfortunately, no formal evaluation of the Pilot Debt Settlement Scheme has been undertaken. It nonetheless appears that the scheme was largely successful. From a lender's point of view, while the amount of payments recovered were in some cases quite low, creditors largely expressed satisfaction with the operation of the scheme. Almost all creditors approached participated in the scheme, which was presented to them on the basis that while it would lead to large losses for lenders in some cases, in other cases it would lead to the recovery of more than would have been recovered by other means. As the scheme dealt with insolvent debtors, in some cases no money would have been recovered at all without the scheme, and the avoidance of possibly futile court proceedings resulted in savings of time and costs for lenders.

3.193 From the point of view of the MABS, the scheme was relatively easy to administer and was not expensive. The scheme also resulted in costs savings to the State, as court proceedings were avoided.

3.194 Debtors also gained from the scheme, particularly those debtors who were in "hopeless" financial difficulties with no prospect of repaying the amounts and who would have possibly faced committal proceedings without the intervention of the scheme. Debtors' health and well-being also benefitted, as the stress of court proceedings was avoided and debtors restored some self-belief and self-empowerment by repaying part of their debts and completing the arranged repayment plan. Debtors who completed their repayment plans gained from the fresh start principle and the scheme succeeded in establishing this principle for the first time in Ireland. A special entry was created in the Irish Credit Bureau to mark on a debtor's credit history the fact that such a repayment plan had been completed.⁴³¹

3.195 The Pilot Debt Settlement Scheme has now ceased operating, and has not been renewed. It was intended to provide an example for future law reform rather than to operate on a permanent basis. As mentioned above, the scheme has not been evaluated.

(iii) Informal Debt Management Plans

3.196 In addition to these two semi-formal systematic approaches to voluntary debt settlement, in practice many cases of over-indebtedness are resolved on a more informal voluntary basis through the use of debt management plans. Such plans are usually operated with the assistance and supervision of money advisors, with the MABS being the most common source of such services. Commercial fee-charging debt management companies however also provide debt management plan services.

3.197 While such plans are entirely voluntary and follow no fixed form, certain common elements have been identified. A debt management plan provides a means for people to repay their credit agreements in full, although some debt write-off may occur if creditors consent to it.⁴³² An affordable payment is calculated based on an assessment of an individual's income and expenditure. The indebted individual then usually makes one monthly payment to a debt management provider, which is then distributed among creditors on a *pro rata* basis, either electronically or by cheque. Under such arrangements secured debts and particularly mortgage loans may be given priority, due to the potential impact on the debtor if these securities are enforced. Priority may also be given to utility service debts so that essential facilities are not disconnected.

3.198 Such debt management plans operate primarily due to the absence of statutory non-judicial insolvency procedures in Irish law. Informal plans are however a poor substitute for a statutory debt settlement system. First, such plans are not legally binding and so do not stay individual enforcement

⁴³⁰ Paragraph 6(a)-6(d) of the Scheme.

⁴³¹ Paragraph 4(e) of the *Pilot Scheme for Alternative Debt Settlement*.

⁴³² See e.g. Collard *An Independent Review of the Fee-Charging Debt Management Industry* (Personal Finance Research Centre, University of Bristol and Money Advice Trust 2009).

attempts.⁴³³ Secondly, there is usually no debt relief under such plans, unless creditors agree to accept less than the full amount owed.⁴³⁴ This means that such plans could run for indefinite periods, causing severe hardship to the debtor and his or her dependents, while also providing no incentive for debtors to keep up repayments. For example, a study of the operation of debt management plans in the UK found that the average plan provided for a repayment period of 5-10 years.⁴³⁵ The study found that plans rarely lasted for the projected duration, however, with the average plan surviving for three years or less. Reasons for the breakdown of such plans included changes in the debtor's financial circumstances, the use of statutory debt remedies by the debtor or the cancellation of the plan by the debtor due to the provision of a poor service by the debt management agency.⁴³⁶ Also, unless creditors agree otherwise, interest will continue to run on the amount of the principal debts outstanding when the plan began. Finally, such plans are completely unregulated in Ireland. No rules apply to the conditions for such a plan, and debt management companies are not subject to any regulatory control.

3.199 While debt management plans are no substitute for a statutory debt settlement system, there is scope for the operation of such plans on a complementary basis alongside debt settlement schemes. An advantage of such plans is that they can be entered into without the debtor's assets having to be sold, which is usually a condition of bankruptcy or debt settlement procedures. They may also provide a means for indebted – but not over-indebted – “could pay” debtors to organise their obligations and pay their multiple debts in an orderly manner. For this reason the Commission envisages that a role will remain for debt management plans alongside the proposed statutory debt settlement scheme, subject to sufficient regulatory safeguards. As can be seen in the description of the proposed debt settlement scheme in Chapter 5 below, debt management plans will remain an option for “could pay” debtors who do not meet the entry criteria for the statutory debt settlement scheme.

(b) ***Problems in the Law: Non-Judicial Debt Settlement***

3.200 While the Pilot Debt Settlement Scheme was largely successful, the Commission feels that responsibility for organising extra-judicial debt settlement schemes should not be left to private initiatives. In most other European Union Member States the extra-judicial debt settlement system is more regulated and institutionalised.⁴³⁷ As mentioned above, the concept of extra-judicial voluntary debt settlement is contained in the 2009 *Code of Conduct on Mortgage Arrears*. This Code obliges mortgage lenders to negotiate with debtors in financial difficulty “a plan for clearing the mortgage arrears... that is consistent with the interests of both the lender and the borrower.”⁴³⁸ The lender must examine “all viable options open to the borrower”, and his/her repayment capacity, previous payment history and any equity remaining in the property.” The Code does lay down some principles which would be similar to extra-

⁴³³ See Walters and McKenzie Skene *Consumer Bankruptcy Law Reform in Scotland, England and Wales* (July 6, 2006). Available at SSRN: <http://ssrn.com/abstract=914522> at 17.

⁴³⁴ *Ibid.*

⁴³⁵ Collard *An Independent Review of the Fee-Charging Debt Management Industry* (Personal Finance Research Centre, University of Bristol and Money Advice Trust 2009) at 3.

⁴³⁶ *Ibid.*

⁴³⁷ See Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented by the Institute for Financial Services e.v. Erasmus University Rotterdam/School of Law University of Helsinki/Helsinki Collegium for Advanced Studies to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 169ff; *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 96-97.

⁴³⁸ Paragraph 4(b) of the *IFSRA Code of Conduct on Mortgage Arrears*.

judicial debt settlement, such as considering the overall indebtedness of the borrower⁴³⁹ and negotiating repayment plans,⁴⁴⁰ although the Code does not specify any write-off of a portion of the debt.

3.201 While the *Code of Conduct on Mortgage Arrears* is to be commended for promoting the settlement of debt problems outside the system of the courts, such instruments can only have a limited effect without a formal extra-judicial debt settlement system. The Code, though requiring mortgage lenders to consider the overall indebtedness of a borrower, retains a bilateral approach to debt problems, with the mortgage lender likely to be only one of many creditors of the borrower. In addition, mortgage lenders are required to refer borrowers to MABS only “where circumstances warrant it”,⁴⁴¹ and for the most part payment renegotiations would lack the independent mediation element which is an essential aspect of non-judicial debt settlement. The Code does however illustrate recognition by Irish law that debt and arrears issues should be resolved outside of court wherever possible. Yet the Code fails to provide a structural model for an institutionalised system of extra-judicial debt settlement.

3.202 Since debtor rehabilitation has been universally recognised as an integral part of seeking legal solutions to the problem of over-indebtedness,⁴⁴² Ireland is an outlier in Europe by not possessing a consumer insolvency regime. Reports in 2003 identified Ireland as part of a small group of 5 of the then 15 EU Member States whose legal systems did not contain a consumer insolvency procedure.⁴⁴³ Since then, two of those five Member States,⁴⁴⁴ in addition to some new Member States,⁴⁴⁵ have introduced new personal insolvency regimes.⁴⁴⁶

3.203 As a consumer insolvency regime is clearly needed to provide relief and rehabilitation to Ireland’s increasing number of over-indebted individuals, and as Member States have agreed to provide such debt settlement schemes under the Council of Europe *Recommendation on Legal Solutions to Debt Problems*, the Commission provisionally recommends that a consumer debt settlement scheme be created by legislation. The Commission’s provisional model for a statutory non-judicial debt settlement scheme is described in Chapter 5 below.⁴⁴⁷

⁴³⁹ Paragraph 5(b) of the Code.

⁴⁴⁰ Paragraph 5(c) of the Code.

⁴⁴¹ Paragraph 5(f) of the Code.

⁴⁴² *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 83ff.; *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* (Council of Europe CM/Rec(2007)8, 2007) at paragraph 4; International Federation of Insolvency Practitioners *Consumer Debt Report* (INSOL International 2001) at 22; See Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented by the Institute for Financial Services e.v. Erasmus University Rotterdam/School of Law University of Helsinki/Helsinki Collegium for Advanced Studies to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 169.

⁴⁴³ Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 62; See Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented by the Institute for Financial Services e.v. Erasmus University Rotterdam/School of Law University of Helsinki/Helsinki Collegium for Advanced Studies to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 162.

⁴⁴⁴ Spain and Portugal.

⁴⁴⁵ The Czech Republic introduced new legislation in 2008 and legislation is planned on the subject in Poland.

⁴⁴⁶ *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 88-94.

⁴⁴⁷ See paragraphs 5.66 to 5.179 below.

F Debt Enforcement Procedures

3.204 The final step of the European Commission's framework for providing legal solutions to over-indebtedness is the need for holistic court enforcement proceedings. Due to the fact that the legal debt enforcement procedures form the core subject of this Consultation Paper, this step is discussed in more detail than the proceeding subjects of responsible borrowing, lending and arrears management, debt counselling and personal insolvency law. This section therefore outlines the legal debt enforcement procedures, beginning with a brief description of the process of obtaining judgment. The various enforcement mechanisms are then described, before problems in the current law are identified.

(1) Judgment and the Process of Execution

(a) Obtaining Judgment

3.205 It has been shown above that the approaches taken by different creditors to arrears management and debt collection vary widely.⁴⁴⁸ For some creditors adopting a holistic approach, advanced systems of debt prevention, arrears management and debt collection mean that recourse to legal enforcement proceedings is seen only as a last resort to be used only in the case of uncooperative "wont' pay" debtors.⁴⁴⁹ In contrast, other creditors persist in adopting "hard business" or "one-size-fits-all" approaches, both of which view a much larger role for court-based enforcement. In the latter of these two approaches legal enforcement is often the first step taken once an arrears problem arises.⁴⁵⁰ While the *Code of Conduct on Mortgage Arrears* and the voluntary codes of conduct discussed above require court procedures to be used only as a last resort in dealing with arrears problems,⁴⁵¹ no such guidelines or legal requirements are in place for credit agreements not covered by these codes. Thus for the majority of non-mortgage credit agreements the decision when to commence legal proceedings is exclusively to be made by the creditor in question.

3.206 Debt enforcement procedures vary according to the amount of the debt owed, as this will determine the court in which proceedings must be brought. Where the amount owed is less than €6350, proceedings must be brought in the District Court,⁴⁵² while if the claim is for a greater amount but less than €38091, Circuit Court proceedings must be commenced.⁴⁵³ If the claim is for any greater amount, proceedings must be brought in the High Court.⁴⁵⁴

3.207 Section 54 of the *Consumer Credit Act 1995* requires that before a creditor commences proceedings to enforce an agreement covered by the Act, it must first issue to the borrower a default notice at least 10 days before the proposed legal action, outlining the following:

- details of the agreement sufficient to identify it;
- the name and address of the creditor or owner, as the case may be;
- the name and address of the consumer;
- the term of the agreement to be enforced; and
- a statement of the action it intends to take to enforce the term of the agreement, the manner and circumstances in which it intends to take such action and the date on or after which it intends to take such action.

⁴⁴⁸ See paragraphs 1.75 to 1.90 above.

⁴⁴⁹ See paragraphs 1.80 to 1.84 above.

⁴⁵⁰ See paragraph 1.89 above.

⁴⁵¹ See paragraphs 3.106 to 3.120 above.

⁴⁵² Section 4 of the *Courts Act, 1991*.

⁴⁵³ Section 2 of the *Courts Act 1991*.

⁴⁵⁴ Under sections 13 and 14 of the *Courts and Court Officers Act 2002*, these jurisdictional limits were to be raised to €100,000 in the case of the Circuit Court (section 13) and €20,000 for the District Court (section 14). These provisions of the 2002 Act have however not yet been commenced.

In circumstances where this requirement does not apply, it is understood that the practice among solicitors representing creditors is to send a “seven-day demand letter” to the debtor before commencing proceedings. In such a letter the creditor’s solicitor will indicate the party for whom he or she is acting and the amount owed, as well as indicating that if repayment is not made within seven days legal proceedings will be commenced.

3.208 Often a debtor will not respond to either notice and the creditor will in such a case proceed to commence proceedings. As most consumer debt proceedings are brought in the District Court, this section first examines the District Court procedure before identifying any differences in procedure in the Circuit and High Courts.

(i) District Court Procedure

(l) Service of Documents

3.209 The manner in which proceedings must be commenced in turn varies depending on the court in which they are to take place.

3.210 District Court debt enforcement proceedings must be brought in the district court area where the defendant resides or where the contract under which the debt arose was made.⁴⁵⁵ If the agreement however falls under the *Consumer Credit Act 1995*, enforcement proceedings may only be brought in the district court area in which the consumer debtor resides. District Court proceedings are commenced by the issuing of a document called a Civil Summons by the creditor to the debtor.⁴⁵⁶ The civil summons sets out the nature of the creditor’s claim⁴⁵⁷ and indicates a “return date”, that is the date on which the proceedings before the District Court are due to commence.⁴⁵⁸ The Civil Summons presents three options to the debtor defendant:

- The summons must set out the fact that if the defendant pays the amount claimed and costs within 10 days after the service of the summons, all further proceedings will be stayed.
- The civil summons must also set out the steps to be taken by a defendant who disputes the claim and wishes to defend the proceedings, and contains detachable Notices of Intention to Defend. If the debtor wishes to defend proceedings, he or she must submit to the court the notice of intention to defend within 7 days of receiving the summons.
- The summons must also indicate the steps to be taken by a defendant who admits the claim and desires further time for payment. If the debtor wishes to avail of this option, he or she must visit the creditor’s solicitor within 10 days and sign a consent form.⁴⁵⁹

The *District Court Rules 1997* provide that in appropriate cases the summons should also set out the consequences which may follow if the debtor fails to act in accordance with one of the three above options. A civil summons issued in relation to an agreement covered by the *Consumer Credit Act 1995* must also contain a statement that proceedings have been brought in compliance with the relevant provisions of the Act.⁴⁶⁰

⁴⁵⁵ Order 39 Rule 1 *District Court Rules 1997* (“DCR”).

⁴⁵⁶ Order 39 Rule 2 DCR. The civil summons must be stamped before service under Order 39 Rule 4(6).

⁴⁵⁷ Order 39 Rule 4(1) DCR.

⁴⁵⁸ Order 39 Rule 4(3) DCR. For District Court proceedings outside of Dublin, the return date is the date of the hearing of the case. For proceedings in Dublin, the proceedings are only listed “for mention” on this date, when a date for the hearing will then be fixed.

⁴⁵⁹ Order 45 Rule 2(1)(c) DCR. It must be noted that in the case of agreements not covered by the *Consumer Credit Act 1995*, the debtor may consent to judgment involving payment by instalments. In relation to other agreements a general consent to judgment may be signed. See Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 20.

⁴⁶⁰ Order 40 Rule 1 DCR.

3.211 The civil summons must be served on the debtor by delivering it to the debtor's residence by registered prepaid post or by personal service⁴⁶¹ at least 21 days in advance of the "return date".⁴⁶² Often a debtor may not answer the door when a registered letter is being delivered⁴⁶³ and in this case the creditor is obliged to apply to the District Court for "substituted service". Under this procedure, the court may permit service in a manner other than by registered prepaid post where it is satisfied that the creditor has shown "good cause" to allow a departure from the primary rule of service.⁴⁶⁴ The court may thus allow service to be conducted in such other manner as it thinks proper, which usually permits the civil summons to be sent to the debtor's place of residence by ordinary post. The creditor must first however ascertain where the debtor is living⁴⁶⁵ and provide the court with an affidavit (sworn statement) to this effect. Also, if the debtor is found to live in a residence other than that to which the original civil summons was sent, proceedings must be reissued.

3.212 If the civil summons still returns undelivered at this stage, the creditor may ask the Court to deem the summons to be properly served even though it has not been served in the manner specified in the rules of court.⁴⁶⁶ As can be seen, even the commencement of debt enforcement proceedings through the serving of a summons on a non-participating debtor can be a time-consuming and expensive procedure. Nonetheless, as many debt enforcement proceedings are uncontested and take place in the absence of the debtor, it is crucially important that at least the debtor has been adequately served and has been given proper notice of the proceedings. In this regard it has been indicated to the Commission that District Court judges are quite exacting in ensuring that the requirements of the rules for proper service are respected.

3.213 If the debtor has been served, the creditor must then provide proof of service by either providing evidence orally before the District Court or by making a statutory declaration as to service before the Court.⁴⁶⁷ The statutory declaration of service, as well as any other documents intended for entry for hearing, must be lodged with the District Court Clerk at least four days before the return date.⁴⁶⁸

(II) *Undefended Proceedings*

3.214 Although statistics do not appear to be available, it appears that the majority of consumer debt enforcement proceedings are undefended. A 2009 report by the Free Legal Advice Centres examining debt enforcement procedures found that all 38 cases surveyed were undefended.⁴⁶⁹ The reasons for this

⁴⁶¹ Under s 7 *Courts Act 1964* and Order 10 Rule 13 DCR. See section 16 of the *Civil Law (Miscellaneous Provisions) Act 2008*, amending section 7 of the *Courts Act 1964*. This provision states that service in the District and Circuit Courts may be effected by either registered prepaid post, personal service, or such other means as may be prescribed by rules of court. Upon proof that an envelope containing a copy of the summons was addressed, registered and posted, good service shall be deemed to have taken place unless it is proved that the copy of the summons was not in fact delivered: section 7(4) of the *Courts Act 1964*, as amended by section 16 of the 2008 Act.

⁴⁶² Order 10 Rule 20 DCR.

⁴⁶³ See Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 21.

⁴⁶⁴ Order 10 Rule 14 DCR.

⁴⁶⁵ It would appear that this is usually achieved by the creditor's solicitor telephoning the debtor, although in this regard it must be noted that s45 of the *Consumer Credit Act 1995* states that the creditor must not contact the consumer debtor at his or her workplace unless the debtor has consented to such contact in advance. If the creditor does not possess an up to date telephone number for the debtor, the creditor may be required to hire a private investigator in order to ascertain the debtor's place of residence.

⁴⁶⁶ Order 10 Rule 15 DCR.

⁴⁶⁷ Order 10 Rule 17 DCR.

⁴⁶⁸ Order 10 Rule 21 DCR.

⁴⁶⁹ Free Legal Advice Centres (FLAC) *To No One's Credit: The Debtor's Experience of Instalment and Committal Orders in the Irish Legal System* (FLAC 2009) at 61. See the further discussion of these results at paragraphs 3.328 to 3.331 below.

will be discussed below, but for now it can be noted that a consumer debtor will usually have no legal defence to the creditor's claim, while furthermore it has been shown that debtors in deeply stressful financial circumstances often struggle to cope with the prospect of court proceedings and so do not appear to contest the creditor's claim.⁴⁷⁰ In 2008, 24,873 District Court applications were disposed of by Summary (undefended) Judgment, although unfortunately statistics are not available to indicate how many of these proceedings involved consumer debt claims.⁴⁷¹

3.215 If no notice of intention to defend is filed by the defendant, no hearing takes place and judgment for the amount claimed by the creditor will be given in the absence of the debtor, on the creditor filing an Affidavit of Debt and a District Court Decree, both signed by the creditor or its representative, with the District Court Clerk.⁴⁷² These documents together are known as the "District Court Judgment Set". The Court will then compare these documents with the civil summons and the statutory declaration of service, and if all is in order the Court will sign the district court decree for the amount of the debt owed, as well as costs and all actual and necessary outlay incurred.⁴⁷³ This decree, signed by the District Court Judge, forms the District Court Judgment, which is usually issued to the judgment creditor within 20-60 days of filing the documents in the court office.⁴⁷⁴ Once this judgment has been obtained by the creditor, it may then proceed to enforcement. Interest at a rate of 8% begins to run on the amount awarded (excluding costs) from the date of the judgment.⁴⁷⁵

(III) *Defended Proceedings*

3.216 If a debtor intends to defend proceedings, he or she must send notice of intention to defend to the plaintiff or plaintiff's solicitor at least four days in advance of the return date, and must lodge a copy of this notice with the District Court clerk.⁴⁷⁶ The proceedings will then continue to a hearing, at which the District Court Judge will hear arguments and will grant a decree or judgment or dismiss the proceedings.⁴⁷⁷ As noted above, in the majority of cases the debt will not be disputed and in such a case entering a defence may be a futile operation as the conduct of a formal hearing, including the attendance of witnesses and the preparation of legal arguments, will result in increased costs for both parties, which will ultimately be borne by the unsuccessful judgment debtor.⁴⁷⁸ A 2009 report by FLAC has illustrated that many consumer debtors do not realise that they must provide a notice of intention to defend to the plaintiff and to the Court. As a consequence, such debtors may simply appear in court on the return date seeking to defend a claim only to find that this is no longer possible.⁴⁷⁹

3.217 When the Court gives judgment for payment of a sum of money by way of debt and the judge is satisfied that the judgment debtor, through no conduct, act or default of his/her own, is unable to pay that sum, the judge may grant a stay of execution for such time as it thinks reasonable.⁴⁸⁰ The judge

⁴⁷⁰ See Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 21.

⁴⁷¹ *Courts Service Annual Report 2008* (Courts Service 2009) at 71.

⁴⁷² Order 45 Rule 2 DCR. Various forms of affidavits of debt and district court decrees must be entered, depending on whether the agreement falls under the *Consumer Credit Act 1995* and the type of agreement. The applicable types of affidavit of debt are listed in Forms 45.1 to 45.6 of Schedule C of the DCR, while the relevant types of district court decrees are listed in Forms 45.9 to 45.15 of Schedule C.

⁴⁷³ Order 45 Rule 2(4) DCR.

⁴⁷⁴ *Debt Recovery: A Guide to Legal Procedures in Ireland* (Mason Hayes and Curran Solicitors) at 2.

Available at: http://www.mhc.ie/filestore/documents/Debt_Recovery_w.pdf

⁴⁷⁵ Order 46 Rule 15(1) DCR, under s26 *Debtors (Ireland) Act 1840*.

⁴⁷⁶ Order 41 Rule 1 DCR.

⁴⁷⁷ Order 46 Rule 1 DCR.

⁴⁷⁸ See Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 20.

⁴⁷⁹ Free Legal Advice Centres (FLAC) *To No One's Credit: The Debtor's Experience of Instalment and Committal Orders in the Irish Legal System* (FLAC 2009) at 57.

⁴⁸⁰ Order 46 Rule 7(1) DCR. See also paragraph 3.235 below.

may, in granting such a stay, order the sum of money plus costs to be paid by the judgment debtor by instalments in such manner as the judge may direct.⁴⁸¹ A stay of execution is however unlikely to be granted where no defence has been entered and where consequently no hearing has taken place.⁴⁸²

(b) **Circuit Court Procedure**

3.218 The procedure for obtaining judgment in the Circuit Court largely resembles that of the District Court, with some differences arising in relation to the documents which must be prepared by the creditor and lodged with the Court.

3.219 First, Circuit Court proceedings are commenced by issuing an “ordinary civil bill” rather than a civil summons.⁴⁸³ The civil bill contains largely the same information as the civil summons, including the parties to the proceedings and the particulars of the plaintiff creditor’s claim. The particulars of the claim are set out in an Indorsement of Claim, and in a debt recovery claim must include the date of the contract in question, whether the contract was oral or written, the parties to the contract, the consideration and nature of the breach of contract and the relief sought.⁴⁸⁴ Case law has established that the particulars of claim are to be framed in language which a reasonably intelligent layman could understand.⁴⁸⁵ Service of the civil bill is to be by prepaid registered post to the residence of the debtor, by personal service or by any such other means as may be prescribed by rules of court.⁴⁸⁶ The procedure for substituted service in the Circuit Court⁴⁸⁷ is largely the same as that described above in relation to the District Court.⁴⁸⁸ If the application for substituted service is granted, the Court may permit the plaintiff to serve the defendant by ordinary post or by newspaper advertisement where the defendant is known to reside in a particular area but where his or her precise address is unknown.⁴⁸⁹ The Court in any case retains the power to deem good service in a situation where the requirements of the rules of court have not been satisfied.⁴⁹⁰

3.220 The civil bill will call on the defendant, if he or she chooses to defend the proceedings, to enter an appearance within 10 days of its receipt, although this period may be extended by agreement of the parties or by direction of the Court.⁴⁹¹ To “enter an appearance”, the defendant must lodge a specified form with the County Registrar and at the same time provide a copy of this form to the plaintiff or the plaintiff’s solicitor. The defendant may also consent to the claim in a manner similar to that described above in relation to the District Court procedure.⁴⁹²

⁴⁸¹ Order 46 Rule 7(2) DCR.

⁴⁸² Free Legal Advice Centres (FLAC) *To No One’s Credit: The Debtor’s Experience of Instalment and Committal Orders in the Irish Legal System* (FLAC 2009) at 58.

⁴⁸³ Order 5 Rule 1 *Circuit Court Rules 2001* (“CCR”).

⁴⁸⁴ Order 10 CCR.

⁴⁸⁵ *PW v Coras Iompar Éireann* [1967] IR 137.

⁴⁸⁶ Section 7(3) *Courts Act 1964*, as amended by section 16 of the *Civil Law (Miscellaneous Provisions) Act 2008*. See footnote 461 above.

⁴⁸⁷ Order 11 Rule 11 CCR.

⁴⁸⁸ Although it has been stated that the plaintiff should not apply for substituted service unless at least three attempts have been made in good faith to serve the defendant personally at a place and time where it could reasonably have been expected that the defendant would be found Cordial and Marray (eds.) *Consolidated Circuit Court Rules* (Round Hall Sweet & Maxwell 2001) at paragraph 11-29.

⁴⁸⁹ Order 11 Rule 11 CCR.

⁴⁹⁰ Order 11 Rule 13 CCR.

⁴⁹¹ Order 15 Rule 2 CCR. It is understood that in practice it will often take a defendant longer than ten days to enter an appearance.

⁴⁹² See Order 29 CCR.

3.221 If no appearance has been entered by the defendant debtor, or if the defendant has entered an appearance but has not delivered a defence, the plaintiff creditor may apply to the Court for Judgment in Default of Appearance. According to the rules of court, the creditor must include in this application:

- A request for judgment in default of appearance/in default of delivery of a defence;
- the civil bill,
- a statutory declaration of the service of the civil bill,
- a certificate of the County Registrar indicating that no appearance has been entered or an affidavit of the plaintiff/plaintiff's solicitor verifying that an appearance has been entered but that no defence has been delivered;
- an affidavit of debt sworn by the plaintiff;
- a certificate of the plaintiff or its solicitor indicating the amount due.⁴⁹³

When these documents are lodged in the Office of the Circuit Court, judgment may be entered for the amount due,⁴⁹⁴ with reasonable costs also being allowed.⁴⁹⁵ In practice, some, but not all, County Registrars also require a creditor to present a 14-day warning letter giving the debtor 14 days in which to pay the amount owed at the expiry of which judgment will be sought. Once judgment has been obtained the creditor may apply for an Execution Order which is used for enforcement purposes. It appears that creditors will usually include the relevant form requesting an execution order⁴⁹⁶ with the above listed documents when applying for judgment in default of appearance.

(c) **High Court Proceedings**

3.222 High Court debt recovery procedures largely follow that of the District and Circuit Courts, with again some minor variations.

3.223 First, proceedings will be commenced by the issuing of a Summary Summons⁴⁹⁷ rather than a Civil Summons or Civil Bill. The rules for serving this summons are also different to those of the District and Circuit Courts, as personal service by delivering a copy of the summons to the defendant in person is required in High Court proceedings unless it is not "reasonably practicable".⁴⁹⁸ If it has been impossible to serve the defendant despite using due and reasonable diligence in so attempting, service may be effected by delivering a copy of the summons to the defendant's place of residence or to a family member of the defendant aged over sixteen years.⁴⁹⁹ The creditor may apply for substituted service in a similar manner to that described above where the creditor is unable for any cause to effect prompt personal service.⁵⁰⁰

3.224 The summary summons must include an indorsement of claim stating the amount claimed including costs, and indicating that if the defendant pays this amount within six days of service proceedings will be discontinued.⁵⁰¹ If the creditor is a licensed moneylender, this fact must be stated in

⁴⁹³ Order 26 Rule 2 CCR.

⁴⁹⁴ Order 26 Rule 5 CCR.

⁴⁹⁵ Order 26 Rule 7 CCR.

⁴⁹⁶ This document is a requisition for the issue of execution. It must contain the title of the proceedings, the date of judgment, the order giving leave to issue execution, the names and description of the parties against whom the execution order is to be issued. See Ord. 36 r18 CCR. See also paragraph 3.233 below.

⁴⁹⁷ As the creditor will only be seeking to recover a debt or liquidated demand in money: See Order 2 Rule 1 *Rules of the Superior Courts 1986* ("RSC").

⁴⁹⁸ Order 9 Rules 2 and 3 RSC.

⁴⁹⁹ In practice, "due and reasonable diligence" will be found to have been used if three attempts have been made at personal service, although there is no rule of law requiring three attempts: *Hodson v Hanley* 15 ILT 233.

⁵⁰⁰ Order 10 Rule 1 RSC.

⁵⁰¹ Order 4 Rule 5(1) RSC.

the indorsement of claim, as well as certain other particulars relating to the loan agreement sought to be enforced such as the annual percentage rate of interest.⁵⁰²

3.225 Again the defendant has the option of

- paying the amount owed plus costs within six days and so avoiding further proceedings;
- admitting the claim and consenting to judgment while asking for further time for payment;
- defending the proceedings by entering an appearance by delivering a memorandum in writing to the Central Office of the Four Courts, Dublin within eight days of the service of the summons.⁵⁰³

3.226 If the defendant does not enter an appearance, the plaintiff may enter final judgment in the Central Office of the High Court. If the proceedings are to enforce a moneylending or hire purchase agreement or a contract of guarantee in relation to such an agreement, judgment shall not be entered in default of appearance unless the leave of the Master of the Court has been first obtained.⁵⁰⁴

3.227 Where the plaintiff is applying for judgment in default of appearance, judgment will be given when the plaintiff presents the following documents to the Central Office of the High Court:

- The original summary summons;
- An affidavit of service swearing that service has been effected in compliance with the rules of court,⁵⁰⁵
- An affidavit of debt sworn by someone with knowledge of the creditor's accounts, indicating the amount owed;⁵⁰⁶
- A certificate signed by the plaintiff's solicitor stating the address and description of all parties to the case.
- A Judgment Form for judgment in default of appearance or defence in the case of liquidated demand to be completed by the Court.
- A praecipe for *feri facias* signed by the plaintiff's solicitors. This is a document stating the parties to the action, the amount owed, the date of judgment, the order directing execution to be issued and the party against whom the execution is to be issued. It is in effect a document requesting an order of *feri facias* to be made by the Court.
- An order of *feri facias* addressed to the sheriff or county registrar to be signed by the Court. The order of *feri facias* directs the sheriff or county registrar to execute the judgment of the Court by obtaining the money owed to the creditor from the debtor and making a return to the Court indicating the manner in which the order has been executed. This is an execution order of the type described in the next section.

3.228 If for the reasons identified above leave of the Master of the High Court is required before judgment may be given, the Order made by the Master must also be included in the documents submitted to the Central Office.

3.229 Once judgment has been awarded in favour of the creditor, the next step will be the execution or enforcement of the judgment debt.

(2) The Process of Execution

3.230 The enforcement of judgment debts in Irish law consists of various different means of enforcement, all of which form part of the process of execution.⁵⁰⁷ Once a judgment has been obtained,

⁵⁰² Order 4 Rule 12 RSC.

⁵⁰³ Order 12 Rule 1 RSC.

⁵⁰⁴ Order 13 Rule 3 RSC.

⁵⁰⁵ Order 13 Rule 2 RSC.

⁵⁰⁶ Order 13 Rule 18 RSC.

the successful judgment creditor issues execution by applying for an execution order. It is well established that enforcement or execution forms part of the proceedings,⁵⁰⁸ and by applying for an execution order the judgment creditor is not commencing new proceedings. The enforcement of the judgment is put into effect through a system of various execution orders which the court or court official may then issue.

3.231 Execution is simply the enforcement of a judgment or order, and the most widely-cited definition of this term was given in the English Court of Appeal decision of *Re Overseas Aviation Engineering (GB) Ltd.*:⁵⁰⁹

“Execution means quite simply the process for enforcing or giving effect to the judgment of the court... In cases where execution was had by means of a common law writ, such as *fiery facias*... it was legal execution; when it was had by means of an equitable remedy, such as the appointment of a receiver, then it was equitable execution. But in either case it was execution because it was the process for enforcing or giving effect to the judgment of the court.”

From this quotation it can be seen that execution is a process for enforcing a court judgment which can take various forms. Thus enforcement mechanisms were developed both by the common law courts and the courts of equity, as well as being introduced by statutes such as the *Judgment Mortgages (Ireland) Act 1850-1858*, the *Debtors (Ireland) Act 1872*, and the *Enforcement of Court Orders Acts 1926-2009*.⁵¹⁰ The procedural rules relating to the enforcement of judgments are contained in Orders 42-49 of the *Rules of the Superior Courts*, Orders 35A-40 of the *Circuit Court Rules* and Orders 48 and 53 of the *District Court Rules*. In the Superior Courts (High Court and Supreme Court), these rules however do not restrict any previously existing right of the Court to enforce a judgment in any manner.⁵¹¹ The various methods of enforcement are described below.

3.232 The creditor may choose the method of enforcement to be used, and may use several different methods at any one time.⁵¹² Under certain circumstances however, such as if six years have elapsed since the judgment or order, the creditor may be required to apply to court for leave to issue execution.⁵¹³ In such cases leave to issue is a matter of judicial discretion, and the creditor is not entitled to such permission to issue execution as of right. In all other cases, the various execution orders are issued by court offices and the creditor is not obliged to apply to court to issue execution.⁵¹⁴

3.233 In order to be issued with an execution order, the judgment creditor must produce to the issuing officer the judgment or order upon which the execution order is to issue, and a certificate signed by the creditor or creditor’s solicitor stating the sum awarded in the judgment. This certificate is to be filed in the court office, and the sum is then entered in the body of the execution order.⁵¹⁵

3.234 As noted above, in the High Court, a *praecipe* document containing the title of the matter, reference to the record, date of judgment and order directing execution, names of the parties and

⁵⁰⁷ See Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 16ff.

⁵⁰⁸ *The Zafiro* [1959] 2 All ER 537; *Hornsby v Greece* (1997) 24 EHRR 250 ECtHR. See further paragraphs 2.10 to 2.11 above.

⁵⁰⁹ [1963] Ch 24, 39 per Lord Denning MR.

⁵¹⁰ Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 16.

⁵¹¹ Order 42, Rule 29 RSC.

⁵¹² See e.g. *Honniball v Cunningham* [2006] IEHC 326.

⁵¹³ Order 42 Rule 24 RSC.

⁵¹⁴ See Glanville *op cit.* page 18. A further limitation is placed on the creditor’s right to enforce in proceedings brought by a moneylender where judgment has been entered for the plaintiff by warrant of attorney and where judgment has been entered more than 12 months after the entry of judgment. In such a case, no execution order shall be issued from the court offices without an order of the court being obtained by the judgment creditor: Ord. 42, r18 RSC.

⁵¹⁵ Order 42 Rule 10 RSC.

signature of the creditor's solicitor must also be filed before execution can issue.⁵¹⁶ This is an additional requirement which must be satisfied in the High Court which need not be met in the Circuit and District Courts.⁵¹⁷

3.235 The courts have an inherent jurisdiction to stay execution. A stay may however only be granted on grounds which are relevant to a stay, and matters which are properly legal defences will not provide grounds of a stay as these must be raised in the action itself.⁵¹⁸ In addition to this inherent jurisdiction, the Court possesses two statutory powers to stay execution. First, under the rules of court, the Superior Courts have a general power to stay execution until such time as they see fit.⁵¹⁹ Section 21 of the *Enforcement of Court Orders Act 1926* also provides courts with a statutory power to grant a stay of execution "upon such conditions as shall appear to the court to be reasonable" where the court is satisfied that reasonable grounds exist to stay execution and that the debtor's inability to pay is not a result of the debtor's own conduct or default. If execution is stayed on conditions, the failure of the judgment debtor to comply with these conditions will entitle the judgment creditor to pursue enforcement mechanisms.⁵²⁰ Importantly the power to stay will not be used by a court where no defence has been entered by the debtor, as in such a case the court does not have the benefit of hearing arguments from the debtor as to why a stay should be granted.⁵²¹

3.236 Creditors have 12 years from the date of the judgment within which to issue execution,⁵²² although as indicated above leave of the Court must be given before obtaining an execution order where six years have expired since judgment was given.⁵²³ Once granted, an execution order shall remain in force for one year after it has been issued, with the creditor required to renew it within a year for it to remain valid after this period.⁵²⁴

⁵¹⁶ Ord. 42 Rule 11 RSC.

⁵¹⁷ In the Circuit Court in order to issue execution the creditor must lodge a requisition of execution, usually when lodging the other documents required when applying for judgment in default of appearance in the manner described above. See Order 36 rule 18 CCR and paragraph 3.221 above. In the District Court, the decree recording the judge's decision and order in the case also contains a warrant commanding all county registrars or sheriffs to take in execution the goods of the defendant to satisfy the debt, costs and witnesses' expenses, and so no separate documents must be lodged with the Court to apply for the issuing of execution. See Order 48 rule 1 DCR.

⁵¹⁸ See Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 33, citing Lord Denning MR in *TC Trustees Ltd v JS Darwen (Successors) Ltd*. [1969] 1 All ER 271, 274.

⁵¹⁹ Order 42 Rule 17 RSC. The power of District Court judges to stay proceedings in a similar manner is discussed above at paragraph 3.217 above.

⁵²⁰ See e.g. *Honniball v Cunningham* [2006] IEHC 326. If the stay is granted on terms that the judgment debtor pay instalments and the debtor defaults on any one payment, the judgment creditor may issue execution immediately for the amount outstanding: *Farbenbloom v Lazare Morel (Glasgow) Ltd & Another* [1930] IR 361.

⁵²¹ Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 20. See also *Debt Collection: (1) The Law Relating to Sheriffs* (The Law Reform Commission of Ireland LRC 27-1988) at 19, where the Commission considered that the power of the court to grant a stay of execution should not be extended to cases of default judgments generally.

⁵²² Order 42 Rule 23 RSC; Order 36 Rule 9 CCR; Order 48 Rule 4(1) DCR.

⁵²³ Order 42 Rule 24 RSC; Order 36 Rule 9 CCR; Order 48 Rule 4(1) DCR. It is to be noted in this regard that if the process of registering a judgment mortgage is completed within the first six years following the judgment, execution will be deemed to have been issued and leave of the Court will not be required if an application for a well-charging order is made during the second six year period following the judgment. *Cooke v Finlay* High Court 24 July 2007, Dunne J. See Fahey "Time Limits on Execution of Judgments" (2008) *Bar Review* 62.

⁵²⁴ Order 42 Rule 20 RSC; Order 36 Rule 12 CCR. An order may be renewed even if partial execution has already taken place under the old order: *Wymes v Tehan* [1988] IR 717.

3.237 It is to be noted that a procedure of “discovery in aid of execution” exists under which a judgment creditor may apply to the court for an order directing the judgment debtor to attend at court for the purpose of giving information on the debtor’s assets and means.⁵²⁵ This procedure is available to judgment creditors when any mechanism of enforcement is being used, but is primarily used where the creditor seeks to appoint a receiver by way of equitable execution.⁵²⁶ The operation of this procedure in relation to execution against goods is discussed below.⁵²⁷ While this procedure could possibly be used to obtain crucial information concerning the assets of a debtor, it appears to be very much under-used in practice, with just one examination of a debtor taking place in the High Court in 2007, as compared to 1208 *fieri facias* orders issued out the Central Office of that court.⁵²⁸

(3) Enforcement Mechanisms

3.238 The mechanisms available for the enforcement of a judgment for the payment of money are:

- Registration of the judgment.
- Execution against goods under:
 - an order of *fieri facias* in the High Court;
 - or an execution order against goods in the Circuit Court;
 - or an execution warrant.
- Judgment mortgage.
- Enforcement of the judgment through an instalment order and the procedure for arrest and imprisonment.
- The attachment of debts owed to the debtor by garnishee order.
- The appointment of a receiver by way of equitable execution..
- Bankruptcy proceedings under the *Bankruptcy Act 1988*. Bankruptcy law has been described in detail above and will not be discussed in this section.⁵²⁹

These various mechanisms will now be described in turn. In addition, the procedure for obtaining an order of possession enforcing a security under a mortgage will also be discussed, although this is not strictly a procedure for the enforcement of a judgment debt in the same manner as those listed above.

(a) Registration of a Judgment

3.239 A primary method of enforcement frequently used by creditors is the registration of the judgment given against the debtor in the Central Office of the High Court. This mechanism has already been discussed above.⁵³⁰ Judgments obtained from the District,⁵³¹ Circuit⁵³² and High Courts may be registered by judgment creditors in the Central Office of the High Court.⁵³³ The registration of judgments

⁵²⁵ See Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 50ff.

⁵²⁶ *Ibid.* See the discussion of enforcement by a receiver under equitable execution below at paragraphs 3.307 to 3.316 below.

⁵²⁷ See paragraph 3.250 below.

⁵²⁸ *Courts Service Annual Report 2007* (Courts Service 2008) at 97.

⁵²⁹ See paragraphs 3.148 to 3.158 above.

⁵³⁰ See paragraph 3.71 above.

⁵³¹ Under section 25 of the *Courts Act 1981*.

⁵³² Under section 59 of the *Courts of Justice Act 1924* and the *Circuit Court (Registration of Judgments) Act 1937*.

⁵³³ See *Judgments (Ireland) Act 1844*.

aims to publicise the fact that a judgment debtor has defaulted on a loan, and lists of judgments registered in this manner are published by reference agencies for the benefit of other creditors.⁵³⁴

3.240 The registration of judgments in this manner serves an indirect enforcement purpose. After a judgment has been obtained, the creditor's solicitor will write to the judgment debtor informing him or her of the fact of the judgment and indicating that if payment is not made the judgment will be registered and then published. It is hoped by creditors that the threat of the publication of the judgment debtor's adverse credit rating and resultant inability to obtain credit in future will provide a sufficient deterrent to encourage the debtor to pay the sums due. In this manner, it has been said that the registration of a judgment can be "a more potent inducement" for unwilling debtors to pay than a court order or other enforcement measure.⁵³⁵ This method also has the advantage of being a relatively cheap method of inducing payment from the judgment debtor.

3.241 In addition to inducing payment from recalcitrant debtors, it has been suggested that the registration of a judgment also serves another purpose for dissatisfied creditors in allowing them to formally and publicly register their condemnation of perceived dishonest conduct on the part of the non-compliant judgment debtor.⁵³⁶ As noted above, the registration of judgments also contributes to the prevention of irresponsible lending practices by allowing lenders to be informed that a certain debtor has defaulted on his or her obligations. It can also prevent creditors from engaging in futile enforcement proceedings against a debtor who has already failed to comply with a court judgment.

(b) **Execution against Goods**

3.242 Apart from the registration of judgments, the primary direct method of enforcing judgments remains the procedure of execution against goods whereby the creditor obtains an order from the Court directing a Sheriff or County Registrar to seize goods of the judgment debtor and sell them in order to raise the amount owed by the debtor plus costs.⁵³⁷ Where the judgment being enforced is one given by the High Court, the order directing the seizure of the debtor's goods is known as an order of *fiery facias* or *fifa*,⁵³⁸ while in the Circuit Court it is known as an execution order against goods.⁵³⁹ In the case of the enforcement of a District Court judgment, the court's judgment or decree itself is sent to the Sheriff or County Registrar for execution.⁵⁴⁰ The rules relating to these orders and the method for obtaining them have been described above. In 2008, 1,601 *fifa* orders were issued by the Central Office of the High Court, with a further 71 orders renewed, indicating the widespread use of this method of enforcement.⁵⁴¹ Similarly, 6, 844 execution orders were issued by the Circuit Court in 2008.⁵⁴²

⁵³⁴ See Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 22. Such publishers include Business Pro: see paragraph 3.68 above.

⁵³⁵ Baldwin and Cunningham, "The Crisis in Enforcement of Civil Judgments in England and Wales" [2004] *Public Law* 306 at 323.

⁵³⁶ Baldwin "The Enforcement of Judgments in undefended Claims in the Civil Courts in England and Wales" [2004] *Civil Justice Quarterly* 354 at 362.

⁵³⁷ Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 20.

⁵³⁸ Order 43 RSC.

⁵³⁹ Order 36 CCR.

⁵⁴⁰ Order 48 DCR.

⁵⁴¹ *Courts Service Annual Report 2008* (Courts Service 2009) at 71.

⁵⁴² *Ibid.*

(i) The Enforcing Officers: Sheriffs and County Registrars

3.243 Historically, the execution of court judgments was effected by officers known as sheriffs (a High Sheriff and several Under-Sheriffs) who were either appointed by the executive or elected by local authorities.⁵⁴³ Legislation passed in 1926 modified this system by transferring enforcement functions for all courts outside the cities and counties of Dublin and Cork to County Registrars.⁵⁴⁴ County Registrars are civil servants who also carry out functions in relation to the administration of the Circuit Courts and act as Returning Officers for each county during elections and referenda.⁵⁴⁵ It was provided at this time that the work of execution itself was to be carried out by “Court Messengers” acting under the supervision of the County Registrars.⁵⁴⁶ While the existing Under-Sheriffs were not removed, legislation provided that as each office became vacant, enforcement functions would be transferred to the County Registrars.⁵⁴⁷

3.244 Legislation permitted the Minister for Justice to order that the sheriff functions would not be transferred to County Registrars in certain areas, and that new Sheriffs could be appointed instead.⁵⁴⁸ Orders made under this section have provided that responsibility for the enforcement of judgments remains with Sheriffs in the County Borough and County of Dublin and County Borough and County of Cork. Just as for County Registrars, legislation provided for a new official known as a Court Messenger who could be appointed by the Sheriff and to whom all the powers which had previously been vested by law in a bailiff employed by a Sheriff would vest.⁵⁴⁹ The Sheriffs are for the most part remunerated on a commission basis called poundage, unlike County Registrars, who are salaried civil servants. The relevant fees and commissions are set out in statutory instruments.⁵⁵⁰

3.245 The Minister for Justice also appointed additional officers to act as special Revenue Sheriffs for the particular purpose of enforcing revenue debts.⁵⁵¹ These Revenue Sheriffs collect taxes on the basis of a certificate of liability issued by the Collector General under s962 of the *Taxes Consolidation Act 1997*, rather than on the basis of a court judgment. It is to be noted that Sheriffs or County Registrars may also enforce revenue debts in respect of which a court judgment has been obtained in the same manner as they enforce normal civil judgment debts.

3.246 The division of enforcement functions between Sheriffs and County registrars and the problems to which it leads is discussed below. For present purposes the word “Sheriff” will be used when referring to both Sheriffs and County Registrars, unless otherwise specified.

(ii) Execution

3.247 The procedure for obtaining a High Court *fifa order*, Circuit Court execution order and District Court decree have been discussed above. Once these documents have been obtained by the judgment creditor, the creditor may send the order to the Sheriff or County Registrar in the relevant county or counties for enforcement.⁵⁵² The delivery of the writ to the Sheriff “binds” the property in the judgment

⁵⁴³ *Debt Collection: (1) The Law Relating to Sheriffs* (LRC 27-1988) at 3.

⁵⁴⁴ See section 54 *Court Officers Act 1926*.

⁵⁴⁵ *Debt Collection: (1) The Law Relating to Sheriffs op cit* at 3.

⁵⁴⁶ *Ibid* at 7.

⁵⁴⁷ Section 54 *Court Officers Act 1926*.

⁵⁴⁸ Section 12 *Court Officers Act 1945*, as amended by section 6 *Court Officers Act 1951*.

⁵⁴⁹ Section 4 *Enforcement of Court Orders Act 1926*.

⁵⁵⁰ *Sheriffs' Fees and Expenses Order 1998; Sheriffs' Fees and Expenses Order 2005*.

⁵⁵¹ See Donnelly and Walsh *Revenue Investigations and Enforcement* (Butterworths 2002) at 117ff.

⁵⁵² Currently where an order of *fieri facias* has been sent to the Sheriff/County Registrar of one county, the judgment creditor may send another such order to a sheriff/County Registrar without waiting for the return of the first order: Order 42 rule 34 *RSC*. This situation was previously criticised by the Commission and it was recommended that rules of court be amended to require a judgment creditor to inform each Sheriff/County Registrar of the issue of the other execution orders. *Debt Collection: (1) The Law Relating to Sheriffs* (LRC 27-1988) at 14. This recommendation does not however appear to have been adopted.

debtor's goods.⁵⁵³ This has the effect of making the debtor's goods both liable to seizure and subject to the rights of the judgment creditor, so that if the debtor sells the goods the Sheriff may seize them from the party to whom they are sold. The binding effect does not however interfere with the proprietary interest of the judgment debtor in the goods.⁵⁵⁴ Legislation has limited the scope of the binding effect, so that if the judgment debtor's goods are acquired in good faith and for valuable consideration by a third party who is unaware of the delivery of a writ in respect of the judgment debtor, the title to such goods will not be prejudiced.⁵⁵⁵

3.248 The Sheriff receiving the execution orders owes a duty to the creditor to execute the orders as soon as is reasonably practicable,⁵⁵⁶ acting with "reasonable diligence and without wilful or unnecessary delay."⁵⁵⁷ The Sheriff is under no obligation to give notice to the judgment debtor of his or her intention to levy execution before seizing the debtor's goods; the law taking the view that the debtor is aware of the judgment awarded against him or her and should thus expect execution to be levied.⁵⁵⁸ The Sheriff may not refuse to execute an order when he or she has the opportunity, if nothing prevents execution.⁵⁵⁹ Thus since the duty owed by the sheriff is to the creditor who has issued execution, he or she has no power to delay execution, even to avoid hardship to the judgment debtor or other creditors, with the only power to stay execution lying with the court in accordance with the procedure described above.⁵⁶⁰ As regards priority of execution, if several execution orders are received in respect of the same judgment debtor, they must be implemented in the order in which they were received.⁵⁶¹

3.249 Rules also exist as to the goods which are seized under this enforcement mechanism, particularly as regards the seizure of goods owned by someone other than the judgment debtor. The duty of the Sheriff is to seize all goods of the debtor sufficient to satisfy the judgment where he has notice that they are in his bailiwick or could have had such notice on applying due diligence.⁵⁶² The precise content of this duty is however unclear, and the general approach is for the Sheriff to seize any goods in the possession of the judgment debtor unless the debtor's ownership is denied.⁵⁶³ In a similar manner, where goods are not in the possession of the judgment debtor, they will not be seized by the Sheriff unless he or she has positive evidence that they belong to the judgment debtor. Since the Sheriff is liable for the wrongful seizure of a third party's goods, generally the Sheriff will err on the side of caution and will decline to seize goods unless there is clear evidence that title to them rests in the judgment debtor.⁵⁶⁴ An

⁵⁵³ Section 26 of the *Sale of Goods Act 1893*.

⁵⁵⁴ See the discussion of the binding effect of a writ of execution in *McPherson v Temiskaming Lumber Co.* [1913] AC 145 (P.C.). See also *Enforcement of Money Judgments Volume 1* (Alberta Law Reform Institute Report No. 61, 1991) at 31-34.

⁵⁵⁵ Section 26 of the *Sale of Goods Act 1893*.

⁵⁵⁶ *Six Arlington Street Investments Ltd v Persons Unknown* [1987] 1 WLR 188.

⁵⁵⁷ *Hodgson v Lynch* (1870-71) IR 5 CL 353, 355 per Lawson J.

⁵⁵⁸ See *Wymes v Tehan* [1988] IR 717; Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 64-65.

⁵⁵⁹ *Mason v Paynter* (1841) 1 QB 974.

⁵⁶⁰ Under section 21 *Enforcement of Court Orders Act 1926*. See *Debt Collection: (1) The Law Relating to Sheriffs* (LRC 27-1988) at 16.

⁵⁶¹ *Debt Collection: (1) The Law Relating to Sheriffs* (LRC 27-1988) at 16.

⁵⁶² *Yourell v Proby* (1868) IR 2 CL 460.

⁵⁶³ *Debt Collection: (1) The Law Relating to Sheriffs op cit* at 20. If the creditor indicates that certain goods belong to the judgment debtor when they do not, the sheriff will be liable to be sued for wrongful seizure but will possess a cause of action against the creditor: *Stratten v Lawless* (1864) 14 ICLR 432.

⁵⁶⁴ *Debt Collection: (1) The Law Relating to Sheriffs op cit.* at 46. The judgment creditor is liable to a third party for any benefit obtained as a result of the wrongful seizure: *Jones v Woodhouse* [1922] 2 KB 117. If the creditor indicates that certain goods belong to the judgment debtor when they do not, the sheriff will remain liable to be sued for wrongful seizure but will possess a cause of action against the creditor: *Stratten v*

exception to this practice is provided by section 13 of the *Enforcement of Court Orders Act 1926*, which provides that no action for wrongful seizure will lie against the Sheriff for seizing goods found in the house of which the judgment debtor is the occupier which are claimed to be the property of a member of the debtor's family, whether or not the claim is subsequently proven to be well-founded. If a member of the debtor's family proves to have been the possessor of the goods, he or she will have a claim against the debtor for the value of the goods plus any other damage sustained. This section does not place a duty on the Sheriff to seize such goods and the Sheriff is not obliged to seize them, but is given the power to do so and is immune from suit for so doing. This provision, in permitting the seizure of a third party's goods to satisfy the debt of a judgment debtor, has been criticised as unjustifiable in principle and possibly inconsistent with the Constitution of Ireland.⁵⁶⁵

3.250 Apart from this situation of goods claimed by the debtor's family, goods possessed by the debtor in which third parties have an interest⁵⁶⁶ or which are jointly owned by a third party⁵⁶⁷ may be seized, provided that the proceeds of sale are applied to the third party. The *Rules of the Superior Courts and Circuit Court Rules* allow for an examination procedure whereby the judgment creditor may apply to the court to have the judgment debtor or any other person orally examined as to the assets of the debtor available to satisfy the judgment.⁵⁶⁸ This procedure is intended to assist the Sheriff in identifying seizable assets of the debtor while also assisting the debtor by facilitating the seizure of goods appropriate to satisfying the debt and ensuring other goods are not seized and sold at below their market values.⁵⁶⁹ This procedure is to be distinguished from the examination of means hearing conducted as part of enforcement by instalment order in the District Court as discussed below.⁵⁷⁰

3.251 An interpleader procedure exists where a claim is made to any goods seized or intended to be seized, under which the Sheriff may apply to the court to have the issue as to the ownership of the goods resolved.⁵⁷¹ Where a claim in writing is presented to the Sheriff by a party claiming an interest in the goods, the Sheriff must give notice to the judgment creditor of the claim, who must in turn indicate within four days after receiving this notice whether he or she admits or disputes the claim. If the judgment creditor does not admit the claimant's title, the sheriff may apply for an Interpleader Order, and the court can then make all such orders as may be just and reasonable. This procedure was criticised as cumbersome and costly by the Commission in a previous Report, although the recommended reforms of the procedure do not appear to have been implemented.⁵⁷²

Lawless (1864) 14 ICLR 432. This case also establishes that the judgment creditor will not be liable, however, where he or she merely knew or ought to have known of a third party's interest in the goods and withheld this information from the sheriff. For a discussion of the merits of the allocation of liability between the Sheriff and the judgment creditor in the case of wrongful seizure, see *Debt Collection: (1) The Law Relating to Sheriffs op cit.* at 49-51.

⁵⁶⁵ *Debt Collection: (1) The Law Relating to Sheriffs* (LRC 27-1988) at 33.

⁵⁶⁶ Section 13 *Common Law Procedure Act (Ireland) 1853*, as implemented in Order 57 rule 12 RSC, provides that the court may order the sale of goods in which a third party has a security interest and direct the application of the proceeds of the sale "in such manner and upon such terms as may be just."

⁵⁶⁷ *Farrar v Beswick* (1836) 1 M & W 682

⁵⁶⁸ Order 42 Rule 36 RSC; Order 36 Rule 7 CCR. It appears however that this procedure is not available in the Circuit Court in respect of a judgment for the payment of money: *Aerospan Board Centre (Dublin) Ltd v Dean Furniture Ltd* [1989] 7 ILT 79.

⁵⁶⁹ *Debt Collection: (1) The Law Relating to Sheriffs op cit.* at 21.

⁵⁷⁰ See paragraph 3.286 below.

⁵⁷¹ See Order 57 RSC; Order 40 CCR; Order 49 DCR. See also Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 69-70; *Debt Collection: (1) The Law Relating to Sheriffs* (LRC 27-1988) at 46ff.

⁵⁷² *Debt Collection: (1) The Law Relating to Sheriffs op cit.* at 46ff.

3.252 The Sheriff possesses considerable powers to enter the judgment debtor's premises for the purpose of seizing his or her goods. The constitutional and human rights implications of these powers have been examined above.⁵⁷³ At common law, the basic principle that "every man's house is his castle" prevented a sheriff from forcing his or her way into a debtor's premises for the purposes of levying execution.⁵⁷⁴ The Sheriff was however free to enter a premises without breaking or using force, such as by entering through an open door or window.⁵⁷⁵

3.253 The common law position in this regard has been modified by section 12 of the *Enforcement of Court Orders Act 1926*, which provides that no action shall lie against a sheriff for entering or breaking into a premises or for any damage to a premises, provided certain conditions are met. Thus the Sheriff must make reasonable efforts to enter a debtor's premises "peaceably and without violence" before effecting a forced entry, and if breaking and entering a third party's premises, the sheriff must first have had good grounds for believing that goods of the debtor were on the premises.

3.254 As noted above, while County Registrars are salaried civil servants, Sheriffs are remunerated partly on the basis of a form of commission known as poundage. Section 14 of the *Enforcement of Court Orders Act 1926* permits the Minister for Justice to issue scales of fees and expenses to be charged by and paid to Sheriffs, officers of court and members of the Garda Síochána in respect of the execution of court orders. Current rates are contained in a statutory instrument enacted under this section in 2005 which outlines the fees to be charged by the Sheriff for the various functions carried out as part of the process of execution.⁵⁷⁶

3.255 The Sheriff is required to make a return to the court giving an account of the goods, if any, which have been seized in execution.⁵⁷⁷ Where the Sheriff has not found any goods available for seizure, he or she makes a return of "no goods" or "*nulla bona*". A return of no goods is a prerequisite for the exercise of other alternative enforcement mechanisms by the creditor, as will be seen below. This return is not made to the judgment creditor, but to the court, and the judgment creditor has no legal right to information on the progress of the execution, although the creditor may apply to the court for an order directing the Sheriff to make a return.⁵⁷⁸ In practice however the Sheriff tends to make payments directly to the judgment creditor and hands the order and the return to the creditor for filing in court. On the return of an order of *fieri facias* when the Sheriff has seized but not sold any goods of the debtor, the judgment creditor may apply to court for an order of *venditio exponas* which directs the Sheriff to sell for the best price obtainable and to make a return on the order for payment to the judgment creditor.⁵⁷⁹

3.256 On seizing goods, the Sheriff must produce an itemised inventory of the goods seized within 24 hours of seizure, and a signed copy of this inventory must be supplied to the judgment debtor.⁵⁸⁰ The Sheriff may sell the goods seized by public auction at any time after the expiry of 48 hours after the goods have been taken in execution.⁵⁸¹ The Sheriff must not wilfully allow an unreasonable delay to occur prior

⁵⁷³ See paragraphs 2.42 to 2.46 above.

⁵⁷⁴ *Semayne's Case* (1604) 5 Co. Rep. 9112. *Broughton v Wilkerson* (1880) 44 JP 781 DC. See Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 60-70.

⁵⁷⁵ *Vaughan v Mackenzie* [1969] 1 QB 557

⁵⁷⁶ S.I. 644/2005 *Sheriff's Fees and Expenses Order 2005*.

⁵⁷⁷ *Debt Collection: (1) The Law Relating to Sheriffs* (LRC 27-1988) at 13.

⁵⁷⁸ The Commission has previously recommended that a right to such information should be provided to the judgment creditor: *ibid*.

⁵⁷⁹ Order 43 RSC.

⁵⁸⁰ Section 6 of the *Enforcement of Court Orders Act 1926*.

⁵⁸¹ Section 8 of the *Enforcement of Court Orders Act 1926*.

to the sale of the goods.⁵⁸² In practice the Sheriff will include a warning of the impending sale within 48 hours in the inventory notice provided to the judgment debtor.⁵⁸³

3.257 Problems arising under the mechanism of execution against goods are discussed below.

(c) **Judgment Mortgage**

3.258 The judgment mortgage procedure is a means of enforcement which permits the judgment creditor to secure the amount of the judgment debt by way of a mortgage or charge over the judgment debtor's real property.⁵⁸⁴ It is a widely used and effective method of enforcement, although it is much more expensive than other enforcement mechanisms. The legislative basis for the judgment mortgage procedure is found in the *Judgment Mortgage (Ireland) Act 1850* and *Judgment Mortgage (Ireland) Act 1858*, although these Acts are amended by the *Land and Conveyancing Law Reform Act 2009* which is due to come into force in December 2009.⁵⁸⁵

3.259 Enforcement by means of a judgment mortgage involves two steps. First, the judgment mortgage must be registered with the Land Registry (in the case of registered land) or Registry of Deeds (for unregistered lands) as appropriate. Secondly, the judgment creditor may recover the money owed by either forcing a sale of the asset subject to the judgment mortgage, or by claiming entitlement to proceeds upon a sale by the judgment debtor.⁵⁸⁶

3.260 In order to register a judgment as a mortgage, the judgment creditor must swear an affidavit outlining the following information:

- The title of the action and relevant court in which the debt was recovered.
- The names and usual last-known places of abode of the parties.
- The title, trade or profession of the parties.
- The location of the land to be mortgaged, giving the county and barony or town and parish, or Land Registry folio number.
- The amount of the debt or damages recovered and costs.
- The date of the judgment.
- A statement that to the best of the knowledge and belief of the person swearing the affidavit the person against whom the judgment is entered was at the time of swearing the affidavit seised, possessed or had disposing power over the land in question.⁵⁸⁷

Once this affidavit is sworn, it is filed in the court in which judgment was entered and a copy of the affidavit is registered in the Land Registry or Registry of Deeds. This procedure under section 6 *Judgment Mortgage (Ireland) Act 1850* was previously criticised by the Commission as "archaic" and in need of modification,⁵⁸⁸ and is amended by the *Land and Conveyancing Law Reform Act 2009*. Section 116(1) of the Act merely provides that "[a] creditor who has obtained a judgment against a person may apply to the Property Registration Authority to register a judgment mortgage against that person's estate or interest in land." Section 116(2) then adds that "[a] judgment mortgage shall be registered in the Registry of Deeds or Land Registry, as appropriate."

⁵⁸² *Carlile v Parkins* (1822) 3 Stark 163.

⁵⁸³ Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 68; *Debt Collection: (1) The Law Relating to Sheriffs op cit.* at 47.

⁵⁸⁴ Law Reform Commission *Consultation Paper on Judgment Mortgages*, (LRC CP30-2004) at 3.

⁵⁸⁵ See sections 115-119 of the *Land and Conveyancing Law Reform Act 2009*.

⁵⁸⁶ Law Reform Commission *Consultation Paper on Judgment Mortgages*, (LRC CP30-2004) at 9.

⁵⁸⁷ See section 6 of the *Judgment Mortgage (Ireland) Act 1850*.

⁵⁸⁸ Law Reform Commission *Consultation Paper on Judgment Mortgages*, (LRC CP30-2004) at 10. This was particularly so due to the fact that a failure to comply with the requirements of section 6 of the 1850 Act could render the judgment mortgage invalid: see *Consultation Paper on Judgment Mortgages* at 12-16.

3.261 When the judgment is registered in this manner, a mortgage by deed is created over the judgment debtor's equitable interest in the real property in question.⁵⁸⁹ Section 117(1) of the *Land and Conveyancing Law Reform Act 2009* will again simplify the effect of registration by providing that

“[r]egistration of a judgment mortgage... operates to charge the judgment debtor's estate or interest in the land with the judgment debt and entitles the judgment mortgagee to apply to the court for an order under this section.”

3.262 The second step in enforcing a judgment by judgment mortgage is for the creditor to apply to court for a declaration that the mortgage and sum due under the judgment mortgage is well charged on the interest in property of the judgment debtor.⁵⁹⁰ After obtaining such a declaration, the judgment creditor will apply firstly for an order for payment of the sum due. If this does not induce payment by the debtor, the creditor will then apply for an order for sale of the property in default of payment within a specified time. The proceedings are commenced by way of special summons in the High Court or by an equity civil bill in the Circuit Court.⁵⁹¹ This must be served on the judgment debtor and notice must be given to any other interested parties, such as those in possession or in receipt of rents or profits from the land. An affidavit of service indicating that these procedures have been followed must be provided to the court. Orders which may then be sought by the judgment creditor include:

- an order for payment of the sum due, an order for the sale of the mortgaged asset;
- an order for an account to be taken by the Court Examiner or County Registrar of the money due,
- an order for partition of the property if necessary; or
- an order appointing a receiver over the mortgaged assets.

3.263 If an order for sale is granted, ultimately the premises are sold and the proceeds are lodged in court.⁵⁹² A motion may then be brought for payment out to the mortgagee and others entitled to an interest in the asset who have proved their claims. The court has a power to approve arrangements for a sale out of court in order to expedite proceedings and allow the best sale price to be obtained.⁵⁹³

3.264 This procedure is to be simplified by the *Land and Conveyancing Law Reform Act 2009*, which provides that once a judgment mortgage has been registered, the judgment creditor may apply for:

- An order for the taking of an account of other rights or incumbrances affecting the land, if any, and the making of inquiries as to the respective priorities of any such rights or incumbrances.
- An order for the sale of the judgment debtor's estate or interest in the land, and where appropriate, the distribution of the proceeds of sale.
- Or such other order for enforcement of the judgment mortgage as the court thinks appropriate.⁵⁹⁴

The Act confirms in section 117(3) that the judgment mortgage is subject to any right or incumbrance affecting the judgment debtor's land, whether registered or not, at the time of its registration.

3.265 It appears that while creditors will frequently register judgment mortgages, they are very slow to take the severe step of seeking a well-charging order and an order for sale. Creditors will register the judgment mortgage to obtain a position of priority over a judgment debtor's other creditors in the event of the sale of the mortgaged asset, while also proceeding with other less draconian enforcement measures

⁵⁸⁹ Section 7 of the *Judgment Mortgage (Ireland) Act 1850*.

⁵⁹⁰ Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 159.

⁵⁹¹ Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 159.

⁵⁹² Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 160. The procedures for court sales are discussed below: see paragraphs 3.277 to 3.282.

⁵⁹³ Glanville *op cit.* at 160.

⁵⁹⁴ Section 117(2) *Land and Conveyancing Law Reform Act 2009*.

which do not involve the loss of the judgment debtor's premises. Creditors may thus wait for a very long period before seeking an order for sale of the mortgaged asset.

3.266 The judgment mortgage will be discharged by the lodging by the judgment debtor in the relevant court office of a document signed by the judgment creditor indicating that the debt has been paid.⁵⁹⁵ This document is known as a satisfaction piece. In the case of unregistered land, when the satisfaction piece is lodged with the Registrar of Deeds, it reconveys the legal or equitable estate in the mortgaged land to the judgment debtor as if no judgment mortgage had been registered. Discharge will operate in a similar manner under section 118 of the *Land and Conveyancing Law Reform Act 2009*, which provides that "Registration in the registry of Deeds of a certificate of satisfaction of a judgment in respect of which a judgment mortgage has been registered extinguishes the judgment mortgage." In the case of registered land, the judgment mortgage is cancelled as a burden on registered land either by the judgment debtor producing to the Land Registry a certificate of satisfaction of the judgment or by the judgment creditor requesting the discharge of the judgment mortgage.⁵⁹⁶

3.267 The Commission's prior *Consultation Paper on Judgment Mortgages* outlined several proposals for the modernisation of the judgment mortgage procedure, many of which are to be enacted by the *Land and Conveyancing Law Reform Act 2009*, as described above.

(d) ***Mortgage Suits and Orders for Possession of Land***

3.268 While not strictly a means of enforcing a judgment debt, the Commission will briefly discuss the procedure for enforcing the security over land/real property which a lender holds under a mortgage loan by obtaining an order of possession or sale. This is because as increasingly large numbers of over-indebted individuals are falling into arrears on mortgage loans, applications for orders for possession have increased in number and frequency. The Courts Service's report for 2008 indicates that there has been an increase in 103% in the number of cases for recovery of the possession of land or premises in the High Court in that year.⁵⁹⁷ In addition, another reason for discussing the enforcement of mortgage securities is that it becomes difficult to isolate issues of secured debt such as mortgages from problems relating to unsecured debt such as credit cards or personal loans due to the practice of "charge-backs" whereby loans are granted and secured on a debtor's property for the purpose of paying a debtor's prior debts. The Commission will not however examine the substantive law of mortgages, which has been discussed by the Commission in prior publications.⁵⁹⁸ Recommendations for the reform of the law on mortgages which were proposed by the Commission are to be implemented by the *Land and Conveyancing Law Reform Act 2009*.

3.269 The *Code of Conduct on Mortgage Arrears* has been described in detail above.⁵⁹⁹ This Code states the steps which must be taken by a mortgage lender before enforcement proceedings may be commenced. Of particular note is the requirement that six months must have expired from the date of the first accrual of arrears before the lender may apply to court for enforcement.⁶⁰⁰

3.270 The remedies available to a lender (mortgagee) to enforce the security over the mortgaged property have been created and developed by the courts rather than by legislation.⁶⁰¹ Five main remedies are available to the mortgagee:

- A sale of the mortgaged property out of court;⁶⁰²

⁵⁹⁵ Law Reform Commission *Consultation Paper on Judgment Mortgages*, (LRC CP30-2004) at 8.

⁵⁹⁶ *Ibid* at 9.

⁵⁹⁷ *Courts Service Annual Report 2008* (Courts Service 2009) at 5.

⁵⁹⁸ Law Reform Commission *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* (LRC CP 34-2004) Chapter 9 at 139ff.; Law Reform Commission *Report on Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74-2005) Part 9 at 247ff.

⁵⁹⁹ See paragraphs 3.106 to 3.115 above.

⁶⁰⁰ Paragraph 4(d) of the *IFSRA Code of Conduct on Mortgage Arrears*

⁶⁰¹ See Wylie *Irish Land Law* (3rd ed. Butterworths 1997) at 717.

- The taking of possession of the mortgaged property by the mortgagee (including the taking of rents and profits of the property by the mortgagee);⁶⁰³
- A court order for possession of the mortgaged property, followed by a sale of the property by the mortgagee out of court;
- A court order for the sale of the mortgaged property;
- Foreclosure, i.e. a court order destroying the borrower's (mortgagor's) interest in the property leaving the mortgagee as sole owner. It is to be noted that an order of foreclosure is never granted in practice in Ireland.⁶⁰⁴ Under section 96(2) of the *Land and Conveyancing Law Reform Act 2009*, a mortgagee's right of foreclosure will be abolished on the commencement date of the Act.

A mortgagee may make use of more than one of these remedies at the same time, provided he does not act inconsistently. Thus in Ireland a mortgagee may sue the mortgagor for the debt created in the mortgage to repay the principal and interest while at the same time bringing proceedings for a court order for the sale of the mortgaged property.⁶⁰⁵ The two main remedies used in practice are a court order for possession and a court order for sale, and it is these procedures which will now be discussed.

(i) Court Order for Possession (and Sale out of Court)

3.271 Until recent times, the most commonly used remedy by mortgagees was an application to the court for a well charging order followed by an order for sale. Due to the disadvantages of this procedure described below, it began to be replaced by applications for orders for possession of the mortgaged property so that it can be sold out of court by the mortgagee.⁶⁰⁶ Such orders for possession are discretionary,⁶⁰⁷ and early authorities stated that an order for possession would only be granted by the court in special circumstances.⁶⁰⁸ It has been held however that an order will be granted where it can be shown that the property would raise more when sold with vacant possession, and that a sale out of court would save considerable costs to the borrower.⁶⁰⁹ Provision is now made for the remedy of an order of possession under section 62(7) of the *Registration of Title Act 1964*, which allows an owner of a registered charge to apply to the court for an order for possession when repayment of the principal money secured by the charge has become due. Order 53, rule 3 of the *Rules of the Superior Courts 1986* also provides for the procedure of applying for an order of possession. It is to be noted that the procedure for applying for a possession order is to be regularised under section 97 of the *Land and Conveyancing Law Reform Act 2009*, which the Commission understands is to be commenced in December 2009. Section 97(1) will prevent a mortgagee from taking possession of the mortgaged property without a court order unless the mortgagor has consented in writing to such taking of possession. Section 97(2) then provides that a mortgagee may apply to the court for an order of possession of the mortgaged property and the court may, if it thinks fit, order that possession be granted to the mortgagee on such terms and conditions as the court thinks fit.

⁶⁰² Note however that section 99(2) of the *Land and Conveyancing Law Reform Act 2009* provides that the power of sale shall not become exercisable by a mortgagee without a court order unless the mortgagor consents in writing to the exercise of the power of sale.

⁶⁰³ A prohibition on a mortgagee taking possession without a court order is to be introduced by section 96(1) of the *Land and Conveyancing Law Reform Act 2009*: see paragraph 3.271 below.

⁶⁰⁴ See Wylie *Irish Land Law* (3rd ed. Butterworths 1997) at 717.

⁶⁰⁵ *Ibid*, citing *Bradshaw v McMullan* [1915] 2 IR 187.

⁶⁰⁶ Wylie *Irish Land Law* (3rd ed. Butterworths 1997) at 718.

⁶⁰⁷ As recently restated by the Master of the High Court in his decision in *GE Capital Woodchester v Patrick Connolly* 11 February 2009, ref 2009 No. 1046 SP.

⁶⁰⁸ Wylie *Irish Land Law* (3rd ed. Butterworths 1997) at 718.

⁶⁰⁹ *Irish Permanent Building Society v Ryan* [1950] IR 12.

3.272 In the High Court, proceedings by a mortgagee (lender) for an order for the recovery of possession of the mortgaged asset must be commenced by way of special summons.⁶¹⁰ These proceedings must first be considered by the Master of High Court before being placed on the High Court list for hearing.⁶¹¹ The Master will set a return date for his or her consideration of the proceedings, which shall not be less than seven days after the issue of the special summons.⁶¹² The special summons must then where necessary be served on the parties concerned at least four days before the return date.⁶¹³ An affidavit verifying the lender's claim must be indorsed on the special summons and filed in the Central Office of the High Court.⁶¹⁴ Special summons proceedings in the Master's Court may be heard on affidavit⁶¹⁵ or by oral evidence.⁶¹⁶

3.273 It is important to note, however, that section 101(5) of the *Land and Conveyancing Law Reform Act 2009* provides that where an application for possession concerns property which is subject to a housing loan mortgage, the Circuit Court shall have exclusive jurisdiction to deal with the application. No application for a possession order in respect of a housing loan mortgage may therefore be made in the High Court, but must instead be made in the Circuit Court of the circuit in which the property is located.⁶¹⁷ Therefore for the purposes of this Consultation Paper the relevant procedural rules are not those described above, but rather are those of the Circuit Court. In 2009, new rules of court were enacted specifying the procedure to be followed in actions for possession of land and for well-charging relief before this court.⁶¹⁸ The amended *Circuit Court Rules 2001 to 2009* now provide that such proceedings shall be commenced by a Civil Bill of a specified form, which shall state specifically the relief claimed and the grounds for such claim.⁶¹⁹ Each Civil Bill shall be assigned a return date before the County Registrar on being issued,⁶²⁰ and must be served on the defendant, together with a sworn affidavit of the plaintiff, at least 21 days before this return date.⁶²¹ The defendant must then enter an appearance in the Circuit Court office within ten days, and must file a replying affidavit to the plaintiff at least four days before the return date in order to defend the claim.⁶²² Apart from specified exceptional circumstances, no evidence is to be given otherwise than by affidavit.⁶²³ These exceptions include where evidence of failure to enter an appearance is presented by production of a certificate of non-appearance,⁶²⁴ and where the Judge or County Registrar decides that a trial of an issue is necessary, at which trial evidence may be given orally or by affidavit as the Judge thinks proper.⁶²⁵ Parties also have the right to cross-examine a deponent who

⁶¹⁰ Order 3 Rule 15 RSC. No statement of claim or other pleading shall be delivered in special summons proceedings except by order of the court: Order 20 rule 1 RSC.

⁶¹¹ In all cases in which the Master has jurisdiction, he or she may decide the matter or alternatively refer it to the High Court list for hearing: Order 38 rule 5 RSC.

⁶¹² Order 38 Rule 1 RSC.

⁶¹³ The mortgagee bringing proceedings need not serve any other mortgagee or incumbrancer unless they are in actual possession or receipt of the rents and profits of the lands in question: Order 15 Rule 29 RSC.

⁶¹⁴ Form No. 3 Part III Appendix B RSC.

⁶¹⁵ Order 38 Rule 2 RSC.

⁶¹⁶ Order 38 Rule 3 RSC.

⁶¹⁷ Section 101(6) of the 2009 Act.

⁶¹⁸ *Circuit Court Rules (Actions for Possession and Well-Charging Relief) 2009* S.I. No. 264/2009.

⁶¹⁹ Order 5B Rule 3(1) *Circuit Court Rules 2001 to 2009*.

⁶²⁰ Order 5B Rule 4 CCR.

⁶²¹ Order 5B Rule 3(2).

⁶²² Order 5B Rule 5(2).

⁶²³ Order 5B Rule 6(1).

⁶²⁴ Order 5B Rule 7(4).

⁶²⁵ Order 5B Rule 8(1).

has sworn an affidavit.⁶²⁶ The County Registrar has a number of options available on the return date, including the power to: order service of the Civil Bill on any other person; make an order enlarging the time for entry of an appearance; give directions and fix time limits for the filing and delivery of any further affidavits by any party or parties; and give any other directions for the preparation of the proceedings for trial.⁶²⁷ Where an appearance has not been entered or a replying affidavit has not been filed, the County Registrar may make an order for possession.⁶²⁸ If a replying affidavit has been entered which on first appearances discloses a defence, the County Registrar shall transfer the Civil Bill to the Judge's list for hearing on the first opportunity.⁶²⁹ The Judge may then give judgment for the relief to which the plaintiff appears to be entitled,⁶³⁰ and may give any special directions touching the carriage or execution of any judgment or order as he or she thinks just.⁶³¹ The Judge or County Registrar may also make any order for costs as he or she considers just.⁶³²

3.274 At the hearing, the mortgagor will usually have no defence to the mortgagee's claim and "cannot be expected to do more than to seek leniency in a general way."⁶³³ The court will thus generally allow the claim for possession of the mortgagee, and will make an order directing the mortgagor to give up possession of the property to the mortgagee forthwith. If the mortgagor fails to do this, the mortgagee may obtain an order of *habere* from the court offices under which the County Registrar or Sheriff is ordered to put the mortgagee into possession.⁶³⁴

3.275 A controversial question arises as to the powers of the court to postpone granting the mortgagee an immediate order for possession by, for example, staying the action or granting the order but staying its execution to allow the mortgagor time to repay the arrears owed or sell the mortgaged property.⁶³⁵ While it was established in *Irish Permanent Building Society v Ryan*⁶³⁶ that possession orders are not available as a matter of course, the current position appears to be that the courts have a very limited discretion to defer execution of the order for possession which should be used sparingly.⁶³⁷ Section 7 of the *Family Home Protection Act 1976* provides the court with power to adjourn proceedings for possession or sale of a family home where one spouse has defaulted on mortgage repayments where, among other factors, the other spouse is desirous and capable of paying the arrears and future instalments within a reasonable time.

3.276 The law on this issue is to be clarified by section 101(1) of the *Land and Conveyancing Law Reform Act 2009*, which permits a court, where it appears that the mortgagor is likely to be able within a reasonable period to pay any arrears and interest due, to adjourn the proceedings or allow possession but stay enforcement, postpone the date for delivery of possession or suspend the order for a reasonable period. The court may make such an adjournment, stay, postponement or suspension subject to such terms and conditions as it thinks fit, and may vary or revoke any of these terms or conditions.⁶³⁸

⁶²⁶ Order 5B Rule 6(1).

⁶²⁷ Order 5B Rule 7(1).

⁶²⁸ Order 5B Rule 7(1)(e).

⁶²⁹ Order 5B Rule 7(2).

⁶³⁰ Order 5B Rule 9.

⁶³¹ Order 5B Rule 10(1).

⁶³² Order 5B Rule 10(2).

⁶³³ High Court Master Honohan, *GE Capital Woodchester v Patrick Connolly* 11 February 2009, ref 2009 No. 1046 SP.

⁶³⁴ Wylie *Irish Land Law* (3rd ed. Butterworths 1997) at 720.

⁶³⁵ See Wylie *ibid.*

⁶³⁶ [1950] IR 12

⁶³⁷ Wylie *Irish Land Law* (3rd ed. Butterworths 1997) at 720.

⁶³⁸ Sections 101(2) and 101(3) *Land and Conveyancing Law Reform Act 2009*.

(ii) Court Order for Sale

3.277 A mortgagee may also enforce its security by applying to court to obtain an order for the sale of the property by the court and the application of the proceeds to discharge the principal and interest owing under the mortgage loan. This form of proceedings is known as a mortgage suit and involves two steps.

3.278 First the mortgagee must apply to the court for a well-charging order.⁶³⁹ This order declares that the principal and interest due under the mortgage loan are well-charged on the mortgagor's interest in the property, and directs an inquiry as to all incumbrances (charges, mortgages, liens or other debts secured on the property).⁶⁴⁰ The court will also direct that the property should be sold if the mortgagor does not pay the amount due within a certain period of time from the date of service of the certificate finding the amount due on the defendant.⁶⁴¹ This well-charging order must then be served on the mortgagor.

3.279 The second step is the court sale itself. The relevant rules for court sales are specified under Order 43 CCR and Order 51 RSC respectively. The sale will be organised by the court, which will engage an auctioneer and specify a venue for the sale, as well as directing a party to prepare the conditions of sale.⁶⁴² The sale will usually be by public auction, and the property is to be sold at the best price realisable.⁶⁴³ The court will then approve the sale and all proper parties will join in the sale and conveyance as the court shall direct.⁶⁴⁴ The court will appoint a barrister, known as the Court Conveyancing Counsel, to examine the conditions of sale and to investigate the title of the land in question.⁶⁴⁵ When the sale has been made, the funds are paid into court⁶⁴⁶ and are allocated first to pay the first mortgagee's principal, interest and costs, with any balance remaining applied to any other mortgages or incumbrances on the land.⁶⁴⁷ Any balance still remaining will then be paid to the mortgagor.

3.280 Proceedings in the High Court are more complicated than those in the Circuit Court and are now described in more detail. In the High Court, before a sale is ordered a preliminary step of the taking of accounts and inquiries before the Examiner of the High Court must take place. Where a well-charging order has been made by the High Court and the mortgagor does not pay the full amount due within the time the court has allowed, the mortgagee must proceed with the sale by referring the matter to the Examiner's Office. The mortgagee must lodge the well-charging order and several other documents including a note stating the parties to the proceedings and their solicitors, the originating summons, pleadings and affidavits (if any).⁶⁴⁸ The mortgagee must then serve the mortgagor with a Notice to

⁶³⁹ In the High Court proceedings must be commenced by special summons (Ord. 3 r 15) in the manner described above. See also Order 54 Rule 3 RSC.

⁶⁴⁰ In the High Court, this inquiry will be carried out by the Examiner of the High Court under Order 55 RSC.

⁶⁴¹ Wylie *Irish Land Law* (3rd ed. Butterworths 1997) at 731.

⁶⁴² Order 43 Rule 3 CCR; Order 51 Rule 4 RSC.

⁶⁴³ Order 43 Rule 5 CCR; Order 51 Rule 5 RSC.

⁶⁴⁴ Order 43 Rule 5 CCR; Order 51 Rule 5 RSC.

⁶⁴⁵ Order 43 Rule 4 CCR; Order 51 Rule 9 RSC.

⁶⁴⁶ Order 43 Rule 2 CCR; Order 51 Rule 2 RSC.

⁶⁴⁷ See Wylie *Irish Land Law* (3rd ed. Butterworths 1997) at 732.

⁶⁴⁸ Order 55 Rule 8, 10 RSC. The full list of documents includes: the Notice to Proceed; the well-charging order and affidavit of service of this order; every document in the schedule of the well-charging order; a recent copy folio from the Property Registration Authority or a Registry of Deeds search; a plain copy of the special summons and an affidavit of special summons. A letter addressed to the Examiner must also be submitted, stating that the amount due has not been paid nor disputed within the time specified in the order; whether or not an appearance or notification of appeal has been made by the mortgagor; whether or not any other orders have been made in the proceedings since the date of the well-charging order; and whether or not the property is a family home. See *Mortgage Suits and the Examiners Office* (Courts Service) at 6-7.

Proceed⁶⁴⁹ setting out the date for a sitting before the Examiner. The purposes of the Examiner's proceedings are to ascertain the incumbrancers of the property in question and their respective priorities, and to arrange the sale of the property. As regards ascertaining those who have claims to an interest in the property, advertisements may be placed as directed by the Examiner inviting those with claims to come forward.⁶⁵⁰ The Examiner will then hear these claims and adjudicate as to their validity, issuing a Certificate of Incumbrancers stating the results of the proceedings.⁶⁵¹ This certificate is then filed in the Central Office of the High Court, and is binding on all parties to the proceedings.⁶⁵²

3.281 The next stage of the High Court procedure involves arranging the sale of the property in the manner described above. The Examiner will direct the mortgagee to request the Court Conveyancing Counsel to prepare the conditions of sale. The mortgagee then issues a motion before the Examiner asking the Examiner to settle these conditions. The mortgagee nominates an auctioneer to conduct the sale, and the Examiner will appoint this auctioneer and an independent valuer. The sale is conducted by public auction, and the Examiner signs a Certificate of Result of Sale. Court duty will be payable on the amount raised as a percentage of the sale price, and the sale proceeds must be paid into court. Following this step, the Examiner will sign the Certificate of Incumbrancers, on which court duty is again payable as a percentage of the value of the claims allowed under the certificate. This certificate serves as a draft payment schedule which is presented to the High Court when entitled parties present an Application to Pay Funds out of Court. The Court will then make an order directing the proceeds of sale to be paid as specified in the certificate.⁶⁵³

3.282 The procedure of obtaining a court order for sale contains several disadvantages.⁶⁵⁴ First, the period for payment allowed to the mortgagor by the court after the making of the well-charging order and before the sale takes place leads to a delay which may prove frustrating to mortgagees. Secondly, as can be seen from the above description, the procedure for sale is complicated and expensive, particularly as the court stamp duty to be paid on the proceeds of sale is very high. Finally, the amount raised through a court sale is often lower than the amount that could be realised by a private sale or on a sale not advertised as a court sale.⁶⁵⁵ It is for this reason that orders for possession are preferred by mortgagees. Orders for possession are also ultimately for the benefit of mortgagors also, as alternatively the costs of expensive court sale proceedings would ultimately be passed on to the mortgagor. It is in the mortgagor's interest that the sale of the property raises as much money as possible, as any surplus after the mortgage principal, interest and costs have been paid will be available to the mortgagor.

(e) ***The Instalment Order Procedure***

3.283 An important mechanism for the enforcement of judgment debts against individuals is the instalment order procedure provided for by the *Enforcement of Court Orders Acts 1926 to 2009* and Order 53 of the *District Court Rules*.⁶⁵⁶ According to this procedure, a creditor can apply to have a debtor attend before his or her local District Court to participate in an oral examination of his or her means, on the basis of which the Judge makes an instalment order directing the debtor to pay weekly or monthly instalments towards repaying the debt owed, with the threat of committal or imprisonment lying against those debtors who wilfully refuse or culpably neglect to comply with the instalment order. This procedure is a very significant enforcement mechanism, with 9, 271 instalment orders made in District Courts throughout the country in 2008.⁶⁵⁷ 201 individuals were committed to prison for the non-payment of civil debt in 2007,

⁶⁴⁹ Order 55 Rule 11; Form 1 Appendix G RSC.

⁶⁵⁰ Order 55 Rule 26 RSC; Form No. 4 Appendix G RSC.

⁶⁵¹ Order 55 Rule 41 RSC; Form No. 16 Appendix G RSC.

⁶⁵² Order 55 Rule 49 RSC.

⁶⁵³ See *Mortgage Suits and the Examiners Office* (Courts Service) at 7-8.

⁶⁵⁴ See Wylie *Irish Land Law* (3rd ed. Butterworths 1997) at 718.

⁶⁵⁵ *Ibid.*

⁶⁵⁶ See generally Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 137 to 143.

⁶⁵⁷ *Courts Service Annual Report 2008* (Courts Service 2009) at 71.

with this figure rising to 276 in 2008.⁶⁵⁸ The procedure consists of five steps. First, where a judgment debt has not been paid, the judgment creditor may apply to the District Court clerk for the issue of a summons requiring the debtor to attend for an examination summons. After the debtor's means have been examined, the court will assess the debtor's ability to repay the debt and make an instalment order directing how much the debtor must repay each week or month. Thirdly, if the debtor fails to make a payment under the instalment order, the creditor may apply to the District Court for an order for the arrest and imprisonment of the debtor. A hearing will then take place to determine whether the failure to comply with the instalment order was attributed to the debtor's wilful refusal or culpable neglect. If the court finds beyond all reasonable doubt that this is the case, it may make an order for the arrest and imprisonment of the debtor. Finally, the creditor may lodge this order with the District Court clerk, who will send it to members of the Gardaí Síochána, who will in turn arrest and imprison the debtor.

3.284 Whenever a judgment debt⁶⁵⁹ is owed by an individual (and not a company) to the creditor, the creditor may apply to the District Court clerk for the issue of a summons requiring the debtor to attend for an examination of his or her means by a District Court Judge.⁶⁶⁰ When applying for such a summons, the creditor must prove, and include in a statutory declaration, that the debt is due under a judgment of a competent court and that the debtor is ordinarily resident in the District Court District wherein the examination is to take place.⁶⁶¹ Thus the debtor may only be sued in the district in which he or she resides under this procedure.⁶⁶² It was once the case that a creditor was also obliged to prove that the debtor had no goods available for seizure before an application for an examination summons could be made, but this requirement was removed in 1986,⁶⁶³ meaning that a creditor may now use the instalment order procedure as a first enforcement step without first having to attempt enforcement by levying execution against the debtor's goods.⁶⁶⁴ The creditor's application must be brought no more than six years after the date of judgment.⁶⁶⁵ The District Court clerk will then issue a summons requiring the debtor to attend a sitting of the court, with the normal rules for service, including the possible need to apply for substituted service, applying in the manner described above.⁶⁶⁶ The summons requires the debtor to prepare and lodge at least a week before the hearing with the court a statement of means in a specified form⁶⁶⁷ setting out:

- The assets and liabilities of the debtor;
- The debtor's income, earned and unearned;

⁶⁵⁸ Dáil Debate Vol. 674 No. 1 February 10 2009 at 354. It would appear that this figure does not distinguish between imprisonment for the failure to pay a court order for maintenance payments or other kinds of civil debt.

⁶⁵⁹ There is no monetary limit on the amount of the judgment, and the judgment may be one of "any competent court."

⁶⁶⁰ Section 15 *Enforcement of Court Orders Act 1926*, as amended by section 1 *Courts (No. 2) Act 1986*.

⁶⁶¹ Section 15(2) *Enforcement of Court Orders Act 1926*.

⁶⁶² See also Order 53 Rule 2 DCR.

⁶⁶³ Section 3 of the *Enforcement of Court Orders Act 1940*, as amended by section 3 of the *Courts (No. 2) Act 1986*.

⁶⁶⁴ It should be noted however that the judge is now required to be satisfied that the debtor has no goods capable of being seized before an order for *arrest and imprisonment* may be made: section 6(8)(b) *Enforcement of Court Orders Act 1940*, as inserted by section 2(1) of the *Enforcement of Court Orders (Amendment) Act 2009*.

⁶⁶⁵ Section 3 of the *Enforcement of Court Orders Act 1940*, as amended by section 3 *Courts (No. 2) Act 1986*.

⁶⁶⁶ See paragraph 3.209ff above. Order 53 rule 3(2) DCR requires that the summons be served upon the debtor according to the usual rules of service at least 14 days before the examination hearing, or at least 21 days in advance if service is by registered post.

⁶⁶⁷ DCR Schedule C, Form 53(3).

- The means by which the income is earned or the source from which it is derived; and
- The persons for whose support the debtor is legally or morally liable.⁶⁶⁸

3.285 In practice, for many reasons it is possible that the debtor will not respond to the examination summons and prepare a statement of means, and there is no legal obligation upon the debtor to do so.⁶⁶⁹ The Money Advice and Budgeting Service (MABS) perform an important role in preparing their clients for examination hearings, and it is standard practice for MABS to draw up a statement of means on behalf of its clients.⁶⁷⁰ It would however appear that the practices of District Court judges vary as to whether or not such documents prepared by MABS should be admissible in the proceedings. Some judges will however afford a significant role to MABS, asking the service to assist the debtor and even staying proceedings to allow the debtor to meet with MABS so as to produce a more accurate statement of means.

3.286 The next step in the procedure is a hearing of the District Court at which the debtor will be examined as to his or her means. The creditor must produce proof of the amount of the debt due⁶⁷¹ and also must provide evidence that the debtor resides in the district. It should be noted that free legal aid will not generally be available to the judgment debtor at this hearing.⁶⁷² The statement of means lodged by the debtor is received in evidence and the debtor may also give evidence on oath as to his or her means.⁶⁷³ The debtor may be cross-examined by the creditor as to the contents of the statement of means and on any evidence given by the debtor. It is to be noted that these proceedings take place in open court in the district in which the debtor resides.⁶⁷⁴ At the examination, the burden of proof rests on the debtor to prove that he or she cannot pay the debt owed either in one sum or by instalments.⁶⁷⁵ The judge may choose not to grant an instalment order if the debtor shows that he or she cannot pay the sum at all, or may grant an instalment order ordering the debtor to pay such sum as the court considers reasonable. What little case law exists in this area suggests that Irish courts will rarely refuse outright to grant an instalment order.⁶⁷⁶

3.287 Although comprehensive statistics are not available on the issue, it appears that in the majority of cases the debtor will not reply to the examination summons nor appear at the examination hearing. This is supported by the evidence from a 2009 report of the Free Legal Advice Centres, the results of which are discussed further below.⁶⁷⁷ This case is acknowledged in section 17 of the *Enforcement of Court Orders Act 1926*, which specifically contemplates the non-attendance of a debtor at the examination hearing, and provides that if the debtor fails to attend, the court, at the request of the

⁶⁶⁸ Section 15(3) of the *Enforcement of Court Orders Act 1926*.

⁶⁶⁹ See Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 24.

⁶⁷⁰ *Ibid* at 25.

⁶⁷¹ By producing the original court judgment on which the creditor relies and a certificate provided by the creditor's solicitor setting out the amount outstanding: Order 53 rule 5 DCR.

⁶⁷² See Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 25, who notes that if the debt is uncontested and there is no legal defence to the creditor's claim, the debtor's legal aid application will fail the "merits" test applied by the Legal Aid Board when assessing clients deserving of legal aid.

⁶⁷³ Section 16 of the *Enforcement of Court Orders Act 1926*.

⁶⁷⁴ See Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 24.

⁶⁷⁵ Section 17 of the *Enforcement of Court Orders Act 1926*.

⁶⁷⁶ See *Brennan v Gilligan* (1944) 78 ILTR 191, where a District Court decision refusing to grant an Instalment Order was overturned by the Circuit Court on the ground that since the debtor was fit to work and there was available employment, he was found to be dishonestly avoiding work for the purpose of frustrating enforcement of the decree.

⁶⁷⁷ Free Legal Advice Centres (FLAC) *To No One's Credit: The Debtor's Experience of Instalment and Committal Orders in the Irish Legal System* (FLAC 2009) at 65-66: see the discussion of the findings of this report in relation to the participation of debtors in enforcement proceedings at paragraph 3.328 below.

creditor, shall order the debtor to pay the debt and the costs of the proceedings either in one payment or by such instalments at such times as the judge considers reasonable. In such a case, the court will make an order without having any information concerning the debtor's financial circumstances available, a circumstance which has been strongly criticised and which is discussed further below.⁶⁷⁸ As it has been held by case law that the District Court judge is "bound to have regard to the means of the defendant and his ability to pay",⁶⁷⁹ the judge will often request information from the creditor's legal representatives of their view of the debtor's ability to pay, a view which must necessarily be one-sided and limited in its accuracy, as it will be unable to take into account various other debts which the debtor may owe.⁶⁸⁰

3.288 Once the instalment order has been made by the judge, it is lodged in the District Court Office to be signed and must be served upon the debtor in accordance with the normal rules of service described above, including a possible need for the creditor to apply for substituted service. The creditor's legal representatives will then usually write to the debtor indicating that an instalment order has been made, when the first instalment is due, and a warning that if the first instalment is not paid, committal proceedings will be instituted.

3.289 The debtor may apply to the District Court to have the instalment order varied if he or she is unable to afford the instalment payments.⁶⁸¹ The judge may then vary the number, amount or time of the instalments to be paid, or order any two, but not all three, of these options. The variation order may be back-dated to have effect as from a specified date prior to the date of the variation. Studies have shown that it is not often understood by debtors that the instalment order may be varied in this matter.⁶⁸² The instalment order itself does indicate that the District Court may alter the amounts or times of instalments, advising debtors to consult a solicitor or a District Court clerk if such a variation is required, although as is noted below, this statement may be of little value to debtors.⁶⁸³

3.290 The procedure which takes place in the case of the failure by a debtor to comply with an instalment order has been recently reformed by the *Enforcement of Court Orders (Amendment) Act 2009*. The reforms contained in this Act were necessitated by the decision of the Irish High Court in *McCann v Judge of Monaghan District Court and Ors*, which found the procedures in operation before the 2009 Act to have breached the debtor applicant's right to a fair trial under articles 34, 38 and 40.3 of the Constitution, and the debtor's right to liberty under article 40.4.1^o.⁶⁸⁴

3.291 Under the new section 6(1), where a debtor has failed to comply with an instalment order, a creditor may apply to a District Court clerk⁶⁸⁵ for a summons directing the debtor to appear before the District Court. This summons shall contain details of the consequences of a failure to comply with an instalment order, in particular the possibility of imprisonment, and shall state that the debtor may be arrested if he or she fails to appear before the District Court as directed. The sub-section also provides that the summons should be served on the debtor by personal service. Section 6(3) provides that if the debtor fails, without reasonable excuse, to appear before the court in response of this summons, the District Court judge may issue a warrant for the arrest of the debtor or, if appropriate, may fix a new date for a hearing and direct that the debtor be notified of the date for this hearing. Where the debtor is

⁶⁷⁸ See Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 24. See also paragraphs 3.338 and 6.211 to 6.212 below.

⁶⁷⁹ *Garrahan v Garrahan* [1959] IR 168, 173, per Dixon J.

⁶⁸⁰ Joyce *An End Based on Means?* *op cit.* at 24.

⁶⁸¹ Section 5 of the *Enforcement of Court Orders Act 1940*.

⁶⁸² See Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 26.

⁶⁸³ Schedule C Form No. 53.5 DCR. See the discussion of the lack of awareness among debtors of their rights at paragraph 0 below.

⁶⁸⁴ [2009] IEHC 276. See the discussion of the *McCann* decision and its treatment of these rights at paragraphs 2.25 to 2.34 above.

⁶⁸⁵ For the District Court area where the debtor resides.

arrested and brought before the District Court,⁶⁸⁶ the judge shall fix a new date for a hearing and shall explain to the debtor in ordinary language that he or she is entitled to apply for a certificate of legal aid and must attend before the court at the date next fixed for the hearing of the summons.⁶⁸⁷ The judge must also explain to the debtor the consequences of a failure to comply with an instalment order, and in particular the possibility of imprisonment. In addition, the consequences of a failure to attend before the court at the fixed date for the hearing must be explained, which are that the judge may deal with the debtor's failure to appear without reasonable excuse as if it was a contempt of court.⁶⁸⁸

3.292 At the hearing stage, where the debtor and creditor are present, the judge must inform the debtor again of his or her right to apply for a legal aid certificate and of the consequences which may follow a failure to comply with an instalment order, in particular the possibility of imprisonment.⁶⁸⁹ The judge then has four options, and may:

- Treat the proceedings as an application for a variation of the instalment order, in which case section 5 of the 1940 Act applies;
- If appropriate, request the creditor and debtor to seek to resolve the dispute by mediation;
- If appropriate, make an order fixing a term of imprisonment, but postponing the execution of that order until such time and on such conditions as to the payment of the outstanding debt and costs as are just; or
- If appropriate, order the arrest and imprisonment of the debtor for a period not exceeding three months.⁶⁹⁰

3.293 The options of requesting the parties to attempt mediation and of making a suspended order for arrest and imprisonment had not been available to the District Court judge under the previous version of the 1940 Act. Section 6(8) is also a radical departure from the 1940 Act, as it reverses the onus of proof in committal proceedings from the position under the 1940 Act. As a result, an order for arrest and imprisonment may only be made if the judge is satisfied, beyond reasonable doubt, that the creditor has established that the failure to pay is not due to the debtor's mere inability to pay but is due to his or her wilful refusal or culpable neglect, and that the debtor has no goods which could be taken in execution. This provision is designed to comply with the statement of Laffoy J in the *McCann* decision that the Constitution of Ireland probably requires proof beyond reasonable doubt to be shown before the District Court becomes competent to make an order for the arrest and imprisonment of a defaulting debtor.⁶⁹¹ Section 6(9) provides that where a suspended order for imprisonment has been made, the debtor has a right to apply for a variation of the order for payment if his or her ability to comply with the order has changed. Similarly, under section 6(10)(a), a debtor who has been imprisoned may apply for a variation if his or her ability to pay has changed. An imprisoned debtor is entitled to be released immediately on payment to the District Court clerk or prison Governor the sum of money consisting of all instalments of the debt and costs.⁶⁹² The Minister for Justice may at any time and for any reason which appears to him or her sufficient, direct that the debtor be released either forthwith or after the debtor has paid a specified part of the sum of money.⁶⁹³ It is understood that in practice the Minister very rarely makes such a direction.

3.294 A new section 6A is also inserted into the 1940 Act by the 2009 Act. This section contains the rules governing the provision of legal aid to a debtor facing committal proceedings under section 6 arising

⁶⁸⁶ Section 6(4) requires that this should occur "as soon as is practicable".

⁶⁸⁷ Section 6(5) of the 1940 Act as amended.

⁶⁸⁸ Section 6(12) of the 1940 Act as amended.

⁶⁸⁹ Section 6(6) of the 1940 Act as amended.

⁶⁹⁰ Section 6(7) of the 1940 Act as amended.

⁶⁹¹ *McCann v Judge of Monaghan District Court and Ors* [2009] IEHC 276 at 77.

⁶⁹² Section 6(10)(b) of the 1940 Act as amended.

⁶⁹³ Section 9 of the *Enforcement of Court Orders Act 1940*.

from his or her failure to comply with an instalment order. The entitlement to free legal aid to debtors who do not have the means to pay for legal assistance has been introduced in order to make the procedure compliant with the provisions of the Constitution of Ireland as interpreted in the *McCann* case. In the judgment in that case, Laffoy J held that for the procedure to be compatible with the Constitution, the same procedural safeguards must exist in committal hearings as are provided in criminal trials. This means that it would be necessary for the debtor to be present before the Court, to be informed by the District Court Judge of his/her entitlement to legal aid, and for the District Court to apply fair procedures in the hearing of the creditor's application for arrest and imprisonment.⁶⁹⁴ The previous procedure under the 1940 Act gave no jurisdiction to the judge to grant legal aid to the debtor if he or she had not the means to maintain a lawyer, and so was contrary to the case law under the Constitution and European Convention on Human Rights which required free legal aid in cases where deprivation of liberty is at stake. The decision stated that there was no scheme in place under which a judge could order that free legal aid be provided to the debtor, and so section 6A now extends the scheme established by the *Criminal Justice (Legal Aid) Act 1962* to cover legal aid in these proceedings.⁶⁹⁵ A District Court judge may now provide a debtor with a "debtor's legal aid certificate" where it appears that the debtor's means are insufficient to enable him or her to obtain legal aid.⁶⁹⁶

3.295 When the District Court judge makes an order for arrest and imprisonment,⁶⁹⁷ the creditor's solicitor must prepare this order and a Warrant to Enforce Order for Arrest and Imprisonment⁶⁹⁸ The creditor will then lodge these documents with the District Court clerk, who will either send the warrant directly to the Gardaí or will give it to the creditor's solicitor to lodge with the Gardaí.⁶⁹⁹ It appears that some creditors will obtain an order for arrest and imprisonment but will not lodge it with the District Court clerk, preferring to use the threat of lodging it as a means of obtaining payment from a "won't pay" debtor. If the warrant has been sent to the Gardaí, it is then up to the Gardaí to execute it. Sometimes Gardaí will give warnings to the debtor before executing the warrant, indicating that if the debtor does not immediately pay the District Court clerk, it will be executed.⁷⁰⁰ The debtor must pay the amount of all the instalments due plus any costs which have accrued if he or she is to avoid committal at this stage.⁷⁰¹ If however the debtor reaches an arrangement with the creditor and makes a part payment of the amount owed, the creditor will be deemed to waive its right to enforce the imprisonment order by accepting the part payment.⁷⁰² The debtor does have the power to appeal the Order for Arrest and Imprisonment to the Circuit Court at this stage, and such an appeal will operate as a stay of the execution of the warrant.⁷⁰³ Again it however appears that debtors are largely unaware of this right, particularly as debtors most often will not have access to legal advice.⁷⁰⁴ For example, a 2009 study published by the Free Legal Advice Centres found that of 14 cases surveyed, the debtor involved was aware of this right in only one case.⁷⁰⁵

3.296 It is to be noted that an alternative procedure for the imprisonment of debtors who default in obeying a court order for the payment of a debt exists under section 6 of the *Debtors (Ireland) Act*

⁶⁹⁴ *McCann v Judge of Monaghan District Court and Ors* [2009] IEHC 276 at 71.

⁶⁹⁵ Section 6A(3) of the 1940 Act as amended.

⁶⁹⁶ Section 6A(1) of the 1940 Act.

⁶⁹⁷ See Schedule C, Form No. 53.9 DCR.

⁶⁹⁸ Schedule C, Form No. 53.10 DCR.

⁶⁹⁹ *Joyce An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 26.

⁷⁰⁰ *Ibid.*

⁷⁰¹ Section 6(10)(b) of the *Enforcement of Court Orders Act 1940* as amended.

⁷⁰² *The Commercial Banking Company v Foley* (1933) 67 ILTR 54.

⁷⁰³ Order 53 Rule 9(1) DCR.

⁷⁰⁴ *Joyce An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 26.

⁷⁰⁵ Free Legal Advice Centres (FLAC) *To No One's Credit: The Debtor's Experience of Instalment and Committal Orders in the Irish Legal System* (FLAC 2009) at 87.

1872.⁷⁰⁶ Section 5 of this Act provides that imprisonment for debt is to be abolished and that “no person shall after the commencement of this Act be arrested or imprisoned for making default in payment of a debt contracted after the passing of this Act.” An exception however is provided under which a power to imprison is retained on default in the payment of sums of money due under court orders.⁷⁰⁷ The court must however only make an order of committal where it has been proved that the debtor has or has had since the date of the order or judgment the means to pay the sum due and has refused or neglected to pay it.⁷⁰⁸ The maximum committal period under this section is six weeks. The court may direct that any debt due be payable by instalments, and retains the power to vary or rescind such direction from time to time.⁷⁰⁹ As under the *Enforcement of Court Orders Act 1926-1940*,⁷¹⁰ imprisonment under the *Debtors (Ireland) Act 1872* does not satisfy the debt owed.⁷¹¹

3.297 The *Debtors (Ireland) Act 1872* confers jurisdiction on the High Court, Circuit Court and District Court, unlike the 1926 and 1940 Acts, which provide for arrest and imprisonment procedures only in District Court debt enforcement proceedings.⁷¹² The *Debtors (Ireland) Act 1872* has not been repealed, and reference is made to the section 6 imprisonment procedure in recent legislation.⁷¹³ It however appears that in practice the procedure is rarely invoked and that the instalment order procedure under the *Enforcement of Court Orders Acts 1926-1940* appears to have largely replaced the procedure under the 1872 Act.⁷¹⁴ This point was recognised by Laffoy J in the Irish High Court decision of *McCann v Judge of Monaghan District Court and Ors*.⁷¹⁵

(f) **Attachment of Debts: Garnishee Procedure**

3.298 A garnishee order is an enforcement mechanism which allows a judgment creditor to obtain an order attaching a debt owed by a third party to the judgment debtor so that the third party must pay the amount owed to the judgment creditor instead of the judgment debtor. Under this procedure, which is also known as an attachment of a debt,⁷¹⁶ the debt owed to the judgment debtor becomes available for seizure in largely the same manner as the debtor’s goods may be seized under an execution order as

⁷⁰⁶ The Rules of Court relevant to this procedure are contained in Order 44 Rules 9-14 RSC. The Circuit Court also has jurisdiction under the Act, although no procedural rules are specified in the Circuit Court Rules: *Aerospan Board Centre (Dublin) Ltd v Dean Furniture Ltd*. [1989] ILT 79. The power to make orders under section 6 of the Act is provided to District Court judges under section 81 *Courts of Justice Act 1924*. See Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 116-118.

⁷⁰⁷ Exception 6 of section 5 *Debtors (Ireland) Act 1872*.

⁷⁰⁸ Section 6(2) of the *Debtors (Ireland) Act 1872*.

⁷⁰⁹ Section 6(2) of the *Debtors (Ireland) Act 1872*

⁷¹⁰ Section 20 of the *Enforcement of Court Orders Act 1926*.

⁷¹¹ Section 6(2) of the *Debtors (Ireland) Act 1872*.

⁷¹² See the discussion of the respective roles of the parallel procedures in the decision of Laffoy J in *McCann v Judge of Monaghan District Court and Ors* [2009] IEHC 276 at 6.

⁷¹³ See e.g. sections 284 and 305 *Social Welfare Consolidation Act 2005* provide that “Any sum received by any person by way of benefit shall not be included in calculating that person’s means for the purposes of section 6 of the *Debtors Act (Ireland) 1872*.” and “Any sum received by any person by way of benefit, children’s allowance or assistance with the exception of assistance under Chapters 2 and 3 of Part III shall not be included in calculating that person’s means for the purposes of section 6 of the *Debtors Act (Ireland), 1872*.”

⁷¹⁴ See Costello *The Law of Habeas Corpus in Ireland* (Four Courts Press 2006) at 240.

⁷¹⁵ [2009] IEHC 276 at 6.

⁷¹⁶ This is the term used in the headings to the relevant rules of court concerning this enforcement mechanism: see Order 45 RSC and Order 38 CCR.

described above.⁷¹⁷ The debt most commonly attached under a garnishee order is the debt owed by the judgment debtor's bank to the judgment debtor under a bank account. The debtor's bank is in such a case ordered by the court to pay funds from the debtor's credit balance to the judgment creditor. Despite its utility in this manner against individual's bank accounts, the procedure is not widely used in enforcing judgments against consumers, and is instead more often used when enforcing business debts.⁷¹⁸

3.299 The statutory power of a court to make a garnishee order originates from the *Common Law Procedure Amendment Act (Ireland) 1856*, and the relevant procedural rules are contained in Order 45 *Rules of the Superior Courts* and Order 38 *Circuit Court Rules*.

3.300 Applications for a garnishee order are in two stages. First, the judgment creditor may apply *ex parte* (in the absence of the judgment debtor) to court for a conditional order, known as an order *nisi*, that all debts owing and accruing from a third party – the garnishee – to the judgment debtor shall be attached to pay the judgment debt.⁷¹⁹ Secondly, where the garnishee does not dispute the debt owed by him or her to the judgment debtor, the court will make the conditional garnishee order absolute.

3.301 The judgment creditor's application must be grounded on an affidavit (sworn statement) and, due to the absence of the judgment debtor from proceedings, must be made in utmost good faith.⁷²⁰ The creditor must thus make a full and frank disclosure of all material facts. The creditor's sworn statement must set out the following:⁷²¹

- An identification of the judgment which the creditor seeks to enforce;
- A statement that the judgment remains unsatisfied;
- A statement that to the best of the creditor's knowledge the putative named garnishee is within the jurisdiction of the court;
- A statement that the garnishee is indebted to the judgment debtor in respect of a debt which was also incurred within the jurisdiction of the court and the amount of the debt.
- The source of the creditor's information or the grounds of his or her belief;
- That the debt to be attached does not belong to a third person and that no third person has an interest in it;
- Where the garnishee is a bank with more than one place of business, a statement of the name and address of the branch at which the judgment debtor's account is believed to be held if known;
- The manner in which the judgment was obtained and the attitude of the judgment debtor to the proceedings;
- A statement that the ordinary execution processes (i.e. execution against goods, instalment order etc.) are unlikely to avail the judgment creditor and a request on this basis for an equitable garnishee order;

⁷¹⁷ "The debt is made equally available to the judgment creditor as property seizable under a *feri facia*; and his rights are as ample in the one case as they are in the other." *Sampson v Seaton and Beer Railway Co.* (1874) LR 10 QB 28.

⁷¹⁸ Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 26

⁷¹⁹ Order 45 Rule 1(1) RSC; Order 38 Rule 1 CCR. The court may make such an order either before or after an oral examination of the judgment debtor has taken place. The order may also require the garnishee to appear before the court to show cause as to why he or she should not pay the judgment creditor the debt due to the judgment debtor.

⁷²⁰ For a recent statement of the rule that *ex parte* applications must be made in utmost good faith or *uberrimae fides*, see *Bambrick v Cobley* [2005] IEHC 43.

⁷²¹ See Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 128.

It appears to be unclear whether or not the judgment creditor must also produce an order of *fiery facias* returned marked as “no goods” before applying for a garnishee order. Commentators and case law appear to be divided on the issue,⁷²² while in practice it appears that a court will generally require a judgment creditor to attempt legal execution against goods before seeking a garnishee order. The judgment creditor is not entitled to a garnishee order as of right, and the making of such an order is at the discretion of the court.⁷²³ A garnishee order will not be made where it would be inequitable to do so, if the judge has been informed of reasonable grounds making it so inequitable.⁷²⁴ It is of note that in this regard the Circuit Court Rules provide that if a judge is satisfied that the attachment of salary or wages will not leave sufficient amount to the judgment debtor to maintain him or herself and his or her dependents, the order may be set aside or varied to leave a sufficient maintenance amount for the debtor.⁷²⁵

3.302 Where the court makes a conditional order, it is to be served on the garnishee and on the judgment debtor at least seven days before the date of hearing.⁷²⁶ If the garnishee disputes liability to the judgment debtor, the court may order that any questions of liability be tried,⁷²⁷ with the Master of the High Court permitted to try any issue of fact with the consent of all parties involved.⁷²⁸ If the garnishee claims that its debt is not owed to the judgment debtor but to a third party, that party may also be heard.⁷²⁹

3.303 Service of a conditional garnishee order on the garnishee prevents the garnishee from dealing with the debt so that he or she shall not pay it to the judgment debtor, and may not pay it to the judgment creditor to discharge his or her own liability, without an order of the court.⁷³⁰ The conditional garnishee order does not create a new debt between the judgment creditor and the garnishee, but rather an attachment of the existing debt owed to the judgment debtor.⁷³¹ Thus the debt remains the property of the judgment debtor and is subject to such rights as already exist in respect of the debt. Service of the conditional garnishee order does not assign the debt to the judgment creditor.⁷³² Thus the sole effect of

⁷²² Cordial and Marray indicate that a judgment creditor must procedure proof of a returned order of *fiery facias* marked no goods as part of the *ex parte* application for a conditional garnishee order: Cordial and Marray (eds.) *Consolidated Circuit Court Rules* (Round Hall Sweet & Maxwell 2001) at paragraph 38-08. Glanville however notes that “that it is probably not necessary to await the return on an order of *fiery facias* before applying for a garnishee order. The issue of whether or not an order may be applied for concurrently with other remedies is not clear”, citing the cases of *Hayter v Beall* (1881) 44 LT 131 and *Montgomery & Co. v De Bulmes* [1898] 2 QB 420: Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 130.

⁷²³ See Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 121.

⁷²⁴ *Martin v Nadel* [1906] 2 KB 26.

⁷²⁵ Order 38 Rule 10 CCR.

⁷²⁶ Order 45 Rule 1(2) RSC.

⁷²⁷ Order 45 Rule 4 RSC; Order 38 Rule 4 CCR.

⁷²⁸ Order 63 Rule 5 RSC.

⁷²⁹ Order 45 Rule 5 RSC; Order 38 Rule 5 CCR. Such a party however appears at his or her own risk and will have to bear his or her own costs if the court finds that he or she has no interest in the debt: *McFeran v Donnelly* (1899) 33 ILTR 175. If the court does find the third party to have such an interest, however, costs may be awarded out of the money recovered even though the third party’s interest has been excluded from the amount recovered: *Guardians of the Cork Union v Bull* (1891) 25 ILTR 15.

⁷³⁰ Section 64 of the *Common Law Procedure Amendment (Ireland) Act 1856*, Order 45 Rule 2 RSC; Order 38 Rule 2 CCR. Pigot CB stated in the case of *Sparks v Younge* “The effect upon the garnishee of an attachment order will... mainly be to bind the debt in the hands of the garnishee (after service or notice of the order) to this extent, first, that he shall not pay it to his creditor so long as the order remains in force... secondly... that the garnishee cannot pay or settle with the attaching creditor, so as to discharge his own liability, without an order of the Court..”(1858) 8 ICLR 251, 265.

⁷³¹ Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 131.

⁷³² *Norton v Yates* [1906] 1 KB 112.

the order is that the garnishee is ordered to pay the sum specified to the judgment creditor, and if the garnishee does not do so, the order will be enforced against the garnishee in the same ways as a judgment is enforced against a judgment debtor. The priority of the garnishee order is established on service of the conditional order on the garnishee.⁷³³

3.304 A debt attachment book, recording details relating to any attachments of debts made by the courts, is kept by the Master's office in relation to the superior courts and the County Registrars of each Circuit Court. Copies of entries to these books may be sought by any person by applying to the Master or County Registrar.⁷³⁴ Payment of the debt by the garnishee serves to discharge the debt owed by him or her to the judgment creditor.⁷³⁵

3.305 Rules exist as to the types of debts which may be attached. The most important limitation is that attachment by garnishment can only apply to present debts due to a judgment debtor and future earnings cannot be attached.⁷³⁶ Thus a separate mechanism of attachment of earnings is required for a debt to be paid out of a judgment debtor's wages, as discussed in Chapter 6 below.⁷³⁷ Uncertainty is however cast upon this position by Ord. 38 r 10 CCR, which assumes that future earnings are attachable by garnishment, in providing that a judge may vary the amount of wages or salary attached if it does not leave enough money to maintain the debtor and his or her dependents. Money owing as rent,⁷³⁸ the proceeds of insurance policies,⁷³⁹ and an amount in damages recovered by a judgment debtor in a legal action⁷⁴⁰ may all be attached. As mentioned above, the most common use of garnishee orders is to attach a judgment debtor's bank account.⁷⁴¹ Unlike in the case of execution by seizure of goods, a garnishee order may not be made to attach a joint account jointly held by the judgment debtor and another.⁷⁴²

3.306 The costs of garnishee order proceedings are to be awarded at the discretion of the court,⁷⁴³ although the costs of the judgment creditor shall, unless otherwise directed, be retained out of the money recovered under the order in priority to the amount of the judgment debt.⁷⁴⁴

(g) ***Equitable Execution: The Appointment of a Receiver***

3.307 Equitable execution is an enforcement method granted to a judgment creditor where the ordinary methods of execution are unavailable or likely to be ineffective due to the nature of the assets of

⁷³³ Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 132, citing *Hamer v Giles* (1879) 11 Ch. D. 942.

⁷³⁴ Section 68 of the *Common Law Procedure Amendment (Ireland) Act 1856*; Ord. 37 r 8 CCR; see Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 129.

⁷³⁵ Section 67 of the *Common Law Procedure Amendment Act (Ireland) 1856*; Order 45 Rule 7 RSC; Order 38 Rule 11 CCR.

⁷³⁶ See Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 123. A garnishee order in respect of future contractual payments to the debtor was however made on the consent of all parties in *O'Leary v Buttimer* [1953-4] Ir Jur Rep 15.

⁷³⁷ See paragraphs 6.253 to 6.330 below.

⁷³⁸ Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 123.

⁷³⁹ *Sinnott v Bowden* [1912] 2 Ch. 414.

⁷⁴⁰ *Cronin v Scott* (1876) IR 10 CL 173; *National Irish Bank Ltd. v Barry* (1966) 100 ILTR 185.

⁷⁴¹ See Glanville *op cit.* at 124-5.

⁷⁴² *Hirschorn v Evans* [1938] 2 KB 801; *Belfast Telegraph Newspapers v Blunden* [1995] NI 351. See Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 124-5. See also paragraphs 6.234 to 6.243 below for a discussion of the possible reform of this rule.

⁷⁴³ Section 69 *Common Law Procedure Amendment (Ireland) Act 1856*.

⁷⁴⁴ Order 45 Rule 8 RSC; Order 38 Rule 9 CCR.

the debtor available to satisfy the judgment.⁷⁴⁵ It is not strictly a method of execution, but a form of discretionary equitable relief available for the purposes of enforcing a judgment.⁷⁴⁶ Equitable execution most often involves the appointment of a receiver over certain assets of the judgment debtor but can also involve a charging order over a fund in court or a fund in the hands of an official, or an injunction conserving the judgment debtor's assets.⁷⁴⁷ When appointed, a receiver, who is usually a solicitor, will be authorised to receive rents, profits and moneys receivable in respect of the judgment debtor's interest in a specified property.⁷⁴⁸

3.308 The appointment of a receiver by means of equitable execution is a power originating from the Courts of Equity, with the procedural rules relating to the remedy now contained in Order 45 rule 9 RSC and Order 39 CCR. It is a remedy which has been in existence since before the *Supreme Court of Judicature Act 1877*, and as will be seen many of the rules relating to this remedy are derived from very old case law. The power is based on the principle that equity will not suffer a wrong to be without a remedy,⁷⁴⁹ and so operates to provide a means of execution where the legal methods of enforcement described above are ineffective. Thus, before a judgment creditor may obtain an order for equitable execution, he or she is first expected to exhaust any reasonable method of legal execution.⁷⁵⁰ If a means of execution is available at law through, for example, the seizure and sale of the debtor's goods, equitable execution will not be permitted.⁷⁵¹ The court will not appoint a receiver by way of equitable execution over property of which the judgment debtor is the legal owner and which can be the subject of the legal process,⁷⁵² but since the sheriff cannot seize assets in which the judgment debtor has merely an equitable interest,⁷⁵³ a receiver may be appointed in respect of such assets.⁷⁵⁴ Equitable execution will not be ordered where it is merely convenient due to difficulties in effecting legal execution.⁷⁵⁵ The practice is for a judgment creditor to produce to the court a sheriff's return marked no goods when seeking the appointment of a receiver.⁷⁵⁶ In exceptional circumstances an order may be made notwithstanding the failure of the judgment creditor to levy legal execution, such as where the receivership is granted for the purpose of getting in debts so that it is a more convenient method of satisfying the judgment than garnishee proceedings. Another such example of where an order may be made is where the receiver is appointed to prevent a judgment debtor from making away with the property liable to execution.⁷⁵⁷

⁷⁴⁵ Ó Floinn, Abrahamson and Gannon *Practice and Procedure in the Superior Courts* (2nd ed. Tottel Publishing 2008) at 430.

⁷⁴⁶ *Ibid* at 179.

⁷⁴⁷ Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 178.

⁷⁴⁸ Cordial and Marray (eds.) *Consolidated Circuit Court Rules* (Round Hall Sweet & Maxwell 2001) at paragraph 39-03.

⁷⁴⁹ See e.g. *O'Connell v An Bord Pleanala* [2007] IEHC 79.

⁷⁵⁰ *O'Connell v An Bord Pleanala*, [2007] IEHC 79.

⁷⁵¹ *National Irish Bank Ltd v Graham* [1994] 1 IR 215.

⁷⁵² See e.g. *Holmes v Millage* [1893] 1 QB 551; *Honnibal v Cunningham & Ors.*[2006] IEHC 326

⁷⁵³ *Ronan v King* [1894] 2 IR 61, QB 648, CA.

⁷⁵⁴ See e.g. *Honnibal v Cunningham op cit.*

⁷⁵⁵ *Harris v Beauchamp* [1894] 1 QB 801.

⁷⁵⁶ Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 178.

⁷⁵⁷ Glanville *ibid* at 180, citing *Goldschmidt v Oberrheinische Metallwerke* [1906] 1 KB 373. The creditor will not however be required to issue execution at law through the sheriff if it can be shown that to do so would be a waste of time. *Manchester and Liverpool District Banking Co. Ltd v Parkinson* (1889) 22 QB 173. See also *O'Connell v An Bord Pleanala* [2007] IEHC 79, where the court was satisfied that the ordinary processes of execution were not sufficient to allow the judgment creditor to enforce the judgment.

3.309 The rules of court state that in addition to the above requirements, the court must determine whether it is “just and convenient” to appoint a receiver, having regard to the following factors:

- The amount of the debt claimed by the applicant;
- The amount which may probably be obtained by the receiver;
- The probable costs of the appointment of a receiver.⁷⁵⁸

The court may direct any enquiries on these matters before making the appointment. The appointment of a receiver by way of equitable execution is a discretionary remedy, and the court may make the appointment upon such terms as the court may direct. In exercising its discretion the court will consider how much of the payment due should be subject to the order having regard to the means of sustenance of the debtor.⁷⁵⁹

3.310 Three rules apply delimiting the property which may be subject to an order for the appointment of a receiver.⁷⁶⁰ First, the court will not appoint a receiver over a debtor’s general property: the creditor must apply to have a receiver appointed only over a specific item or items of property. Secondly, the court must be satisfied that the property in question is capable of assignment. Finally, the court will not appoint a receiver where to do so would be futile due to the fact that there is nothing for him or her to receive.⁷⁶¹ A non-exhaustive list of examples of the types of property which may form the object of a receiver’s appointment includes:

- A share of rents and profits of realty and leaseholds held on joint tenancy subject to mortgages;
- Rents accruing but not accrued;
- Income of a trust fund;
- Interest in personal property subject to a mortgage;
- Debts where garnishee proceedings are inappropriate e.g. a civil servant’s pension.⁷⁶²

3.311 The Circuit Court Rules provide that the order may be limited to a single sum, or may cover several sums, or a series of continuing periodical payments in which the judgment debtor is beneficially interested.⁷⁶³ These rules also note that though an order of the court appointing a receiver is absolute, the judgment debtor may apply to the court to discharge the order and the judge may discharge as he or she thinks right.⁷⁶⁴

3.312 Generally a receiver will not be appointed over payments to be received in the future, but only over payments which have already accrued and which have not as yet been paid over to a judgment debtor.⁷⁶⁵ This rule has however been relaxed in subsequent cases.⁷⁶⁶ Despite these developments, the

⁷⁵⁸ Order 45 Rule 9 RSC; Order 39 Rule 1 CCR.

⁷⁵⁹ *Clery & Co. (1941) Ltd. v O'Donnell* (1944) 78 ILTR 190; *Garrahan v Garrahan* [1959] IR 168.

⁷⁶⁰ Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 182.

⁷⁶¹ *Bourne v Colodense Ltd* [1985] ICR 291.

⁷⁶² Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 182.

⁷⁶³ Order 38 Rule 4 CCR.

⁷⁶⁴ Order 38 Rule 3 CCR.

⁷⁶⁵ *Ahern v O'Brien* [1991] 1 IR 421.

⁷⁶⁶ In *Ahern, ibid*, a receiver was appointed over ground rents payable in the future where it appeared on first appearances that these were not subject to disbursements in favour of third parties. In the English decision of *Soinco SACI & Another v Novokuznetsk Aluminium Plant & Ors* [1988] 1 QB 406, it was held that a receiver could be appointed over sums not yet ascertained and payable in the future; and that a receiver could be appointed both to preserve assets acquired after judgment and to receive future assets or debts. This decision was followed in Ireland in *O'Connell v An Bord Pleanala* [2007] IEHC 79, where an award of

position of future earnings or wages has been distinguished from other future receipts,⁷⁶⁷ and the law appears to remain that a creditor has no right to be paid out of the future earnings of the debtor, and so no receiver may be appointed in respect of such payments.⁷⁶⁸ A receiver may however be appointed over an instalment of a salary which has become due to the judgment debtor but which has not been paid. In a similar manner, where a pension is awarded entirely for past service and not at all for future services it is assignable and therefore may be subject to an order appointing a receiver.⁷⁶⁹ In Ireland this appears to be the legal position even where the pension is a statutory one and where law precludes the voluntary assignment of the pension by the person entitled to it.⁷⁷⁰

3.313 The rules of procedure for applying to have a receiver appointed are contained primarily in case law in respect of the superior courts and Order 39 CCR in respect of the Circuit Court. In the superior courts, the judgment creditor may make an application in the absence of the judgment debtor, but only in an exceptional situation, such as where the judgment debtor has indicated an unwillingness to pay the judgment debt.⁷⁷¹ If the court refuses to make an appointment in the absence of the debtor, the creditor may instead seek an injunction ordering the debtor not to dissipate his or her assets.⁷⁷² The Circuit Court Rules indicate that an application may be made in the absence of the debtor,⁷⁷³ and it has been suggested that the same principles should apply as in respect of applications in the superior courts.⁷⁷⁴ If the court refuses to make an order in the absence of the debtor, the debtor must be served personally with the motion, unless substituted service has been permitted.⁷⁷⁵

3.314 When applying for the appointment of a receiver, the creditor must swear an affidavit containing the following information:

- The date and particulars of the judgment;
- The fact that the judgment remains unsatisfied;
- Particulars of any execution issued and its result, e.g. a return of “no goods” on an execution order;
- The reasons why legal execution would be futile;
- The fact that the debtor is due money or is in receipt of periodic payments or has an interest in property;
- Particulars of the property over which the appointment is proposed.

The court has a discretion as to who is appointed receiver, and may appoint the judgment creditor if the debt is small.⁷⁷⁶ Usually the receiver will however be a solicitor, and if so he or she should not be from

damages which would become due to the judgment debtor in respect of litigation not yet determined could be the subject of an order appointing a receiver.

⁷⁶⁷ See *O'Connell v An Bord Pleanala op cit*.

⁷⁶⁸ *Holmes v Millage* [1893] 1 QB 551; *McCreery v Bennett* [1904] 2 IR 69.

⁷⁶⁹ *Manning v Mullins* [1898] 2 IR 34; *Higgins v Higgins* [1951] Ir Jur Rep 29.

⁷⁷⁰ *Garrahan v Garrahan* [1959] IR 168.

⁷⁷¹ The general rule was stated in *Lucas v Harris* by Lindley LJ as “*Ex parte* applications for a receiver ought not to be granted even after judgment, except in case of emergency, and it is desirable that this rule should always be borne in mind and not be lightly departed from.” (1887) 18 QBD 127, 134.

⁷⁷² See Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 186. See also *Soinco SACI & Another v Novokuznetsk Aluminium Plant & Ors* [1988] 1 QB 406.

⁷⁷³ Ord. 39 r 2 CCR.

⁷⁷⁴ Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 186.

⁷⁷⁵ *Tilling v Blythe* [1899] 1 QB 557.

⁷⁷⁶ Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 188.

the office representing the creditor.⁷⁷⁷ An affidavit must be presented to the court swearing that the proposed receiver is fit to hold the position, and this must be sworn by a person knowing the receiver for at least five years.

3.315 An order appointing a receiver takes effect from the moment it is pronounced.⁷⁷⁸ It confers on the judgment creditor purely personal rights against the judgment debtor and gives the creditor no right over the debtor's property,⁷⁷⁹ instead operating as an injunction against the debtor preventing him or her from receiving the proceeds of sale.⁷⁸⁰

3.316 The receiver's duty is to get in the money as set out in the order and pay it over to the judgment creditor, while also obeying any other terms set by the court making the appointment.⁷⁸¹ The receiver must make an account of the amounts received to the Master or County Registrar and seek liberty to pay them to the judgment creditor and to be discharged from the position of receiver.⁷⁸² The costs of the receivership are ordinarily paid out of the monies received, while the costs of the motion applying for a receiver are at the discretion of the court.⁷⁸³

(4) Problems of the Current Law

(a) General Problems of the Legal Enforcement System

(i) A Pre-Credit Society System

3.317 As can be seen from the above description, Irish law on debt enforcement is mainly derived from legislation and case law which long predates the "credit society" in which we now live. In this regard, legal debt enforcement procedures are largely inappropriate to deal with modern debt recovery situations.

(I) Outdated View of Debtors

3.318 First, legal enforcement is largely premised on an outdated conception of the "won't pay" debtor, who seeks to deliberately evade his or her obligations, and who can therefore be coerced into satisfying the debt owed either by having his or her goods or incomes seized, or by the threat of committal.⁷⁸⁴ As the discussion in Chapter 1 above has shown, this view cannot be justified as the majority of individuals defaulting on debt repayments do so not because they are seeking to avoid their obligations, but because they are, for a variety of reasons, unable to repay their debts.⁷⁸⁵ The law in this regard provides no solution to the problem of the over-indebted, "can't pay" consumer. It has been shown above that since the procedures under the *Bankruptcy Act 1988* are in practice unavailable to such over-indebted consumers,⁷⁸⁶ many "can't pay" debtors end up in the legal enforcement system, which is wholly inappropriate to deal with situations where a debtor simply has no means of paying a debt and where there is a lack of awareness on the part of the creditor and the court of the debtor's inability to pay. The Commission has already indicated above that such "can't pay" debtors should not be subject to court-based legal enforcement procedures.⁷⁸⁷ The current debt enforcement system in this regard does not

⁷⁷⁷ *Ibid.*

⁷⁷⁸ *Re Bristow* [1906] 2 IR 215.

⁷⁷⁹ *Stevens v Hutchinson* [1953] Ch. 299.

⁷⁸⁰ Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 189.

⁷⁸¹ *Ibid* at 192.

⁷⁸² *Adamson v Connaughton* (1893) 27 ILTR 114; *Peakin v Peakin* [1947] Ir Jur Rep 7.

⁷⁸³ Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 193; Order 39 Rule 1 CCR states that the order appointing a receiver is to be made upon such terms as to costs and otherwise as the judge may direct.

⁷⁸⁴ See paragraphs 1.27 to 1.28 above.

⁷⁸⁵ See paragraphs 1.30 to 2.111 above.

⁷⁸⁶ See paragraphs 3.159 to 3.176 above.

⁷⁸⁷ See paragraphs 2.117 to 2.118 above.

successfully distinguish between “can’t pay” and won’t pay” debtors. A 2009 report of the Free Legal Advice Centres found that of 38 debt enforcement cases surveyed, none of the debtors involved could be categorised as a “won’t pay” debtor.⁷⁸⁸ Only one debtor produced all the money owed in order to avoid imprisonment, and in this case the money was borrowed from a relative of the debtor. It should be noted however that the debtors participating in the survey were all clients of the Money Advice and Budgeting Service at some stage throughout their cases, and so are unlikely to be “won’t pay” debtors as the MABS’ only provides services to those genuinely experiencing debt difficulties.

(II) *Failure to Address the Problem of the Multiply-Indebted Consumer*

3.319 A second related problem is that the current enforcement system deals with debts individually, with proceedings focusing on a single debt owed by a debtor to a creditor. It has however been shown above that the majority of debtors in default will be multiply indebted,⁷⁸⁹ and that a holistic approach must be taken to the recovery of debt which recognises this situation.⁷⁹⁰ Such an approach has been adopted in many European countries since the 1990s,⁷⁹¹ but the Irish law on debt enforcement currently retains a “vertical” approach, failing to respond to the problem of the multiply-indebted consumer.⁷⁹² There are several negative consequences of this situation. Firstly, from the point of view of the effective administration of justice, it is more efficient to deal with all of a debtor’s debts and creditors in a single set of proceedings rather than holding separate proceedings for each single debt.⁷⁹³ Court time and money is currently frequently wasted through the bringing of enforcement proceedings which prove to be futile due to the existence of prior enforcement orders against a debtor.⁷⁹⁴ A similar negative consequence is that creditors who adopt best practices in arrears management techniques and who seek to achieve amicable resolution of their debtors’ debt difficulties may lose out to more aggressive creditors who pursue legal enforcement in respect of their debts.⁷⁹⁵ Thus the current legal system must respond to modern credit conditions where a consumer debtor will typically have multiple obligations.

(III) *Outdated Procedures and Inefficiency*

3.320 Finally, the development of a consumer credit society has meant that legal enforcement procedures contained in outdated legislation are inefficient in light of the large volume of credit available and the accompanying high volume of enforcement proceedings. Irish court procedures are based on the concept of adversarial proceedings between a competing plaintiff and defendant. Now, due to the fact that the majority of debt claims are uncontested and are not attended by the debtor, debt claim proceedings have developed from an adversarial to an administrative or bureaucratic procedure whereby large numbers of claims are mass-processed.⁷⁹⁶ In this context, practitioners working in the area of debt

⁷⁸⁸ Free Legal Advice Centres (FLAC) *To No One’s Credit: The Debtor’s Experience of Instalment and Committal Orders in the Irish Legal System* (FLAC 2009) at 95, 44-45.

⁷⁸⁹ See paragraph 1.26 above.

⁷⁹⁰ See paragraphs 1.80 to 1.84 and 1.94 to 1.94 above.

⁷⁹¹ *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 87.

⁷⁹² See Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 25-26.

⁷⁹³ *Towards A Common Operational European Definition of Over-Indebtedness op cit.*

⁷⁹⁴ See for example the situation which arose in the case of *Gallagher v Mahon* [2008] 1 IR 694, where a dispute arose between two judgment creditors who had both obtained garnishee orders from different courts against the same debtor in respect of separate judgment debts but where the fund was sufficient to satisfy only one of their debts.

⁷⁹⁵ *Towards A Common Operational European Definition of Over-Indebtedness op cit.*

⁷⁹⁶ See e.g. Ramsay “Debtors and Creditors: Themes and Issues” in Ramsay (ed.) *Debtors and Creditors* (Professional Books Limited 1986) at 5.

enforcement complain of long delays and frequent adjournments as the courts struggle to cope with the large number of low value debt enforcement claims.⁷⁹⁷

3.321 The first problem is that enforcement proceedings, from the first serving of a summons to the obtaining of an enforcement order, are complicated and involve the preparation of a large number of documents. The detailed description of the procedures contained in the relevant Rules of Court above was included to illustrate the complexity involved.⁷⁹⁸ The complicated procedure has been criticised as being cumbersome and liable to lead to errors. If any of the documents are rejected by court officials due to such errors, they must be re-submitted, causing further cost and delay.⁷⁹⁹ As all of the creditor's costs of enforcement are to be paid by the debtor, it is neither in the creditor's nor the debtor's interest that avoidable expense should be incurred in enforcement proceedings.

3.322 The problem is exacerbated by inconsistent practices in courts throughout the country. The procedural steps to be followed and documents to be prepared vary not only depending on the level of court involved and the different Rules of Court, but can also vary as between courts at the same level of jurisdiction depending on the practices of judges and court officials in the various courts. For example, some County Registrars will require a 14-day warning letter to be prepared and sent to the debtor before seeking enforcement in the Circuit Court, while other County Registrars do not insist on this procedural step, which is not contained in legislation or Rules of Court. Also, at the enforcement stage under the instalment order procedure, some District Court judges will require the creditor to swear an affidavit of residency when applying for an examination summons, while other judges will not require this document to be supplied. These inconsistencies and additions to the requirements established by legislation and rules of court reduce legal certainty and lead to increased costs and delays in enforcement.

3.323 Similar inconsistencies have been reported in relation to possession proceedings in Circuit Courts, with differing practices as regards stays on possession orders and the awarding of costs leading to uncertainty for creditors seeking such orders. This is one reason why creditors often prefer to bring proceedings in the High Court, where one judge oversees the Chancery list and rules on all possession applications, thus ensuring consistent practices and increased legal certainty.

3.324 Problems are also experienced in relation to the fixing of court hearings in District and Circuit Courts. Hearings can be scheduled on a long list for a particular date and end up not proceeding on that date. Proceedings may then be rescheduled for another date, often in another venue, with no guarantee that the same delay will not re-occur. This is a very costly and wasteful situation. The costs incurred by creditor's legal representatives are hugely increased by multiple court appearances at various venues throughout the country, often involving the payment of different legal representatives. This is another reason why creditors, particularly in possession proceedings, often prefer to take proceedings in the High Court where the list system operates more predictably and where the venue is usually fixed.

3.325 The Commission believes that legal debt enforcement proceedings could be made more efficient and less expensive. The Commission stresses its primary view that the majority of debt disputes can be resolved through non-judicial proceedings, which will avoid court costs, and futile court proceedings in the cases of over-indebted consumers. The Commission nonetheless acknowledges that enforcement proceedings must be available to creditors in certain circumstances, and that these proceedings must be efficient.⁸⁰⁰ The costs of enforcement in a given case are ultimately added to the

⁷⁹⁷ This problem has been identified by lenders and legal practitioners in England and Wales as well as in Ireland: see Dominy and Kempson *Dominy and Kempson Can't Pay or Won't Pay? A Review of Creditor and Debtor Approaches to the Non-Payment of Bills* (Personal Finance Research Centre, University of Bristol, No. 4/03 2003) at 46.

⁷⁹⁸ See paragraphs 3.205 to 3.236 above. For example, in Circuit Court proceedings six documents must be prepared by a creditor's legal representatives, some of which must be sworn and/or stamped, in order to obtain judgment in the case of a debt which has not been contested by the debtor: paragraph 3.221 above. In High Court proceedings seven such documents must be prepared: paragraph 3.227 above.

⁷⁹⁹ For example, an affidavit of debt remains valid for only 30 days, and if processing delays lead to a delay longer than this period, a new affidavit must be re-sworn, which involves more expense.

⁸⁰⁰ See paragraphs 2.64 to 2.69 above.

debt to be repaid by the debtor. In addition, it has been shown above that inefficient enforcement proceedings lead to lower availability of credit and increases in interest rates, thus leading to increased costs for society.⁸⁰¹ Therefore it is in the interests of debtors and society in general that enforcement is made more efficient, and not just a concern of creditors. In this regard it must be recalled that the ECtHR has indicated that a duty falls on Contracting States to provide efficient enforcement,⁸⁰² a view which is also contained in the Council of Europe *Recommendation of the Committee of Ministers to Member States on Enforcement*.⁸⁰³ The Commission believes that inefficiencies cannot be disguised as consumer protection, and that while the Commission recommends that specific measures be adopted to provide sufficient protection for debtors, enforcement proceedings must also be made more efficient.

(IV) Scale Costs

3.326 The above problems in relation to expense are increased by inconsistent practices in awarding costs in District and Circuit Court proceedings throughout the country. Scale costs are awarded by the court in respect of particular work carried out by the creditor's legal representatives at various stages of the proceedings, such as for example the issuing of a summons. These costs are to be distinguished from costs in the action, which are awarded on judgment. Scales of costs in the District Court are established by statutory instruments which contain a schedule of the costs to be awarded on the completion of certain work.⁸⁰⁴ These schedules must be followed by the court in making an award of costs. Where there is a scale of costs identifying the costs to be paid in respect of particular work, a court or court officer may not conclude that the scale is inappropriate and to disregard it.⁸⁰⁵ The judge may however "for special cause" award costs on a scale higher than that otherwise applicable.⁸⁰⁶ Scale costs are exclusive of and in addition to the actual outlay incurred by the creditor's legal representatives, and the court may award costs for actual and necessary outlay incurred.⁸⁰⁷ Practices vary among different courts throughout the country as to the level of costs which will be awarded in excess of the scale costs. The outlay incurred by a creditor's legal representatives, often including multiple service attempts (including the possible need to hire a private investigator), Commissioners for Oaths' fees and certain other expenses, will not be covered by the scale costs set out in the relevant statutory instruments, and thus to recover their outlays it is necessary that judges award additional costs. It appears that in practice some judges generally only award the scale costs, even though they may not be sufficient to cover the actual outlay incurred. Others meanwhile will award costs corresponding to the actual expense incurred by the creditor's legal representatives. The problem is exacerbated by the fact that the legislation setting out the scale costs is now quite dated.

3.327 In the Circuit Court, no scale of costs exists, and all awards of costs are at the discretion of the Judge or County Registrar, which again leads to inconsistencies.

(ii) Low Participation Rates Among Debtors

3.328 It has been noted above that the levels of participation by debtors in enforcement proceedings are very low. A 2009 study of the Free Legal Advice Centres (FLAC) provides an insight into these low

⁸⁰¹ 2.70 to 2.78 above,

⁸⁰² *Apostol v Georgia* Application No. 40765/02 November 28 2006. See paragraphs 2.12 to 2.14 above.

⁸⁰³ *Recommendation of the Committee of Ministers to member states on enforcement* (Council of Europe Rec(2003)17, 2003).

⁸⁰⁴ See e.g. *District Court (Costs) Rules 1992* S.I. No. 225/1992.

⁸⁰⁵ *Blackall v Blackall* High Court 18 February 1994, Murphy J.

⁸⁰⁶ Order 66 Rule 12 CCR;

⁸⁰⁷ Order 86 Rule 15 CCR; Order 51 Rule 7 DCR.

participation levels.⁸⁰⁸ The following table contains a summary of the results of the survey of 38 instalment order cases which was carried out by FLAC as part of this study.⁸⁰⁹

Number of debtors who...	Yes	No	Total
... contacted the creditor on receipt of summons	11	15	26
... defended the debt claim	0	38	38
... contacted the creditor after judgment was granted	10	15	25
... sent in a statement of means in advance of the examination of means hearing	13	12	25
... attended examination of means hearing	4	24	28
... applied for a variation of the instalment order	4	18	22
... attended arrest and imprisonment hearing	2	12	14

3.329 The lack of debtor participation in enforcement proceedings can be attributed to a number of factors. First, the documents served on debtors informing them of enforcement proceedings are written in legal language and in a format which is not readily accessible to individuals.⁸¹⁰ Debtors may thus not realise the consequences of failing to participate in proceedings and that it is in their interests to appear and present their financial circumstances to the court.⁸¹¹ While case law has established that the particulars of claim are to be framed in language which a reasonably intelligent layman could understand,⁸¹² the reality of the situation is that many consumer debtors find the documents served upon them to be very difficult to comprehend. The following table, again drawn from the results of the 2009 FLAC study, illustrates the lack of understanding among debtors of the relevant documents.⁸¹³

⁸⁰⁸ Free Legal Advice Centres (FLAC) *To No One's Credit: The Debtor's Experience of Instalment and Committal Orders in the Irish Legal System* (FLAC 2009).

⁸⁰⁹ The following statistics have been taken from pages 58-81 of the FLAC report. The reason for the discrepancies in the "Total" figure at various stages is that certain debtors surveyed did not recall receiving the relevant documents commencing each stage, and so the number of debtors able to provide information varies from stage to stage.

⁸¹⁰ See Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 21-26.

⁸¹¹ This concern is particularly great since recent empirical studies show that Irish consumers have a relatively poor knowledge of their legal rights: Donnelly and White "The Effect of Information-Based Consumer Protection: Lessons from a Study of the Irish Online Market" *The Yearbook of Consumer Law 2008* 271, at 295.

⁸¹² *PW v Coras Iompar Éireann* [1967] IR 137.

⁸¹³ The following statistics are drawn from pages 58-81 of Free Legal Advice Centres (FLAC) *To No One's Credit: The Debtor's Experience of Instalment and Committal Orders in the Irish Legal System* (FLAC 2009).

Number of debtors who understood...	Yes	No	Total
<i>Pre-Judgment Stage</i>			
... the nature of draft proceedings/summons	10	10	20
... actual proceedings/summons document	14	12	26
... options available on receiving a summons	6	20	26
<i>Post-Judgment Stage</i>			
... letter informing the debtor of the judgment	11	14	25
... options available after judgment	4	21	25
Number of debtors who understood...			
<i>Examination of Means Stage</i>			
... options available on receiving an examination summons	5	20	25
<i>Instalment Order Stage</i>			
... options available on receiving an instalment order	6	12	18
... that this was a court order	10	8	18
... that a variation of the instalment order could be sought at any time	1	21	22
<i>Summons for Arrest and Imprisonment Stage</i>			
... that he/she could go to prison	12	6	18
... options available on receiving summons for arrest and imprisonment	6	12	18
... that a variation of the instalment order could be sought at this stage	2	20	22

3.330 Secondly, the fact that enforcement proceedings are held in public acts as a huge deterrent of debtor participation.⁸¹⁴ Debtors are often very intimidated by the prospect of being required to disclose their financial circumstances and debt defaults in a public forum, most often the District Court, in full view of members of the debtor's community. Furthermore, it has been shown above that over-indebtedness leads to considerable levels of stress, emotional suffering and mental health problems.⁸¹⁵ Debtors in such situations may find themselves unable to cope with the additional pressure of legal proceedings, and may panic and ignore the proceedings.⁸¹⁶ The Commission understands that this problem is becoming increasingly common among the "new" type of "middle class" debtor described above,⁸¹⁷ who may be unused to financial difficulties and so particularly susceptible to stress and anxiety at the thought of engaging in legal enforcement proceedings.

⁸¹⁴ Joyce *op cit.* at 24.

⁸¹⁵ See paragraph 1.13 above.

⁸¹⁶ Joyce *op cit.* at 24.

⁸¹⁷ See paragraph 1.26 above.

The 2009 FLAC study argued that a key factor contributing to the low participation rates among debtors is the lack of awareness of the assistance available to debtors in the form of money advice. The FLAC study clearly illustrated that the availability of debt advice to debtors facilitated mutually acceptable resolutions of debt disputes. From a survey of 38 cases, informal settlements were reached at the post-judgment and pre-enforcement stage in just two cases, in both of which the debtor had obtained assistance from a debt advisor.⁸¹⁸ At the Examination Hearing stage of the instalment order procedure, 11 of the remaining 36 debtors obtained money advice. Informal repayment arrangements were successfully negotiated in nine of these 11 cases.⁸¹⁹ In a remaining case an instalment order was made, but on terms agreed by creditor and debtor in advance of the examination hearing. Of the 25 cases where debtors did not obtain money advice, no informal agreements were reached and instalment orders were made. In 23 of these 25 cases the debtor did not even attend the hearing and so the instalment order was made without the debtor's input in relation to his or her financial means, a situation which FLAC describes as "almost a guarantee that default in instalment order payments would ensue, sooner rather than later."⁸²⁰ Of these 25 debtors, 21 only contacted the MABS after an application for their arrest and imprisonment had been made, or after an order for arrest and imprisonment itself had been made.⁸²¹ The remaining four debtors only contacted the MABS having actually served a term of imprisonment.⁸²² FLAC concluded from the results of this study of a particular group of debtors that early referral to the MABS and intervention by a money advisor generally worked very well. The earlier that a person has access to money advice, the more likely it is that a settlement will be reached between creditor and debtor. It was argued that the survey showed that a strong case exists for the vigorous promotion of money advice at the earliest possible opportunity, reiterated at every stage of the proceedings.⁸²³ The report concluded that the essence of money advice is that it is preventative and it should therefore be available to debtors before their situations deteriorate.⁸²⁴ The following tables illustrate that debtors are not receiving sufficient information on the facilities available to them, and this is having the consequence of delaying access to money advice services, with the effect of prolonging debt disputes.⁸²⁵ This results in higher costs for the State, for creditors and ultimately for debtors, both in financial terms and in terms of the unnecessary trauma of prolonged legal proceedings. A lack of awareness of money advice services is the primary reason for delays among debtors in seeking advice. The final table illustrates that the legal process itself is not providing debtors with sufficient information of their options when faced with enforcement proceedings.

⁸¹⁸ Free Legal Advice Centres (FLAC) *To No One's Credit: The Debtor's Experience of Instalment and Committal Orders in the Irish Legal System* (FLAC 2009) at 67. In both of these cases the debtor had made offers of payment by instalments to the creditors, but these offers were refused. The revised, but largely similar, offers made with assistance of the Money Advice and Budgeting Service were accepted.

⁸¹⁹ *Ibid* at 71.

⁸²⁰ *To No One's Credit: The Debtor's Experience of Instalment and Committal Orders in the Irish Legal System op cit.* at 71.

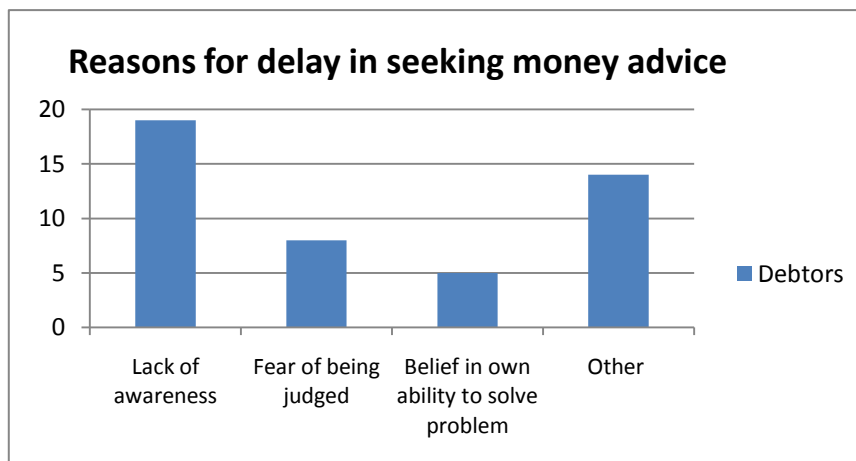
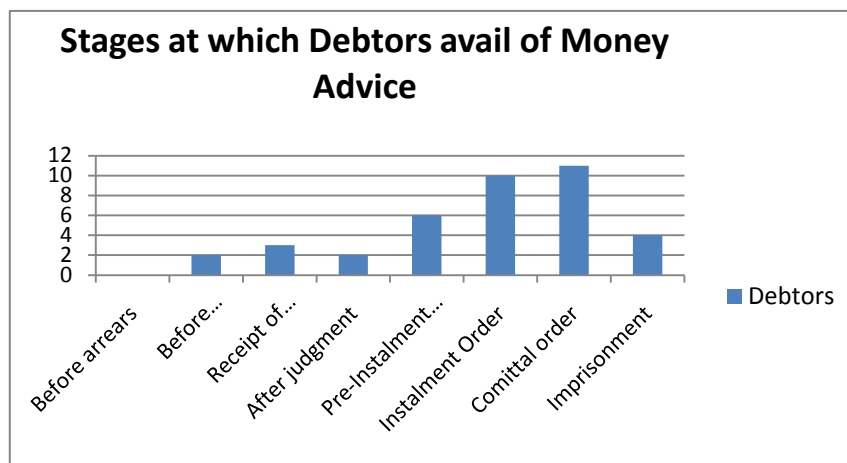
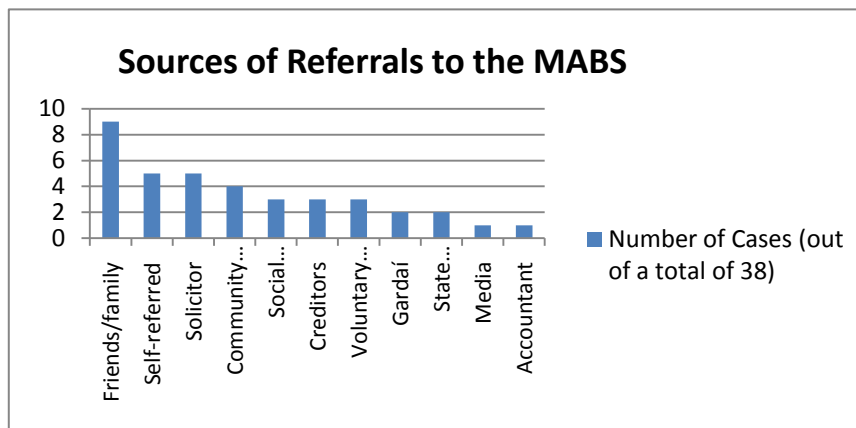
⁸²¹ *Ibid* at 144.

⁸²² *To No One's Credit: The Debtor's Experience of Instalment and Committal Orders in the Irish Legal System op cit.* at 144.

⁸²³ Free Legal Advice Centres (FLAC) *To No One's Credit: The Debtor's Experience of Instalment and Committal Orders in the Irish Legal System* (FLAC 2009) at 71.

⁸²⁴ *Ibid* at 144.

⁸²⁵ The following tables are taken from pages 46-48 of the 2009 report.



3.331 While the above figures are taken from a survey of just 38 cases, they illustrate that debtors may be obtaining money advice at late stages in enforcement proceedings, and that this is largely because debtors are unaware of the availability of such advice. Information about money advice is not being provided to debtors by the legal system, with referrals from family and friends and self-referrals being the most common sources of such information. Given the success of money advice in resolving debt disputes, any measures designed to increase debtor participation must necessarily involve methods of providing information concerning money advice to debtors at an early stage. The Commission discusses options for measures seeking to achieve greater debtor participation in Chapter 6, and places a particular emphasis on the role of money advice in facilitating this goal to be achieved.

(iii) Lack of Debtor Information

3.332 A primary flaw of the current enforcement system, and one which has been generally recognised in other jurisdictions, is the lack of information concerning a debtor's financial circumstances and ability to repay which is available both to creditors and the court.⁸²⁶ This problem has been discussed in more detail above.⁸²⁷ Although general statistical information does not appear to be available, the studies of FLAC presented above and anecdotal evidence suggest that the majority of debt enforcement proceedings are uncontested and do not involve the participation of the debtor. In the absence of the debtor, and due to the incomplete nature of credit reporting and the registration of judgments, little information is available to creditors and the court as to the assets and liabilities of the debtor and his or her ability to pay the debt owed. This lack of information means that the court may be forced to make unrealistic or inappropriate orders. At the first and most basic level, enforcement proceedings should not be taken at all against "can't pay" debtors, but the current system provides no means of distinguishing between "can't pay" and "won't pay" debtors and as a consequence futile judgments and enforcement orders are made against those who are unable to pay.

3.333 Secondly, a lack of information concerning a debtor's assets and financial standing also has negative repercussions as regards the enforcement mechanisms to be deployed in a given case. Under the instalment order procedure, if an accurate examination of means cannot be conducted, the court may make an instalment order setting the repayments to be made at a level above that which the debtor can afford.⁸²⁸ Despite its inefficiencies, which are described below, enforcement by the seizure and sale of the debtor's goods is the most widely-used enforcement mechanism by creditors. This is due to the fact that it is cheap and also because it involves the sheriff or court messenger calling to the debtor's premises, from where the debtor's assets can be ascertained. Thus, as execution against goods involves "face-to-face" contact between the debtor and the enforcing officer, it is one of the few existing methods of obtaining any information on the debtor's financial circumstances and ability to meet the judgment debt. As has been discussed above,⁸²⁹ execution against goods involves considerable interference with rights of debtors and should thus be avoided unless it is appropriate, necessary and proportionate. The current law, in failing to provide information relating to the debtor's assets, produces the result that these undesirable situations often arise, and that the most appropriate and least restrictive methods of enforcement cannot be identified in a given case.

3.334 Similarly, it has been shown that alternative enforcement procedures such as garnishee orders can both provide an effective method of enforcement while also involving less intrusion of a debtor's rights than other methods. The use of the garnishee mechanism however depends on the creditor and the court possessing information regarding the assets of the debtor and thus under the current system it is underused.

3.335 The lack of information concerning debtors' ability to repay debts is a fundamental problem of the current debt enforcement system, and proposals to address this problem will be discussed in the next chapter. In so doing, the Commission will have particular regard to the Green Paper on Transparency of Debtors' Assets published by the European Commission.⁸³⁰

⁸²⁶ See e.g. *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* (Council of Europe CM/Rec(2007)8, 2007); *Key Principles for a New System of Enforcement in the Civil Courts* (Lord Chancellor's Department Enforcement Review 2nd Consultation Paper, 1999); European Commission *Effective Enforcement of Judgments in the European Union: The Transparency of Debtor Assets* (Green Paper COM(2008) 128 final 2008)

⁸²⁷ See paragraphs 2.112 to 2.114 above.

⁸²⁸ See Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 24.

⁸²⁹ See paragraphs 2.42 to 2.46 and 2.51 to 2.54.

⁸³⁰ *Effective Enforcement of Judgments in the European Union: The Transparency of Debtor Assets* (European Commission Green Paper COM(2008) 128 final 2008). See the discussion of developments at the level of the European Union in this area at paragraphs 6.87 to 6.91 below.

(b) **Problems of the Individual Enforcement Mechanisms**

3.336 In addition to the inherent flaws in the enforcement system as a whole, problems with individual enforcement mechanisms can also be identified.

(i) **The Instalment Order and Committal Order Procedure**

3.337 The instalment order procedure as it currently operates suffers from several flaws. The Commission now outlines these defects.

(I) *Instalment Orders made without an Examination of Means*

3.338 First, as discussed above, the levels of debtor attendance at examination and committal hearings are very low.⁸³¹ This means that instalment orders are made in the absence of information of the debtor's ability to pay, resulting in orders set at unrealistically high levels which certain debtors could never afford to pay.⁸³² This occurs because the District Court judge may rely on one-sided information provided by the creditor which will solely outline the debt owed to that particular creditor, failing to take into account information of the debtor's other obligations. Similarly, the information provided by a creditor may be based on that provided by the debtor on first entering a credit agreement, before the debtor's circumstances have changed.⁸³³ In the absence of debtor participation, the examination of means and instalment order procedure is unrealistic and could lead to courts making futile orders. This is illustrated by the results of the 2009 report of the Free Legal Advice Centres, which illustrates the low attendance rates of debtors at examination of means hearings, and the resultant low completion rates of instalment orders.⁸³⁴ Debtors attended only 4 of the 28 examination of means hearings which were monitored by this study, and instalment orders were granted in 27 of the 28 cases. This means that in the majority of cases an instalment order was granted in the absence of the debtor and without conducting a full examination of the debtor's means. Of the 27 instalment orders made, only one was repaid in full, while no payment at all was made in 15 cases. It should be noted that these results are drawn from a survey of only a small number of cases. They nonetheless support the argument that instalment orders should not be made in the absence of adequate information about the debtor's means.

(II) *The Role of Imprisonment in Debt Enforcement*

3.339 The Commission believes that the imprisonment of debtors for failing to comply with an instalment order is unjustifiable. Imprisonment for debt has long been abolished in the developed world, and was indeed abolished by statute in Ireland as long ago as 1872 under section 5 of the *Debtors (Ireland) Act 1872*.⁸³⁵

3.340 Both the European Convention on Human Rights⁸³⁶ and the United Nations International Covenant on Civil and Political Rights⁸³⁷ provide that no one shall be imprisoned/deprived of his or her liberty merely on the ground of inability to fulfil a contractual obligation. The Commission recognises that the reformed procedure for arrest and imprisonment for failing to comply with an instalment order under the *Enforcement of Court Orders Acts 1926-2009* should prevent debtors from being imprisoned on the grounds of failing to pay a debt and should reserve imprisonment for those who have the means to satisfy

⁸³¹ See paragraph 3.328 above.

⁸³² See paragraph 3.285 above.

⁸³³ Such a change of circumstances being recognised as the primary cause of debt default: see paragraphs 1.31ff. above.

⁸³⁴ Free Legal Advice Centres (FLAC) *To No One's Credit: The Debtor's Experience of Instalment and Committal Orders in the Irish Legal System* (FLAC 2009) at 68 to 72.

⁸³⁵ This Act however subsequently exceptionally permits a court to permit imprisonment of a person who defaults in payment of any order or judgment of a competent court in respect of a debt: Section 5(6) and Section 6(1) *Debtors (Ireland) Act 1872*. See paragraph 3.296 above. See also Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 116-118.

⁸³⁶ Article 1, Protocol No. 4 ECHR.

⁸³⁷ Article 11 UNICCPR.

an instalment order but refuse to do so.⁸³⁸ The question nonetheless remains as to whether imprisonment should have any role in civil debt enforcement procedures, even as a remedy of last resort for “won’t pay” debtors.

3.341 In addition to the issues of the human rights and basic dignity involved, the committal of debtors for failing to comply with instalment orders incurs great expense for the State. The cost of imprisoning a debtor often exceeds by far the amount of an instalment order which the debtor has failed to pay. Imprisoning debtors therefore does not appear to be capable of economic justification. This is especially so when it is considered that the arrest and imprisonment of a debtor does not discharge the debt owed,⁸³⁹ and that it is understood that in 2007 94 debtors who had previously served a term of imprisonment for failing to comply with an instalment order were imprisoned a second time for again failing to comply with such an order after their release. It should be noted in this regard that the reformed procedure for arrest and imprisonment introduced in 2009 should reduce the number of debtors imprisoned. Nonetheless, in order to comply with the requirements of the Constitution of Ireland as interpreted in the *McCann* decision,⁸⁴⁰ section 6A of the *Enforcement of Court Orders Act 1940* now provides that debtors facing imprisonment must be provided with free legal aid, which involves further great expense for the State. The Commission returns to the question of whether any role should remain for imprisonment in civil debt cases, even in the case of “won’t pay” debtors, in Chapter 6.⁸⁴¹

(ii) The Procedure of Execution against Goods

(I) The Role of County Registrars

3.342 Widespread dissatisfaction exists in relation to the procedure of execution against goods, which is regarded as an inefficient enforcement mechanism which produces low returns for creditors.

3.343 A first problem arising is that outside Cork and Dublin there are no officials dedicated to the task of enforcing judgments. As described above, in the majority of the country the responsibility for the execution procedure is placed on County Registrars, while the actual work of visiting debtors’ premises and seizing debtors’ goods is carried out by Court Messengers under the supervision of the Registrars. County Registrars are civil servants also entrusted with several other duties, primarily the organisation and administration of the Circuit Courts.⁸⁴² This means that they may not have sufficient resources to effectively process the large volume of time-consuming work involved in enforcing judgments, and the view has been expressed that this function necessarily ranks much lower in their lists of priorities than the Registrars’ primary functions of administering the Circuit Courts. Many County Registrars’ offices simply do not possess the resources to carry out seizures of goods, a state of affairs which has worsened in recent times. If proposed increases to the jurisdiction of the Circuit Courts are enacted,⁸⁴³ the workload of County Registrars would increase even further, again reducing the level of resources which can be committed to enforcing judgments. Furthermore, while the sheriffs in Dublin and Cork are paid a commission fee for seizures effected, County Registrars and Court Messengers are salaried civil servants and therefore are provided with no incentive to execute judgments. This remuneration system also means that the enforcement functions result in considerable costs to the State.

3.344 It is understood that the above factors have led to inefficiency in the execution of judgments, and have also contributed to widespread inconsistency in enforcement practices in different counties, based on varying levels of resources and workloads among the different County Registrar offices. The following statistics, originating from the Courts Service and reproduced in a 2009 legal journal article,

⁸³⁸ In this regard it is to be noted that Article 5(1)(b) ECHR expressly provides for “the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law.”

⁸³⁹ Section 20 *Enforcement of Court Orders Act 1926*.

⁸⁴⁰ *McCann v Judge of Monaghan District Court and Ors* [2009] IEHC 276.

⁸⁴¹ See paragraphs 6.425 to 6.433 below.

⁸⁴² See paragraph 3.246 above.

⁸⁴³ See section 13 of the *Courts and Courts Officers Act 2002*.

illustrate the low success rates of enforcement by County Registrars.⁸⁴⁴ During 2007, 7,535 execution orders were lodged or already held in County Registrars' offices throughout the country. Approximately only 30% of these orders were enforced, while the average number of orders returned marked "no goods" amounted to 35%. In addition to the general ineffectiveness of execution, it is significant that the operation of this remedy varies considerably throughout the country. While three County Registrars' offices (Dundalk, Limerick and Clonmel) produced an enforcement rate in excess of 50% in 2007, three other County Registrars (Castlebar, Naas and Trim) presented an enforcement rate of less than 10% for that year. Similar trends can be observed for the year 2008. Of the 9,516 execution orders lodged or already held in County Registrar offices in 2008, only 2085 were enforced. 3,221 were returned marked "no goods", with only 12 seizures and 32 sales taking place throughout the country. 4,064 execution orders remained unenforced at the end of the year. The following table provides statistics on the rates of the enforcement of judgments by County Registrars throughout the country in 2008.

Office	Number at start of 2008	Number Lodged	Number Enforced	Number returned "No Goods"	Seizures	Sales	Number at End of 2008
Carlow	37	136	74	56	0	0	43
C-on- Shannon	13	64	15	53	0	0	9
Castlebar	131	247	21	171	0	0	186
Cavan	43	170	48	121	0	0	44
Clonmel	142	358	268	136	1	0	95
Donegal	129	288	70	198	0	0	149
Dundalk	215	222	223	105	1	1	107
Ennis	159	274	38	136	0	0	259
Galway	200	511	178	257	0	0	276
Kilkenny	300	191	35	80	0	0	376
Laois	91	213	50	142	0	0	112
Limerick	67	422	109	306	0	0	74
Longford	89	149	91	2	0	0	145
Monaghan	98	138	171	119	0	0	-54
Portlaoise	93	23	5	14	0	0	97
Naas	224	515	39	444	0	0	256
Roscommon	72	191	23	98	2	0	140
Sligo	18	125	42	65	0	0	36
Tralee	73	326	70	212	0	0	117

⁸⁴⁴ Keating and Donnelly "The Sheriff's Office: An Effective Model for Debt Enforcement?" (2009) 16(7) *Commercial Law Practitioner* 135.

Office	Number at start of 2008	Number Lodged	Number Enforced	Number returned "No Goods"	Seizures	Sales	Number at End of 2008
Trim	166	461	35	164	0	33	395
Tullamore	162	270	130	59	0	0	243
Waterford	463	284	146	159	3	0	439
Wexford	181	296	56	91	1	0	336
Wicklow	172	324	89	117	4	0	286

3.345 The dissatisfaction with the execution procedure by County Registrar contrasts with the relative satisfaction with the execution of judgments and the collection of Revenue debts by the Sheriffs in Dublin and Cork and the specialist Revenue sheriffs. The fact that these officers do have the same administrative responsibilities as County Registrars and so can dedicate more resources to enforcing judgments, as well as their commission-based remuneration system, have been described as important factors in promoting efficient enforcement by these officers. No comparable statistics to those provided above appear to be available in respect of Sheriffs in Cork and Dublin. Furthermore, the following statistics relating to Revenue Sheriffs presented in the table below are not directly comparable with those presented in the above paragraphs in respect of County Registrars. These figures nonetheless indicate that the enforcement rates of Revenue Sheriffs appear to be higher than those of County Registrars.⁸⁴⁵

Year	Total Number of Referrals to Revenue Sheriffs	Total Value of Referrals (€million)	Total Payments Received (€million)	Total Yield (%)	Average Value of Referrals (€)
2008	44,090	675.4	257.8	38.17%	15,319
2007	43,157	553.9	249.2	45%	12,834
2006	45,444	530.6	242.8	45.76%	11,675

3.346 The Commission is concerned at the inconsistencies in the enforcement of judgments throughout the country. As it has been shown above, the protection of the right of access to the courts under the Constitution of Ireland and the ECHR extends to the right to have judgments enforced,⁸⁴⁶ and it is unacceptable that this right can be less well protected in some parts of the country than others. Thus the anomalous system whereby sheriffs are available to effect relatively efficient enforcement of civil judgments in Dublin and Cork but not in the rest of the country cannot be maintained. Similarly, since it has been shown that different enforcement rates exist even as between County Registrars, such inconsistencies must also be removed.

3.347 A further concern resulting from the inefficient enforcement regime operating in the majority of the country is that creditors may in frustration turn to private debt collection agencies to carry out the function which County Registrars are unable to perform. As such agencies are currently unregulated and lack a recognised Code of Practice, this is to be discouraged and official enforcement must consequently be made more efficient. The Council of Europe has acknowledged the need for efficiency in enforcement for this reason, stating that it is

⁸⁴⁵ These figures are drawn from statistics supplied to the Commission by the Revenue Commissioners and from the *Annual Report of the Revenue Commissioners 2008* at 19.

⁸⁴⁶ See paragraphs 2.07 to 2.14 above.

“[a]ware of the risk that without an effective system of enforcement, other forms of ‘private justice’ may flourish and have adverse consequences on the public’s confidence in the legal system and its credibility.”⁸⁴⁷

3.348 Concerns have also been raised as to the propriety of a court official carrying out the execution of judgments, which is by right an executive function.⁸⁴⁸ In this sense, the enforcement of judgments may conflict with the other functions of the County Registrars.

3.349 In a previous Report, the Commission recommended that the responsibility of County Registrars for enforcing judgments should be ended, and that a system of nationwide sheriffs should be introduced.⁸⁴⁹ This possibility is discussed by the Commission in Chapter 6 as part of provisional recommendations for a comprehensive reform of the Irish enforcement system.⁸⁵⁰ The Commission is also conscious of the fact that many other legal systems use private enforcement agents to enforce judgments, and the merits of such a system are considered in Chapter 6.⁸⁵¹

3.350 The Commission is also conscious that the terminology used in this area, particularly the term “sheriff” is outdated and possibly confusing for interested parties, particularly debtors. This terminology may therefore be in need of reform. The Commission will examine these options for reform in the next chapter.

(II) *Documents required to obtain a fifa order*

3.351 The procedures to be followed in obtaining an order of *fieri facias* in the High Court and an execution order in the Circuit Court are described above, where it is also noted that only a District Court decree is needed for the execution of a District Court judgment. To obtain a *fifa* order in the High Court, it is necessary for the creditor’s solicitor to file a certificate describing the parties and their places of residences, as well as a *praecipe* describing certain matters. These documents are not required in the Circuit and District Courts, and the Commission has previously recommended that these requirements should be removed in the High Court with a view to making enforcement more efficient and less expensive.⁸⁵² Chapter 6 addresses this problem in discussing methods of making enforcement procedures less costly and time-consuming in general.

3.352 The Commission also notes that the term “*fieri facias*” is unnecessarily complex and confusing for interested parties. The Commission considers the possibility of changing the name of this order in Chapter 6 as part of general proposals for the reform and updating of the terminology used in debt enforcement proceedings.⁸⁵³

(III) *The Seizure of Goods of the Debtor’s Family*

3.353 It was noted above that section 13 *Enforcement of Court Orders Act 1926* currently permits the sheriff or County Registrar to seize goods belonging to the debtor’s family, with the owner of the goods obtaining a cause of action against the debtor for any loss suffered.⁸⁵⁴ The Commission noted in a previous Report that

⁸⁴⁷ *Recommendation of the Committee of Ministers to member states on enforcement* (Council of Europe Rec(2003)17, 2003).

⁸⁴⁸ *Debt Collection: (1) The Law Relating to Sheriffs* (LRC 27-1988) at 7.

⁸⁴⁹ *Ibid* at 8.

⁸⁵⁰ See paragraphs 6.50 to 6.58 below.

⁸⁵¹ See paragraphs 6.59 to 6.66 below.

⁸⁵² *Debt Collection: (1) The Law Relating to Sheriffs* (LRC 27-1988) at 12.

⁸⁵³ See paragraphs 6.367 to 6.375 below.

⁸⁵⁴ See paragraph 3.249 above.

“it has been suggested that to allow the seizure of one person's goods in execution of the judgment debt of another in circumstances where there is no dispute as to the facts of ownership is unjustifiable in principle and may indeed be inconsistent with the Constitution.”⁸⁵⁵

This is especially so since the cause of action given to the owner is of dubious value since it is against a debtor who already has not paid a judgment debt and presumably does not possess seizable goods of sufficient value to be able to repay the owner.

3.354 In its previous Report, the Commission however concluded that this power was justified as it provides a valuable protection for the sheriff and a useful source of recovery for creditors. The compatibility of similar legislation with the protection of property rights under the ECHR was upheld in the case of *Gasus Dosier und Fördertechnik GmbH v The Netherlands*⁸⁵⁶. It must however be noted that the case concerned a tax debt rather than a private civil debt, and the special position of tax authorities as involuntary creditors was emphasised by the ECtHR in finding that the legislation was a justifiable intrusion on a third party's property rights.

3.355 Ultimately, the Commission's previous report reserved its position on this provision, as it was being challenged by way of judicial review in the High Court at the time. A judgment does not appear to have been given however. Chapter 6 of this Consultation Paper briefly refers to this issue in discussing the reform of the rules relating to the seizure of the goods of third parties by sheriffs.⁸⁵⁷

(IV) *Exempted Goods*

3.356 Limitations are placed on the goods which can be seized by the sheriff by section 7 *Enforcement of Court Orders Act 1926*, which makes certain goods exempt from seizure. Thus the “necessary wearing apparel and bedding” of the debtor and family and the “tools and implements of this trade” are not to be seized, provided that such necessities do not exceed a monetary value of £15. The rationale of this provision was to protect the dignity of the debtor and his or her family by ensuring they are not deprived of a basic standard of living and to allow a judgment debtor the means to earn a livelihood. It has been argued that the original rationale behind such exemptions under the common law was also founded on concerns relating to the wider interests of the “commonwealth”.⁸⁵⁸ Thus clothes and jewellery were exempt from seizure because an attempt to seize such goods might provoke a breach of the peace. Also, the exemption for tools of the trade was to prevent the loss to the general community which would occur if trade was disturbed through the seizure of a debtor's tools.⁸⁵⁹ The same rationale lay behind a common law exemption preventing the seizure of beasts in agriculture. Willes CJ in the case of *Simpson v Hartopp*⁸⁶⁰ explained that this exemption was “in favour of husbandry (which is of so great advantage to the nation) and likewise because a man should not be left so destitute of getting a living for himself and his family.”

3.357 Section 7 of the 1926 Act is so grossly outdated however that it is of little use in affording the debtor a reasonable standard of living and must be amended to reflect modern living standards. This was recognised by the Commission's previous Report on this subject, but it appears that no amendment has yet been made to this provision.

3.358 Therefore the Commission recommends that this section be repealed and that a new section should be introduced which has regard to the modern requirements of a dignified basic standard of living.

3.359 In particular, the Commission is concerned that domestic appliances such as cookers and fridges which are essential to the debtor and his or her family, be exempt from seizure. It is not current practice for sheriffs or County Registrars to seize such goods due to their low second-hand values and

⁸⁵⁵ *Debt Collection: (1) The Law Relating to Sheriffs* (LRC 27-1988) at 32.

⁸⁵⁶ Application No. 15375/89 ECtHR

⁸⁵⁷ See paragraphs 6.394 to 6.414 below.

⁸⁵⁸ See Kruse “Enforcement law reform and the common law” [2008] *CJQ* 494 at 498.

⁸⁵⁹ *Ibid* at 499.

⁸⁶⁰ (1744) Willes 512

storage difficulties. Concerns have however been raised that such goods may begin to be seized as economic conditions and debt default worsen, and so the Commission believes that these goods should be expressly identified as being exempt from seizure. The Commission recommends provisional reforms in this area in Chapter 6.⁸⁶¹

(iii) Garnishee Orders and Equitable Execution

3.360 As described above, both garnishee orders and equitable execution can be effective and useful methods of enforcement. It was however noted that their use is limited in two respects. First, the use of both these mechanisms is only permitted where the creditor can demonstrate that legal enforcement mechanisms have been ineffective, with courts traditionally requiring the production of a return of no goods by the sheriff or County Registrar to illustrate this. In furtherance of the aim of achieving the most appropriate, least coercive and most proportionate means of enforcement in an individual case, the Commission finds this requirement to be problematic. If a judgment debtor is in receipt of seizable income or holds a seizable bank account balance, these assets should be available to the creditor for enforcement without first requiring a creditor to attempt to seize the debtor's physical goods. Creditors should not have to waste time and money in attempting execution against goods where an alternative means of enforcement is available which would be more appropriate and involve less restriction of debtor's rights than the intrusive seizure procedure. It is thus arguable that the remedies of a garnishee order and equitable execution should be available in appropriate cases without need for proof that legal execution would be ineffective. The Commission returns to this issue in Chapter 6 below.⁸⁶²

3.361 This leads to the second limitation on the use of garnishee orders and equitable execution: the fact that both these remedies are dependent on the creditor possessing detailed information on the income and assets of the debtor. The Commission has already identified the problem of a lack of debtor information in the current enforcement system, and discusses possible solutions to this problem in the next chapter. It is hoped that if sufficient information concerning a debtor's assets is made available then the useful remedies of garnishee orders and equitable execution will be more readily available to creditors.

3.362 It has been noted above that garnishee orders are not available in favour of future earnings, meaning that wages and salaries may not be attached to pay a judgment debt.⁸⁶³ It was also noted above that despite this rule, Ord. 38 r 10 CCR appears to envisage the garnishment of earnings. The Commission believes that the uncertainty generated by this rule must be removed, and that the question of whether a garnishee order can be made in respect of earnings should at least be clarified. In addition, in Chapter 4 the Commission considers the merits of formally introducing a system of attachment of earnings into Irish law.⁸⁶⁴

3.363 Finally, the Commission realises that the term "garnishee order" is unnecessarily complicated and confusing. The Commission also notes that this term has been replaced by the term "third party debt order" in the United Kingdom.⁸⁶⁵ The amendment of this term is considered by the Commission in Chapter 6 when discussing the reform of terminology used in the debt enforcement process.⁸⁶⁶

⁸⁶¹ See paragraphs 6.359 to 6.366 below.

⁸⁶² See paragraphs 6.225 to 6.227 in respect of garnishee orders and 6.435 to 6.440 in respect of equitable execution below.

⁸⁶³ See paragraph 3.305 above.

⁸⁶⁴ See paragraphs 6.253 to 6.330 below.

⁸⁶⁵ See Part 72 *Civil Procedure Rules (UK)*. See also Lord Mackey of Clashfern Halsbury's Laws of England Volume 17(1) (4th ed. Reissue Butterworths 2002) at paragraph 251.

⁸⁶⁶ See paragraphs 6.247 to 6.250 below.

3.364 The Commission is conscious that the European Commission has published a Green Paper on the Attachment of Bank Accounts, and the findings of this paper are considered by the Commission when making recommendations in this area.⁸⁶⁷

(iv) Registration of Judgments

3.365 The registration of judgments as a means of enforcement has been described above.⁸⁶⁸ It is noted that currently the system of registration is voluntary, with responsibility for registration lying with judgment creditors, who use the threat of registration as a means of inducing payments from recalcitrant debtors. Thus if the creditor does not choose to register the judgment, it will not be included in the Register of Judgments and will not be published. This means time and money of creditors and the courts may be wasted through the bringing proceedings against a debtor who has failed to satisfy previous judgments, and may lead to multiple enforcement orders being made against a single debtor where he or she is unable to fulfil even one.

3.366 As part of the policy of making more information concerning a debtor's ability to pay available, the Commission will examine the possibility of introducing a comprehensive register of all judgments which would not depend on the voluntary registration of judgments by creditors. Such a system is currently operating in Northern Ireland, whereby creditors can pay a small fee in order to search a record of legal proceedings which may have been taken against a debtor.⁸⁶⁹ The Commission discusses the merits of introducing a comprehensive register of judgments in Chapter 6.⁸⁷⁰

⁸⁶⁷ *Green Paper On Improving The Efficiency Of The Enforcement Of Judgments In The European Union: The Attachment Of Bank Accounts* COM(2006) 618 final.

⁸⁶⁸ See paragraphs 3.239 to 3.241 above.

⁸⁶⁹ See Capper *The Enforcement of Judgments in Northern Ireland* (SLS Legal Publications (NI) 2004) at 39-42.

⁸⁷⁰ See paragraphs 6.187 to 6.193 below.

CHAPTER 4 DEBT MANAGEMENT: SUGGESTIONS FOR CONSIDERATION

4.01 This chapter considers certain debt management issues raised in Chapter 3, which lie outside of the core concerns of this Consultation Paper, but yet have a significant influence on personal insolvency and debt settlement law. The Commission identifies certain issues which are relevant to the problems which personal insolvency and debt enforcement procedures aim to solve, while recognising that they are not appropriate subjects to be addressed by a law reform agency. The chapter thus proposes that these issues should be considered by the relevant agencies overseeing law and policy in the areas of consumer credit, financial regulation and over-indebtedness. To distinguish the Commission's suggestions for consideration by other bodies from the Commission's provisional recommendations for law reform, such suggestions for consideration will be marked with an asterisk in this Chapter and in the summary of the Commission's provisional recommendations and suggestions in Chapter 7.

4.02 In following the framework of the six "building blocks" identified by the European Commission in its 2008 report *Towards a Common Operational Definition of Over-Indebtedness*, this chapter considers the first four subjects discussed in Chapter 3. These are responsible borrowing, responsible lending, responsible arrears management and debt counselling.

4.03 Part A discusses the subject of responsible borrowing. This section notes that the issue of financial education is one of social policy which does not fall within the competence of a law reform body. This part nonetheless describes the reforms to the system of financial education which are currently being made in Ireland and at a European Union level. Similarly, this part notes that consumer credit legislation is an issue which now falls within the competence of the EU, and so the Commission does not make any recommendations for the reform of this area of the law. Part A nonetheless describes the reforms which are being made to this area of the law as a result of the implementation of the 2008 EC *Consumer Credit Directive* into Irish law.

4.04 Part B discusses the subject of responsible lending. This part opens with a discussion of developments in the area of responsible lending at the level of European Union law. It then conducts a comparative analysis of credit reporting systems in various different countries before suggesting that a review of financial services legislation could include a consideration of the need for more comprehensive credit reporting systems in Ireland. The part then proposes various regulatory measures which could be considered as a means of curbing irresponsible lending, before identifying the question of whether the law of contract should provide remedies for cases of irresponsible or unjust lending practices. Finally, consideration is given to whether special rules on responsible lending are needed for specialist lenders and to the impact of any proposed reforms in this area on the problem of financial exclusion.

4.05 Part C discusses the question of responsible arrears management. The reform of existing rules on arrears management in relation to mortgage loans is considered, before the possible introduction of legislation to regulate arrears management practices in cases of non-mortgage loans is identified as an issue for consideration. The part concludes by considering whether a system for the regulation of debt collection agencies should be introduced into Irish law. Part D discusses the subject of debt counselling. This part again recognises that the provision of debt counselling is an issue of social policy rather than one of law reform, but the legal issue of the need to introduce a system for regulating commercial debt advice agencies is considered.

A Responsible Borrowing

4.06 The Commission regards responsible borrowing as a vital element in the creation of successful credit agreements and the prevention of over-indebtedness. Together with responsible lending and arrears management, the use of credit in an informed and understanding manner by borrowers is

essential in avoiding over-commitment among debtors and the consequent high risk of over-indebtedness. Therefore the issue of responsible borrowing must be addressed through legal and non-legal measures as part of a holistic approach to preventing over-indebtedness. Similarly, responsible borrowing is also an important complimentary element to the proposed remedial responses to over-indebtedness. Personal insolvency systems and enforcement procedures must only be used as last resorts where situations of over-indebtedness have not been prevented. In particular, responsible borrowing as part of a preventative approach to over-indebtedness is important in ensuring that the proposed debt settlement scheme is not over-used, and that it is reserved for cases of honest insolvent debtors.

4.07 As identified above, the principle of responsible borrowing as understood by the Commission involves two elements.¹ The first, non-legal, element is financial education. It is important that borrowers are provided with sufficient financial literacy and money management skills to allow them to make rational and beneficial borrowing decisions. The second element of responsible borrowing is the provision of information to borrowers under consumer credit legislation. Such legislation aims to provide consumer borrowers with the details of credit products necessary for them to make informed and rational choices as to the most appropriate form of credit, if any, for their circumstances. These two subjects fall outside the scope of the Commission's recommendations. The Commission takes the view that the subject of financial education is not a topic for law reform, but rather is an issue of social, economic and educational policy. The Commission therefore will make no recommendations in this regard. While consumer credit legislation is undoubtedly an area capable of being addressed by a law reform agency, this area of the law now lies within the competence of the European Union. The *EC Consumer Credit Directive 2008*² is a maximum harmonisation Community instrument, meaning that it seeks to harmonise the national laws of all Member States in the areas in which it applies. Article 22(1) of the Directive provides that:

"Insofar as this Directive contains harmonised provisions, Member States may not maintain or introduce in their national law provisions diverging from those laid down in this Directive."

4.08 On the basis that the 2008 Directive involves mandatory requirements which the State is required to implement, and because the State is actively engaged in drafting the relevant implementing legislation to transpose the Directive into national law, the Commission therefore makes no recommendations on the subject of responsible borrowing. This section however discusses reforms which are being made in this area by other organisations.

(1) Financial Education

4.09 The Commission recognises that financial education is a fundamental compliment to any legal reforms which seek to prevent and remedy over-indebtedness. It has been shown in Chapter 3 above that a chief criticism of traditional legal approaches to the prevention of over-indebtedness through information-based consumer credit legislation is that consumers often do not possess the requisite financial literacy skills to understand and appreciate the information concerning credit products which is provided under this legislation.³ The Commission therefore welcomes the ongoing development of financial education programmes at both a national and European level. The following paragraphs present a brief description of current work reform initiatives in this area.

(a) European Union Initiatives on Financial Education

4.10 In 2007, the European Commission adopted a *Communication on Financial Education*.⁴ This communication acknowledged the current deficiencies in financial literacy skills among consumers in Europe and highlighted the benefits of financial education for individuals, for society and for the economy. The communication surveyed the current extent of financial education throughout the European Union,

¹ See paragraphs 3.04 to 3.50 above.

² *Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC.*

³ See paragraph 3.39 above.

⁴ *Communication from the Commission on Financial Education (COM(2007)808).*

before listing a series of basic principles for the provision of high-quality services in this area. These principles included the following:⁵

- Financial education should be available and actively promoted at all stages of life on a continuous basis.
- Financial education programmes should be carefully targeted to meet the specific needs of citizens. Research should be conducted to identify the issues that particularly need to be addressed.
- Consumers should be educated in economic and financial matters as early as possible, beginning at school. National authorities should give consideration to making financial education a compulsory part of the school education curriculum.
- Financial education schemes should include general tools to raise awareness of the need to improve understanding of financial issues and risks.
- Financial education delivered by financial services providers should be supplied in a fair, transparent and unbiased manner. Care should be taken to ensure that it is always in the best interests of the consumer.
- Financial education trainers should be given the resources and appropriate training so as to be able to deliver financial education programmes successfully and confidently.
- National co-ordination between stakeholders should be promoted in order to achieve a clear definition of roles, facilitate sharing of experiences and to rationalise and prioritise resources.
- Financial education providers should regularly evaluate and update the schemes they administer to align them with international best practices.

4.11 In addition to this Communication, the European Commission has established an Expert Group on Financial Education, which is composed of 25 financial education practitioners and experts in the area.⁶ This group meets twice per year and aims to promote the exchange of ideas, experience and best practices. It also advises the European Commission on policy issues in the area of financial education.

4.12 The Commission wishes to endorse the initiatives of the European Commission in the area of financial education. Improvements in standards of financial education will complement and enhance law reform in the areas discussed in this Consultation Paper. Because of these developments, the Commission does not propose to make any recommendations in this area.

(b) ***Commitments and Recommendations of the National Steering Group on Financial Education***

4.13 The 2009 report of the National Steering Group on Financial Education presented a number of commitments and recommendations for the promotion and development of personal finance education in Ireland.⁷ A comparative survey of financial education programmes in other countries was undertaken in formulating these commitments and recommendations, and the principles from the European Commission Communication, as well as those proposed by the OECD,⁸ were considered by the group. The members⁹ of the Steering Group committed to carry out the following tasks, with each member specifying particular ways in which such tasks would be effected:

⁵ *Ibid* at 7-8.

⁶ *Commission decision of 30 April 2008 setting up a group of experts on financial education (2008/365/EC)*.

⁷ *Improving Financial Capability – A Multi-Stakeholder Approach* (Report of the National Steering Group on Financial Education 2009) at 33.

⁸ *OECD Recommendations on Principles and Good Practices for Financial Education and Awareness: Recommendation of the Council* (OECD Directorate for Financial and Enterprise Affairs 2005).

⁹ The group was composed of the following members: Consultative Consumer Panel of the Financial Regulator; Department of Education and Science; Department of Finance; FÁS; Financial Regulator (chair, secretary & co-ordination); Institute of Bankers in Ireland; Irish Banking Federation; Irish Insurance Federation; Irish

- To conduct and/or share research, knowledge and best practice related to personal finance education.
- To utilise the Financial Capability Framework when developing personal finance education resources or to raise awareness of this Framework. This framework is a development tool containing a collection of learning outcomes which can be used to design a common financial education course, covering a wide variety of financial education topics.
- To provide personal finance education materials and/or other resources, alone or in partnership.
- To provide volunteers or other resources to promote personal finance education, for example through the workplace or the community.

In addition to agreeing to these commitments, members of the group also proposed a series of recommendations to the Government. The report recommended that the government should:¹⁰

- Establish structures to co-ordinate the implementation of the commitments and recommendations of the report. The report envisaged that the structures in question would take the form of a dedicated unit embedded within an existing agency.
- Establish as soon as possible a Financial Capability Fund, using start-up funding from the Government Recapitalisation Scheme. The Recapitalisation Scheme introduced by the Government in 2008 states that:

“The recapitalised banks will provide funding and other resources, in cooperation with the Financial Regulator, to support and develop financial education for consumers and potential consumers. The resources to be made available will take account of the Financial Regulator’s Financial Capability Study and the Report of the Steering Group on Financial Education.”¹¹

The Steering Group recommended that use of the fund should prioritise vulnerable groups and those identified in the IFSRA Financial Capability Study as having low levels of financial capability.¹²

- Create a national standard for personal finance education.
- Enhance financial capability through the compulsory national curriculum. The group recommended that this should involve the inclusion of the Financial Capacity Framework in the compulsory elements of the school curriculum, as well as the incorporation of personal finance education into other elective subjects, based on the relevant learning outcomes identified in the framework. The group recommended that financial capability should be embedded as a general core value in the formal education system.

4.14 The Commission endorses the commitments and recommendations of the National Steering Group on Financial Education. Because of these developments, the Commission does not propose to make any recommendations in this area, but it is clear that the success of these measures will greatly enhance the efficacy of the proposed reforms to the law provisionally recommended in this Consultation Paper.

League of Credit Unions; Irish Vocational Education Association; Money Advice and Budgeting Service; National Adult Literacy Agency; National Council for Curriculum and Assessment; The Pensions Board.

¹⁰ *Improving Financial Capability – A Multi-Stakeholder Approach* (Report of the National Steering Group on Financial Education 2009) at 41.

¹¹ See *Government Announcement on Recapitalisation*, 21st December 2008, available at: <http://www.finance.irlgov.ie/Viewtxt.asp?DocID=5609&StartDate=1+January+2009>. (Accessed 14 September 2009)

¹² *Financial Capability in Ireland: An Overview* (Irish Financial Services Regulatory Authority 2009). See also paragraphs 3.46 to 3.47 above.

(2) **Consumer Credit Law**

4.15 Irish consumer credit law is currently in the process of being reformed. At a European Union level, the 2008 *Consumer Credit Directive*,¹³ which repeals and replaces the previous Directive of 1987, is to be implemented in national law by 12 May 2010.¹⁴ The Department of Finance is responsible for the implementation, and has conducted a consultation on the process.¹⁵ When implemented, the Directive will replace large portions of the *Consumer Credit Act 1995*. The information-based approach to consumer protection of the 1995 Act is continued in the 2008 Directive. Therefore the Directive seeks to ensure responsible borrowing by providing consumers with the information necessary to make responsible and informed borrowing decisions, while also introducing responsible lending obligations on creditors. The main reforms introduced by the Directive from the point of view of the subject of responsible borrowing will now be presented.

4.16 First, the Directive lays down certain requirements in relation to both the information which must be provided to consumers at the pre-contractual stage and which must be included in credit agreements themselves. Article 5 requires that, in good time and before becoming bound by any credit agreement or offer, the consumer is provided with “the information needed to compare different offers in order to take an informed decision on whether to conclude a credit agreement.” This information is to be provided on paper or on another durable medium by means of the *Standard European Consumer Credit Information Form*, the format of which is described in an annex to the Directive. Any additional information provided by the lender must be contained in a separate document.¹⁶ While the information to be provided in this form largely mirrors that required by the Irish *Consumer Credit Act 1995* and the *Consumer Protection Code* described above, the introduction of a standardised form is a welcome development in increasing the ease of access to this information for consumers. Articles 10 and 11 prescribe further information which must be included in credit agreements themselves. Additional requirements contained in the Directive include information concerning the consumer’s right to be informed immediately of the result of a database consultation carried out in order to assess his or her creditworthiness.¹⁷

4.17 Article 5(6) requires Member States to place a duty on creditors to explain adequately the terms of the credit agreements to an individual consumer. This explanation must enable the consumer to assess whether the proposed agreement is adapted to his or her individual needs and financial situation, and must, where appropriate, include the specific effects which the credit agreement may have on the consumer, including the consequences of default. Member States are provided with discretion as regards the manner in and extent to which this assistance is given to the consumer and this may vary depending on the individual circumstances of the consumer and of the agreement in question.¹⁸ This provision may introduce a responsibility on lenders to advise a customer to whom it is lending. Such a duty had not existed under the common law,¹⁹ and this is a welcome development in promoting responsible borrowing.

¹³ *Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC.*

¹⁴ Article 27 of the Directive.

¹⁵ Department of Finance *Consumer Credit Directive Consultation Paper* (2009), available at: <http://www.finance.gov.ie/viewdoc.asp?DocID=5707>.

¹⁶ Recital (19) of *Directive 2008/48/EC* states that the consumer should be able to take away and consider this information prior to concluding the credit agreement. The potentially binding nature of this information and the period of time within which the creditor is bound to the offer proposed are matters left open to national law: See Recitals (25) and (30).

¹⁷ Article 5(1)(q) of *Directive 2008/48/EC*.

¹⁸ Recital (27) of the Directive further describes this “duty to assist the consumer” as consisting of explaining the essential characteristics of the products offered in a “personalised” manner so that the consumer is able to understand the effects which they may have on his or her economic situation.

¹⁹ See Breslin *Banking Law* (2nd ed. Thomson Round Hall 2007) at 125-128. The author states that at present under the common law principles of negligence, a lender is under no duty to assume responsibility for advising

The provision of advice rather than mere information may have the advantage of helping a consumer to appreciate the potential individual consequences of the loan, including the effects of default, on his or her particular personal circumstances. This may have the effect of reducing the consumer “irrationalities” or “biases” discussed in Chapter 3 above.²⁰

4.18 In addition to the above information requirements, the Directive also encourages responsible borrowing by providing consumers with a right to withdraw from the credit agreement, without giving any reason, within 14 calendar days of concluding the agreement.²¹ Thus the current “cooling-off period” of ten days will be extended a 14-day period under this Directive. Article 14 does not contain any provisions for the waiver of this right by the consumer and article 22(2) provides that Member States shall ensure that consumers may not waive the rights conferred on them by the national law provisions implementing the Directive.²² Thus it appears the new Directive will not permit a consumer to waive his or her right to a “cooling-off period”, as a consumer currently can under the *Consumer Credit Act 1995*.²³ This is a welcome development in seeking to ensure responsible borrowing, as the Commission understands that consumers frequently waive their right to a cooling-off period under the 1995 Act.

4.19 The Directive adopts a maximum harmonisation approach. As a result, insofar as it contains harmonised provisions, Member States may not maintain or introduce in their national law provisions diverging from the rules of the Directive.²⁴ Several important issues are nonetheless left to be decided by national law. Importantly, Article 23 states that national law shall decide on the penalties applicable to infringements of the provisions implementing the Directive, although this article provides that the penalties must be effective, proportionate and dissuasive. Similarly, the Directive does not seek to regulate issues of contract law relating to the validity of credit agreements.²⁵ Member States may thus maintain or introduce national provisions in this area provided these conform to Community law.

4.20 The Directive excludes from its scope “credit agreements which are secured either by a mortgage or by another comparable security commonly used in a Member State on immovable property or secured by a right related to immovable property.”²⁶ While land-related consumer loans and mortgages are thus excluded, in 2001 the European Commission assisted in developing an agreement between the European Credit Sector Associations and European consumer organisations which established a voluntary code of conduct outlining the pre-contractual information to be provided to consumers when entering home loan agreements.²⁷ This voluntary agreement seeks to ensure

a customer, citing cases such as *Schioler v National Westminster Bank Ltd* [1970] 2 QB 719 and *Redmond v AIB Plc* [1987] FLR 307.

²⁰ See paragraphs 3.38 to 3.45 above.

²¹ Or within 14 days of receiving the contractual terms and conditions and Article 10 information, whichever is soonest.

²² An exception exists in the circumstances of a linked credit agreement if national legislation already provides that funds cannot be made available to the consumer before the expiry of a specific period. A “linked credit agreement” means a credit agreement where the credit in question serves exclusively to finance an agreement for the supply of specific goods or the provision of a specific service, and those two agreements form, from an objective point of view, a commercial unit: see Article 3(n). If such national legislation exists, the “cooling-off period” may be reduced to the length of the period provided in that national legislation if the consumer explicitly so requests: Article 14(2) of the Directive.

²³ See paragraph 3.18 above.

²⁴ Article 22 *EC Consumer Credit Directive* 2008.

²⁵ Recital (30) of the Directive. See also Article 10, which states that the Directive’s requirements as to the information which must be included in credit agreements is “without prejudice to any national rules regarding the validity of the conclusion of credit agreements which are in conformity with Community law.”

²⁶ Article 2(2)(a) of the Directive.

²⁷ *European Agreement on a Voluntary Code of Conduct on Pre-Contractual Information for Home Loans*, available at:

consumers are provided with both general information about home loans on offer and personalised information at a pre-contractual stage to be presented in a “European Standardised Information Sheet”. The code specifies what information is to be provided to the consumer before entering a home loan agreement, including a detailed description of the product being offered; the APR and any additional recurring or non-recurring costs; the amount, number and frequency of each instalment; information relating to the complaints procedures available to the consumer; and the terms applicable in the case of early repayment. It appears that the code does not require the provision of any information relating to the consequences of default for the consumer.²⁸

4.21 Work is ongoing at European Union level on the issue of consumer protection legislation for mortgage loans. In 2007 the European Commission published a White Paper on the integration of mortgage credit markets within the EU, which contained a discussion of the issues of responsible borrowing and lending.²⁹ Possible legislative measures to improve the quality and comparability of information provided to consumers when entering mortgage credit agreements were discussed, including the possibility of extending some provisions of the *Consumer Credit Directive* to mortgage credit agreements. Also, in 2009 the European Commission began a public consultation on responsible lending and borrowing.³⁰ The consultation document again identified the problem of a lack of legally binding rules on the provision of information to consumers in mortgage loans, and discussed the possibility of introducing binding rules in this area.³¹ It also discussed the possibility of introducing legislation requiring consumers to be provided with risk guidelines in advance of borrowing, which would alert consumers to the risks involved in the credit products they intend to buy. The document also discussed the potential introduction of requirements for lenders to provide advice to borrowers in respect of offered mortgage credit. The European Commission also expressly asks in the document whether any other measures apart from financial education could be introduced to encourage responsible borrowing.

4.22 From the above discussion it can be seen that various reforms have taken place or are in the process of being made at European Union level. In addition, national law on responsible borrowing is to be reformed also, as the Irish Financial Services Regulatory Authority is conducting a review of its *Consumer Protection Code* in 2009.

4.23 The Commission welcomes these reforms and believes that they will be successful in promoting responsible borrowing. The Commission also reiterates its view that financial education is fundamental to ensuring the efficacy of consumer credit legislation, as the information provided to consumers must be understood if it is to be used to make responsible borrowing decisions. In this regard, the Commission recognises that on the addition of the *Consumer Credit Directive* and the other proposed EU reforms to the existing law in this area, as contained in the *Consumer Credit Act 1995* and the *Consumer Credit Code*, there will be several layers of consumer credit law in operation in Ireland. The Commission believes that the rights of consumers under these provisions should be consolidated and made available to consumers in an easily accessible manner. A model for this approach could be IFSRA’s *Consumer Protection Code: Your Little Red Book*, which reduces the content of the *Consumer Protection Code* to a readily accessible, plain language form.

4.24 *The Commission provisionally recommends that a complete collection of all of the rights of consumers under the various consumer credit law instruments should be made available to consumers in a consolidated and reduced form, written in plain language.*

http://ec.europa.eu/internal_market/finservices-retail/docs/home-loans/agreement_en.pdf. (Accessed 14 September 2009)

²⁸ Although Irish law requires warnings as to these consequences to be included when providing a consumer with an informative document relating to a housing loan: see paragraph 3.16 above.

²⁹ Commission of the European Communities *White Paper on the Integration of EU Mortgage Credit Markets* (COM(2007) 807 final) at 6-7.

³⁰ *Public Consultation on Responsible Lending and Borrowing in the EU* (European Commission DG Internal Market and Services 2009).

³¹ *Ibid* at 5-6.

4.25 The Commission recognises that, even with these reforms, a clearer legislative framework concerning responsible borrowing alone will not prevent over-indebtedness. The considerable progress yet to be made in the area of financial education and the limitations of information-based consumer credit law have been discussed in Chapter 3 above.³² For these reasons, the Commission believes that responsible lending and arrears management are of vital importance in working alongside responsible borrowing to prevent over-indebtedness. The next section therefore discusses the subject of responsible lending, while section C is concerned with responsible arrears management.

B Responsible Lending

4.26 The importance of responsible lending in preventing over-indebtedness, and the methods by which Irish law currently seeks to ensure responsible lending practices are observed, are discussed in detail in the Chapter 3.³³ Due to the limitations of the information-based approach to consumer credit legislation and deficiencies in financial literacy skills among consumers, responsible lending has a significant role to play in preventing over-indebtedness. The Commission again recognises that the subject of responsible lending is one which may not be appropriate for consideration by a law reform agency. The Commission therefore makes no provisional recommendations on this subject, but rather identifies certain issues which should be considered by relevant organisations as part of a holistic treatment of the issue of over-indebtedness.

(1) EU Rules on Responsible Lending

4.27 Before discussing possible reforms based on the principle of responsible lending, the Commission will outline developments in this area at a European Union level.

(a) Article 8 EC Consumer Credit Directive 2008

4.28 As described earlier in this report, the 2008 *Consumer Credit Directive* seeks to ensure responsible lending practices are observed by placing an obligation on creditors to assess the creditworthiness of the consumer.³⁴ Creditors must obtain sufficient information to assess the consumer's creditworthiness, from the consumer where appropriate and from a relevant database where necessary. This legislation is a maximum harmonisation Directive and article 22(1) provides that:

“Insofar as this Directive contains harmonised provisions, Member States may not maintain or introduce in their national law provisions diverging from those laid down in this Directive.”

Therefore any national law reforms must be compatible with the Directive, and this will limit the scope of the issues considered by the Commission.

4.29 Nonetheless, Recital 26 of the Directive provides 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 behaviour and should determine the necessary means to sanction creditors in the event of their doing so... The Member States' authorities could also give appropriate instructions and guidelines to creditors.”

³² See paragraphs 3.31 to 3.50 above.

³³ See paragraphs 3.52 to 3.102 above.

³⁴ See paragraph 3.69 above.

This provision has been recognised by the European Commission as leaving to Member States the responsibility of taking appropriate measures to promote responsible lending practices.³⁵ Therefore some scope is left to Member States to take appropriate measures to promote responsible lending and to carry out the supervision and enforcement necessary to ensure that irresponsible lending practices do not occur.

4.30 The Commission recognises that any recommendations for reform in the area of responsible lending must be compatible with the requirements of the Directive, and this will inform the final recommendations of the Commission in its Report.

(b) ***EU Public Consultation on Responsible Lending and Borrowing***

4.31 In addition to the *Consumer Credit Directive*, further plans for legislation are underway at EU level. In June 2009, the European Commission published a paper entitled *Public Consultation on Responsible Lending and Borrowing in the EU*.³⁶ This paper began a public consultation which aims to develop measures at EU level on responsible lending and borrowing in the context of delivering responsible and reliable markets for the future and restoring consumer confidence. The paper described responsible lending as consisting of the principle that credit products should “be appropriate for consumers’ needs and be tailored to their ability to pay.”³⁷ It is stated that this goal may be achieved through the creation of an appropriate framework “to ensure that all lenders and intermediaries act in a fair, honest and professional manner before, during and after the lending transaction.” The paper discussed the existing EU measures aimed at ensuring responsible lending practices are observed, encompassing legislation in the form of the *Consumer Credit Directive 2008*³⁸ and the *Capital Requirements Directive 2006*,³⁹ policy documents such as the *White Paper on the Integration of EU Mortgage Credit Markets of 2007*⁴⁰ and the *Report of the Expert Group on Credit Histories of May 2009*.⁴¹ The paper noted the importance of credit markets to the economy throughout the EU, but also pointed out that the growth in consumer credit has led to increased over-indebtedness, with up to 38% of households in a recent European Commission survey having difficulty in repaying their loans.⁴² The document therefore presented responsible lending as a partial solution to the problem of over-indebtedness.

4.32 The paper identified several different factors which must be addressed when ensuring responsible lending. First, the paper discussed pre-contractual business practices, and addressed the possibility of extending the rules on advertising and the provision of pre-contractual information and advice to mortgage credit agreements. The paper next addressed the question of whether risk guidelines should form part of the information to be provided to borrowers in advance of entering a credit agreement. These guidelines, either communicated directly to borrowers or available more generally such as on the internet, “would alert potential borrowers to the risk involved in the product they intend to buy and allow them to better assess which product is suitable to their needs.”⁴³

³⁵ *Public Consultation on Responsible Lending and Borrowing in the EU* (European Commission DG Internal Market and Services 2009) at 7.

³⁶ *Ibid.*

³⁷ *Ibid* at 3.

³⁸ *Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC.*

³⁹ *Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions.*

⁴⁰ *White Paper on the Integration of EU Mortgage Credit Markets of 2007* (European Commission COM(2007) 807 final.)

⁴¹ *Report of the Expert Group on Credit Histories* (European Commission DG Internal Market and Services 2009).

⁴² *Public Consultation on Responsible Lending and Borrowing in the EU* (European Commission DG Internal Market and Services 2009) at 4.

⁴³ *Ibid* at 6.

4.33 Secondly, the paper discussed business practices in the context of lending transactions themselves, such as the need for creditworthiness assessments. The paper identified failings in this area in recent years, noting that some borrowers have been granted credit that was unsuitable for them or their needs. The issues of the suitability of certain credit products for consumers generally and for individual borrowers in particular were identified. The absence of responsible lending rules in relation to mortgage credit agreements was again noted.

4.34 The final issue which the paper discussed in the context of responsible lending was the credit intermediary market. Key problems identified included the influence that the levels of commission-based remuneration received by credit intermediaries in respect of certain products can have on the advice that intermediaries give, and the disclosure of the contractual arrangements between intermediaries and lenders. The paper thus suggested that rules could be introduced regulating the commission or fee structures of intermediaries, and creating registration and supervision systems for intermediaries.

4.35 The European Commission consultation document invites views on each of the problems identified, and the consultation period remains open until September 2009. The Law Reform Commission recognises that the results of this consultation process will have significant consequences for any recommendations made in relation to the subject of responsible lending. The outcome of the EU consultation will therefore inform any final recommendations made by the Commission in its Report.

(2) *The Content of the Principle of Responsible Lending*

4.36 The question of the exact content of the principle of responsible lending should be addressed. As noted above, the European Commission consultation on responsible lending and borrowing simply defines responsible lending as consisting of the idea that “credit products are appropriate for consumers’ needs and are tailored to their ability to repay.”⁴⁴ This reflects the core conception of responsible lending as requiring lenders to assess a consumer’s ability to repay before offering credit. The principle can however have a wider meaning, and the detailed elements of the principle as viewed by the European Commission have been described in the preceding paragraphs and consist of the following:

- Pre-contractual elements: advertising and marketing; the provision of pre-contractual information to consumers; the provision of risk guidelines to consumers.
- Business practices in the context of lending transactions: suitability and creditworthiness assessments; responsible product design; advice standards.
- Responsible practices among credit intermediaries: mis-selling and other credit intermediary misconduct; conflicts of interest among intermediaries; supervision and licensing of intermediaries; prudential and professional standards; redress mechanisms.

4.37 Similarly, the Office of Fair Trading (OFT) in the UK has provided a definition of responsible lending which focuses on the core concept of assessing a consumer’s creditworthiness in advance of lending, while also encompassing other areas of the business practices of lenders. Thus the OFT has stated that:

“Lenders may take different approaches to responsible lending in line with variations between the needs of different sectors of the market. However, lenders should always take reasonable care in making loans or advancing lines of credit and should take full account of the interests of consumers in doing so. They should undertake proper and appropriate checks on the potential borrower’s creditworthiness and ability to repay the loan and to meet the terms of the agreement.”⁴⁵

From this statement it can be seen that the core of the principle of responsible lending as viewed by the OFT involves a duty to conduct appropriate assessments of a consumer’s creditworthiness and ability to repay in advance of lending. The OFT has however published a further consultation document on the

⁴⁴ *Public Consultation on Responsible Lending and Borrowing in the EU* (European Commission DG Internal Market and Services 2009) at 3.

⁴⁵ Office of Fair Trading *Consumer Credit Licensing: General guidance for licensees and applicants on fitness and requirements* (OFT 969 2008) at paragraph 2.14.

content of the responsible lending element of consumer credit licensing requirements in the UK which includes a much wider range of elements than mere creditworthiness assessments. The following factors are included:

- Explanations of credit products.
- Assessments of affordability.
- Pre-contractual issues: advertising and promotion; transparency; the avoidance of deceptive and unfair practices, harassment or psychological pressure.
- Post-contractual issues: transparency; monitoring repayments; the avoidance of harassment and deceptive or unfair practices.
- Handling of default and arrears.

Therefore it can be seen that a wide range of elements of the credit relationship can be included within the principle of responsible lending.

4.38 The research paper commissioned by the European Commission which guides the structure of this Consultation Paper identifies a more limited content of the principle of responsible lending.⁴⁶ This can most likely be attributed to its categorisation of pre-contractual issues under the principle of “responsible borrowing” and its placing of certain post-contractual and post-default practices under the principle of “responsible arrears management.” The study identifies the key elements for achieving responsible lending as:⁴⁷

- The establishment of legal requirements to check affordability, which must be supported by credit reporting and credit scoring systems.
- The existence of legislation allowing courts to re-open usurious and exploitative credit agreements.

In addition, the study states that interest rate ceilings may have a role to play in ensuring irresponsible lending is not permitted. Finally, the study identifies the need to have regard to the problem of financial exclusion when designing responsible lending provisions, and that alternative means of supporting those who are refused access to credit may be required.

4.39 As noted elsewhere in this Consultation Paper, the Commission wishes to largely follow the structure identified by this study, and therefore confines itself to the more limited concept of responsible lending. This is because other sections of the Consultation Paper are devoted to the subjects of responsible borrowing and responsible arrears management. In this section the Commission therefore first focuses on the issues of creditworthiness assessments and the role of credit reporting in facilitating such assessments. The next two sub-sections of section B discuss the various means of enforcing responsible lending requirements, first through regulatory means and secondly through the private law. The discussion of private law remedies also considers the power to re-open exploitative credit agreements. After this the Commission discusses how the preceding measures may need to be modified for specialist lenders such as credit unions and moneylenders.

4.40 The Commission next briefly highlights the question of product design, which has also been identified as playing an important role in ensuring responsible lending. Section B concludes by raising the need to consider the question of financial exclusion when introducing responsible lending standards. The Commission recognises that many of the issues raised by this subject are not appropriate matters for consideration by a law reform agency, and involve complex issues of social and economic policy, as well as financial services regulatory concerns. Therefore this section merely identifies issues for discussion by the financial services legislation review group and other interested organisations, and does not propose any provisional recommendations.

⁴⁶ See *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 65-76.

⁴⁷ *Ibid* at 76.

(3) Creditworthiness and suitability assessments: Credit Register

4.41 The important role of credit reporting in facilitating responsible lending is discussed in the Chapter 3.⁴⁸ Gaps in the Irish system of credit reporting were also highlighted in the previous chapter, including the voluntary and therefore incomplete nature of credit reporting in the Irish Credit Bureau. A related problem is that membership of the Irish Credit Bureau, and thus access to the credit reports contained therein, is currently limited to financial institutions. This has the consequence of excluding other creditors, such as utility and telephone providers, from access to credit history records of their customers. It also prevents financial institutions from accessing information relating to potential borrower's defaults in respect of utility bills, which are often an early indicator of over-indebtedness.⁴⁹

4.42 This section therefore examines credit reporting regimes in other countries as a means of identifying the question of whether reforms to the credit reporting system in Ireland as an issue for consideration by the relevant organisations.

(a) Comparative Models

4.43 Credit reporting systems take a variety of forms in different countries. The institutional structures of these systems vary due to the historical factors which led to their development and the problems which they were designed to address.⁵⁰ Despite these differences, credit reporting systems may be divided into three principal categories:

- Public systems: composed solely of a public credit register.
- Private systems: composed solely of private credit bureaus.
- Dual systems: both public credit registers and private credit bureaus operate.

These different categories of credit reporting systems are now discussed, and specific examples of the operation of such systems are presented.

(i) Public Credit Registers

(l) The purpose and structure of public credit registers

4.44 Public credit registers are databases operated by national central banks or other supervisory authorities, which collect credit information about borrowers in order to make it available to reporting institutions for their credit decisions. The information collected may also be used by the supervisory authorities for other purposes linked to their legally recognised roles.⁵¹ While such public credit registers exist in many countries, they do not perform the same role in each, and may have been created for different purposes.⁵² Some registers were created for the purposes of the prudential supervision of the banking system, and so to monitor systemic risk (e.g. Germany, Austria and Italy). In contrast, other registers were established to monitor and prevent the over-indebtedness of consumers (e.g. Belgium and France).⁵³ The rationale behind establishing such public registers argues that the issues of ensuring financial stability and preventing over-indebtedness are matters of the public interest, and so it is appropriate to attribute the task of collecting and distributing data for these purposes to an objective supervising authority.⁵⁴ Where a public register exists, national law will usually compel certain institutions

⁴⁸ See paragraphs 3.57 to 3.63 above.

⁴⁹ See paragraph 1.20 above.

⁵⁰ See Jentsch *Financial Privacy: An International Comparison of Credit Reporting Systems* (2nd ed. Springer 2007) at 62.

⁵¹ *Report of the Expert Group on Credit Histories* (European Commission DG Internal Market and Services 2009) at 8.

⁵² Jentsch *Financial Privacy: An International Comparison of Credit Reporting Systems* (2nd ed. Springer 2007) at 62.

⁵³ *Ibid.*

⁵⁴ *Report of the Expert Group on Credit Histories op cit.*

to report all credit agreements (usually over a certain threshold) to the register.⁵⁵ This has the consequence of ensuring that the register covers a very high percentage of the credit market. Under such public systems the supervisory authority usually has enforcement powers to correct inaccuracies or omissions, with sanctions often existing for those who fail to comply. Supervision of the accuracy of the information provided to the registers can be accomplished through inspections of premises, logical-statistical checks, cross-checks with other data supplied to the authority, or through consumer complaints. Public registers are primarily concerned with collecting corporate and consumer credit data from financial institutions, which takes the form of information concerning the type of loan and details such as repayments, guarantees and the maturity of the loan. These registers will usually not collect data from non-financial institutions, such as telecommunications companies, utility providers or retailers. Public registers also generally do not provide additional services such as credit scoring, marketing services or portfolio monitoring to creditors.⁵⁶ The preceding paragraphs present examples of public credit reporting systems.

(II) *France: Fichier National des Incidents de Remboursement des Crédits aux Particuliers*

4.45 France's credit reporting system is quite distinct from those existing in most of the rest of Europe.⁵⁷ It is centralised, non-competitive and structured along strict public policy lines. In addition, unlike the majority of credit reporting systems in Europe, it involves the sharing of negative information only. The *Banque de France*, the French Central Bank, operates several databases, including bad cheque registers and registers of commercial credit ratings. For the purposes of this paper the most important database run by the French Central Bank is the *Fichier National des Incidents de Remboursement des Crédits aux Particuliers* (FCIP) or National Register of Household Credit Repayment Incidents. The FCIP was created by the *loi Neiertz* or Neiertz Act of 1989, named after the French Minister who sponsored the law.⁵⁸ Under the Act, the Central Bank created and regulates a national database on repayment incidents which centralises and distributes credit reports. These reports first detail defaults in personal non-business loans and secondly provide details of repayment schedules drawn up as part of the French debt settlement regime.⁵⁹ The Central Bank has the sole right of collecting information on judicial measures except for cases in which a bank is directly involved. In 2008, the register contained records on approximately 2.4 million individuals, with over 3.1 million "incidents" or defaults recorded. In addition, records of almost 800,000 judicial or voluntary debt repayment plans were contained in the register.⁶⁰

4.46 Access to the database is limited to credit institutions, the financial services wing of the national post service, over-indebtedness commissions⁶¹ and the courts. Access takes two forms.⁶² First, the Central Bank makes available a monthly up-to-date statement of the register to the most important lending institutions in the country. Secondly, the register may be consulted by financial institutions with respect to an individual debtor when making a lending decision. Non-financial institutions are not permitted to access the data, and the financial institutions obtaining information are not permitted to

⁵⁵ *Ibid* at 9.

⁵⁶ *Report of the Expert Group on Credit Histories* (European Commission DG Internal Market and Services 2009) at 9.

⁵⁷ Jentzsch *Financial Privacy: An International Comparison of Credit Reporting Systems* (2nd ed. Springer 2007) at 101-106.

⁵⁸ *Loi n°89-1010 du 31 décembre 1989 relative à la prévention et au règlement des difficultés liées au surendettement des particuliers et des familles.*

⁵⁹ See paragraphs 5.50 to 5.55 below.

⁶⁰ Statistics obtained from the website of the FCIP, available at: http://www.banque-france.fr/fr/instit/services/protection_consommateur/fichier_national_des_incidents_de_remboursement_des_credits_aux_particuliers.htm. (Accessed 14 September 2009)

⁶¹ See paragraphs 5.50 to 5.55 below.

⁶² Secrétariat général du Conseil national du crédit et du titre *Rapport sur la prévention et le traitement du surendettement des ménages* (2003) at 7.

transfer it to third parties under any circumstances. Such a transfer would violate French data protection rules, which are among the strictest in the world.

4.47 Financial institutions are obliged to report data to the register. The register thus creates a mandatory and exclusive reporting regime. The minimum threshold for reporting defaults and overdrafts is approximately €500. A default may not be reported to the register until one month has passed, a rule designed to allow a borrower to pay the amount due before his or her credit rating will be damaged. This rule also allows for a situation where a debtor merely forgets to pay. If the liability remains unpaid after one month, the default must be reported, and the creditor must inform the borrower of the record entered in the database. Court judgments and debt repayment plans were originally stored for three years in the register, even if the debtor had repaid the sums owed. This period has now been extended to eight years.

4.48 Only negative information is stored in the register. In this regard the French Central Bank describes it more as a default register rather than as a database of overall indebtedness.⁶³ Apparently there is no express legal prohibition on the sharing of positive information in French law, but the Neiertz Act of 1989 does not expressly authorise the sharing and storing of positive information records. The French data protection officials (the *Commission nationale de l'information et libertés*) take the view that positive information records are only permitted where expressly provided for in law, due to the risk that such detailed records may be used for means other than their original purposes, such as for marketing or employment screening.⁶⁴ The restriction on the sharing of positive information has been the subject of evenly-balanced debate in France over recent years. Opposition to positive reporting on the grounds of its greater restriction of privacy rights has resulted in the negative reporting system being retained. It should be noted however that a 2008 report of the Consultative Committee of the Financial Sector called for a study to be undertaken into the possibility of introducing a positive register, and so the debate remains ongoing.⁶⁵

4.49 In addition to the FICP, private credit information companies also operate in France, but their activities are generally limited to the marketing industry or the reporting of business credit data.⁶⁶ Three private credit bureaus operate in France, but they do not provide credit reporting services due to data protection restrictions.⁶⁷ Instead they confine their operations to cheque processing, risk management and some credit scoring services.

(III) *Belgium: Centrale des crédits aux particuliers*

4.50 Belgium is another example of a credit reporting system which almost exclusively consists of a public credit register.⁶⁸ The *Banque Nationale de Belgique* or Belgian National Bank operates two credit databases, one for corporate debt and the other for personal debt. This latter database is known as the *Centrale des crédits aux particuliers* or Central Individual Credit Register and registers all consumer credit

⁶³ Jentzsch *Financial Privacy: An International Comparison of Credit Reporting Systems* (2nd ed. Springer 2007) at 104.

⁶⁴ Similarly, the French Central Bank interprets the relevant legislation as containing the parliamentary intention that only negative information should be collected in the register.

⁶⁵ *Pour un développement responsable du crédit renouvelable en France* (Rapport réalisé par Athling Management pour le Comité Consultatif du Secteur Financier 2008) at 73.

⁶⁶ Jentzsch *Financial Privacy: An International Comparison of Credit Reporting Systems* (2nd ed. Springer 2007) at 105.

⁶⁷ These are Experian, Equifax and CRIF.

⁶⁸ Jentzsch *op cit.* at 81; see also *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 68.

agreements over €200 and all consumer mortgages.⁶⁹ In contrast to the position in France, the register contains both positive and negative information. At the end of 2008, approximately 7.9 million credit contracts were registered in the database. The database is not limited to financial institutions, but also receives information from insurers and some retailers.

4.51 The creation of the Central Individual Credit Register is part of an innovative and comprehensive policy for the prevention of over-indebtedness in Belgium, which focuses sharply on ensuring responsible lending practices are observed. Credit reporting to the register is mandatory. Lenders are also legally obliged to consult the register in advance of granting credit to an individual, and must also collect full and precise information about the financial situation of borrowers in order to responsibly assess the borrowers' ability to repay. Full information must be obtained from the borrower, supported by documentary evidence. Lenders are then obliged to decide whether to lend, and how much credit to offer, and must identify the most suitable product from their portfolio for each individual borrower. Any security offered may be considered when making the lending decision, but only as a secondary consideration once the ability to repay has been first assessed. The central credit database is funded by the *Fonds de traitement de surendettement* or Fund for the Treatment of Over-indebtedness, which consists of payments made by creditors based on the portion of their consumer loan books which are in default.⁷⁰ This taxation of bad debt aims to further advance responsible lending practices among creditors by introducing financial disincentives for irresponsible lending. This measure will be described in more detail below. Lenders may also access the register in relation to credit agreements which are in progress for the purpose of responsible arrears management.

4.52 There are currently no private credit bureaus operating in Belgium. Until recent years, a trade association called the *Union professionnelle du credit* shared data through a mechanism known as the *Mutuelle d'information sur le risqué* (MIR).⁷¹ It was in 2003 that the Belgian National Bank expanded its role to the collection of positive information on all credit contracts, and this expansion effectively crowded out the private MIR database, which became unsustainable. The MIR register has since been incorporated into the national central register.

4.53 It should be noted that the Belgian credit reporting system under the Central Individual Credit Register was identified as a model of best practice by the European Commission in a 2008 report.⁷²

(ii) Private Credit Bureaus

4.54 Private credit bureaus are privately owned agencies which collect data on credit histories of both corporations and consumers, and provide credit reports to their members or clients. Private credit bureaus can take the form of any of the three main ownership structures:⁷³

- Credit bureaus in which creditors and/or other service providers are either majority or minority shareholders (e.g. the Irish Credit Bureau as described in the previous chapter).
- Credit bureaus owned and operated by specialised credit reporting companies (e.g. Experian, Equifax, Callcredit plc, CRIF, Transunion).
- Credit bureaus formed on the basis of associations (e.g. the "Kreditschutzverband" or KSV in Austria).

⁶⁹ See *Statistiques Centrale des credits aux particuliers* (Banque nationale de Belgique 2008), available on the website of the Belgian National Bank at:
http://www.bnb.be/pub/04_00_00_00_00/04_02_00_00_00/04_02_06_00_00.htm?l=fr.

⁷⁰ See paragraphs 4.111 to 4.116 below for a further discussion of the operation of this taxation system, which effectively amounts to a levy on irresponsible lenders.

⁷¹ Jentzsch *op cit.* at 82.

⁷² *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 68.

⁷³ *Report of the Expert Group on Credit Histories* (European Commission DG Internal Market and Services 2009) at 9.

Most private credit bureaus in Europe operate for profit, with only a small number operating on a non-profit basis. These non-profit credit bureaus are usually owned by national industry associations and will be discussed in the next sub-section below. The majority of European credit bureaus are owned by specialised credit reporting commercial agencies. Credit bureaus collect data from various different types of creditors, as well as from publicly available sources such as registers of court judgments. They merge the data, interpret and analyse it for quality control, before providing this data and/or a credit report to their clients. In addition, certain credit bureaus now provide additional services such as fraud prevention and credit scoring⁷⁴ facilities.⁷⁵ Credit reports may take many different forms, depending on the information collected, the type of credit application in question, and the needs of the client requesting a report.

4.55 Based on the principle of reciprocity, creditors who provide data to the bureaus are permitted to access the stored data, provided the information they provide is accurate and is provided in a timely manner. This principle is fundamental to the contracts between lenders and credit bureaus. The accuracy of information is also assured through data protection laws. The credit bureau is not involved in the lending decision, which remains the responsibility of the lender throughout. Most credit bureaus operate for profit by charging clients for each credit report obtained, as well as for ancillary services provided. Credit bureaus are therefore incentivised to obtain as many clients as possible, and will often collect data from a wider variety of sources than public registers. Limitations are however placed on the type and structure of the information the agencies may collect from and supply to non-institutional lenders such as telecommunications companies and utility providers. The minimum threshold which a transaction must pass before being reported is usually lower in the case of private bureaus than public registers, which can in certain countries lead to greater coverage of the market by private agencies than public registers.⁷⁶

(I) *United States of America*

4.56 Credit reporting in the United States is conducted by private credit bureaus, the market for which is an oligopoly of three firms: TransUnion, Experian and Equifax.⁷⁷ These three companies provide various different services such as consumer credit reporting, business credit reporting, credit scoring services and marketing services. In the credit scoring market they also compete with the major credit scoring agency Fair Isaac, which provides credit scores directly to clients as well as providing credit scoring models to the three above-mentioned credit reporting agencies. There is a significant number of smaller credit reporting agencies in the US market, but these are primarily resellers or operate in niche areas, such as more in-depth consumer inquiries rather than mere credit reports. These smaller niche players also provide services such as insurance, tenant or employee screening using credit report data. It is a notable difference between European and US regimes that the use of credit report data for these screening purposes is widespread in the US, while it is generally prohibited in Europe.⁷⁸

⁷⁴ See paragraphs 3.62 to 3.63 above.

⁷⁵ *Report of the Expert Group on Credit Histories op cit.* at 10.

⁷⁶ This appears to be the case in Spain, for example, where the public credit register holds information on 14 million borrowers, while a private credit bureau, *ASNEF-Equifax* manages data on more than 38 million people. This greater coverage can be attributed to the fact that the threshold for reporting credit agreements to the public register is much higher than to the private agency: see Jentzsch *Financial Privacy: An International Comparison of Credit Reporting Systems* (2nd ed. Springer 2007) at 88.

⁷⁷ Jentzsch *Financial Privacy: An International Comparison of Credit Reporting Systems* (2nd ed. Springer 2007) at 69.

⁷⁸ See Gross "Expanding the Use of Credit Reports and Credit Scores: the need for Caution and Empiricism" *The Yearbook of Consumer Law 2008* (Ashgate Publishing 2008) 327 at 331-336 for a critical discussion of the use of credit data for these ancillary purposes in the US.

4.57 Private credit bureaus in the US collect both positive and negative data, and their operations are governed primarily by the *Fair Credit Reporting Act 1970* as amended.⁷⁹ While a detailed discussion of this Act and its amendments is beyond the scope of this paper, a brief outline will be provided.⁸⁰ There are four main purposes for which credit records can be disclosed. These are purposes in connection with:

- A credit transaction;
- The underwriting of insurance;
- Any other business transaction initiated by the consumer; and
- Any other purpose if the report user has a legitimate business need.

This last purpose is very wide, and it is this which permits the use of credit reports for purposes not related to creditworthiness such as tenant and employee screening. Reforms have now limited the use of information for these purposes, as consumers must “opt-in” or consent to having their information used for medical and employment purposes. Consumers must however opt-out of having their information used for marketing purposes, and their consent is not initially required to have their data used for these purposes. Consumers are now entitled to one free credit report per year, a measure which is designed to allow consumers to check the accuracy of the information reported about them. Consumers are also entitled to see their credit scores, and for a “reasonable fee” they must be provided with the most recently calculated credit score and information enabling them to understand the meaning of the score.

4.58 The regulation of credit reporting in the US differs from that in Europe in that it takes the form of an industry-specific code rather than a general framework of data protection law. The law has been excessively amended, due to the initial failure to acknowledge that credit reporting raises data protection issues which extend beyond a single industry. This has led to criticisms of the regime as being over-complicated.⁸¹ Other general criticisms of credit reporting and scoring in the US involve complaints that errors are widespread in credit reports; that important information relevant to creditworthiness assessments is often omitted from such reports, and that as a consequence credit assessments, and the resultant risk-based pricing, may be based on unreliable information.⁸² The practice of using credit scores for employment and insurance decisions has also been heavily criticised, particularly in the context of concerns that certain disadvantaged sectors of society may be more likely to have lower credit scores than others.⁸³

(II) *United Kingdom*

4.59 In the United Kingdom credit reporting is almost exclusively conducted through private credit bureaus.⁸⁴ Credit reporting originated in the UK and commercial agencies were allowed to thrive through a combination of the lack of a national credit register and relaxed data protection laws (until the implementation of the *EC Data Protection Directive*).

⁷⁹ The primary amendments to this Act are contained in the *Consumer Credit Reporting Reform Act of 1996* (Public Law 104-208), *Consumer Reporting Employment Clarification Act of 1998* (Public Law 105-347); the *Financial Services Modernization Act of 1999* (Public Law 106-102) and the *Fair and Accurate Credit Transactions Act of 2003* (Public Law 108-159).

⁸⁰ See Jentzsch *Financial Privacy: An International Comparison of Credit Reporting Systems* (2nd ed. Springer 2007) at 122-134.

⁸¹ See Jentzsch *ibid* at 134-135.

⁸² See Gross “Expanding the Use of Credit Reports and Credit Scores: the need for Caution and Empiricism” *The Yearbook of Consumer Law 2008* (Ashgate Publishing 2008) 327 at 329-333.

⁸³ See Gross “Expanding the Use of Credit Reports and Credit Scores: the need for Caution and Empiricism” *The Yearbook of Consumer Law 2008* (Ashgate Publishing 2008) 327 at 333-336.

⁸⁴ See Jentzsch *Financial Privacy: An International Comparison of Credit Reporting Systems* (2nd ed. Springer 2007) at 95-100.

4.60 The sole public contribution to credit reporting in the UK is the work of Registry Trust Ltd., an independent organisation set up by parliament in 1852 which holds the statutory register for all county court judgments. The county court register originally operated as a source of credit data on trade debtors, due to the threshold of judgments of £10 or more. As inflation meant that more judgments passed this threshold, the register began to include consumer judgments. In the 1980s, due to increasing costs, the Lord Chancellor's Department handed over the operation of the Registry to a non-profit organisation, and it is now governed by the *Register of County Court Judgment Regulations 1985*, as amended. The Registry was ultimately superseded in 2006 by the Register of Judgments, Orders and Fines, and Registry Trust Limited is contracted to maintain this new register which contains records of County Court and High Court judgments and orders, as well as records of unpaid fines in Magistrates' Courts. Access to the register is public, and therefore credit reporting agencies may withdraw data from it for the purposes of merging the data with positive credit information to produce credit reports. Therefore, while the judgments register itself provides a limited insight into a consumer's creditworthiness, the information contained in it may be combined with other positive information to increase the value of credit reports so produced.

4.61 In a similar situation to that existing in the US, the UK credit reporting market is highly competitive, with three main agencies occupying the majority of the market. The first is *Callcredit plc.*, which is an internet-based agency formed by a partnership between the American company *D&B* and the *British Skipton Building Society*. In 2004, this company stated it contained data on 30 million consumers.⁸⁵ *Equifax* also has a major presence on the market, again holding data on over 30 million consumers.⁸⁶ Finally, *Experian* is the other major player in the market, and is believed to hold data on 13.5 million consumers. The credit reporting market in the UK is one of the most competitive in Europe and mirrors the highly competitive consumer credit market, which had been expanding rapidly until recent times.

(III) Germany

4.62 A different model of private credit bureau also exists in certain countries whereby the bureau is owned not by a specialist commercial entity but by an association of financial and other institutions for their own benefit. An example of such a private credit bureau may be found in Germany, where the credit reporting market is dominated by an association of financial institutions and other creditors called *Schufa Holding AG*.⁸⁷ This association had operated as a non-profit company called *Bundes-Schufa b.V.* from 1995 until 2000, when it was restructured into a for-profit company called *Schufa Holding AG*. The major shareholders of the association are private banks, savings institutions, specialised credit institutions and credit cooperatives. Other members such as retailers make up approximately 15% of the shareholding. In 2006 Schufa held 407 million items of data, on 64 million people, and received 82 million updates and enquiries.⁸⁸

4.63 Until its restructuring into a profit-making company, Schufa's non-profit status had shielded it from competition. The market is now open to competition however, and Schufa's main competitor is the *Creditreform Experian GmbH* which holds a database of approximately 29 million individuals.⁸⁹ This company also provides other services such as credit scoring and risk management. Another smaller competitor is *Karstadt Quelle Information Services (KQIS)*, which began in the mail-order industry and now holds records on 21 million consumers.

4.64 In addition to these private bureaus, a public credit register called *Bürger Wirtschaftsinformationen* also operates in Germany. This register holds data on 32 million firms and consumers. The register operates a system of mandatory reporting of credit agreements for all credit

⁸⁵ See Jentsch *Financial Privacy: An International Comparison of Credit Reporting Systems* (2nd ed. Springer 2007) at 100.

⁸⁶ *Ibid.*

⁸⁷ See Jentsch *op cit.* at 89-94.

⁸⁸ Jentsch *op cit.* at 92.

⁸⁹ Jentsch *op cit.* at 93.

institutions and some public administration offices, but only for borrowers whose debts exceeded €1.5 million at any one time during the last quarter. Each quarter, all creditors receive information relating to the overall indebtedness of their portfolios. It can be seen from these features that the database's function is to monitor prudential stability rather than to prevent the over-indebtedness of private individuals. These factors, coupled with its high reporting threshold, mean this register can be said not to compete with the private credit bureaus. These private bureaus do not have access to the database.

(IV) *Non-profit Private Credit Bureaus*

4.65 The final category of private credit bureaus is that of non-profit bureaus. In the Netherlands for example no public credit register exists, but the credit reporting industry is dominated by a non-profit foundation known as the *Bureau Krediet Registratie* (BKR).⁹⁰ This institution was founded in 1965 and receives data from the majority of financial institutions in the Netherlands. It collects both positive and negative information, with a threshold of €500 applying for the reporting of loan information, and a threshold of €150 for negative information. The BKR has some cross-border relations with credit reporting bodies in other jurisdictions, such as *Schufa Holding AG* in Germany.

(iii) **Dual systems: public credit registers and private credit bureaus**

4.66 In addition to the above public and private systems, certain dual systems of credit reporting exist whereby public credit registers and private credit bureaus co-exist and operate alongside one another. This can be seen from the above description of credit reporting in Germany, where the *Bürger* credit register and private credit bureaus such as *Schufa* operate, albeit not in the same market.

4.67 Similarly, in Austria a dual system exists, with a labour division between the public credit register and private credit reporting association which means that there is no overlap between the two systems.⁹¹ The *Osterreichische Nationalbank* runs a public creditor register which was founded in 1986. The purpose of this register is to facilitate the prudential supervision of the banking system and therefore it has a high threshold of €350,000 for the registration of credit agreements. Only a relatively small number of records are stored in this register as a consequence. The register only collects information concerning outstanding indebtedness and not negative information, and has no real function in preventing the over-indebtedness of individuals. In contrast, the *Kreditschutzverband von 1870* (KSV), a non-profit association with over 700 members drawn from banks, insurance and leasing firms, shares positive and negative information on credit agreements over €35. This database is used by its members to perform credit assessments of individual borrowers. Therefore the public and private credit reporting operations in Austria co-exist and do not compete with one another.

4.68 The above descriptions have been chosen to provide examples of different models of credit reporting systems. The table below, taken from the report of the European Commission Expert Group on Credit Histories, provides details of the credit reporting systems in all countries of the European Union⁹².

⁹⁰ See Jentzsch *Financial Privacy: An International Comparison of Credit Reporting Systems* (2nd ed. Springer 2007) at 86.

⁹¹ *Ibid* at 81.

⁹² *Report of the Expert Group on Credit Histories* (European Commission DG Internal Market and Services 2009) at 12.

European Credit Reporting System							
Country	PCR	No. of CBs		Ownership structure			
		For Profit	Not for Profit	Not Ownership by creditors	More than 50 % ownership by creditors	50 % or less ownership by creditors	Other (association, public organisation...)
Austria	yes		1				1
Belgium	yes						
Bulgaria	yes	1		1			
Cyprus	no	1				1	
Czech Republic	yes	1			1		
Denmark	no	2		2			
Estonia	no	1		1			
Finland	no	1		1			
France	yes						
Germany	yes*	1*			1		
Greece	no	1			1		
Hungary	no	1			1		
Ireland	no	1			1		
Italy	yes	2	1	1		1	1
Latvia	yes						1
Lithuania	yes	1				1	
Luxembourg	no						
Malta	no	1				1	
Netherlands	no	1	1	1			1
Portugal	yes	1				1	
Poland	no	1**		–	1	–	
Romania	yes	2		1	1		
Slovakia	yes	2		1	1		
Slovenia	yes		1				1
Spain	yes	2		1		1	
Sweden	no	6		5	1		
United Kingdom	no	3		3			

PCR=Public Credit Register
CB=Private Credit Bureau as defined in Annex 2. It does not include municipal court's judgement records.
* The credit register operated by the Central Bank does not cover data on consumers. Concerning CBs, only one collects information from creditors. However, there are at least five other information bureaus which compile information from public sources.
** Apart from the Credit Information Bureau, also the Polish Bank Association processes data from banks (mainly anti-fraud)
Sources:
– ACCIS, *Fact Sheet*, December 2007.
– IFC, website: <http://www.ifc.org/ifcext/gfm.nsf/Content/FinancialInfrastructure-PCB-List>
– A. Matuszyk & L. Thomas, *The evolution of credit bureaus in European country*, *Journal of financial transformation*, 2008.
– N. Jentzsch, *Financial Privacy. An international comparison of credit reporting systems*, Springer Verlag, Heidelberg, 2007.

(iv) Other Differences

4.69 It can be seen from the above that credit reporting systems take various forms in different countries. In addition to the structural differences described above, variations arise as to the data registration criteria. The report of the European Commission Expert Group on Credit Histories identified the following differences among credit reporting systems in the EU:⁹³

- Different definitions of terms such as payment defaults and delinquencies, particularly as to the length of time which must pass before a default exists;
- Differences in reporting thresholds;
- Different types of credit registered in different countries;
- Different data retention periods, from periods of months in some countries to years in others.

⁹³ *Report of the Expert Group on Credit Histories* (European Commission DG Internal Market and Services 2009) at 45-46.

4.70 The Expert Group recommended that credit registers and credit bureaus should seek some degree of convergence in relation to these characteristics, and that information in relation to them should be made more readily available.

(v) Data Protection Rules

4.71 It can therefore be seen that a variety of credit reporting systems exist in different countries. Differences also exist in relation to the regulatory regimes controlling the use of data in different countries, although the EC *Data Protection Directive* has succeeded in providing a level of harmonisation to data protection rules in Europe.⁹⁴

4.72 While a detailed discussion of the *Data Protection Directive* is beyond the scope of this paper, the key principles of the Directive as relevant to credit reporting are now presented. First, article 6 of the Directive provides certain basic rules in relation to the processing of data, which Member States are required to define more precisely. Under these basic rules data protection authorities must ensure that personal data must be:

- processed fairly and lawfully;
- collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes;
- adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;
- accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified; and
- kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed.

4.73 Article 7 of the Directive then lays down several pre-conditions which must be satisfied before data processing can be considered to be lawful. The consent of the data subject is the primary condition for processing data, but other justifications may allow the processing of data without consent. The Directive requires that the data subject's consent is freely given and informed. It is often argued that if a consumer does not have an option other than giving his or her consent to the processing of his or her data in order to obtain a loan, this may not be true consent.⁹⁵ This is the view of the Irish Data Protection Commissioner in relation to the legislation implementing the Directive.⁹⁶ The Commissioner has indicated that if the consent of the data subject is a condition for the provision of a service rather than a purely optional choice, it is unlikely that the data subject has freely consented to the processing, and therefore the processing must comply with one of the other justificatory conditions.⁹⁷ It should be noted in this regard that an alternative justificatory condition is where processing is necessary for the purposes of the legitimate interests pursued by a third party, except where such interests are overridden by the right to privacy of the data subject. The application of this condition involves a balance between the rights of an individual and the legitimate interest of other parties.⁹⁸

4.74 All data subjects also have the right to be provided with the identity of the data processor as well as any potential recipients of the data, and must also be told the purpose for which data is being

⁹⁴ *Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.*

⁹⁵ See e.g. *Report of the Expert Group on Credit Histories* (European Commission DG Internal Market and Services 2009) at 48.

⁹⁶ See section 2 of the *Data Protection Act 1988*, as amended by the *Data Protection Act 2003*.

⁹⁷ *Annual Report of the Data Protection Commissioner 2007* (Data Protection Commissioner PRN. A8/0298 2007) at 67.

⁹⁸ See Jentzsch *Financial Privacy: An International Comparison of Credit Reporting Systems* (2nd ed. Springer 2007) at 142.

processed.⁹⁹ In addition, data subjects are provided with the right to object to the processing of data where there are compelling legitimate grounds for so doing.¹⁰⁰ Data subjects are also entitled to object to the processing of personal data for direct marketing purposes, and must be permitted to do so free of charge. The Directive also imposes obligations of confidentiality and security on data processors.¹⁰¹

4.75 Despite the harmonisation of data protection rules in the EU brought about by the Directive, the Expert Group on Credit Histories identified differences in how these legal requirements are met throughout the Member States.¹⁰² Differences exist in relation to the policing and enforcement of data protection rules, and the methods by which data subjects may seek redress for infringements of their rights. Data quality control mechanisms also vary in different countries, as do measures to overcome problems in identifying data subjects. For example, the problem of matching data to the wrong individual may be less pronounced in countries where unique identifiers such as identity cards or national social security numbers are readily used. Similarly, this problem may be more severe in countries where language variations of names exist.¹⁰³

4.76 Many of the variations and unique characteristics of national credit reporting systems arise from particular economic or social conditions in different countries, and it is important to recognise such differences when considering recommendations for reform.

(b) ***Public v Private systems***

4.77 The following table provides a brief description of the respective key features of public credit registers and private credit bureaus¹⁰⁴.

⁹⁹ Article 10 of *Directive 95/46/EC*.

¹⁰⁰ Article 14 of *Directive 95/46/EC*.

¹⁰¹ Articles 16 and 17 of *Directive 95/46/EC*.

¹⁰² *Report of the Expert Group on Credit Histories* (European Commission DG Internal Market and Services 2009) at 45.

¹⁰³ See e.g. *Report of the Expert Group on Credit Histories* (European Commission DG Internal Market and Services 2009) at 44.

¹⁰⁴ *Report of the Expert Group on Credit Histories* (European Commission DG Internal Market and Services 2009) at 11.

: Main features of Credit Bureaus and Public Credit Registers in the EU		
	Credit Bureau	Public Credit Register
Ownership structure	Private/commercial entity	Central Bank or Supervisory Authority
Clients structure	Mainly creditors but sometimes also other services providers	Financial institutions authorised to grant credit
Scope	Credit assessment and monitoring	<ul style="list-style-type: none"> ▪ Banking supervision, building statistics, financial stability studies ▪ Monitoring and preventing over-indebtedness ▪ Credit assessment ▪ Fostering credit institutions prudent management
Creditors' participation	Generally voluntary	Mandatory by law
Principle of reciprocity/Non discriminatory access	Yes	Yes
Type of data stored	<ul style="list-style-type: none"> ▪ Full credit data (positive and negative data) ▪ Often also non-credit data 	<ul style="list-style-type: none"> ▪ Credit data from financial institutions authorised to grant credit (including both positive and negative data in a majority of cases) ▪ Data on bankruptcy of natural and legal persons
Additional services provided to creditors	Mainly: <ul style="list-style-type: none"> ▪ Credit scoring based on the whole CB dataset ▪ Software applications ▪ Portfolio management services ▪ Fraud prevention systems ▪ Authentication products... 	None
Use of thresholds	Yes, but generally low	Yes
Degree of detail of the information provided ¹⁷	Detailed information on each individual loan. In some countries, credit information merged with other data (e.g. from public sources).	Information sometimes in a consolidated form (giving the total loan exposure of each borrower). In some PCRs, (Belgium, Italy, Portugal or Spain), the information is also given in a detailed form.
Coverage	Depends on the legislation, length of service provided, financial culture, etc.	Universal coverage

(i) Advantages of public credit registers

4.78 The credit reporting business is characterised by network externalities and economies of scale which mean that credit registers and bureaus could potentially be categorised as a natural monopoly.¹⁰⁵ This is because credit bureaus become more useful to creditors as the number of potential borrowers included increases. Similarly, the more creditors are included in a register, the more useful it becomes as creditors are more likely to be able to obtain a full picture of a potential borrower's entire indebtedness. The information public credit registers collect is more comprehensive and complete than that of private credit bureaus, because reporting is generally mandatory.¹⁰⁶ This centralisation of information also facilitates valuable supervisory functions such as the monitoring of individual over-indebtedness and systemic risk.¹⁰⁷ In this regard it should be noted that since 2008 the Irish Credit Bureau has been providing statistical data (without identifying individual data subjects) to the Irish Financial Services Regulatory Authority which the Authority uses in performing its supervisory role, which further illustrates the utility of such an information database to regulators.¹⁰⁸ As central banks and regulators in most

¹⁰⁵ Report of the Expert Group on Credit Histories (European Commission DG Internal Market and Services 2009) at 13.

¹⁰⁶ *Ibid* at 115.

¹⁰⁷ *Ibid* at 112.

¹⁰⁸ Mr. Séamus Ó Tighearnaigh, Irish Credit Bureau, speaking before the Joint Oireachtas Committee on Economic Regulatory Affairs, 11 November 2008. Available at: <http://debates.oireachtas.ie/DDebate.aspx?F=ERJ20081111.xml&Node=H2#H2>.

countries typically collect large amounts of data on the banking industry, there is institutionalised knowledge and expertise on dealing with such information in large volumes. The Bank of France argues that this expertise is a justification for the public reporting system in that country, as is the guarantee of objectivity and impartiality which a public system provides.¹⁰⁹

(ii) Disadvantages of public credit registers and advantages of private credit bureaus

4.79 Disadvantages also exist in relation to such public registers however.¹¹⁰ As with most monopolies, there is a risk that they will be more likely to be slow to innovate, potentially inefficient and more expensive as they are not subject to competition. Also, public registers do not provide the useful ancillary services such as credit scoring which are provided by private agencies. Private credit bureaus use a wider range of sources of information than public registers, and can merge information to produce either credit reports or credit scores which are more detailed than the information made available by public registers.¹¹¹ Other marketing services such as profitability scoring or customer identification are also provided by private agencies. Some credit bureaus even provide special services aimed at preventing over-indebtedness among potential borrowers, thus facilitating the furtherance of this public aim.¹¹² The costs of public credit registers are also large, while private credit bureaus are funded by the industry as part of a commercial profit-making model.

(iii) Previous debates on the idea of introducing a public credit register

4.80 In its 2003 report *An End Based on Means?*, the Free Legal Advice Centres argued that the possibility of the State facilitating the creation of an industry-facilitated credit register as a means of contributing to the prevention of over-indebtedness should be investigated.¹¹³ The report argued that access to comprehensive information on the current indebtedness of a potential borrower would enable lenders to come to more informed decisions when lending. FLAC was also keen to emphasise that a balance must be struck between avoiding irresponsible lending and restricting access to credit. The importance of safeguarding data subjects' right to privacy was also highlighted.

4.81 As noted above, Article 8 of the *EC Consumer Credit Directive 2008* provides for an obligation on lenders to conduct creditworthiness assessments in advance of extending credit. This article requires lenders to make these assessments on the basis of sufficient information, and to consult a relevant database where necessary. Article 9 of the Directive also requires each Member State to ensure cross-border access to databases in its country for lenders from other Member States. It should be noted that the original Proposal for a Directive had provided for the imposition of an obligation on each Member State to create a centralised credit database.¹¹⁴ The article also provided Member States with the option to go further than this by setting up central positive databases recording positive information relating to consumer credit agreements. The rationale for introducing this requirement was that such a national register, together with civil and trade sanctions for irresponsible lenders, could address the problem of over-indebtedness by preventing inappropriate lending decisions. This provision was abandoned before the final version of the Directive was adopted however. In its Second Report on the proposal for a Directive, the European Parliament rejected this idea, stating that the obligation to create separate central

¹⁰⁹ Jentzsch *op cit.* at 104.

¹¹⁰ *Ibid* at 110-111.

¹¹¹ Jentzsch *op cit.* at 115.

¹¹² See Department for Business, Enterprise and Regulatory Reform *Removing Barriers to the Sharing of Non-Consensual Data: Government Response to Consultation* (URN 08/591 2008) at 33.

¹¹³ Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 117.

¹¹⁴ Article 8, *Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers* (COM(2002) 443 final). See *Explanatory Memorandum* at 14-15. This provision stated that the proposed register should: hold negative, neutral and reliable data recording late payments; contain identification of consumers and guarantors; and cover at least the territory of the Member State in question with guaranteed access to all creditors

databases where there is already an existing credit reporting framework would be unjustified and would impose disproportionate costs, considering the small numbers of cross-border consumer credit applications.¹¹⁵ The Parliament felt that the original proposal ignored the existence of established, reliable and adequate public or private institutions for credit reporting in Member States. It was also noted that where more than one database operates in a Member State, consumers benefit from competition on price, quality and accuracy of data and innovation. The reasoning of the European Parliament in this regard was accepted by the European Commission and the Council, and the requirement for Member States to establish central national credit reporting databases was dropped.¹¹⁶

4.82 In 2009, the Expert Group on Credit Histories' report referred to above discussed whether a single pan-European credit register should be established to facilitate the cross-border access to credit data.¹¹⁷ The Group considered that this would not be a realistic option as it would require mandatory regulations and would have a heavy impact on creditors. This impact would be disproportionate to the current level of demand for cross-border credit data, as creditors would be obliged to change their procedures and IT systems at a cost of great time and expense. Concerns were also raised regarding the level of consumer data protection under such a system.

4.83 These previous policy debates concerning the optimum system of credit reporting should be considered as part of a holistic approach to addressing the problem of over-indebtedness. To contribute to this debate, the preceding paragraphs present some advantages and disadvantages of the various approaches to credit reporting systems.

(iv) Discussion

4.84 Commentators such as Jentzsch have concluded from the above that the true question is not one of either private or public reporting systems, but of how to design both.¹¹⁸ Public credit registers can be designed to perform different functions or cover different markets to private bureaus, thus allowing both public and private systems to operate concurrently. The author concludes that benefits are provided by both public and private systems, and that the establishment of a public register must not exclude private agencies from accessing the market.¹¹⁹

4.85 It can therefore be seen that there are advantages and disadvantages to both public and private systems of credit reporting. The main criticism of the reporting regime in Ireland, as dominated by the Irish Credit Bureau, is that it is not comprehensive. Many creditors, including many credit unions, all trade creditors and utility and telecommunications providers, are currently excluded from the ICB. This means that it is impossible for lenders to obtain a comprehensive view of a potential borrower's entire indebtedness. The argument for a public credit register, featuring a mandatory reporting regime, is that this situation would be remedied as all credit agreements would necessarily be reported.

4.86 There are difficulties with this argument in favour of the establishment of a public credit register however. While all loans granted by financial institutions would be covered by such a regime, thus including all credit unions in the register, information provided by trade creditors and utility and telecommunications companies may not be capable of being included.

¹¹⁵ European Parliament *Second Report on the Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers* (COM(2002) 0443 – C5-0420/2002-2002/0222(COD)), Amendment 47.

¹¹⁶ See *Communication from the Commission to the European Parliament in accordance with the second paragraph of Article 251(2) of the EC Treaty on the common position adopted by the Council with a view to the adoption of a Directive of the European Parliament and of the Council on credit agreements for consumers* (COM(2007) 546 final) at 5-6.

¹¹⁷ *Report of the Expert Group on Credit Histories* (European Commission DG Internal Market and Services 2009) at 25.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid* at 111.

(c) **Comprehensive credit reporting: the sharing of credit data with non-institutional creditors**

(i) **The Arguments in Favour of Comprehensive Credit Reporting**

4.87 Having considered the above discussion, another more limited method of reforming the current system of credit reporting in Ireland would be to permit the sharing of data between creditors other than the current members of the Irish Credit Bureau. This would permit the sharing of data relating to utility and telecommunications services with institutional lenders such as banks and credit unions. Lenders have expressed the view that since debtors usually have multiple debts involving more than just loans from financial institutions, information relating to utility bills and similar debts would be very useful in facilitating more accurate creditworthiness assessments.

4.88 In assessing this argument, the economic studies conducted on the value of comprehensive credit reporting should be considered. Research comparing credit markets in countries where credit reporting includes both bank and non-bank lending with those in countries where such reporting is limited to the commercial banks demonstrates that loan default rates increase by up to 61%¹²⁰ in the latter country when compared to a complete data sharing model.¹²¹ The loan approval rate was also almost 10% lower in the incomplete data sharing model, leading to the exclusion of many potential borrowers.¹²² Critics of comprehensive credit reporting have however noted that this study found that comprehensive credit reporting could result in *either* greater availability of credit with the current rate of default *or* a lower rate of default with a lower availability of credit, but not both.¹²³ This led these critics to argue that comprehensive credit reporting may lead solely to more lending rather than decreased default, and so would be limited in preventing over-indebtedness. The conclusions of this research would therefore appear to be inconclusive.

(ii) **Arguments Against Comprehensive Credit Reporting**

4.89 Objections exist to the introduction of more comprehensive data sharing. There would be a risk that a poor credit rating could deprive an individual of access to telecommunications services. In today's society such services are often essential for work purposes, and if credit data sharing restricted access to such services it would run contrary to the traditional protection of the debtor's tools of trade.¹²⁴ Also, a poor credit rating should not be capable of restricting access to essential utilities which are necessary to maintain a reasonable standard of living for debtors and their families.

4.90 Legal obstacles also exist to the more comprehensive sharing of credit information. The office of the Data Protection Commissioner has expressed the view that the sharing of credit data must be confined to the financial sector.¹²⁵ The Commissioner expressly identified the sharing of Irish Credit Bureau data with utility companies as being "incompatible with the purpose" for which data is stored in the ICB database, and so contravening section 2(1)(c)(ii) of the *Data Protection Act 1988*. The fact that a utility company may issue bills on a 30-day arrears basis would not provide a sufficient basis for allowing it to access the ICB database to check the credit history of a customer. Only if the utility company entered the business of providing financial credit could it access the database, and access in such circumstances would be limited to the purpose of assessing creditworthiness for the granting of such

¹²⁰ These results are based on a model where the target default rate is set at 3%.

¹²¹ Barron and Staten *The Value of Comprehensive Credit Reports: Lessons from the US Experience* (Credit Research Centre, Georgetown University 2000) at 23.

¹²² *Ibid.*

¹²³ Australian Law Reform Commission *Review of Privacy – Credit Reporting Provisions* (Issues Paper 32, 2006) at 122, citing the views of the Consumers' Federation of Australia.

¹²⁴ See e.g. section 7 of the *Enforcement of Court Orders Act 1926* and section 45(1) of the *Bankruptcy Act 1988*, both of which protect the tools or equipment of a debtor's trade and occupation in the case of execution against the debtor's goods or the liquidation of a debtor's assets as part of bankruptcy proceedings.

¹²⁵ Data Protection Commissioner *Twelfth Annual Report of the Data Protection Commissioner 2000* (PN. 10430, 2001) at 38.

credit, rather than for the purpose of providing utility services. Therefore it appears that current data protection rules would not permit the sharing of information by non-financial credit providers, and the introduction of a comprehensive credit reporting system would necessitate the amendment of the *Data Protection Acts 1988-2003*.

(d) ***The Problem of Data Sharing without Consent***

4.91 Further difficulties also arise when the reform of the current credit reporting system is considered. Any reforms, either through the introduction of a public credit register or the sharing of information with non-ICB members, would necessitate some sharing of data without the data subject's consent. This is because while most lenders now obtain a borrower's consent to share data on entering a credit agreement, problems may arise with agreements entered into in the past where consent was not given. Since the consent of the customers of ICB members was only obtained for the purpose of sharing data among other ICB members, any modifications to credit reporting practices may involve the use of data in circumstances to which the data subject has not consented. Similarly, under current loan agreements involving credit unions which are not currently members of the ICB, but which would be required to provide data to a national credit register, the consent of the borrower will not have been obtained for such data sharing.

4.92 When considering this lack of consent, it is necessary to discuss not only data protection legislation, but also the duty of confidentiality owed by a bank to its customers. The case of *Tournier v National Provincial and Union Bank of England*¹²⁶ established that a duty of confidentiality is owed by a banker to a client as an implied term of the contract between these parties.¹²⁷ This duty therefore prohibits banks from sharing information without the consent of the lender. A solution to this problem could be for lenders to write to existing customers requesting their retrospective consent to the extended sharing of information relating to their accounts. This would however be an expensive and time-consuming exercise and its efficacy would largely depend on reply rates among consumers. For example, it has been reported that one lender in the UK sent such requests to almost one million customers and received responses from just 3% of these, despite offering a donation to charity for each response received.¹²⁸

4.93 It should be noted that this duty of confidentiality is not absolute however, and may be subject to restrictions. The Irish Supreme Court in *National Irish Bank v Radio Telefís Éireann*¹²⁹ regarded the duty of confidence as a duty arising from the needs of the public interest rather than an implied contractual duty. As such the duty is subject to other public interests, and has been qualified by statute. For example legislation providing for the enforcement of revenue debts permits the exchange of otherwise confidential information concerning a client's account between a bank and the Revenue Commissioners.¹³⁰ It is arguable that the prevention of over-indebtedness through comprehensive credit assessments and responsible lending is a public interest which could justify placing restrictions on this duty. Nonetheless it is important that the principles represented by data protection rules and the duty of confidentiality are adequately recognised and respected. Any legislation allowing for the sharing of data

¹²⁶ [1924] 1 KB 461

¹²⁷ See generally Breslin *Banking Law* (2nd ed. Thomson Round Hall 2007) at 175ff. While it is unclear as to the exact contents of this duty, it would appear to encompass at least confidentiality as to: "... the state of the account, that is, whether there is a debit or a credit balance, and the amount of the balance. It must extend at least to all the transactions that go through the account, and to the securities, if any, given in respect of the account..."

¹²⁸ See Department for Business, Enterprise and Regulatory Reform *Removing Barriers to the Sharing of Non-Consensual Data: Government Response to Consultation* (URN 08/591 2008) at 12.

¹²⁹ [1998] 2 IR 465.

¹³⁰ See s73 of the *Finance Act 1988*. See also Breslin "Revenue Power to Attach Debts under Section 73 Finance Act, 1988: Implications for Credit Institutions" (1995) 2(7) *CLP* 167. This legislation was upheld when its constitutionality was challenged, albeit the challenge was not based on the constitutional right to privacy as protected in the banker/client duty of confidentiality: *Orange v Revenue Commissioners* [1995] 1 IR 517. See paragraph 2.38 above.

without consent would therefore be obliged to avoid disproportionately interfering with the privacy rights of data subjects. Surveys have shown individuals to value privacy in relation to financial information highly.¹³¹ Concerns have also been raised that a potential greater sharing of data could be used for purposes of aggressive marketing and predatory lending.¹³² Data protection rules would have to be applied strongly to prevent this misuse of credit data.

4.94 It should be noted in this regard that a consultation was undertaken by the Department of Business Industry and Skills¹³³ in the UK as to the possibility of introducing legislation to permit the sharing of data without consent.¹³⁴ This consultation concluded that a working group should be established to conduct a further examination of the issue, and the report of this working group is due to be published in the near future.

(e) **Conclusions**

4.95 The preceding paragraphs have presented arguments for and against the reform of credit reporting systems in Ireland as a means of facilitating responsible lending and so preventing over-indebtedness. The Commission recognises that this is a complex subject which raises issues of financial and economic policy in addition to legal questions. The introduction of a national credit register would most likely require the nationalisation of the Irish Credit Bureau, which is the primary credit database in Ireland. Alternatively, a tendering process could take place for the licensing of a private credit bureau to act as a mandatory and comprehensive credit register. If the option of establishing a national credit register is not adopted, other methods of improving credit reporting exist. First, it has been noted above that the Irish Credit Bureau does not currently store information in relation to utility or telecommunication service provider accounts, as this is not permitted by the *Data Protection Acts 1988-2003*, as interpreted by the office of the Data Protection Commissioner.¹³⁵ A possible option for reform would be to enact legislation permitting the sharing of this data for the limited purpose of facilitating creditworthiness assessments, in order to advance the public aim of preventing over-indebtedness. The question of whether such a measure would be proportionate to the interference with data subjects' rights must be considered, having regard to the duty of banking confidentiality. In this regard the benefits of allowing such data sharing must be considered. As credit reporting would remain voluntary despite this proposed measure, it would fail to achieve comprehensive credit reporting and so the benefits of the measure may be reduced in this regard.

4.96 The Commission therefore highlights the question of whether reforms should be made to the credit reporting system in Ireland as an issue which should be considered as part of a review of financial services legislation.

4.97 *The Commission suggests that the issue of introducing a more comprehensive system of credit reporting in Ireland should be considered as part of a review of financial services legislation.**

(4) Regulatory Enforcement of Responsible Lending Rules

4.98 It will be recalled that while Article 8 of the maximum-harmonisation *Consumer Credit Directive* introduces an obligation for lenders to make creditworthiness assessments in advance of lending, Recital 26 of the Directive provides that:

“... the Member States should carry out the necessary supervision to avoid [irresponsible lending] and should determine the necessary means to sanction creditors in the event of their

¹³¹ See e.g. Data Protection Commissioner *Ninth Annual Report of the Data Protection Commissioner 1997* (PN 6398, 1998).

¹³² *Credit Card Charges and Marketing* (House of Commons Treasury Committee Second Report of Session 2004-5, January 2005) at 24.

¹³³ Then the Department for Business, Enterprise and Regulatory Reform.

¹³⁴ See Department for Business, Enterprise and Regulatory Reform *Removing Barriers to the Sharing of Non-Consensual Data: Government Response to Consultation* (URN 08/591 2008).

¹³⁵ See paragraph 4.86 above.

doing so... The Member States' authorities could also give appropriate instructions and guidelines to creditors.”

The next paragraphs therefore identify certain issues which should be considered as part of Ireland's duty to carry out the necessary supervision to avoid irresponsible lending practices and to impose the necessary sanctions to address such practices. These sub-sections therefore examine how irresponsible lending is supervised and sanctioned in other countries, in order to identify possible approaches to this issue which could be considered by the financial services legislation review group.

4.99 A direct way of addressing irresponsible lending is by giving financial regulators powers to supervise lending practices and punish irresponsible lending as part of the supervision of financial institutions. This sub-section discusses two examples of such regulatory approaches. First it examines the 2006 amendments to consumer credit legislation in the United Kingdom which enable the Office of Fair Trading to refuse to grant a licence to, or to revoke a licence from, lenders who act irresponsibly. Secondly, legislation in Belgium which imposes a tax on lenders based on the proportion of their consumer loan books which are in default is considered.

(a) ***The Consumer Credit Licensing Regime in the UK***

4.100 Recognising that credit is a product which can be particularly confusing for consumers and that the consumer credit industry historically has had a bad reputation with regard to its enforcement practices, a licensing regime for consumer credit agencies was introduced in the UK in 1974.¹³⁶ This licensing system aimed to restrict access to the industry to those satisfying requirements of good character and probity as well as providing the Office of Fair Trading (OFT) with an enforcement mechanism to ensure that licensed lenders comply with their regulatory obligations.¹³⁷ Therefore the *Consumer Credit Act 1974* introduced a requirement to obtain licences to carry out a consumer credit, consumer hire or ancillary credit business.¹³⁸ A much wider range of consumer credit businesses are subject to licensing than is the case in Ireland, a topic which will be discussed in more detail below. When applying for a licence, the onus is on the applicant to satisfy the Director-General of Fair Trading that he or she is a fit person to engage in the activities covered by the licence.¹³⁹ The 1974 Act allows the Director-General of Fair Trading to take into account a wide range of factors when assessing fitness to hold a licence, in particular the following factors:

- the applicant's skills, knowledge and experience;
- the practices and procedures which the applicant proposes to implement; and

any evidence that the applicant or his/her/its agent has:

- committed any offence involving fraud, dishonesty or violence;
- contravened regulatory legislation;
- practised discrimination; or
- engaged in business practices appearing to the Office of Fair Trading to be deceitful or oppressive or otherwise unfair or improper (whether unlawful or not).

4.101 This last factor of carrying out deceitful, oppressive or otherwise unfair or improper business practices was inserted by the *Consumer Credit Act 2006*, and it is in relation to this factor that an

¹³⁶ See Howells and Weatherill *Consumer Protection Law (Markets and the Law)* (2nd Avebury Technical 2005) at 438.

¹³⁷ *Ibid.*

¹³⁸ See sections 21 and 147, *Consumer Credit Act 1974* (UK). The types of activities covered by the licensing regime are consumer credit, consumer hire, credit-brokerage, debt-adjusting, debt-counselling, debt-collection, debt administration, credit information services (including credit repair) and credit referencing: Section 24A(4) of the 1974 Act (as amended).

¹³⁹ Section 25 (1AA)(b) of the *Consumer Credit Act 1974* (UK), as amended by section 29 *Consumer Credit Act 2006* (UK).

assessment of whether a lender has engaged in irresponsible lending is considered. A new section (s25(2B)) was therefore inserted in the 1974 Act which states that:

“...the business practices which the OFT may consider to be deceitful or oppressive or otherwise unfair or improper include practices in the carrying on of a consumer credit business that appear to the OFT to involve irresponsible lending.”¹⁴⁰

Therefore this legislation has introduced a requirement of responsible lending as a necessary precondition to obtaining and retaining a consumer credit licence. In 2009, the OFT published draft guidance for lenders on the content of this duty to lend responsibly.¹⁴¹ This guidance indicated that the duty is an extensive one, encompassing the following elements:

- general principles of responsible lending including an obligation to consider fully the suitability of a product to a borrower’s needs and the borrower’s ability to meet repayments in a sustainable manner;
- a duty to explain credit products;
- a duty to assess the affordability of a credit product for a particular consumer;
- rules for responsible arrears management;
- duties of honesty and transparency in promoting, advertising or offering credit products;
- and similar duties of honesty and transparency in the post-contractual context, as well as a duty to closely monitor a borrower’s repayment record.

Lenders are similarly required to actively encourage borrowers to seek independent advice, and must regularly monitor credit agreements so as to notify borrowers who are in financial difficulty.¹⁴² Lenders must also take responsibility for any acts or omission of intermediaries or agents such as brokers or debt recovery businesses.¹⁴³ All communications between lender and borrower must be clear, accurate and balanced, written in plain language and not misleading. Warnings as to risks must be given equal prominence to any benefits or incentives.¹⁴⁴ The lender must act proportionately in all dealings with borrowers, particularly when taking enforcement action, in which all alternative options must be considered.¹⁴⁵ Lenders also must not target specific vulnerable groups of borrowers with credit products that are likely to be inappropriate for members of such groups.

4.102 It can be seen from the above that the duty to lend responsibly imposed on those seeking to obtain and retain consumer credit licences is quite onerous. The powers to enforce this duty provided to the Office of Fair Trading are also extensive and include the power to refuse to grant a licence, to grant a licence subject to conditions, or to revoke, suspend or refuse to renew an existing licence.¹⁴⁶ In addition, the OFT may impose requirements on licensees where it is dissatisfied with any matter in connection with a business being carried on by a licensee.¹⁴⁷ The OFT has also been given powers to impose civil penalties of up to £50000 on businesses failing to comply with the regulatory requirements.¹⁴⁸

¹⁴⁰ Section 25(2B) *Consumer Credit Act 1974* (UK), as inserted by section 29 *Consumer Credit Act 2006* (UK).

¹⁴¹ Office of Fair Trading *Irresponsible Lending – OFT guidance for creditors: An OFT consultation* (OFT1107con 2009).

¹⁴² Office of Fair Trading *Irresponsible Lending – OFT guidance for creditors: An OFT consultation* (OFT1107con 2009) at 7.

¹⁴³ *Ibid* at 8.

¹⁴⁴ *Irresponsible Lending – OFT guidance for creditors op cit.* at 9.

¹⁴⁵ *Ibid* at 10.

¹⁴⁶ Sections 29-22 of the *Consumer Credit Act 1974* as amended.

¹⁴⁷ Section 33A of the 1974 Act.

¹⁴⁸ Section 29A of the *Consumer Credit Act 1974* (UK), as inserted by sections 52, 72(1) of the *Consumer Credit Act 2006* (UK).

4.103 The threat of the refusal or withdrawal of a credit licence has been described as the most important weapon in the OFT's armoury, and the above provisions therefore provide strong powers to ensure that responsible lending practices are observed.¹⁴⁹ The Commission therefore believes that the possibility of introducing a similar requirement to act responsibly in order to obtain a credit licence in Ireland should be strongly considered.

4.104 The Irish licensing regime for lenders is contained in various pieces of legislation. Those carrying on a "banking business"¹⁵⁰ and accepting deposits from the public must be licensed under section 7 of the *Central Bank Act 1971*.¹⁵¹ Those carrying on a "regulated business" of either a bureau de change, money transmission service, home reversion firm or retail credit firm are obliged to obtain authorisation by section 29 of the *Central Bank Act 1997*, as amended by the *Central Bank and Financial Services Authority of Ireland Act 2004* and the *Markets in Financial Instruments and Miscellaneous Provisions Act 2007*. A retail credit firm is a body prescribed as a "credit institution" under section 2 of the *Consumer Credit Act 1995*, or someone who carries on business which consists solely or partly of providing credit directly to natural persons within the State. As part of the licensing process, a "fit and proper" assessment is conducted by IFSRA.¹⁵² This test however differs from the UK test discussed above, as it applies to individuals within regulated institutions – particularly Directors and Managers – rather than to the institution as a whole. The test in this way does not assess the business practices of a lender as a whole. In this way responsible lending practices cannot be assessed and enforced as part of the lender licensing regime in Ireland.

4.105 The Consumer Directorate of IFSRA however possesses other methods of monitoring lending practices. As noted above, the Irish Financial Services Regulatory Authority (IFSRA) currently seeks to ensure responsible lending practices are observed through the provisions of the *Consumer Protection Code*.¹⁵³ IFSRA has the power to issue administrative sanctions in the case of violations of the Code.¹⁵⁴ These sanctions can be quite severe, with infringing banks liable to pay sums up to €5 million. Compliance with this Code may be monitored in a number of ways, including themed inspections and "mystery shopping" assessments.¹⁵⁵ IFSRA also follows a practice of issuing reminders to lenders of their obligations under the Code if certain practices cause concern for IFSRA but no breaches of the Code have yet occurred.¹⁵⁶

4.106 In addition to the creditworthiness assessments requirements and prohibitions on certain irresponsible practices described above, the responsible nature of bank charges is monitored by provisions of the *Consumer Credit Act 1995* which require IFSRA to be informed of any proposals by lenders to introduce new or increased charges for certain financial services.¹⁵⁷ IFSRA can decide to waive or reduce this fee or charge, and one of the criteria which it considers in so doing is the impact that the charge may have on customers. In this way irresponsible pricing structures which may contribute to the over-indebtedness of customers can be prevented.

¹⁴⁹ Howells and Weatherill *Consumer Protection Law (Markets and the Law)* (2nd Avebury Technical 2005) at 439.

¹⁵⁰ Section 2 of the *Central Bank Act 1971*, as amended by section 70(c) of the *Central Bank Act 1997* and item 1 of Pt. 6 of Sch. 1 to the *Central Bank and Financial Services Authority of Ireland Act 2004* provides that "banking business" consists of or includes: the receipt of money from members of the public either on deposit or as repayable funds; any other business normally carried on by a bank; and any other business of a kind prescribed by the Minister for Finance.

¹⁵¹ See e.g. Breslin *Banking Law* (2nd ed. Thomson Round Hall 2007) at 18ff.

¹⁵² See Financial Regulator *Fit and Proper Requirements* (IFSRA Instructions Paper 2008).

¹⁵³ See paragraph 3.73 above.

¹⁵⁴ See paragraph 3.22 above.

¹⁵⁵ See Financial Regulator *Annual Report of the Financial Regulator 2008* (2009) at 65-68.

¹⁵⁶ See the Financial Regulator's *Annual Report 2008* for examples of this practice: *ibid* at 62.

¹⁵⁷ See section 149 of the *Consumer Credit Act 1995*.

4.107 Similarly, article 23 of the 2008 *Consumer Credit Directive* provides that Member States shall lay down the rules on penalties applicable to infringements of the rules contained in the Directive. The penalties introduced as part of the implementation of the Directive will therefore provide a further means of sanctioning irresponsible lending practices.

4.108 Therefore it can be seen that Irish law possesses various means of monitoring lending practices of regulated entities and of sanctioning irresponsible conduct. The question then arises as to whether an approach similar to the UK licensing test for responsible lending should be introduced in Ireland. This would involve a general consideration of whether a lender's business practices, both individually and as a whole, meet the requisite standards of responsible lending. If this standard is not met, a licence could be refused or revoked. IFSRA could publish guidance as to the detailed elements of the responsible lending test. It may be the case that IFSRA currently holds sufficient powers to address irresponsible lending, and that changes to the licensing regime may not be needed. Alternatively, as the Commission discusses proposed changes to the consumer credit licensing regime to include debt collection agencies and debt management companies, it may be desirable to include a responsible lending test as part of wider reforms of the consumer credit licensing system.

4.109 The Commission recognises that the question of whether the lending practices of creditors should be considered under the licensing system for lenders is an issue which lies outside the scope of this Consultation Paper. The Commission therefore makes no provisional recommendation on this issue, but rather suggests that consideration should be given to whether such an approach is necessary and desirable as part of a review of financial services legislation.

4.110 *The Commission suggests that the issue of whether a "responsible lending" test should be introduced as part of the licensing process for credit institutions should be considered as part of a review of financial services legislation.**

(b) The Belgian Levy on Distressed Debt

4.111 Belgian consumer credit and insolvency legislation is very conscious of the role which responsible lending practices play in preventing over-indebtedness. This can be seen in the discussion of the Belgian comprehensive credit reporting regime above and in the fact that lenders are obliged by law to consult the national credit register before offering credit. Any credit agreement created without doing this is rendered unenforceable. In addition, Belgian law has targeted irresponsible lending in a direct manner by levying a form of tax on consumer lenders whose lending practices result in large levels of default amongst their customers.

4.112 Under a 2002 law, consumer lenders make contributions to a fund that are assessed on the basis of the proportion of each lender's consumer lending portfolio which is in default each year.¹⁵⁸ When Belgian legislators began to address the growing consumer debt problem through the introduction of debt counselling and mediation services, they proposed that the costs of these services should be partially paid by contributions from the consumer credit industry. Therefore a "Fund for the Treatment of Over-indebtedness" was established to pay for the fees of mediators in cases of debt settlement where the debtor has insufficient assets to meet these fees. Belgian legislators thought that the making of contributions to this fund should be considered to be a "cost of doing business" for consumer lenders, and originally it was provided that all consumer lenders would pay into the fund, with a tax being imposed on each consumer credit transaction.¹⁵⁹ Before legislation establishing the over-indebtedness fund was enacted, the Belgian government decided that a fairer means of funding debt relief services and a more effective way of preventing irresponsible lending would be to provide that the burden of contributing to the fund should lie with those lenders who are more responsible for the problem of over-indebtedness. Therefore it was decided that the levy should be assessed only on the portion of a consumer lending portfolio that is *in default* at the end of each year. In this way the law aims to increase responsibility

¹⁵⁸ Loi de 19 avril 2002, art. 2, MB 7 juin 2002, p. 26229. See Kilborn, "Continuity, Change, and Innovation in Emerging Consumer Bankruptcy Systems: Belgium and Luxembourg." *American Bankruptcy Institute Law Review*, Vol. 14, 69, (2006).

¹⁵⁹ Similar smaller funds operated in three Belgian regions into which contributions are made by utility companies, and these funds are used to reduce the costs of utilities for low-income consumers.

among overly aggressive or lax lenders by diverting part of the costs of debt relief to them. Also, structuring the levy in this manner seeks to reward and encourage responsible lending by providing a financial incentive to lenders to conduct more careful creditworthiness assessments in advance of lending, and by preventing responsible lenders from unfair competition. Secondary legislation has set the rate of this tax at 0.02% of all defaulted mortgage loans and 0.2% for defaulted consumer loans.¹⁶⁰ Further secondary legislation was passed in 2004 to allow 25% of the fund to be used to fund a public awareness campaign about the new consumer debt relief law, in order to make consumers aware of the debt settlement procedures introduced under that law. The information campaign is also designed to prevent over-indebtedness through the provision of information and education about responsible borrowing and money management practices.

4.113 Before consideration may be given to introducing a similar levy on irresponsible lenders in Ireland, further research into how the Belgian system has operated in practice would be necessary. For now it should be noted that these reforms have been supported in the academic literature on this subject. The first advantage of a tax such as this is that it recognises the external costs created by irresponsible lending practices.¹⁶¹ It has been noted that irresponsible lending practices were in recent years allowing some lenders to aggressively expand their market shares and increase profits, while leading to increased over-indebtedness, which results in significant costs for debtors and for the State.¹⁶² The levy on lenders with high rates of defaults therefore seeks to force these costs to be partially borne by irresponsible lenders. Secondly, the Belgian law has the advantage of adopting a preventative rather than a reactive approach to over-indebtedness.¹⁶³ When a new debt settlement law was introduced in Belgium, it was recognised that this was not sufficient to address the over-indebtedness problem and that the prevention of over-indebtedness is more desirable than merely remedying individual cases through debt settlement. Thirdly, the tax only targets the net effects of lending policies, and applies to defaulting loans without examining the causes of default. Therefore difficult and complicated inquiries into whether or not the lender has acted responsibly in particular cases are avoided. This approach thus recognises that lenders are in a better position than borrowers to prevent default through responsible lending practices, and so should bear losses when default occurs. Finally, the tax is a more targeted method of addressing irresponsible lending than previous legislation which has often only focused on whether the interest rate charged is excessive.¹⁶⁴ As very high rate loans may be justified in certain circumstances and may be repaid without excessive difficulty, the law should target only those loans which lead to default.¹⁶⁵

4.114 Disadvantages of this approach have been identified also however. First, the cost of the levy will be added to the cost of credit by lenders, and so it will ultimately be consumer borrowers, rather than the lenders themselves, who will pay the levy.¹⁶⁶ The consequential increased cost of credit and the restrictions on access to credit it may produce therefore raise very complicated issues of social and economic policy. Secondly, this effect may be particularly felt by low-income borrowers, who may carry the highest risk and so may be charged higher interest rates than lower-risk, high income borrowers. Ultimately all measures which seek to prevent irresponsible lending must necessarily involve some restrictions on access to credit, and alternative “safe” forms of credit may be necessary to prevent

¹⁶⁰ See Royal Order of 9 Aug. 2002, article 2, M.B. 6 Sept. 2002 at 39443.

¹⁶¹ Harris and Albin “Bankruptcy Policy in Light of Manipulation in Credit Advertising” (2006) 7 *Theoretical Inquiries in Law* 431 at 459.

¹⁶² See e.g. Mann “Optimizing Consumer Credit Markets and Bankruptcy Policy” [2006] *Theoretical Inquiries in Law* 395 at 423.

¹⁶³ Harris and Albin “Bankruptcy Policy in Light of Manipulation in Credit Advertising” (2006) 7 *Theoretical Inquiries in Law* 431 at 459.

¹⁶⁴ See for example sections 47 and 48 of the *Consumer Credit Act 1995*, which allow a court to re-open a credit agreement where the level of interest charged is excessive.

¹⁶⁵ See Mann *op cit.* at 419.

¹⁶⁶ Harris and Albin “Bankruptcy Policy in Light of Manipulation in Credit Advertising” (2006) 7 *Theoretical Inquiries in Law* 431 at 459.

financial exclusion. Finally, the point has been made that the level at which such a levy should be set will also be a difficult question, as it would involve considerations of what level of default is acceptable, which is a difficult economic and social issue.¹⁶⁷

4.115 The Commission recognises that the introduction of a tax on defaulting consumer loans of the type discussed would raise complex issues of social, economic and fiscal policy. The Commission therefore makes no provisional recommendation in relation to this issue, but instead merely raises the issue of the desirability of introducing such a measure as an issue which could be considered as part of a review of financial services legislation.

4.116 *The Commission suggests that, as part of a review of financial services legislation, consideration should be given to the question of whether it would be desirable to introduce a levy on consumer lenders, calculated on the basis of the proportion of their defaulting consumer loans, as a means of preventing irresponsible lending practices. Such a fund could be used to contribute to the cost of debt counselling services, financial education programmes and the introduction of a statutory debt settlement system.**

(5) Private Law Remedies against Irresponsible Lending

4.117 Another method of addressing irresponsible lending practices is through the private law of contract. Consumer credit law has traditionally allowed unconscionable or extortionate credit agreements to be re-opened by the courts or to be rendered unenforceable. An example of this approach to debtor protection can be seen in sections 47 and 48 of the *Consumer Credit Act 1995*.¹⁶⁸ In more recent years various countries have introduced legislation extending the grounds on which a contract may be set aside to include situations where lenders have lent irresponsibly, and this sub-section discusses the possibility of introducing similar measures in Ireland. A brief comparative analysis of contractual remedies in cases of irresponsible lending is now presented.

(a) Comparative analysis

4.118 This sub-section discusses the private law contractual remedies in the UK, Australia and South Africa that are available to consumer borrowers in cases of unfair credit agreements. It can be seen from the discussion that recent reforms in these countries have introduced a consideration of a wide range of factors into the assessment of the fairness of a credit agreement, and that irresponsible lending is now one of the grounds on which an unfair agreement may be re-opened by the courts.

(i) The United Kingdom: the Consumer Credit Act 2006 and the “Unfair Relationship” Test.

4.119 Consumer credit law in the UK provided consumers with a contract law remedy allowing a credit agreement to be re-opened if it was found to contain payment terms that were “grossly exorbitant” or where the agreement “otherwise grossly contravenes ordinary principles of fair dealing.”¹⁶⁹ In deciding whether such a credit bargain was extortionate, courts were to have regard to all relevant considerations, including evidence concerning the interest rates prevailing at the time it was made.¹⁷⁰ The court was given wide powers to re-open the agreement where it was found to be extortionate, including the power to set aside the whole or part of any obligation imposed on the debtor, and to require the creditor to repay

¹⁶⁷ Ramsay “From Truth in Lending to Responsible Lending” in Howells et al (eds.) *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (Aldershot, 2005) 47 at 61.

¹⁶⁸ See the discussion of these provisions at paragraph 3.98 above. Another example of such measures can be seen in sections 137-140 of the *Consumer Credit Act 1974* (UK) before its amendment by the *Consumer Credit Act 2006*.

¹⁶⁹ See section 138(1) of the *Consumer Credit Act 1974* (UK) (repealed by the 2006 Act).

¹⁷⁰ Section 138(2)-(5) of the 1974 Act (repealed by the 2006 Act). Other factors to be taken into account included the debtor’s age, health, experience, business capacity and any financial pressures to which the debtor was subject; the degree of risk accepted by the lender and the lender’s relationship with the debtor.

the whole or part of any sum paid under the credit bargain.¹⁷¹ The terms of the agreement could also be altered by the court.

4.120 The success of this provision in providing protection to consumer debtors was however questioned, in particular by a government White Paper reviewing consumer credit law.¹⁷² Few claims were successfully brought by consumers, and a chief criticism was that the courts had adopted a restrictive approach to applying the provision, by emphasising too much the interest rate imposed by the creditor, rather than examining other terms which may have been unfair.¹⁷³ Also, the requirement that a credit agreement must be found to be “extortionate” before a court could intervene set a high threshold which was successfully reached in very few cases.¹⁷⁴ The White Paper took the view that when assessing fairness, particularly in agreements involving vulnerable consumers, both the terms of credit agreements and factors external to the agreement, such as marketing, transparency and debt recovery practices should be addressed.¹⁷⁵ While it concluded that the new licensing regime described above would partially remedy these problems, it was thought necessary to also amend the extortionate credit bargain test to take into account wider circumstances surrounding credit agreements.

4.121 Therefore the *Consumer Credit Act 2006* replaced the extortionate credit bargain test with new “unfair relationships” provisions.¹⁷⁶ This new test provides that:

“[t]he court may make an order... if it determines that the relationship between the creditor and the debtor arising out of the agreement... is unfair to the debtor because of one or more of the following:

- Any of the terms of the agreement...
- The way in which the creditor has exercised or enforced any of his rights under the agreement...
- Any other thing done (or not done) by, or on behalf of, the creditor (Either before or after the making of the agreement...)”¹⁷⁷

The court is given wide powers under the new provisions, and may require the creditor to repay any sum paid by the debtor; to do or not to do any specified actions; or to return to a surety any property provided by way of security. The court may also reduce or discharge any sum payable by the debtor, otherwise set aside any duty owed by the debtor, or alter the terms of the agreement.¹⁷⁸

4.122 In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant, including the individual circumstances of the creditor and debtor.¹⁷⁹ The Office of Fair Trading has emphasised that the provisions are designed to address individual unfair relationships, and that the court must determine in each case whether the particular credit relationship is

¹⁷¹ Section 139(2) of the *Consumer Credit Act 1974* (UK) (repealed by the 2006 Act).

¹⁷² *Fair, Clear and Competitive: The Consumer Credit Market in the 21st Century* (DTI White Paper December 2003).

¹⁷³ *Ibid* at paragraph 3.31. This emphasis was most likely due to the specific mention of interest rates in the legislation as a factor to be taken into account by courts, which in turn resulted from the view of legislators of this provision as a replacement for the usury laws which had previously capped interest rates: See Brown “The Consumer Credit Act 2006: Real Additional Mortgagor Protection?” [2007] 71 *The Conveyancer and Property Lawyer* 316 at 326.

¹⁷⁴ See Lomnicka “Consumer Credit Bill” *The Yearbook of Consumer Law 2007* (Ashgate Publishing 2007) 395 at 396.

¹⁷⁵ Brown *op cit.* at 328.

¹⁷⁶ Section 19 of the *Consumer Credit Act 2006* (UK) inserted a new section 140A into the 1974 Act.

¹⁷⁷ Section 140A(1) of the *Consumer Credit Act 1974* (UK).

¹⁷⁸ Section 140B of the *Consumer Credit Act 1974* (UK).

¹⁷⁹ Section 140A(2) of the 1974 Act.

unfair.¹⁸⁰ This design leaves courts with maximum flexibility to consider the fairness of an individual credit relationship.¹⁸¹ The Office of Fair Trading has issued guidance on the application of the “unfair relationships” test in the context of its enforcement powers.¹⁸² This guidance divides the factors which may give rise to an unfair relationship into two categories of unfair contract terms and unfair business practices, while indicating that a combination of both could also lead to an unfair relationship.¹⁸³ In relation to business practices which may lead to an unfair relationship, the OFT creates two categories of unlawful and lawful business practices.¹⁸⁴ Unlawful practices include breaches of the relevant consumer credit legislation and the *EC Unfair Commercial Practices Directive*.¹⁸⁵ As regards lawful practices which may nonetheless lead to an unfair relationship, the OFT refers to its new licensing requirements, which identify irresponsible lending as an example of an unfair or improper business practice.¹⁸⁶ The unfair relationship provision will therefore target irresponsible lending practices and so supplement the licensing approach to irresponsible lending described above.¹⁸⁷ Similar considerations will apply to determining whether lending has been irresponsible for the purposes of the unfair relationship test as for the purposes of the licensing test.¹⁸⁸

4.123 It can therefore be seen that UK consumer credit law has shifted from a position whereby consumers could be provided with relief from the enforcement of an extortionate credit agreement to one whereby consumers can obtain relief where a credit relationship is generally unfair, having regard to a wide range of factors. Whether the creditor has acted responsibly in granting credit is one such factor which will be considered.

(ii) Australian Uniform Consumer Credit Code.

4.124 Section 70 of the Australian *Uniform Consumer Credit Code* provides a court or tribunal with the power to re-open an unjust credit transaction.¹⁸⁹ This provision is designed as a “safety net” which can provide relief to consumer debtors in individual cases where the regulatory structures have failed to prevent an unfair credit transaction from taking place.¹⁹⁰ In considering whether a transaction is unjust,

¹⁸⁰ Office of Fair Trading *Unfair Relationships: Enforcement Action under Part 8 of the Enterprise Act 2002* (OFT Guidance OFT854 2008) at 11

¹⁸¹ *Ibid.*

¹⁸² Office of Fair Trading *op cit.* at 11.

¹⁸³ *Ibid* at 16. The guidance notes that an assessment of the unfairness of contract terms will largely resemble the test under the *EC Unfair Terms in Consumer Contracts Directive (Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts)* although some terms which would be unfair under the Directive will be insufficiently central to a credit agreement to render a relationship unfair. Similarly, “core” terms such as the interest rate could not be challenged under the *Directive’s* rules, but could render a credit relationship unfair.

¹⁸⁴ Office of Fair Trading *Unfair Relationships: Enforcement Action under Part 8 of the Enterprise Act 2002* (OFT Guidance OFT854 2008) at 22.

¹⁸⁵ *Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market.*

¹⁸⁶ *Unfair Relationships: Enforcement Action under Part 8 of the Enterprise Act 2002 op cit.* at 26.

¹⁸⁷ See paragraphs 4.101 to 4.102 above.

¹⁸⁸ Guidelines produced on responsible lending to those borrowers with poor credit ratings and on best practice in debt collection are also referred to by the OFT as factors which will be considered when applying the unfair relationships test: Office of Fair Trading *Unfair Relationships: Enforcement Action under Part 8 of the Enterprise Act 2002* (OFT Guidance OFT854 2008) at 27-29.

¹⁸⁹ See e.g. Howell “Preventing Consumer Credit Over-Commitment and Irresponsible Lending in Australia” *The Yearbook of Consumer Law 2007* (Ashgate Publishing 2007) at 387.

¹⁹⁰ Wilson, Howell and Sheehan “Protecting the Most Vulnerable in Consumer Credit Transactions” (2009) 32(2) *Journal of Consumer Policy* 117.

the court or tribunal must consider the public interest and all the circumstances of the case. In addition the court or tribunal may consider a list of specified factors, one of which is:

“whether at the time the contract, mortgage or guarantee was entered into or changed, the credit provider knew, or could have ascertained by reasonable inquiry of the debtor at the time, that the debtor could not pay in accordance with its terms or not without substantial hardship.”¹⁹¹

In this way the provision expressly provides a remedy to debtors who have been subject to irresponsible lending practices where the lender knew the debtor could not repay the loan offered without substantial hardship. It should be noted that this provision is part of a general power of courts or tribunals to reopen unjust transactions. The Australian legislation allows for a finding that a transaction is unjust on a number of grounds, with irresponsible lending being only one of the factors to be taken into account. Other factors listed in section 70(2) of the Code which the court or tribunal may consider include:

- The consequences of compliance or non-compliance with the contract.
- The relative bargaining power of the parties.
- Whether the provisions of the contract were the subject of negotiation and whether the consumer could have negotiated the alteration of any of the terms.
- Whether it could be said to be unreasonably difficult to comply with certain terms of the contract and whether such terms were reasonably necessary for the protection of the legitimate interests of a party to the contract.
- The extent to which the provisions of the contract were explained to the debtor.
- Whether independent legal advice was obtained by the debtor and whether the creditor took measures to ensure the debtor understood the nature and implications of the transaction.
- Whether the terms of the transaction are justified due to the risks undertaken by the creditor.

It can be seen in this way that the “unjust transactions” provisions of Australian law provide broad grounds on which the fairness of credit transactions can be challenged by a debtor. These grounds are wider than the provisions of sections 47 and 48 of the Irish *Consumer Credit Act 1995* and resemble more closely the “unfair relationship” provisions of UK legislation.

4.125 In contrast to the UK provisions, however, the Australian rule expressly empowers courts and tribunals to have regard to the extent to which the creditor was aware in advance of lending of the debtor’s inability to repay and the likelihood that the loan would cause hardship to the debtor. This provision introduced a new concept of responsible lending to Australian law, and was designed to provide an incentive for lenders to perform careful creditworthiness assessments before advancing loans to consumers.¹⁹²

(iii) “Reckless Lending” under the South African National Credit Act

4.126 The South African *National Credit Act 2005* contains provisions rendering “reckless credit” agreements unenforceable. A credit agreement will be found to be reckless if at the time the agreement was made the credit provider failed to conduct an assessment of the consumer’s ability to repay, irrespective of what the outcome of such an assessment would have been.¹⁹³ The requisite assessment

¹⁹¹ Section 70(2)(l) *Uniform Consumer Credit Code* (Au).

¹⁹² Howell “Preventing Consumer Credit Over-Commitment and Irresponsible Lending in Australia” *The Yearbook of Consumer Law 2007* (Ashgate Publishing 2007) at 388. An example of its operation can be seen in the case of *Lewis v Ormes* [2005] NSWCTTT 481 (New South Wales Consumer Trader and Tenancy Tribunal). Here a transaction was set aside under which the purchasers of a home by instalments obtained no equity in the property until all repayments were made. The New South Wales Consumer Trader and Tenancy Tribunal noted that the lender provided no evidence of the calculations or assessments used to reach a conclusion that the borrower could afford the repayments. The transaction was thus set aside.

¹⁹³ Section 80(1) *National Credit Act 2005* (SA). In addition, an agreement may be classed as reckless if the credit provider conducted such an assessment and entered the credit agreements despite the majority of

which the credit provider must make in advance of lending involves taking reasonable steps to judge the proposed consumer's:¹⁹⁴

- General understanding and appreciation of the risks and costs of the proposed credit agreement and of the rights and obligations under the agreement;
- Debt repayment history;
- Existing financial means, prospects and obligations; and

In addition, if the loan is for a commercial purpose, the creditor must take reasonable steps to assess whether the commercial purpose may prove to be successful. If a court declares a credit agreement to be reckless due to the lender's failure to conduct an assessment of the above factors, the court may suspend the agreement or set aside all or part of a consumer's rights and obligations under the agreement.¹⁹⁵

4.127 In assessing whether an agreement is reckless on the ground that a preponderance of information indicated at the time of lending that entering into the agreement would make the consumer over-indebted, the court must first consider whether the consumer is in fact over-indebted. If this is so, the court may suspend the agreement and may also make an order restructuring the consumer's obligations under any other credit agreements.¹⁹⁶ The court must consider the consumer's current means and ability to pay obligations that existed at the time the agreement was made and the expected date at which the debt will be fully repaid under any proposed restructuring order.¹⁹⁷ Lenders are provided with a complete defence to an allegation that a credit agreement is reckless if they can establish that the consumer failed to fully and truthfully answer any requests for information made as part of the creditworthiness assessment, and if a court finds that the consumer's failure to do so materially affected the ability of the credit provider to make a proper assessment.¹⁹⁸ It should be noted that the South African National Credit Regulator may pre-approve the assessment procedures of lenders and may also publish non-binding guidelines proposing assessment procedures.¹⁹⁹ These guidelines can however be made binding on a lender by the National Consumer Tribunal if the lender is found to have repeatedly failed to meet its creditworthiness assessment obligations.²⁰⁰

4.128 It can thus be seen that South African legislation seeks to address the problem of irresponsible lending by providing private law contractual remedies to consumers. Consumers may obtain relief from enforcement where credit has been extended without appropriate creditworthiness assessments being conducted and where sufficient advice has not been provided to a consumer to enable him or her to understand the risks and costs involved. Enforcement may also be suspended pending an enquiry into the potential over-indebtedness of the consumer.

(b) ***Assessment of Efficacy of Private Law Remedies***

(i) ***Doubts concerning the success of private law remedies***

4.129 It must however be noted that the utility of contractual remedies in consumer debt cases has been doubted, due to the fact debtors may be unwilling or unable to take court proceedings to invoke

information available to the creditor indicating that the consumer did not generally understand or appreciate the risks, costs or obligations under the agreement or that entering into the credit agreement would make the consumer over-indebted.

¹⁹⁴ Section 81(2) *National Credit Act 2005* (SA).

¹⁹⁵ Section 83(2) of the 2005 Act.

¹⁹⁶ Section 83(3) of the 2005 Act.

¹⁹⁷ Section 83(4) of the *National Credit Act 2005* (SA).

¹⁹⁸ Section 81(4) of the 2005 Act.

¹⁹⁹ Section 82(2) of the 2005 Act.

²⁰⁰ Section 82(4) of the 2005 Act.

such remedies.²⁰¹ Even in debt claim proceedings where such remedies could be relied on as a defence, debtors will rarely be aware of their rights to avail of them due to a lack of legal representation. A recent study by the Free Legal Advice Centres has illustrated that the majority of debt enforcement proceedings are undefended, and that debtors usually have no access to legal aid.²⁰² In 38 debt enforcement cases surveyed, none were defended, as debtors accepted the money owed, ignored the matter entirely or were unaware that a hearing does not automatically take place if a formal defence is not entered.²⁰³ It appears that the possibility of the existence of a defence under the *Consumer Credit Act 1995*, such as the excessive cost of credit provisions of sections 47 and 48, did not occur to any of the debtors surveyed. The FLAC report notes that in the vast majority of consumer debt cases it is simply assumed that the debt is owed, and the prospect of the debt being unenforceable under the 1995 Act is rarely considered.²⁰⁴ The Commission understands however that the Money Advice and Budgeting Service debt counsellors follow a practice of considering whether a credit agreement complies with the 1995 Act when advising debtors and this practice may be of help in enabling debtors to rely on their rights under the Act. It must be remembered nonetheless that the provisions of sections 47 and 48 of the 1995 Act, which are confined to relief from excessively high interest rates, are more limited in the scope for defences than equivalent legislation in the UK, Australia and South Africa.

4.130 Similar research among a group of 30 low-income consumer borrowers in Australia also concluded that contractual remedies of the type described above are of limited practical use.²⁰⁵ As noted above, the Australian *Uniform Consumer Credit Code* provides relief for consumers from credit contracts on the grounds of hardship, and permits the validity of such contracts to be challenged where they are allegedly unjust or where fees and charges under a contract are unconscionable. These are referred to as “safety net” provisions which provide relief for consumers in individual cases where the regulatory protections have failed. Impediments to the use of such measures by consumer debtors were identified in this study. First, consumers must be aware of the option of invoking these provisions. Secondly, consumers must have the necessary financial and personal resources to bring legal proceedings to enforce their rights. In addition to financial barriers to bringing proceedings, the study noted that non-financial barriers such as the stress of dealing with debt difficulty, the embarrassment of having debt difficulties aired in a public setting and the fear of restricting future access to credit were also significant in limiting the use of such contractual rights by debtors. Surveys conducted as part of this research concluded that the low-income consumer debtors surveyed had very little knowledge of their rights under consumer credit legislation. Even in the cases where consumers recognised potentially unfair terms they indicated that they would accept such terms if offered due to their perceived lack of options for sources of credit. The study concluded that private law remedies of the type discussed in this sub-section are of limited use to the vulnerable consumers who are most likely to need them.

(ii) Facilitating consumer redress: the Financial Services Ombudsman

4.131 In relation to the procedural barriers facing consumer debtors, it should be noted that the possibility is open to consumer debtors to complain to the Financial Services Ombudsman about the conduct of a regulated financial service provider.²⁰⁶ The principal function of the Ombudsman is to deal

²⁰¹ *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 71.

²⁰² Free Legal Advice Centres (FLAC) *To No One's Credit: The Debtor's Experience of Instalment and Committal Orders in the Irish Legal System* (FLAC 2009) at 95, 147.

²⁰³ *Ibid* at 67.

²⁰⁴ FLAC *op cit.* at 147.

²⁰⁵ Wilson, Howell and Sheehan “Protecting the Most Vulnerable in Consumer Credit Transactions” (2009) 32(2) *Journal of Consumer Policy* 117.

²⁰⁶ See section 57BX of the *Central Bank Act 1941*, as inserted by section 16 of the *Central Bank and Financial Services Authority of Ireland Act 2004*. Alternatively consumer debtors may complain to the Irish Financial Services Regulatory Authority. If IFSRA receives a complaint that appears to be within the jurisdiction of the Financial Services Ombudsman, it is obliged to refer this complaint to the Ombudsman without delay: Section 57BX(11) of the 1941 Act.

with complaints by mediation and investigation and by adjudication where necessary.²⁰⁷ The Ombudsman seeks to provide an alternative to judicial proceedings for the resolution of disputes between consumers and regulated financial services providers. Complaints are to be submitted in writing, but the Ombudsman may receive a complaint not in writing if appropriate.²⁰⁸ The investigations of the Ombudsman are to be conducted in private, a contrast to public court proceedings.²⁰⁹

4.132 The Ombudsman is required to act “in an informal manner and according to equity, good conscience and the substantial merits of the complaint without regard to technicality or legal form.”²¹⁰ This means that the Ombudsman has very wide powers to provide remedies for consumers where a lender has acted unlawfully or even lawfully but unfairly. The grounds on which the Ombudsman can uphold a consumer complaint are specified as follows:²¹¹

- The conduct complained of was contrary to law;
- The conduct complained of was unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant;
- Although the conduct complained of was in accordance with a law or an established practice or regulatory standard, the law, practice or standard is unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant;
- The conduct complained of was based wholly or partly on an improper motive, or an irrelevant ground or consideration;
- The conduct complained of was based wholly or partly on a mistake of law or fact;
- No explanation was given for the conduct forming the subject matter of the complaint;
- The conduct forming the subject of the complaint was otherwise improper.

It can be seen from the above that the Ombudsman could use one of many grounds to substantiate a claim of a consumer debtor against a lender who has breached the *Consumer Credit Act 1995*, *Consumer Protection Code* or has otherwise acted lawfully but irresponsibly or unfairly. In this regard the factors which the Ombudsman may take into account resemble the wide factors which can be considered under the Australian and UK legislation described above, and are much wider than the factors to be taken into account under sections 47 and 48 of the 1995 Act.

4.133 If a claim is substantiated wholly or in part, the Ombudsman has wide powers, including the ability to direct the financial service provider to review or change the conduct leading to the complaint, change a business practice relating to that conduct, or pay compensation to the complainant.²¹² The Ombudsman also possesses a power to make recommendations to IFSRA²¹³ with respect to measures that the Regulator may take to deal with persistent patterns of complaints against specified regulated financial service providers.²¹⁴

4.134 The case studies published by the Ombudsman indicate that the service has in fact been used by consumer debtors to make complaints against financial services providers, including complaints based on allegations of irresponsible lending practices. Thus one case study involved a complaint by a consumer whose only income was derived from social welfare benefits who incurred debts through an

²⁰⁷ Section 57BK(1) of the *Central Bank Act 1941*.

²⁰⁸ Section 57BX(7) of the 1941 Act.

²⁰⁹ Section 57CC of the 1941 Act.

²¹⁰ Section 57BK(4) of the 1941 Act.

²¹¹ Section 57CI(2) of the 1941 Act.

²¹² Section 57CI(4) of the 1941 Act.

²¹³ These complaints are made in particular to the Consumer Directorate and Registrar of Credit Unions.

²¹⁴ Section 57CQ(2) of *Central Bank Act 1941*.

overdraft facility on his bank account which he argued he did not request.²¹⁵ The bank acknowledged that it could not produce evidence of an application for the overdraft facility, but insisted that an overdraft would not have been set up on the account without an instruction from a customer. The Ombudsman concluded that despite this, the fact was that overdraft facilities had been put in place, and that the consumer had been given a credit facility which he had not applied for and fell into debt as a result. The Ombudsman therefore held the bank to be 60% liable for the incident and directed it to write off 60% of the €600 debt which had been incurred. Other unfair business practices have also been challenged before the Ombudsman. Errors on the part of a bank in its arrears management practices which caused it to send a “threatening” demand letter to a customer when the arrears situation was in fact caused by the bank led to an award of €4000 to the customer for the stress and annoyance caused.²¹⁶ Complaints have also been brought against financial institutions in relation to fees charged on changing a mortgage loan from a fixed rate to a variable rate.²¹⁷

(iii) Facilitating Consumer Redress: the Unfair Terms in Consumer Contracts Regulations

4.135 Apart from the question of creditworthiness assessments, other elements of responsible lending practices can be enforced through the private law in individual cases under the *European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995*.²¹⁸ These Regulations allow consumers to challenge unfair contract terms which have not been individually negotiated. Article 3(2) of the 1995 Regulations provides that a term will be unfair if:

“... contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer...”

The Regulations thus provide that contract terms in credit contracts must not cause a significant imbalance in the parties' rights and obligations to the detriment of the borrower. Also, the lender must act in accordance with a requirement of “good faith”, which appears to focus on the circumstances surrounding the formation of the contract.²¹⁹

4.136 It has been shown above that some pricing structures such as large default fees, over-limit fees or late fees may contribute to over-indebtedness, as behavioural and psychological factors such as optimism biases may prevent consumers from foreseeing that these charges will become payable.²²⁰ For this reason, product designs which involve excessive charges of this kind may contribute to debt difficulties among consumers and so constitute irresponsible lending. The Unfair Terms Regulations may be of use in allowing consumers to challenge the fairness of such charges. Schedule 3 to the Regulations provides a “grey list” of examples of contractual terms which may be unfair, one category of which includes terms “requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation.”²²¹ The Office of Fair Trading has published guidelines on the application of

²¹⁵ Financial Services Ombudsman *Complaints Findings in Credit Institutions Sector: July to December 2008* (Financial Services Ombudsman 2009) at 7.

²¹⁶ Financial Services Ombudsman *Twenty Significant Complaints Decisions: January to June 2008* (Financial Services Ombudsman 2008) at 8.

²¹⁷ Financial Services Ombudsman *Complaints Decisions in the April to September 2005 period* (Financial Services Ombudsman 2005) at 2. A further complaint was made in relation to a claim that a bank had misadvised customers as regards the sale of an endowment mortgage policy and had failed to keep the customers informed of the performance of the policy: *Ibid* at 3.

²¹⁸ As amended by the *European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations, 2000*. These Regulations implement the *EC Unfair Terms in Consumer Contracts Directive: Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*.

²¹⁹ Clark *Contract Law in Ireland* (6th ed. Thomson Round Hall 2008) at 256.

²²⁰ See paragraph 3.45 above.

²²¹ Schedule 3, article 1(e) of the 1995 Regulations.

the equivalent UK legislation to default charges in credit card agreements.²²² While recognising that an assessment of fairness can only be made by a court, the OFT expresses the view that a court would be likely to find a default charge term to be unfair if it allowed the lender to recover more than the damages which would be awarded at common law in the event that a consumer was sued for breach of contract.²²³ The OFT therefore recommends that to avoid being classed as unfair a charge should reflect a reasonable estimate of the net limited additional administrative costs which occur as a result of the specific breaches of contract and reflect a fair attribution of those costs between defaulting customers.

4.137 The methods of enforcing the Regulations consist of two principal forms. First, a consumer can rely on the Regulations in any case before a court of competent jurisdiction.²²⁴ If a term is found to be unfair, it is not binding on the consumer,²²⁵ although the remainder of the contract will continue to bind the parties, if it is capable of existing without the unfair term.²²⁶ Thus a consumer could rely on the Regulations as a partial defence to enforcement proceedings where it is alleged that part of the amount claimed arose from charges incurred under unfair contract terms. Secondly, and more importantly considering the tendencies for consumers not to assert their rights in court proceedings, article 8(1) of the Regulations empowers the National Consumer Agency or “other consumer organisation”²²⁷ to apply to the High Court for an order prohibiting the use or continued use of any term in contracts concluded by sellers or suppliers which have been found by the Court to be an unfair term. This mechanism therefore allows organisations to take cases on behalf of consumers and obtain orders prohibiting certain unfair terms in consumer contracts, therefore overcoming some of the barriers to the assertion of consumer rights discussed above.

(c) **Conclusions**

4.138 The above discussion illustrates that private law remedies can be provided to address irresponsible lending and unfair creditor practices, and describes the various approaches to achieve this which have been followed in the UK, Australia and South Africa in recent years. The criticisms of the effectiveness of private law remedies in consumer credit law are also presented, as are the ways in which the establishment of the Financial Services Ombudsman may partly address some of these criticisms. The role of the *European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995* in providing consumer protection against one aspect of irresponsible lending – unfair charges or fees – is also discussed.

4.139 The main question for discussion in this regard is whether section 47 of the *Consumer Credit Act 1995* should be reformed to provide a contractual remedy to debtors in cases of irresponsible or unfair practices by creditors in wider circumstances than cases of excessively expensive credit agreements. This question asks whether in addition to the public law or regulatory reforms discussed above, a private law contractual remedy against irresponsible or reckless lending and other unfair creditor practices should be introduced into Irish law. This would allow a court to re-open an unfair or irresponsible lending agreement, and make various orders to reduce the amount owed by the debtor, to

²²² Office of Fair Trading *Calculating Fair Default Charges in Credit Card Contracts: A Statement of the OFT's Position* (OFT842 2006).

²²³ *Ibid* at 5.

²²⁴ See article 8(6) of the *European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995*.

²²⁵ Article 6(1) of the 1995 Regulations.

²²⁶ Article 6(2) of the 1995 Regulations.

²²⁷ Article 2 of the 1995 Regulations (as amended by article 3 of the *European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations, 2000*) provides that a “consumer organisation” is defined as:
“(a) a company, the memorandum of association of which states the company's main object or objects to be the protection of consumer interests,
or
(b) a body corporate (other than a company) or an unincorporated body of persons in relation to which there exists a constitution or a deed of trust which states the body's main object or objects to be the protection of consumer interests.”

vary the terms of the agreement or to order the repayment to the consumer of some sums paid under the agreement. Any such remedy would also require an examination of the actions of the borrower, and could apportion fault between both lender and borrower where both have been found to have acted irresponsibly.

4.140 The Commission recognises that existing remedies provide relief to consumers in cases of unfair or irresponsible credit agreements. Consumers may seek redress before the Ombudsman, and the *Unfair Contract Terms Regulations* may be raised by a consumer in court or invoked in proceedings by a consumer organisation. Sections 47 and 48 of the *Consumer Credit Act 1995* also protect consumers from excessively expensive agreements. The question then arises as to whether sufficient consumer protection is provided by these provisions, or whether consumers who find themselves as defendants in enforcement proceedings should be able to raise a wider defence of irresponsible or unfair lending practices.

4.141 The Commission also recognises the limitations of such private law remedies as described above, and believes that obstacles remain to the assertion of their rights by consumers. In this sense private law remedies may not provide a sufficient deterrent to ensure responsible lending practices are observed. In addition to this problem, there is a risk that if an “irresponsible lending” defence is widely available to debtors, a moral hazard problem arises as “won’t pay” debtors may seek to evade their obligations by claiming the credit in question was provided irresponsibly. For this reason, the Commission believes that regulatory methods, benefiting from the monitoring and enforcement powers of regulatory authorities, are the most effective means of achieving responsible lending.

4.142 Nonetheless private law remedies remain important for attaining justice in individual cases where regulatory measures have not blocked unfair practices, and where consumers have not challenged unfair or irresponsible practices before the Ombudsman. A report of the European Commission in this regard has recommended that there is a need for legislation to allow usurious and exploitative credit agreements to be re-opened by the courts.²²⁸ The report recommended that such legislation should be wide-ranging, covering all aspects of the terms, conditions and charges associated with the credit.²²⁹ This would suggest that such legislation could provide relief in wider circumstances than those covered by section 47 of the 1995 Act.

4.143 Academic literature in this field has also identified some advantages of private law remedies for cases of irresponsible lending and unfair creditor practices. First, private law remedies are used in court or Ombudsman proceedings to determine concrete cases and so will only target those loans which have been proven to have been irresponsibly granted.²³⁰ Regulatory measures which are too wide may in contrast restrict lenders in cases where irresponsible practices have not been proven. Secondly, in determining the appropriate outcome in individual cases, a court or ombudsman can apportion liability in a manner which is appropriate to the responsibility of both borrower and lender for the default. This approach allows an assessment of fairness in individual cases based on both a borrower’s and a lender’s conduct which a regulatory regime cannot guarantee. An example of this apportionment of fault in a case of irresponsible lending is provided in the discussion above of the Financial Services Ombudsman decision in the case of an unsolicited overdraft.²³¹ Finally, it has been said that private law remedies benefit from an inherent normativity in that a finding of a court that a lender has acted irresponsibly amounts to a strong moral judgment against the lender.²³² This may affect the reputation of the lender and so have a strong deterrent effect.

4.144 It can therefore be seen that private law remedies may play a complementary role to regulatory measures in preventing irresponsible lending practices. The Commission suggests that the question of

²²⁸ *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 76.

²²⁹ *Ibid.*

²³⁰ Pottow “Private Liability for Reckless Consumer Lending” 2007(1) *U III L Rev* 405 at 436-7.

²³¹ See paragraph 4.134 above.

²³² Pottow “Private Liability for Reckless Consumer Lending” 2007(1) *U III L Rev* 405 at 438.

whether additional private law remedies against irresponsible or unfair lending practices are necessary under Irish consumer credit law should be considered as part of a review of legislation in this area. The Commission however recognises that the *Consumer Credit Directive 2008* is a maximum harmonisation instrument, and that article 22(1) of the Directive provides that “[i]nsofar as this Directive contains harmonised provisions, Member States may not maintain or introduce in their national law provisions diverging from those laid down in this Directive.” Therefore any private law mechanism to ensure responsible lending must be compatible with article 8 of the Directive concerning the duty to make creditworthiness assessments.

4.145 *The Commission suggests that the question of whether a private law remedy against irresponsible and unfair lending should be introduced should be considered as part of a review of financial services and consumer credit legislation. Such a remedy could for example allow a court to re-open a credit agreement in the event of irresponsible or unfair lending practices.**

(6) Specialist lenders: Credit Unions and Moneylenders

4.146 The above discussion has focused on the regulatory provisions governing credit institutions, including banks, building societies, credit intermediaries and retail credit firms. This section discusses particular issues which arise in relation to credit unions and moneylenders, which are subject to some, but not all, of the regulatory provisions discussed above.

(a) Credit Unions

4.147 In the context of a discussion of responsible lending, the consequence of the specialist regulatory regime for credit unions under the *Credit Union Act 1997* is that credit unions are not bound by the terms of the *Consumer Protection Code* and may be exempt from the *Consumer Credit Directive*.²³³ As a consequence, credit unions, unlike other lenders, are not obliged to conduct “suitability” tests under the Code or creditworthiness assessments under the *Consumer Credit Directive*. The question then arises as to whether reforms are necessary to address the lack of legal obligations on credit unions in this area.

4.148 In 2008, IFSRA published a consultation paper on a voluntary code of practice for credit unions.²³⁴ The consultation paper includes a draft Voluntary Consumer Protection Code for Credit Unions, with the proposed final code to be issued in 2009. It should be noted that the draft code includes certain responsible lending principles. First, there is a requirement for credit unions to gather sufficient information about a member to enable them to provide a recommendation or a product or service appropriate to the member in question.²³⁵ Secondly, a “suitability” test is included in the draft code, requiring credit unions to ensure that any product or service offered or recommended to a member is suitable to that member.²³⁶ The credit union must also prepare a written statement indicating the reasons why the product or service offered is suitable to the member in question.

4.149 The annual report of IFSRA for 2008 indicates that the Registrar of Credit Unions was required during that year to issue warnings and request explanations from credit unions in respect of their lending practices.²³⁷ While many of the concerns in this area may involve prudential issues which are beyond the scope of this Consultation Paper, it appears that responsible lending practices should be ensured for consumer protection purposes also.

4.150 A full review of the *Credit Union Act 1997* is outside of the scope of this Paper. Nonetheless the Commission believes that a possible measure of reform which could be considered is the introduction

²³³ See paragraph 3.26 above.

²³⁴ Financial Regulator *Consultation Paper: Voluntary Consumer Protection Code for Credit Unions (in respect of their Core Services)* (CP32 2008) at 1.

²³⁵ Chapter 2, paragraphs 22-25 of the *Draft Voluntary Consumer Protection Code for Credit Unions: ibid* at 12.

²³⁶ Chapter 2, paragraphs 26-27 of the *Draft Voluntary Code: ibid* at 13.

²³⁷ Financial Regulator *Annual Report of the Financial Regulator 2008* (IFSRA 2009) at 52. For example, the Registrar required credit unions to introduce enhanced scrutiny of all new loan applications and warned unions that lending for commercial property, project finance or main line business activity should not be undertaken.

of responsible lending statutory provisions to provide levels of protection against over-indebtedness similar to those applicable in respect of other credit institutions. Certain factors which distinguish credit unions from other institutions should however be noted. The Commission recognises the valuable role credit unions play in preventing financial exclusion by providing credit to those who would have difficulty obtaining credit from other sources.²³⁸ Credit unions are also important in preventing vulnerable consumers from turning to illegal moneylenders. The clients of credit unions therefore may be higher risk customers than those of mainstream lenders, and therefore different responsible lending standards should apply to credit unions. This problem is heightened by situations where debtors who are already in financial difficulty apply to the credit union for loans to pay other debts. Also, section 38 of the *Credit Union Act 1997* provides that credit unions may charge no more than 12% APR on loans, thus preventing credit unions from adopting the risk-based pricing policies operated by other credit institutions and moneylenders. Furthermore, as credit union staff contains many volunteers, the standards applied could not be the same as those applied to professional lenders. Any responsible lending standards would also have implications as regards the training of credit union staff.

4.151 For these reasons the Commission suggests that it should be considered whether any responsible lending rules for credit unions are sufficiently flexible to accommodate these concerns. The Commission suggests that the possibility of empowering the Registrar of Credit Unions to make binding statutory codes in respect of credit unions should be considered as part of a review of the *Credit Union Act 1997*.

4.152 Other issues arise in relation to responsible lending which could be considered as part of a review of credit union law. Research by the Combat Poverty Agency has concluded that the main barrier to accessing credit from a credit union for low-income consumers is the inability to establish the savings history which is required in many credit unions in order to obtain a loan.²³⁹ While previous credit union legislation expressly provided that loans offered to a credit union member could not exceed a certain multiple of the member's savings, this requirement was not carried into the 1997 Act. Nonetheless, it remains the practice of the majority of credit unions to require a certain ratio to exist between the member's savings and the amount of any loan obtained, with the ratio usually standing at 3.5:1 or 4:1. Studies have shown that this requirement may pose an obstacle to potential borrowers in need of immediate access to credit or with insufficient income to build up a savings history, leading such individuals to obtain much more expensive loans from moneylenders or even unlicensed lenders.

4.153 The rationale of this requirement is founded in principles of responsible lending and borrowing. The making of deposits to the union in advance of borrowing is a necessary element of the requirement that members contribute to making the credit union into a successful financial cooperative.²⁴⁰ It is also viewed by credit unions as a vital element of the financial education of members, as the requirement to make regular savings helps to provide members with money management skills and prepares them for managing loan repayments. Credit unions also have a practice of referring potential borrowers who have not accrued sufficient savings to the Money Advice and Budgeting Service. The credit union could then provide credit if a budget is agreed with the MABS.²⁴¹

4.154 The above discussion illustrates the difficult balance between ensuring responsible lending and preventing financial exclusion which must be struck by credit unions. Following a government consultation on the issue,²⁴² UK reforms have attempted to strike a more even balance by raising the maximum interest rate which a credit union may charge from 1% per month to 2% per month.²⁴³ This

²³⁸ See e.g. *Corr Financial Exclusion in Ireland: An Exploratory Study and Policy Review* (Combat Poverty Agency 2006) at 122-123.

²³⁹ *Corr Financial Exclusion in Ireland: An Exploratory Study and Policy Review* (Combat Poverty Agency 2006) at 93.

²⁴⁰ *Ibid* at 85.

²⁴¹ *Corr Financial Exclusion in Ireland op cit.* at 85.

²⁴² HM Treasury *The Credit Union Interest Rate Cap: A Consultation Document* (HMSO 2005).

²⁴³ *Credit Unions (Maximum Interest Rate on Loans) Order 2006* (UK) (2006 No. 1276.)

reform had the aim of attempting to facilitate credit unions to serve higher-risk borrowers. Some consideration has been given to introducing a similar reform to Irish legislation, with the view expressed that it may remove the need for some members to show a history of saving before they apply for a loan.²⁴⁴ Any such change to allow risk-based pricing to higher-risk borrowers should be balanced with sufficient responsible lending rules however. In this regard it should be recalled that the draft *Voluntary Consumer Protection Code for Credit Unions* provides that credit unions should undertake creditworthiness assessments in the form of a “suitability” test in advance of lending.²⁴⁵ Therefore if linked to this responsible lending requirement, an increased interest rate could facilitate risk-based pricing and allow credit unions greater ability to supply credit to the otherwise financially excluded in appropriate cases.

4.155 The Commission recognises that these subjects raise complex issues of social and economic policy which lie outside the scope of this Consultation Paper. The Commission therefore makes no provisional recommendations in this area. The Commission nonetheless suggests that the issue of the interest rate cap on credit union loans should be considered as part of a general review of the *Credit Union Act 1997*.

(b) **Moneylenders**

4.156 It has been noted above that due to the potential risk of over-indebtedness linked to high-cost credit, specialist regulatory rules apply to moneylending activities under the *Consumer Credit Act 1995* and the *IFSRA Consumer Protection Code for Licensed Moneylenders*.²⁴⁶ These rules are designed to provide protection to the often vulnerable consumers of high-cost credit. Provisions embodying the principle of responsible lending applied to moneylenders even before the principle became more widely applicable to banks and other mainstream lenders. Therefore the 1995 Act prohibits the inclusion of default charges in moneylending agreements²⁴⁷ and prevents a moneylending loan to be obtained for the purpose of repaying an existing loan.²⁴⁸ Also, the Irish Financial Services Regulatory Authority retains control over the maximum level of interest which a moneylender may be licensed to charge.²⁴⁹ Additional responsible lending requirements have been imposed on moneylenders by the *IFSRA Consumer Protection Code for Licensed Moneylenders*, as discussed in Chapter 3.²⁵⁰ IFSRA recognises the distinct status of moneylenders, and so these lenders are not subject to IFSRA’s general *Consumer Protection Code*.²⁵¹

4.157 Debtor organisations acknowledge that due to the high interest rates charged it is preferable that consumers obtain credit from less expensive sources where possible. Concerns are also expressed that debtors may develop a dependency on this expensive form of credit where access to other sources of credit is restricted.²⁵² Nonetheless the important role played by moneylenders in providing credit to high-risk consumers who may not have access to other sources is widely recognised. While research

²⁴⁴ Corr *Financial Exclusion in Ireland: An Exploratory Study and Policy Review* (Combat Poverty Agency 2006) at 93.

²⁴⁵ Financial Regulator *Consultation Paper: Voluntary Consumer Protection Code for Credit Unions (in respect of their Core Services)* (CP32 2008) at Chapter 2, paragraphs 26-27 of the draft Code.

²⁴⁶ See paragraphs 3.84 to 3.87 above.

²⁴⁷ Section 112 of the *Consumer Credit Act 1995*.

²⁴⁸ Section 99(2) of the *Consumer Credit Act 1995*.

²⁴⁹ Section 93(10)(g) of the 1995 Act. See paragraph 3.76 above, where it is noted that the current practice of the Financial Regulator is to refuse a licence to a moneylender who charges an APR in excess of approximately 190%.

²⁵⁰ See paragraph 3.87 above.

²⁵¹ In addition, IFSRA sought to draft the “know your customer” and “suitability” requirements in sufficiently broad terms to allow moneylenders the flexibility when lending to carry out their important role in preventing financial exclusion: see paragraph 3.87 above.

²⁵² See Irish Financial Services Regulatory Authority *A Report on the Licensed Moneylending Industry* (IFSRA 2007) at 11.

conducted by IFSRA has found that a majority of customers of moneylenders have access to other forms of credit, a large minority of those surveyed did not know where they could obtain credit if their moneylender ceased to operate in their areas.²⁵³ The high interest rates charged by moneylenders can also be partly justified by the high-risk status of their customers and by the personal collection service provided. Debtor organisations are generally satisfied that licensed moneylenders are well regulated and have not identified difficulties with the law in this area. They are also wary of increasing the regulatory requirements on moneylenders to the extent that some lenders may be provided with incentives to evade the regime and operate without a licence.²⁵⁴

4.158 The Commission understands that moneylenders have identified difficulties with the current law, with the primary criticism being that the regulatory requirements are overly burdensome, especially given the small scale of many moneylenders' operations.²⁵⁵ When the *Consumer Credit Directive* is implemented, moneylenders will be subject to three layers of regulation, as the *Consumer Credit Act* and *Consumer Protection Code for Licensed Moneylenders* will continue to apply. The Commission believes there is a strong case for consolidating and simplifying the regulatory rules on lenders, both from the point of view of easing the regulatory burden on lenders and of enabling consumers to have easy access to information about their rights. As the regulatory burden may be particularly onerous on small scale moneylenders, and as their customers may be quite vulnerable and unaware of their rights, a strong case exists for consolidating and simplifying the rules governing moneylending.

4.159 An example of a particular regulatory issue which may need to be addressed is the procedure for obtaining a moneylending licence. Under section 93 of the *Consumer Credit Act 1995*, moneylending licences are allocated on the basis of District Court districts, and must be renewed annually. This may prove burdensome for moneylenders. While a detailed discussion of the moneylending licensing regime is beyond the scope of this Consultation Paper, the Commission suggests that a review of the regulatory requirements imposed on moneylenders in relation to the territorial and temporal limits of their licences, should be considered.

(7) Product design

4.160 So far the discussion of responsible lending has focused on creditworthiness assessments, unfair charges and fees and exploitative lending practices. This section now discusses the question of responsible product design, and raises questions as to whether certain product designs should be prohibited or restricted in their use in order to prevent over-indebtedness.

4.161 As discussed in Chapter 1 above, studies have shown a link between certain product designs and over-indebtedness.²⁵⁶ The discussion in Chapter 2 of the "bounded rationality" of consumers and their tendency not to be aware of, understand or fully appreciate aspects of credit products also highlighted how certain elements of product design may take advantage of this "bounded rationality" and contribute to over-indebtedness.²⁵⁷ For this reason the question of product design has been identified in the 2009 European Commission consultation document on responsible lending as an issue which should be addressed.²⁵⁸

²⁵³ See Irish Financial Services Regulatory Authority *A Report on the Licensed Moneylending Industry* (IFSRA 2007) at 6.

²⁵⁴ *A Report on the Licensed Moneylending Industry* (IFSRA 2007) at 11.

²⁵⁵ See e.g. *Consumer Credit Association Republic of Ireland Response to the Department of Finance Consultation Paper on Implementation of Consumer Credit Directive 2008*, available at: <http://www.finance.gov.ie/viewdoc.asp?fn=/documents/Publications/consultation09/conscreditassocrespon09.pdf>. (Accessed 14 September 2009)

²⁵⁶ See paragraphs 1.51 to 1.56 above.

²⁵⁷ See paragraphs 3.44 to 3.45 above.

²⁵⁸ *Public Consultation on Responsible Lending and Borrowing in the EU* (European Commission DG Internal Market and Services 2009) at 6-8.

4.162 Certain product features have been identified as contributing to over-indebtedness. First, initial low introductory interest rates or “teaser” rates on loans have been shown to produce irrational reactions from consumers and to contribute to over-indebtedness.²⁵⁹ These rates have been identified as being particularly problematic in the case of credit card loans. These low introductory rates are attractive to consumers who believe they will pay off the balance, or transfer it to a new card, after the introductory period has expired.²⁶⁰ Studies have illustrated however that consumers do not pay off or transfer their balances at the expiry of this period, but in fact may even borrow more at the later higher interest rate.²⁶¹ It has been shown that consumers fail to anticipate that they will become “locked in” to the later higher introductory rates in this manner, and so continue to be attracted to cards offering low introductory rates even if they lead to higher borrowing costs and indebtedness in the future. Studies in the United States have shown that consumers are at least three times as responsive to changes in introductory rates as to changes in the post-introductory rate and more than more than a third of all consumers identify an attractive introductory rate as the prime criterion for selecting a credit card.²⁶²

4.163 Secondly, the practice of requiring very low minimum monthly repayments on credit cards has been linked to over-indebtedness. As noted in Chapter 1 above, research in the UK has shown that households in financial difficulty have been found to be three times more likely to be making only the minimum repayment, and it may take such households decades to pay off the balance.²⁶³ This can even lead to the problem of “negative amortisation” where the amount owed increases rather than decreases every month even as payments are made. This may prolong financial distress for debtors and increase the related social costs for the general public.

4.164 In addition to these product designs, concerns have been raised as to certain marketing techniques of lenders. In particular, it has been argued that offers of incentives such as free gifts to groups such as students, which are sometimes contingent on a customer making a certain number of transactions, could potentially induce a customer to become indebted. The question of whether such marketing practices correspond to best practice responsible lending standards should possibly be considered by the Financial Services Regulatory Authority.

4.165 The Commission recognises that the question of product design is one which lies within the expertise of a regulatory authority rather than a law reform body. The economic and social consequences of the continued use or the prohibition of certain product designs can be more accurately assessed by a regulator with detailed knowledge of credit markets and products. In addition, the current European Commission consultation on responsible lending and borrowing is considering the possible prohibition of certain credit products. The Commission therefore does not make any provisional recommendations in this regard. The Commission nonetheless believes that questions of product design should be addressed as part of a holistic approach to preventing over-indebtedness. The Irish Financial Services Regulatory Authority has addressed such questions in the *Consumer Protection Code* by prohibiting unilateral increases of credit limits and unsolicited offers of pre-approved credit. The Commission therefore suggests that IFSRA should revisit the question of dangerous product designs as part of its current review of the *Consumer Protection Code*.

(8) Financial Exclusion

4.166 The Commission recognises that any measures aimed at ensuring responsible lending practices may have consequences for the supply of credit to consumers. Research in the area of

²⁵⁹ See e.g. Kempson *Over-Indebtedness in Britain; A Report to the Department of Trade and Industry* (Personal Finance Research Centre 2002) at 41; *Public Consultation on Responsible Lending and Borrowing in the EU op cit.* at 7.

²⁶⁰ Bar-Gill and Warren “Making Credit Safer” [2008] *University of Pennsylvania Law Review* 101 at 150-151.

²⁶¹ *Ibid*, citing Gross and Souleles ‘Do Liquidity Constraints and Interest Rates Matter for Consumer Behaviour? Evidence From Credit Card Data’ (2002) *Quarterly Journal of Economics* 149 at 171, 179.

²⁶² Bar-Gill and Warren *op cit.* at 151.

²⁶³ Kempson *Over-Indebtedness in Britain; A Report to the Department of Trade and Industry* (Personal Finance Research Centre 2002) at 44.

financial exclusion in Ireland conducted by the Combat Poverty Agency indicated that responsible lending standards already lead to some high-risk, low income lenders being excluded from accessing credit from mainstream banks.²⁶⁴ While preventing over-indebtedness by refusing credit to individuals who cannot afford to repay is the aim of responsible lending, other means of support must be made available to allow such individuals to cope with times of financial difficulty. Responsible lending standards which are designed to prevent personal over-indebtedness may lose their efficacy if consumers refused credit from licensed lenders resort to illegal moneylenders. Responsible lending provisions must therefore be accompanied by social measures providing support to individuals in need of financial assistance.

4.167 The role of credit unions in preventing financial exclusion has been discussed above.²⁶⁵ Research of the Combat Poverty Agency noted that some individual credit unions and the Irish League of Credit Unions have developed several services targeted specifically at over-indebted individuals, in conjunction with the Money Advice and Budgeting Service and the One Parent Exchange Network.²⁶⁶ Some credit unions hold a social fund, from which small loans are offered at a nominal rate of interest, but only to members who have been referred by the MABS. The purpose of this fund is to prevent individuals in need of money on an emergency basis from resorting to high-interest moneylender loans.²⁶⁷

4.168 In addition to the role of credit unions in providing loans to those who would otherwise be excluded from credit, certain public funds provide assistance to such individuals. The Department of Social and Family Affairs makes credit available to low-income groups through the supplementary welfare allowance.²⁶⁸ In addition, in 2006 the Social Finance Foundation, a not-for-profit company, was established by the State to act as a wholesale supplier of funding for social finance.²⁶⁹ This foundation aims to provide credit at affordable interest rates to community-based projects and micro-enterprises. As such it is focused more on social lending to small business projects rather than to private consumers. The Social Finance Foundation has been partly financed from contributions from the banking industry through the Irish Banking Federation. In addition, the Government Recapitalisation Scheme includes commitments from the recapitalised banks to widen the provision of basic or introductory bank accounts.²⁷⁰ The banks have also agreed to promote these accounts to particular socio-economic groups which display lower than average levels of bank account use.

4.169 The report of the European Commission on a common operational definition of over-indebtedness has also identified measures in other countries which are designed to balance responsible

²⁶⁴ Corr *Financial Exclusion in Ireland: An Exploratory Study and Policy Review* (Combat Poverty Agency 2006) at 80.

²⁶⁵ See paragraphs 3.25 to 4.155 above.

²⁶⁶ Corr *op cit.* at 123.

²⁶⁷ The Combat Poverty report concluded that a number of other measures could be taken by credit unions to prevent financial exclusion, such as offering small loans and emergency loans to members without members first having to demonstrate a history of savings. Credit unions were also called on to improve their marketing to low-income groups and to work to improve the financial literacy and money management skills of such borrowers.

²⁶⁸ See Corr *Financial Exclusion in Ireland: An Exploratory Study and Policy Review* (Combat Poverty Agency 2006) at 91. This allowance is available to people whose means are insufficient to meet their needs and those of their dependants. Two discretionary payment schemes provide credit to qualifying individuals. The exceptional needs payment may be provided for the purchase of maternity items and essential household items. Secondly, the urgent needs payment is a loan provided to assist with emergency financial demands.

²⁶⁹ See www.sff.ie. (Accessed 14 September 2009).

²⁷⁰ See *Government Announcement on Recapitalisation*, 21st December 2008, available at: <http://www.finance.irlgov.ie/Viewtxt.asp?DocID=5609&StartDate=1+January+2009>. (Accessed 14 September 2009)

lending with financial inclusion.²⁷¹ In Italy, two social funds have been established to complement legislation prohibiting exploitative lending.²⁷² The first, named the Fund for the Prevention of Usury, is financed by the credit industry. Applicants who could not otherwise obtain mainstream credit are screened and if they qualify are provided with guarantees to enable banks and other mainstream lenders to provide credit. Information and advice on money management is also provided to the borrowers. Secondly, the Solidarity Fund for Usury Victims is available to people who declared themselves to be victims of usury practices. The fund is financed from the confiscated assets of convicted illegal lenders. Victims of such lenders can apply for interest-free loans to be repaid over periods of up to 10 years, with the size of the loan based on the level of damage suffered by each victim.

4.170 The European Commission report also identified the national network of “municipal banks” in the Netherlands as a means of addressing financial exclusion. These banks were set up in 1932 to provide an alternative to illegal lenders. Affordable loans are made available to people whose incomes are less than 130% of the social minimum level or who have incomes above this level but are registered as having financial difficulties. There is a gentleman’s agreement that commercial banks will not provide loans to people at or below the social welfare minimum.²⁷³

4.171 In the UK, the government has provided interest-free loans to recipients of social welfare since 1980. More recently, a Financial Inclusion Fund was established in 2004, from which a Growth Fund provides assistance to credit unions and community development finance institutions, allowing them to provide affordable loans to individuals who are excluded from mainstream credit.²⁷⁴ Detailed research projects into illegal moneylending have also been undertaken by the government in the UK,²⁷⁵ and a pilot programme involving specialist detection and enforcement teams has been successful in prosecuting increased numbers of illegal moneylenders. This project is to be extended to all parts of the UK.

4.172 The Commission recognises that the subject of financial exclusion is a social and economic topic which falls outside the scope of law reform. The Commission therefore makes no specific recommendations in this area. The Commission however believes that an assessment of methods to address financial exclusion should be conducted when responsible lending provisions are being introduced.

4.173 *The Commission suggests that to complement the introduction of legal measures to prevent irresponsible lending, research should be undertaken on the impact of such measures on the issue of financial exclusion.**

C Responsible Arrears Management

4.174 The importance of responsible arrears management in preventing over-indebtedness and its benefits to both creditors and debtors have been discussed in Chapter 3.²⁷⁶ The principle of responsible arrears management was also discussed, and it was said to contain three elements. These are arrears avoidance, arrears handling and responsible debt recovery practices. It was noted that Irish law currently addresses the issue of responsible arrears management through legislation and statutory codes of conduct, and that responsible practices are also achieved through voluntary industry codes. Three areas for reform were identified in the previous chapter: the limitations of the *IFSR Code of Conduct on*

²⁷¹ *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 74.

²⁷² Law no. 108 March 7 1996 “*Disposizioni in materia di usura*” “Rules on Usury Practices” in *Gazzetta Ufficiale*, March 1996, Serie Generale No. 58 artt 14-135.

²⁷³ *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 75.

²⁷⁴ See Department for Business, Enterprise and Regulatory Reform *Tackling Over-Indebtedness Annual Report 2007* (BERR 2008) at 50.

²⁷⁵ See e.g. Department of Trade and Industry *Illegal Lending in the UK: Research Report* (URN06/1883 2006).

²⁷⁶ See paragraphs 3.103 to 3.105 above.

Mortgage Arrears; the lack of comprehensive legally-binding rules on arrears management in non-mortgage cases; and the area of debt collection agencies. These three areas are now discussed.

(1) Code of Conduct on Mortgage Arrears

4.175 The provisions of the *IFSRA Code of Conduct on Mortgage Arrears* are discussed in Chapter 3.²⁷⁷ While the Commission commends the Code for introducing sound principles of responsible arrears management into Irish law, there are limitations to the Code. These limitations are now discussed.

(a) Temporal Application of the Code: the need for a “Mortgage Arrears Problem”

4.176 First, the operation of the Code is limited to situations where a “mortgage arrears problem” has occurred, which is where a borrower fails to make a mortgage repayment by the due date. This means that the Code does not address the issue of arrears prevention and only applies once a default has occurred. As a consequence, the Code provides no rules for situations where a debtor realises that he or she is in financial difficulty, but where a default has not yet occurred. Concerns therefore exist as to how a borrower will be treated on approaching a lender and informing the lender that he or she may be facing an arrears problem in the near future. Borrowers in difficulty may be obliged to seek a new agreement from lenders, and there is a risk that some lenders may exploit the vulnerable position of these borrowers and only agree to renegotiate repayment terms on the condition that the borrower pays a higher rate of interest under the restructured agreement.²⁷⁸

4.177 The European Commission report on a common operational definition of over-indebtedness identifies the prevention of the build-up of unmanageable amounts of arrears as an important part of tackling over-indebtedness.²⁷⁹ As part of this policy, the report identified the practice of companies making efforts to encourage customers who expect to miss a payment to contact the company in advance so that alternative repayment arrangements can be discussed.²⁸⁰ Debtors will be more likely to take a proactive approach to addressing future arrears problems if they are confident of being treated fairly and it is important for this reason that debtors must not be exploited when requesting a change in repayment terms. The Commission therefore suggests that consideration should be given by IFSRA to the question of whether the Code should be extended to ensure the fair treatment of debtors in situations where an imminent default has not yet occurred. Consultation should be undertaken with lenders on the detail of such a change to the Code.

4.178 *The Commission suggests that amendments to the Code of Conduct on Mortgage Arrears should be considered to extend it to cover a situation where a debtor who is about to default but has not yet fallen into arrears approaches a creditor to discuss alternative repayment arrangements.**

(b) Status in Court proceedings

4.179 A further criticism of the Code is that it is unclear to what extent it can be taken into account by a court when hearing an application for an order for possession of a mortgaged asset. As noted in Chapter 3, the Code is enforced by IFSRA, who may issue directions to regulated entities to comply with the Code or may even require them to pay a monetary penalty of up to €5,000,000.²⁸¹ No provision is made, however, for the application of the Code in possession order proceedings. An argument may be made that a debtor who has not been given the protection guaranteed by the Code should be able to raise a breach of the Code in court proceedings to avoid an order for possession being made. The debtor could in this way postpone the making of such an order pending attempts to reach the alternative solutions provided in the Code.

²⁷⁷ See paragraphs 3.106 to 3.115.

²⁷⁸ FLAC has for this reason criticised the Code’s lack of clear guidelines on how communications with a borrower should be handled: *FLAC Policy Briefing on Code of Conduct on Mortgage Arrears* (Free Legal Advice Centres 2009) at 2.

²⁷⁹ *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 78.

²⁸⁰ *Ibid* at 78-79.

²⁸¹ See paragraph 3.126 above.

4.180 Alternatively or complementarily, a creditor could be required to demonstrate compliance with the Code as a precondition for obtaining a possession order. In this regard it should be recalled that under the *District Court Rules 1997* a civil summons issued in relation to an agreement covered by the *Consumer Credit Act 1995* must also contain a statement that proceedings have been brought in compliance with the relevant provisions of the Act.²⁸² Therefore a similar requirement could potentially be added to the relevant rules of court in respect of possession proceedings to require creditors to include a statement in the relevant summons indicating that the requirements of the Code have been satisfied. Alternatively, creditors could be obliged to provide evidence demonstrating compliance with the provisions of the Code in the possession proceedings in order to obtain an order for possession. That the question of whether the Code should be capable of being taken into account in possession proceedings should be considered by IFSRA as part of a review of the operation of the Code.

4.181 *The Commission suggests that consideration should be given to the question of whether the Code of Conduct on Mortgage Arrears should be capable of being taken into account in possession order proceedings.**

(c) ***Duty to inform of money advice***

4.182 A further criticism of the *Code of Conduct on Mortgage Arrears* is that it does not oblige creditors to refer debtors to the Money Advice and Budgeting Service. Instead, the Code states that:

“The lender must advise the borrower that it is in his/her own interests to ensure that his/her income is being maximised and that a budgeted approach to expenditure is maintained. Where circumstances warrant it, the lender must refer the borrower for guidance to his/her local Money Advice and Budgeting Service (MABS) or appropriate alternative.”²⁸³

4.183 This provision has been criticised by the Free Legal Advice Centres on the basis that it only requires creditors to refer borrowers to money advice services “where circumstances warrant it”, thus leaving creditors with discretion as to whether such a referral should be made.²⁸⁴ In addition, the Code does not oblige creditors to inform debtors of the availability of free legal advice from the Legal Aid Board.

4.184 The Commission recognises that money advice can be very successful in facilitating the satisfactory resolution of debt disputes. The results of FLAC’s 2009 report on the instalment order procedure discussed above support this view.²⁸⁵ The Commission therefore recognises it may be beneficial to require creditors to inform all debtors with mortgage arrears of the availability of this service. The Commission believes that it is in both the interests of creditors and debtors that the best possible use is made of debtors’ resources, and increased awareness of money advice could contribute to this goal. The results of FLAC’s 2009 report illustrated that low numbers of debtors in instalment order proceedings were aware of the availability of free money advice, and so this suggests that there is a need to publicise the existence of the MABS more widely.²⁸⁶ Against these considerations the Commission recognises that not all debtors will need assistance in rescheduling their repayments. Furthermore, the Commission recognises that the Code permits creditors to draw a distinction between “can’t pay” and “won’t pay” debtors, and a referral to money advice services may be inappropriate in the case of “won’t pay” debtors. A possible solution would be for the Code to be amended to require creditors to provide information to all debtors regarding the existence of the local MABS or alternative money advice service, while saving formal referrals to cases where the circumstances warrant it. The Commission suggests that in reviewing the *Code of Conduct on Mortgage Arrears*, it should be considered whether mortgage lenders should be obliged by the Code to refer debtors in arrears to money advisors. The Commission believes that similar considerations apply in relation to free legal aid services. While the Commission understands that legal

²⁸² See Order 40 rule 1 *District Court Rules*.

²⁸³ Paragraph 5(f) of the *IFSRA Code on Conduct on Mortgage Arrears*.

²⁸⁴ *FLAC Policy Briefing on Code of Conduct on Mortgage Arrears* (Free Legal Advice Centres 2009) at 2.

²⁸⁵ See the discussion of Free Legal Advice Centres (FLAC) *To No One’s Credit: The Debtor’s Experience of Instalment and Committal Orders in the Irish Legal System* (FLAC 2009) at paragraph 0 above.

²⁸⁶ See paragraphs 0 to 3.331 above.

aid services may not be available in possession order proceedings, debtors should at least be informed of the existence of such services and their ability to apply for legal assistance. The Commission therefore suggests that consideration should be given to obliging mortgage lenders under the Code to provide information on the availability of free legal aid.

4.185 *The Commission suggests that the introduction of obligations on mortgage lenders to refer debtors in arrears to money advice and/or free legal aid services should be considered when reviewing the Code of Conduct on Mortgage Arrears.**

(2) Responsible Arrears Management Rules in Cases of Non-Mortgage Arrears

4.186 Despite the limitations identified above, the Commission recognises that the *Code of Conduct on Mortgage Arrears* is to be commended for introducing principles of responsible arrears management into Irish law on a binding statutory basis. The introduction of the Code has illustrated that a gap exists in Irish law in respect of arrears management in cases of non-mortgage arrears. The Commission has discussed in Chapter 1 various recognised approaches to arrears management, and has endorsed the holistic approach adopted by some creditors.²⁸⁷ The arrears management strategy adopted by a creditor nonetheless currently remains solely within the discretion of the creditor. This may lead to some debtors applying less responsible arrears management practices, such as the “hard business” and “one-size-fits-all” approaches described in Chapter 1. The Commission recognises that the holistic approach to arrears management is followed by many Irish creditors, most notably among well-established credit institutions. Also, the Commission has described in Chapter 3 how voluntary codes in the energy sector and in relation to local authority housing have established responsible arrears management practices in those sectors.²⁸⁸

4.187 The Commission however recognises that responsible arrears management practices are not universally established and followed, and that some creditors continue to use legal enforcement proceedings at an early stage of the arrears management process. The Commission believes that debt disputes should be resolved outside of the judicial system to the greatest extent possible. The Commission also believes that creditors who practice responsible arrears management practices should not be prejudiced by other creditors who win the “race to court” and commence legal enforcement proceedings at an early stage of default, often causing more responsible creditors to be deprived of a share of a debtor’s few available assets. Furthermore, creditors who cut costs by avoiding putting in place responsible arrears management practices should not have such costs borne by the general public through the use of the judicial system as a collection device. As was noted in the enforcement review carried out by the Lord Chancellor’s Department²⁸⁹ in the United Kingdom, “the enforcement system should not become a means by which creditors can remedy the deficiencies in their own management and information systems.”²⁹⁰

4.188 While the Commission recognises the special position of mortgage possession proceedings due to the severe consequences for the debtor and his or her family, the Commission recommends that some of the principles of the *Code of Conduct on Mortgage Arrears* are equally applicable in cases of non-mortgage arrears. The Commission therefore provisionally recommends that the law should seek to ensure that responsible arrears management practices are observed in all personal debt cases, and not just in mortgage arrears cases.

4.189 *The Commission suggests that consideration should be given to how the law may seek to ensure that responsible arrears management standards, as currently exist in respect of cases of mortgage arrears, are observed in all personal debt cases.**

²⁸⁷ See paragraphs 1.75 to 1.90 above.

²⁸⁸ See paragraphs 3.117 to 3.120 above.

²⁸⁹ Now the Department for Constitutional Affairs.

²⁹⁰ Lord Chancellor’s Department *Enforcement Review Report of the First Phase of the Enforcement Review* (2000) at paragraph 22.

4.190 The Commission recognises that serious obstacles exist to the introduction of universal responsible arrears management rules in all cases of non-mortgage arrears. First, such cases encompass a wide variety of creditors, all of whom are subject to different regulatory regimes. The *IFSRA Code of Conduct on Mortgage Arrears* was issued by IFSRA and applies to the mortgage lending activities of all those institutions regulated by IFSRA, i.e. banks, building societies and “sub-prime” lenders. IFSRA also regulates moneylenders, and has the power to issue binding statutory codes of conduct in respect of their practices. While credit unions are regulated by the Registrar of Credit Unions, a division of IFSRA, the Registrar does not have the power to issue binding statutory codes of conduct in respect of credit unions, but instead is limited to issuing voluntary codes of conduct. Other types of creditors such as utility suppliers and suppliers of goods and services on credit lie entirely outside the scope of IFSRA’s regulatory powers, and so there is no possibility for the introduction of a statutory code for non-mortgage arrears. Legislation would therefore be required to introduce comprehensive and universal rules of responsible arrears management.

4.191 In addition to this difficulty, the Commission recognises that there are differences between these types of creditors which influence their arrears management practices. Utility providers are different from other unsecured creditors, as they may have recourse to the sanction of disconnection of the service rather than legal enforcement proceedings in the event of a build-up of arrears. Also, suppliers of goods and services on credit may not have the same institutional capacity as large credit institutions to engage in sophisticated arrears management practices. The Commission therefore realises that difficulties arise in attempting to establish comprehensive rules in cases of non-mortgage arrears.

4.192 In addition the Commission recognises that the area of arrears management policy is composed to a considerable extent of questions of business judgment. Creditors will generally be best placed to assess the debtor’s circumstances and to judge the approach to arrears management which is likely to be most successful in a given case. This suggests that any legal rules introduced in this area should be sufficiently flexible to allow discretion to lenders in this regard.

4.193 While the provisional recommendations in Chapter 6 in relation to the provision of certain information by creditors to debtors in advance of litigation seek to facilitate the non-judicial resolution of debt disputes,²⁹¹ the Commission believes that responsible arrears management practices should be established to assist the resolution of such matters at an even earlier stage. Despite the difficulties described above, certain core rules and procedures could be established in legislation. Creditors could be obliged to adopt an individual approach to each case of default, to seek to assess a debtor’s entire indebtedness, and to attempt to resolve the matter through non-judicial means before commencing legal proceedings. Obligations could be placed on lenders to provide information on money advice and legal aid services to debtors before legal proceedings could be brought.²⁹² Also, certain time limits and “triggers” could be established to mark the stages at which various arrears management actions should be taken. Rules relating to the use of debt collection agencies as agents or the assignment of debts to such agencies could also be included. Certain levels of flexibility should be left to creditors under any such rules, and the creditors’ legitimate interests and their right of access to the court to vindicate such interests must be adequately respected. Legitimate distinctions between different categories of creditors and their respective resources must also be recognised. Nonetheless recourse to legal enforcement proceedings should be clearly established as a last resort.

4.194 The Commission therefore suggests that consideration should be given to the desirability of introducing legislation specifying certain basic principles of arrears management which must be followed in all personal debt cases, as part of a review of financial services, consumer credit and energy sector regulation legislation.

²⁹¹ See paragraphs 6.161 to 6.171 below.

²⁹² The Commission’s provisional recommendations in relation to the proposed introduction of a requirement to issue a Pre-Litigation Notice in advance of commencing legal proceedings should again be considered in this regard.

4.195 *The Commission suggests that consideration should be given to the desirability of introducing legislation specifying certain basic principles of arrears management which must be followed in all personal debt cases.**

(3) Private Debt Collection

(a) The problem

4.196 The concerns raised by the lack of regulation of debt collection agencies have been noted in Chapter 3 above.²⁹³ There are currently no rules relating to eligibility to act as a debt collector, meaning that prior convictions or other misconduct do not prevent an individual from operating in this sector. Concerns have been raised about the use of deceptive and unfair practices by private debt collectors, as well as of debtor harassment.²⁹⁴ In 2009, High Court injunctions were obtained against creditors and their debt collector agents restraining them from activities such as interfering with, threatening or using violence against debtors, as well as restraining them from trespassing on debtors' premises.²⁹⁵

4.197 The current law applying to debt collecting is found in section 11 of the *Non-Fatal Offences against the Person Act 1997* and in the *IFSRA Consumer Protection Code*. The *Consumer Credit Act 1995* also contains some relevant provisions.

4.198 Section 11 of the 1997 Act prohibits certain activities which amount to the persistent harassment of a debtor. These include:

- making demands of the debtor which are calculated to subject him or her to distress, alarm or humiliation;
- falsely representing that a collector is authorised in an official capacity to collect a debt or presenting documents which falsely represent to have this character; and
- falsely representing that criminal proceedings lie for non-payment of the debt.

It is an offence to engage in any of these activities, and an offender can be liable to a fine not exceeding £1500.

4.199 In relation to the *Consumer Protection Code*, the legal position is as follows. Under the Code, entities regulated by the Irish Financial Services Regulatory Authority are required to ensure that any outsourced activity, including the appointment of debt collection agencies, complies with the requirements of the Code.²⁹⁶ In addition, under the common law rules on agency, regulated entities will be responsible for the acts of their agents. This means that if a debt collector acting as the agent of a regulated entity acts contrary to the provisions of the Code, IFSRA may take appropriate action against the regulated entity. Relevant provisions of the Code for present purposes include the following obligations:

- To act honestly, fairly and professionally in the best interests of customers and with due skill, care and diligence in the best interests of its customers;²⁹⁷

²⁹³ See paragraphs 3.129 to 3.130 above.

²⁹⁴ *MABS Submission to the Financial Regulator on Regulation of Debt Collection Agencies* (MABS Social Policy 2009).

²⁹⁵ See *Kavanagh v O'Neill* 2009/3862 P, order made on April 30 2009: see Carolan, *Irish Times*, May 1 2009; *Campbell v Kenny* 2009/6701 P, order made on July 22 2009: see *Irish Times*, July 23 2009.

²⁹⁶ General Principle 10 of the *Consumer Protection Code* and the *Consumer Protection Code for Licensed Moneylenders* provides that: "...[a regulated entity]...must ensure that in all its dealings with consumers and within the context of its licence, it ensures that any outsourced activity complies with the requirements of this Code". Common Principle 37 of the *Consumer Protection Code for Licensed Moneylenders* also provides that "Where a moneylender engages the services of a third party to collect debts on its behalf, the moneylender must have in place a written contractual arrangement which seeks to ensure that its consumers are treated in accordance with the provisions of this Code and the relevant provisions of the Act."

²⁹⁷ Chapter 1, paragraphs 1 and 2 of the *IFSRA Consumer Protection Code*.

- To preserve consumer rights i.e. a regulated entity must not seek to exclude or restrict any legal liability or duty of care or any other duty in any agreement with a consumer;²⁹⁸ and
- To avoid personal visits or oral communications except in specified circumstances.²⁹⁹

IFSRA does not possess any power to take action against debt collectors directly for breaching these rules, but must take action against the relevant regulated entity instead.

4.200 If a debt collector is not acting as an agent of a regulated entity, but rather has been assigned a consumer debt, no responsibility will lie against the collector or the regulated entity for a breach of the Code. It appears that this is the position only in respect of entities subject to the *Consumer Protection Code*, and that a different rule applies in respect of moneylenders. Where a moneylending agreement is assigned to a third party, the legal position is that the third party requires a moneylending licence to collect outstanding monies owed under a moneylending agreement. It is therefore an offence for such a third party to collect the debt without first obtaining a moneylending licence. Where a collector has obtained such a licence, the provisions of the 1995 Act and the *Consumer Protection Code for Licensed Moneylenders* would then apply to collection activities.

4.201 Under sections 2(2) and 40 of the *Consumer Credit Act 1995*, the rights of borrower and lender do not change on the assignment of a consumer debt. This however may not alleviate concerns in the case of debts assigned to collection agencies, as the methods of recovery used may nonetheless change on assignment. In this sense it is the methods of enforcing the right to repayment, rather than the right itself, which give rise to concern.

4.202 The question to be discussed in this section is whether the existing legal controls in relation to debt collection agencies are sufficient, or whether a licensing system for debt collectors similar to those existing in the countries now discussed should be introduced in Ireland. Arguments have previously been made for the regulation of debt collection agencies by IFSRA on a basis similar to moneylenders by both the Money Advice and Budgeting Service³⁰⁰ and the Free Legal Advice Centres.³⁰¹ This would involve the introduction of a licensing system for debt collection agencies similar to that existing for moneylenders under the *Consumer Credit Act 1995*. In 2009, a Private Member's Bill was also presented in the Oireachtas which provided for the regulation of such agencies by IFSRA.³⁰² In light of the previous debate in this area, the possibility of introducing a regulatory regime for debt collection agencies under the supervision of IFSRA is therefore the primary focus of this section.

(b) ***Comparative regulation of debt collectors***

4.203 Before the arguments for and against the introduction of a licensing regime for debt collection agencies are discussed, the following paragraphs present a brief description of such licensing systems in other countries.

(i) ***Europe***

(I) ***Overview***

4.204 The table below is taken from a Europe-wide survey conducted in 1999 and provides an overview of the extent of the regulation of debt collectors in European countries.³⁰³ The table illustrates that debt collectors and collection agencies are subject to legal control in the majority of European countries, and Ireland can be said to be an outlier in this regard. It should be noted that the information

²⁹⁸ Chapter 2, paragraph 23 of the Code.

²⁹⁹ Chapter 2, paragraph 32 of the Code.

³⁰⁰ *MABS Submission to the Financial Regulator on Regulation of Debt Collection Agencies* (MABS Social Policy 2009).

³⁰¹ *Joyce An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 118.

³⁰² *Central Bank and Financial Services Authority of Ireland (Protection of Debtors) Bill 2009* (PMB).

³⁰³ *Laws and Mansfield Debt Collection Practices Across Europe* (Consumer Debt Network/Money Advice Trust 1999) at 8-9.

contained in the table is now quite dated, and that some countries have increased the regulatory control of debt collectors since it was published. For example, a law was enacted in 2002 in Belgium which introduced registration requirements for debt collectors, as is discussed below.

Country	Regulated by Legislation?	Regulated by Codes of Practice ?	Regulated by Licence?	Regulated by Common Practice (Commercial Reputation)?	Is Debt Collection Un-regulated?
Austria	No	Yes	Yes	No	No
Belgium	Yes	No	No	No	No
Finland	Yes	Yes	No	Yes	No
Germany	Yes	Yes	Yes	No	No
Switzerland	Yes	No	No	Yes	No
Greece	Yes	No	No	No	Yes
Iceland	Yes	Yes	Yes	No	No
Luxembourg	Yes	No	Yes	No	No
Sweden	Yes	Yes	Yes	No	No
Ireland	No	No	No	No	Yes
Scotland	Yes	Yes	Yes	Yes	No
Norway	Yes	No	Yes	No	No
Holland	No	Yes	Yes	Yes	No
Denmark	Yes	Yes	Yes	Yes	No
France	Yes	Yes	Yes	No	No
England	Yes	Yes	Yes	Yes	No

4.205 The following paragraphs present a brief discussion of the regimes of regulating debt collection agencies in a selection of countries in Europe and elsewhere.

(II) *Belgium*

4.206 In Belgium, debt recovery practices are regulated by the Law of 20 December 2002 relating to the recovery by consent of consumer debts.³⁰⁴ This law contains rules relating to the licensing of debt collectors, specifies certain prohibited practices and establishes mechanisms for enforcing these rules. First, the law provides that no debt recovery activity can be carried on without first registering with the Minister for Economic Affairs.³⁰⁵ This registration may be revoked or suspended by the Minister if the collector or agency breaches the provisions of the law. Secondly, rules are specified prohibiting certain acts during the recovery process. The primary rule is that any behaviour or practice which interferes with the private life of the consumer, which misleads the consumer or which interferes with his or her human dignity is prohibited.³⁰⁶ As part of these principles, the following specific practices are forbidden:³⁰⁷

- Any communications containing false threats of judicial proceedings or false information on the consequences of default in repayment.

³⁰⁴ *Loi relative au recouvrement amiable des dettes du consommateur 20 décembre 2002.*

³⁰⁵ Article 4 §1 of the 2002 law.

³⁰⁶ Article 3 §1 of the 2002 law.

³⁰⁷ Article 3 §2 of the 2002 law.

- Any mention on an envelope that the communication concerns the recovery of a debt.
- Demands for charges not provided for in the credit contract or not legally permitted.
- Approaches to the debtor's neighbours, family or employer.
- The recovery or attempted recovery of debts from someone other than the debtor.
- Any attempt to recover a debt in the presence of a third party, except with the consent of the debtor.
- Any attempt to obtain an acknowledgement of the debt, a bill of exchange or an assignment of wages from the debtor.
- Harassment of a debtor who has expressly contested the debt.
- Telephone calls or visits to the debtor's home between the hours of 10pm and 8am.

In addition, debt collectors are prohibited from demanding from the debtor any sum other than the amounts agreed in the contract which gave rise to the debt originally.³⁰⁸ Before attempting a recovery, the collector must first send a written demand to the consumer, which must contain certain specified information.³⁰⁹ Notably if the collector is a lawyer, ministerial official or court agent, the demand must specify that the recovery in question is an attempt at consensual debt recovery, and not judicial execution.³¹⁰ The time permitted for the debtor to pay before other enforcement steps are taken must also be specified, and a minimum of 15 days must be allowed.³¹¹ When a debt collector makes a visit to the home of a consumer he or she must present a written document to the consumer specifying certain information including his or her name, the right of the consumer to refuse the collector access to his or her home and the right to ask the collector to leave at any time.³¹² This information must also be communicated orally to the consumer. A receipt must also be provided to the consumer if partial or full payment is made to the collector.

4.207 The rules contained in the law can be enforced in a variety of ways. First, an affected party, the Minister of Economic Affairs, a professional association or a consumer organisation can bring an action before a court for an order declaring certain activity to contravene the provisions of the law and ordering the activity to cease.³¹³ Secondly, the law gives the Minister the power to appoint agents to investigate breaches of the law.³¹⁴ These agents are given extensive powers to carry out this function, including powers of entry into business premises and homes (with court authorisation necessary in the case of a home) and the power to seize documents necessary to prove a breach of the law. These agents may also obtain police assistance when carrying out their functions. If evidence of an infraction is found, the Minister or the agents can issue a formal warning to the relevant debt collector, and if this warning is not obeyed a court action for an order prohibiting the impugned conduct may be obtained. Thirdly, additional sanctions exist for breaches of the provisions of the law. Fines of up to €50,000 can be imposed on those who engage in conduct specifically prohibited by the law, or on those who fail to comply with a court order prohibiting certain activity.³¹⁵ The same sanction can be imposed on someone who obstructs the work of the appointed enforcement agents. In addition, any payment obtained through a breach of the specified rules is considered to be validly made by the consumer to the creditor, but the debt collector is obliged to reimburse the consumer with the amount collected. Therefore the collector, rather than the debtor or creditor, must bear the loss where a debt has been unlawfully recovered.

³⁰⁸ Article 5 of the *Loi relative au recouvrement amiable des dettes du consommateur 20 décembre 2002*.

³⁰⁹ Article 6 of the 2002 law.

³¹⁰ Article 6 §2 of the 2002 law.

³¹¹ Article 6 §3 of the 2002 law.

³¹² Article 7 of the 2002 law.

³¹³ Article 9 and 10 of the 2002 law.

³¹⁴ Article 11 of the 2002 law.

³¹⁵ Article 15 of the *Loi relative au recouvrement amiable des dettes du consommateur 20 décembre 2002*.

4.208 It should be noted that the lawyers, ministerial officials and judicial agents who carry out debt collection activities are exempt from the registration requirements of the law.³¹⁶

(III) *United Kingdom*

4.209 In the UK, debt collection agencies are subject to the same consumer credit licensing regime as all consumer lenders and debt management companies, as discussed in other sections of this chapter.³¹⁷ Section 21 of the *Consumer Credit Act 1974* (UK) requires licenses to be held by those carrying on a wide range of business activities in the consumer credit sector, including “a business so far as it comprises or relates to debt-collecting.”³¹⁸ The Office of Fair Trading (OFT) is responsible for issuing consumer credit licences, and will only issue one if satisfied that the applicant is a fit person to engage in activities covered by the licence.³¹⁹ The OFT may take into account any circumstances which appear relevant in assessing a licence application, and will in particular have regard to whether the applicant has:³²⁰

- Committed any offence involving fraud or other dishonesty, or violence;
- Contravened any provisions of consumer credit law, either in the UK or in another Member State of the European Economic Area;
- Practised discrimination on grounds of sex, colour, race or ethnic or national origins in, or in connection with, the carrying on of any business, or
- Engaged in business practices appearing to the Office of Fair Trading to be deceitful or oppressive, or otherwise unfair or improper (whether unlawful or not).

The OFT has indicated in a guidance document that it will take into account other issues such as the insolvency, bankruptcy or disqualification as a director of any applicant; any complaints of consumers or adverse information from other regulators, professional bodies, trade bodies, or consumer organisations; and evidence relating to the skills and competence of the applicant to provide the service.³²¹ The OFT has categorised debt collection businesses as posing an exceptionally high potential risk to consumers, and for this reason additional conditions must be met when applying for a debt collecting licence. The applicant must provide evidence of its credit competence in a Credit Competence Plan, and should expect to be subject to an on-site inspection by the OFT.

4.210 Companies which merely collect debts owed to them, including (since October 2008) debts which have been assigned to them, need not apply for a licence.³²² Exemptions also exist for barristers and solicitors acting in their respective capacity of barristers and solicitors, who will not be considered to be carrying out ancillary credit businesses for the purpose of the *Consumer Credit Act*.³²³ It should be noted that the OFT also operates a group licensing regime whereby professional associations and other bodies can apply for a group licence to cover members of the group for specific credit activities.³²⁴

³¹⁶ Article 1 § 2 of the 2002 law.

³¹⁷ See paragraphs 4.100 to 4.103 above for a discussion of the UK consumer credit licensing system in respect of consumer lenders. See paragraphs 4.239 to 4.245 below for a discussion of the licensing of debt management companies in the UK. See also Conway *Regulation of Debt Collection Companies* (House of Commons Library SN/HA/5138 2009).

³¹⁸ Section 24A(4)(f) of the *Consumer Credit Act 1974* (UK).

³¹⁹ Section 25(1) of the 1974 Act.

³²⁰ Section 25(2) of the 1974 Act.

³²¹ Office of Fair Trading *Do you need a credit licence? An introduction to consumer credit licensing* (2008) at 3.

³²² *Ibid* at 24. See section 146(6)(aa) of the 1974 Act.

³²³ Section 146(1) of the *Consumer Credit Act 1974* (UK).

³²⁴ Office of Fair Trading *Do you need a credit licence? An introduction to consumer credit licensing* (2008) at 8.

4.211 In 2003, the OFT published formal guidance on debt collection, which applies to all consumer credit licence holders and applicants.³²⁵ A detailed description of the guidance is beyond the scope of this Consultation Paper, but it is noted that under the guidance debt collectors are expected to deal fairly with debtors. The minimum standards expected of licensed debt collectors are set out, as are the types of behaviour which the OFT considers to constitute “unfair business practices”. As noted above, such unfair practices can render a licensee unfit to retain a licence.

4.212 In 2006, the OFT published a review into how the guidance had succeeded in raising awareness of the regulatory regime and in changing behaviour within the debt collecting sector. The main results of the review included the following findings:³²⁶

- The guidance was a success in terms of content.
- Awareness of debt collection standards had increased among collectors of debts, individual debtors and consumer advisors.
- There had been positive changes in industry behaviour.
- Nonetheless, more remained to be done to improve compliance levels.

4.213 Under the UK *Consumer Credit Act 1974*, it is an offence to engage in any licensed activities without a relevant licence.³²⁷ Other civil sanctions also exist, and the OFT possesses powers to impose requirements on licensed businesses, as well as civil penalties of up to £50,000 on a licensee who fails to comply with such a requirement.³²⁸ Civil sanctions also exist for operating without a licence, as all regulated agreements entered into by an unlicensed business will be unenforceable against the other party without an order of the OFT.³²⁹

4.214 In addition to the regulatory supervision of the OFT, a form of self-regulation also exists within the debt collecting industry in the UK. The Credit Services Association (CSA) is the national association in the UK for debt collection and tracing agencies. The CSA represents 200 of the estimated 500 debt collection businesses in the UK.³³⁰ All members must comply with a code of practice which outlines the obligations of the members. This code includes obligations to avoid using oppressive or intrusive collection practices and to be circumspect and discreet when attempting to contact the debtor by telephone, email, SMS or personal visit.

(ii) Canada: Debt collection regulation in Ontario

4.215 In Canada, debt collection activities are regulated at a provincial and territorial level, with debt collection agencies obliged to obtain a licence for the province or territory in which they operate. As an example of this system, the regulation of debt collection agencies in Ontario is now briefly described. The relevant rules are found in the *Collection Agencies Act*. This Act provides for the appointment of a Registrar of Collection Agencies, and no person may carry out the business of a collection agency or act as a collector without first registering with the Registrar.³³¹ In addition, creditors are prohibited from using the services of a collection agency that is not registered,³³² and a registered collection agency may not employ a collector or authorise a collector to act on its behalf unless that collector is registered.³³³ An

³²⁵ Office of Fair Trading *Debt Collection Guidance* (OFT664 2003, updated December 2006). The guidance does not apply to the routine collection of debts as they fall due, but rather applies to the collection of a debt once an account is in default.

³²⁶ See Conway *Regulation of Debt Collection Companies* (House of Commons Library SN/HA/5138 2009) at 4.

³²⁷ Section 39 *Consumer Credit Act 1974* (UK).

³²⁸ Section 39A of the 1974 Act.

³²⁹ Section 148 of the 1974 Act.

³³⁰ See Conway *Regulation of Debt Collection Companies* (House of Commons Library SN/HA/5138 2009) at 5.

³³¹ Sections 3 and 4 of the *Collection Agencies Act* (Ont.).

³³² Section 24(1) of the Act.

³³³ Section 24(2) of the Act.

application for registration will be refused if the past conduct of the applicant affords reasonable grounds to believe that the applicant will not carry on business in accordance with law and with integrity and honesty.³³⁴ The applicant must also prove that it possesses sufficient financial resources to run the business, and that its activities have not, or will not in the future, contravene the rules of the Act. The Act also specifies certain prohibited practises, and as a result collection agencies must not collect any more money than that owed under the original credit agreement, and may not use any means of communication which lead to additional charges for the debtor.³³⁵

4.216 The Act provides that an offence will be committed by any person who knowingly contravenes the Act or regulations made under it, or fails to comply with any order, direction or other requirement made under the Act.³³⁶ It is also an offence to provide false information when applying for registration or when making any statement or return under the Act. In addition to a criminal conviction, an offender may also be ordered to pay compensation or make restitution.³³⁷ The Act also provides for the power to make regulations containing detailed rules relating to the operation of a debt collection business.³³⁸ These regulations may cover such matters as the conditions governing applications for registration, the accounting requirements of collection agencies and additional prohibited practices not specified in the Act itself.

(iii) Hong Kong

4.217 The next country to be discussed is Hong Kong, which is chosen because the Law Reform Commission in that country relatively recently recommended that a licensing regime for debt collectors should be introduced.³³⁹ Having conducted a comparative analysis of systems for the licensing of debt collectors in various countries, the Hong Kong Law Reform Commission compiled a list of arguments for and against the introduction of a licensing system for debt collectors. Arguments against the introduction of a licensing system included the following:³⁴⁰

- A licensing regime cannot curb illegal activities arising from debt collection, because delinquent operators would not offer themselves for licensing either because they know that they would not be granted a licence, or they believe that it would be more advantageous for them to operate outside the licensing regime. As a corollary, responsible debt collectors would act in an ethical manner even without a licensing regime.
- Existing laws prohibit certain unlawful practices in debt collection, and a licensing regime would not put an end to all illegal collection practices. Problems of detecting perpetrators of illegal collection conduct would remain.
- A licensing regime would create cost burdens for the State and would increase bureaucracy. It would be necessary to devise an appropriate regulatory system which would be cost-effective.

4.218 Against these considerations, the following arguments in favour of introducing a licensing system were identified by the Hong Kong Law Reform Commission:³⁴¹

- A licensing system which imposes security checks on entrants should reduce the risk of harm to the public by excluding operators likely to engage in harmful activities.

³³⁴ Section 6 of the Act.

³³⁵ Section 22 of the *Collection Agencies Act* (Ont.).

³³⁶ Section 28(1) of the Act.

³³⁷ Section 28(3) of the *Collection Agencies Act* (Ont.).

³³⁸ Section 30 of the Act.

³³⁹ The Law Reform Commission of Hong Kong *Report on the Regulation of Debt Collection Practices* (2002).

³⁴⁰ *Ibid* at 115.

³⁴¹ *Report on the Regulation of Debt Collection Practices op cit.* at 115-116.

- If the law specifies that it is an offence to operate without a licence, the police have the power to take action against someone as soon as a demand for repayment of a debt is made. This makes enforcement easier than in a situation where specific unlawful activities must be proved.
- Responsible and ethical operators favour a licensing system because in the absence of such a system they are subject to unfair competition from collectors who engage in dubious practices.
- A licensing regime would promote professionalism in the industry and so would help the image and reputations of legitimate licensed debt collectors. The threat of the revocation of a licence is a powerful incentive in this regard.
- Even if licensing would not eliminate all unlawful practices due to detection difficulties, it would reduce malpractice among collectors who do not meet the best practice standards of the industry.
- A licensing system would provide the relevant authorities with valuable and comprehensive information about the debt collection industry. This would aid policy development and enforcement in this area.
- Persons of questionable integrity or with previous criminal convictions would be disallowed from engaging in debt collection activities, therefore increasing consumer protection.

4.219 The Hong Kong Law Reform Commission noted that responses to its consultation on this issue overwhelmingly favoured the introduction of a licensing system for debt collectors, even among debt collection companies and credit providers.³⁴² The report concluded that a statutory licensing regime for debt collection should be introduced.³⁴³ It was recommended that it should be an offence to engage in debt collecting operations without a licence. The proposed licensing regime was to cover the collection of both consumer and commercial debts. The decision as to which body should be responsible for the licensing regime was left open by the report, which recommended that the government should decide on the matter. The report recommended that the licensing requirement should apply to individual debt collectors as well as debt collection agencies. Other employees of such agencies not directly involved in collection would however be exempt from licensing.³⁴⁴ Exemptions were also recommended for creditors collecting their own debts (except where the debt had been assigned to the creditor), barristers and solicitors, receivers, liquidators and trustees in bankruptcy, court bailiffs and authorised institutions. It was proposed that the licensing body should take into account all relevant considerations when assessing an application, especially whether the applicant had committed the offence of unlawful harassment of a debtor, or any offence involving fraud, dishonesty or violence.³⁴⁵ Also consideration should be given to whether or not the applicant had carried on a business under a misleading name, or committed a breach of a code of practice.

4.220 The report further recommended that the licensing authority should be provided with statutory powers to refuse to grant, to revoke or to suspend a licence; to inquire into any complaint or alleged breach of legislation or a code of practice; and to apply to court for powers of entry to relevant premises to conduct investigations.³⁴⁶ It was also recommended that the licensing authority should be required to formulate a code of practice for debt collection.³⁴⁷

³⁴² The Law Reform Commission of Hong Kong *Report on the Regulation of Debt Collection Practices* (2002) at 117.

³⁴³ *Ibid* at 119.

³⁴⁴ *Report on the Regulation of Debt Collection Practices op cit.* at 124.

³⁴⁵ The Law Reform Commission of Hong Kong *Report on the Regulation of Debt Collection Practices* (2002) at 131.

³⁴⁶ *Ibid* at 133.

³⁴⁷ *Report on the Regulation of Debt Collection Practices op cit.* at 139. The report suggested that the authority should consult with representative bodies of credit providers, debt collectors, consumers and other relevant bodies in order to draft the code. It was recommended that a breach of the code should entitle the authority to

4.221 The recommendations of the Law Reform Commission of Hong Kong were not implemented however. In 2005, the Hong Kong Administration published a report outlining its reasons for refusing to adopt the recommendations.³⁴⁸ First, this report doubted whether a licensing regime would be an effective means of regulating the conduct of the debt collection industry, as delinquent collectors are unlikely to come forward for licensing in the first place. It was thought that for this reason licensing would not prevent undesirable operators from engaging in debt collection. The report believed that the criminal sanctions in place to prevent debtor harassment were sufficient to prevent unfair competition in the market for debt collection. The report also noted that in many countries the regulating of the debt collection industry takes place within the broader context of regulating trade practices or consumer credit operators, and dedicated regulators for debt collectors are not common.

(c) **Conclusions.**

4.222 The arguments for the introduction of a licensing system for debt collection agencies and examples of systems for regulating such agencies have been presented in the preceding paragraphs. Some arguments against the introduction of a licensing system have also been presented. It should be noted that the 2008 European Commission report on a common operational definition of over-indebtedness, building on the previous studies of the Council of Europe, noted that there is a need for defaulting consumers to be afforded basic protections from debt collection activities.³⁴⁹ The need to delimit the practices of extra-judicial debt recovery agencies through legislation or practice was recognised as part of the process of balancing the protection of the dignity of the debtor and the legitimate interests of creditors. The report suggested that a basic minimum requirement should be that creditors who pass a debt to another agent for collection or sell a debt to another company should ensure that the third party organisation operates in accordance with the codes of practice binding the original creditor.³⁵⁰ It should be noted that such a rule is contained in the *IFSR Consumer Protection Code for Licensed Moneylenders*.³⁵¹ Further protection may nonetheless be required.

4.223 The Commission believes that a strong case exists for the introduction of a licensing system for debt collection agencies. The potential for consumer harm is great in this area, which is an area in which dubious practices have traditionally been applied. A survey of comparative legal systems also demonstrates that a majority of European countries contain rules regulating the activities of debt collection agencies. The Commission recognises that the current law already addresses debt collection activities in certain ways, as specified above. The Commission however believes that these provisions fall short of offering sufficient levels of consumer protection. Particular concerns arise in relation to the inability of the *Consumer Protection Code* to extend to situations where debts have been assigned to debt collectors, and the lack of any binding codes to regulate the use of collection agencies by credit unions, utility service providers and trade creditors. In addition, even where the *Consumer Protection Code* applies in relation to regulated entities employing collection agencies as their agents, the Code contains no specific rules in relation to permissible or prohibited practices in debt collection. A major concern arises from the fact that Irish law does not place restrictions on those who may act as a debt collector, with the consequence that those guilty of criminal offences or other prior misconduct are not prevented from carrying on collection activities.

revoke, suspend or decline to renew the licence of the party in breach, and to impose other penalties such as reprimands and fines.

³⁴⁸ *Law Reform Commission Report on the Regulation of Debt Collection Practices: Report on the Administration's Response* (2005).

³⁴⁹ *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 82-83, citing *Final Activity Report of the Group of Specialist for Legal Solutions to Debt Problems (CJ-S-DEBT)* (Council of Europe CJ-S-DEBT (2006) 6 Final).

³⁵⁰ *Ibid* at 83.

³⁵¹ See Common Principle 37 of the *IFSR Consumer Protection Code for Licensed Moneylenders*.

4.224 The Commission therefore believes that a licensing system should be introduced for the debt collection industry. All those engaging in debt collection activities should be required to obtain a licence, subject to certain limited exemptions.

4.225 *The Commission provisionally recommends that a licensing system should be introduced for the debt collection industry. Subject to specified exceptions, all debt collectors and debt collection agencies should be obliged to hold a licence before operating a debt collection business.*

4.226 The Commission suggests that the Irish Financial Services Regulatory Authority (IFSRA) is the most appropriate body to supervise this proposed licensing system. IFSRA is responsible for regulating the consumer credit market and is experienced in relation to the protection of consumers of credit. Through its enforcement of the *Consumer Protection Code* and *Consumer Protection Code for Licensed Moneylenders* against regulated entities employing debt collectors as their agents, the Authority already indirectly regulates debt collection practices in certain circumstances. IFSRA also regulates the activities of licensed moneylenders, including their collection activities, and many similar issues arise in relation to such operators as arise in the case of debt collection agencies. IFSRA is experienced in issuing codes of conduct for regulated entities, and in drafting voluntary codes of practice in cooperation with industry bodies. Therefore IFSRA would be well-placed to issue a code of conduct for debt collectors specifying the standards to be observed by those operating in that industry.

4.227 The Commission, however, also recognises that certain difficulties arise in relation to the proposal to make IFSRA responsible for supervising the licensing system for debt collection agencies. First, the regulation of debt collectors may be seen as a departure from the core function of IFSRA, which is to regulate financial services providers. Secondly, many creditors employing collection agencies are not currently regulated by IFSRA, such as utility service providers and trade creditors. The Commission therefore recognises that alternative bodies could be suitable supervisors of a licensing system. For example, the Private Security Authority has experience in licensing, controlling and supervising security services, functions which are largely similar to the licensing of debt collection agencies. It should be noted in this regard that while debt collection agencies are regulated by the Office of Fair Trading in the UK, it has been proposed that commercial bailiffs are to be regulated by the UK Security Industry Authority, the equivalent of the Irish Private Security Authority.³⁵² The Commission therefore recognises that arguments in favour of supervision of debt collectors by other authorities can be made, and invites submissions as to whether the licensing of collection agencies by a body other than IFSRA should be considered.

4.228 *The Commission provisionally recommends that the Irish Financial Services Regulatory Authority or another body such as the Irish Private Security Authority should be responsible for supervising the proposed licensing system for debt collection agencies.*

4.229 The Commission recognises that certain exemptions from the licensing system must exist. For example, in most countries creditors collecting debts on their own behalf are exempt from the licensing regime, as otherwise excessive regulatory restrictions would be placed on all creditors. The Commission supports this view. In some countries the exemption for creditors collecting debts on their own behalf extends to those who have been assigned a debt, while in other systems the exemption does not extend to such assignees. The Commission believes that those who have been assigned a debt may and then seek to collect it may need to be subject to the proposed licensing system under certain circumstances in order to ensure sufficient levels of consumer protection. In addition, in many countries lawyers who provide debt collection services are exempt from licensing requirements. Such lawyers are instead subject to the licensing requirements and disciplinary rules of their professional associations. Also, those collecting debts under the authority of legislation or a court order are exempt from licensing requirements in the countries surveyed above. This would mean for example that Sheriffs and County Registrars should be exempt from licensing requirements in Ireland. The Commission invites submissions on the issue of the exemptions to the proposed licensing system.

4.230 *The Commission provisionally recommends that creditors collecting debts on their own behalf should be exempt from the proposed licensing system. The Commission invites submissions as to*

³⁵² See paragraph 6.19 below.

whether this exemption should be extended to those who have been assigned a debt, and as to whether exemptions should be given to other groups.

4.231 Each regulatory regime establishes conditions which an applicant for a licence must satisfy. Common considerations include whether the applicant has been convicted of a criminal offence, whether the applicant has previously, or is likely in the future, to breach the relevant rules on debt collection activities, and whether the applicant has sufficient financial resources to operate such a business. While the Commission believes that all relevant considerations should be taken into account in deciding on the fitness of an applicant for a debt collection licence, the Commission invites submissions as to the specific considerations which should be taken into account in considering an application for a licence.

4.232 *The Commission invites submissions as to the criteria which should be taken into account in assessing whether an applicant is fit to hold a debt collection licence.*

4.233 In addition to these basic conditions which must be met before applying for a licence, it is the Commission's view that more detailed rules should be made to outline certain prohibited practices in debt collection, and to establish standards of best practice in the industry. The Commission recommends that a code of conduct should be issued by the relevant regulatory authority specifying detailed rules regulating the operations of debt collection agencies. Breaches of this code should be punished by administrative sanctions and the potential revocation or suspension of a debt collecting licence in cases of severe breaches. The code should be drafted by the relevant authority in cooperation with representatives of the debt collection industry.

4.234 *The Commission provisionally recommends that in addition to carrying out licensing assessments the relevant regulatory authority should issue a binding code of practice for debt collection agencies. Such a code could be drawn up in cooperation with representatives of the debt collection industry.*

D Debt Counselling

4.235 As noted in the previous chapter, debt counselling has been identified as an essential element in remedying the problem of over-indebtedness. Both the Council of Europe³⁵³ and the European Commission report on a common operational definition of over-indebtedness³⁵⁴ have recognised the central role of debt advice and counselling in providing over-indebted individuals with the support and skills necessary to address their debt difficulties. The Commission recognises that debt counselling is largely an issue of social policy rather than one of law reform, and so the Commission will not make recommendations on issues such as how debt counselling services should be provided. Nonetheless, a legal issue arises in relation to the question of the regulation of commercial debt advice agencies. This issue is now discussed.

(1) Problems arising in the commercial debt advice sector

4.236 The Commission understands that in recent times there has been growth in the number of private companies offering debt advice and debt management services to over-indebted consumers. It appears that while some of these agencies do not charge for their services, others charge fees before providing advice. The potential for conflicts of interests among such advisors has been noted, and concerns have been raised as to whether advisors are representing the sole interests of the debtor. In this regard criticism of the industry have been made by creditors in the UK that certain debt management companies may not be providing the best advice to debtors and may be designing repayment plans which are inappropriate for the debtor but profitable for the company.³⁵⁵ Creditors were also concerned at the high level of fees charged, which a UK survey found on average to be between 15% and 18% of the

³⁵³ *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems: CM/Rec(2007)8* at paragraphs 2(c), 4(a) and 5(c).

³⁵⁴ *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008 at 83ff.

³⁵⁵ Collard *An Independent Review of the Fee-Charging Debt Management Industry* (Personal Finance Research Centre, University of Bristol and Money Advice Trust 2009) at 3.

monthly repayments made.³⁵⁶ Concerns have been raised as regards the transparency of such costs also. In addition, the marketing tactics of debt management agencies may give rise to worry, especially when it is considered that their clients are likely to be in particularly vulnerable situations. The Office of Fair Trading in the UK has in this regard recently taken action against debt advice companies who engaged in misleading marketing practices.³⁵⁷ Furthermore, a study of private debt management plans in the UK revealed many customers of debt management companies found the quality of service provided to be poor, with certain payments to creditors being made late or even not being made at all.³⁵⁸ Some debtors surveyed complained of being worse off financially than before they contacted the company. Such complaints were however not universal, and those surveyed who were currently making payments as part of a debt management plan or who had paid off all their debts under such a plan were generally satisfied with the service provided. Debtors who found the plan to be operating successfully felt themselves to be in a better financial position as a result of the advice received. Nonetheless, it can be seen that the operation of debt management companies has led to concern. It must be recalled that these concerns arise in the UK, a country in which debt management companies are subject to a licensing and regulatory regime. Concerns may therefore be greater in Ireland where no such regime exists.

(2) Comparative Analysis

(a) European Studies

4.237 In relation to the provision of debt counselling, the European Commission report of 2008 on a common operational definition of over-indebtedness recommended that “in order that over-committed consumers receive consistently high quality advice and assistance, there should be systems in place for regulation and to ensure quality standards.”³⁵⁹ In most European countries debt counselling is regulated by law in some way and Ireland appears to be among Europe’s outliers in its lack of legal provisions for such activities.³⁶⁰ This is illustrated by the following table, which is taken from a 2003 survey of consumer credit and insolvency law and over-indebtedness policy in the Member States of the European Union at the time.³⁶¹

Member State	Is Debt Counselling Regulated by Law?	Statutory Source of Regulation	Primary Providers of Money Advice
Austria	Yes	§12 of the Insolvency Law	Independent, non-profit organisations
Belgium	Yes	Decrees of regional governments regulate debt advice services at a local level.	Public social aid centres; Non-profit organisations
Denmark	No		Consumer organisations

³⁵⁶ *Ibid* at 4-5.

³⁵⁷ See e.g. *OFT Seeks Closure of “Look Alike” Debt Advice Websites* (OFT Press Release 26-09), 7 March 2009.

³⁵⁸ Collard *An Independent Review of the Fee-Charging Debt Management Industry* (Personal Finance Research Centre, University of Bristol and Money Advice Trust 2009) at 4.

³⁵⁹ *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 86.

³⁶⁰ See Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented by the Institute for Financial Services e.v. Erasmus University Rotterdam/School of Law University of Helsinki/Helsinki Collegium for Advanced Studies to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 201.

³⁶¹ *Ibid* at 201-204.

Member State	Is Debt Counselling Regulated by Law?	Statutory Source of Regulation	Primary Providers of Money Advice
Finland	Yes	Act of Economy and Debt Counselling 2000/713	Municipalities
France	Yes	Article L-321-1 of the Consumer Code defines which consultants and what kind of consulting services are prohibited.	Consumer associations; social workers; non-profit organisations
Germany	Yes	Individual money advice responsibilities are regulated by: §3, no. 9 of the Legal Advice Act; §305, paragraph 4 of the Insolvency Act; §8, 17 of the Federal Social Security Act	Local authorities; Charitable groups; Consumer Organisations
Greece	No		Consumer Associations
Ireland	No		Money Advice and Budgeting Service
Italy	Yes	Article 16 of the usury law 1996	Local anti-usury foundations; Consumer organisations; "Credit mediators"
Luxembourg	Yes	2000 law on the Prevention of Over-indebtedness and the Collective Settlement of Debts in the Case of Over-indebtedness.	Over-indebtedness Information and Advice Service
Netherlands	Yes	Consumer Bankruptcy Act	Municipal banks; social services; private organisations; lawyers; National Organisation of Debt Advice
Portugal	No		Consumer protection organisations and municipal consumer information services
Spain	No		Commercial debt advice agencies
Sweden	Yes	§1 of the Law on Social Services	Municipalities
UK	Yes	Section 21 of the <i>Consumer Credit Act 1974</i> .	Public and private non-profit consumer debt advice organisations; commercial debt advice agencies

4.238 While the above table illustrates that the majority of Member States of the EU at the time have systems in place for the regulation of debt counsellors, it should be noted that the form of regulation varies in different legal systems. In countries such as Austria, Germany and Luxembourg the debt counselling regulations are contained in the countries' insolvency laws.³⁶² These laws contain a licensing

³⁶² See Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented by the Institute for Financial Services e.v. Erasmus University Rotterdam/School of Law University of Helsinki/Helsinki Collegium for Advanced Studies to Commission of the European

system for debt counsellors. In contrast, in Finland individual regions have enacted local laws to deal specifically with debt counselling, and these provide that free debt counselling is made available by the municipal authorities as a statutory entitlement. The Finnish legislation also specifies the personal requirements and standards which must be met by debt counsellors. Compliance with these requirements is supervised by consumer agencies. In Germany additional rules contained in social security legislation provide the legal basis for money advice for over-indebted households entitled to social welfare, while similar legislation governs social debt counselling in Sweden. In contrast, the Money Advice and Budgeting Services have only recently been given legislative recognition in Ireland³⁶³ and no legal rules exist in relation to the debt advice sector at all. The following paragraphs describe briefly the system of regulating debt advisors in the United Kingdom in order to present a more detailed example of how these operators could be supervised in Ireland.

(b) ***The United Kingdom***

4.239 In the United Kingdom, fee-charging debt management companies are subject to three varied layers of regulation.³⁶⁴ First, any organisation providing debt adjusting, debt counselling or credit information services, whether without charge or for a fee, are subject to a licensing regime under the *Consumer Credit Act 1974* (UK). Secondly, the Office of Fair Trading (OFT) has published *Debt Management Guidance* which establishes the minimum standards which must be met by all debt management providers if they are to be found to be fit to hold a consumer credit licence. Finally, there are three industry codes of practice covering fee-charging debt management companies, although these codes are not mandatory and not all providers subscribe to them.

4.240 As noted above,³⁶⁵ section 21 of the *Consumer Credit Act 1974* (UK) as amended provides that a licence is required to carry on a consumer credit business, consumer hire business or an ancillary credit business. For present purposes, the relevant types of businesses for which licences are required include debt adjusting, debt counselling and credit information services.

4.241 Debt adjusting consists of negotiating terms with the creditor on behalf of an individual for the discharge of a debt; taking over, in return for payments by the debtor, his or her obligation to discharge a debt; or any similar activity concerned with the payment of a debt.³⁶⁶ Applications for a debt adjusting licence must submit a Credit Competence Plan in order to facilitate the OFT's assessment of whether the applicant is fit to be licensed. An on-site inspection of the applicant's premises is also made by the OFT as part of the application procedure. A distinctive debt adjusting licence is required for organisations providing debt adjusting services on a non-commercial basis. This licence prevents its holder from charging for such services. It was thought necessary to require non-commercial organisations to obtain a licence since the principles which underlie the licensing system of transparency, acting in the consumer's best interests and keeping the consumer informed, apply equally to non-commercial services.³⁶⁷

4.242 Debt counselling involves providing advice to individuals about how to discharge specific debts, where those debts arise under consumer credit or hire agreements.³⁶⁸ Again the submission of a Credit Competence Plan and an inspection of the applicant's business premises are conditions of the application

Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 202.

³⁶³ See sections 26-28 *Social Welfare (Miscellaneous Provisions) Act 2008*, amending the *Comhairle Act 2000* (which in turn was amended by the *Citizens Information Act 2007*).

³⁶⁴ See e.g. Collard *An Independent Review of the Fee-Charging Debt Management Industry* (Personal Finance Research Centre, University of Bristol and Money Advice Trust 2009) at 2.

³⁶⁵ See the discussion of the UK consumer credit licensing regime in relation to lending activities at paragraphs 4.100 to 4.101 above; and see paragraphs 4.209 to 4.213 above for a discussion of the licensing system for debt collection agencies.

³⁶⁶ Office of Fair Trading *Do you need a credit licence? An introduction to consumer credit licensing* (2008) at 20.

³⁶⁷ Office of Fair Trading *Debt management guidance* (OFT366 2008) at 3.

³⁶⁸ *Do you need a credit licence? op cit.* at 22.

for this licence. As in the case of debt adjustment, a separate licence is available to those providing debt counselling services on a non-commercial basis. Applicants for such licences are not obliged to prepare Credit Competence Plans and are not subject to on-site inspections.

4.243 Finally, the provision of credit information services covers the activities of: seeking to obtain information on behalf of an individual about his or her financial standing (e.g. credit rating information); and providing advice to individuals on how to seek to alter, secure the omission of, or seek to restrict the availability of, this information.³⁶⁹ This also covers agencies who seek to alter, secure the omission of or restrict the availability of the information themselves, rather than merely providing advice to individuals on how to do so.³⁷⁰ Again applicants must submit a Credit Competence Plan and are subject to having their business premises inspected. It should be noted that the three activities of debt adjustment, debt counselling and credit information services have been identified by the OFT to be of higher potential risk to consumers than other consumer credit activities (for example consumer credit businesses such as hire purchase lending). It is for this reason that they are subject to the additional requirements of submitting a Credit Competence Plan and on-site inspections. It is noteworthy that the OFT has categorised these activities as deserving particularly stringent regulatory control, while no control over these activities exists at all under Irish law.

4.244 Applicants for these licences must satisfy the OFT that they are fit to engage in the activities covered by the licence and that the names under which they operate are not misleading or otherwise undesirable.³⁷¹ In assessing the applicant's fitness, the OFT will have regard to any circumstances appearing to it to be relevant, particularly whether any breaches of the criminal law or consumer credit law³⁷² have been committed by the applicant, or whether the applicant has practised discrimination or engaged in deceitful or oppressive business practices. The OFT has indicated that it will also consider such factors as failures to comply with OFT guidance, any consumer complaints against the business, and evidence relating to the applicant's credit competence.³⁷³ In addition to refusing a licence to applicants not meeting these standards, the OFT can impose requirements on licensees where the OFT is dissatisfied with any matter in connection with the licensed business. Any failure to comply with such a requirement can result in a penalty of up to £50,000.³⁷⁴

4.245 In 2008, the OFT issued guidance on the standards which must be met by debt management companies under the licensing regime.³⁷⁵ This guidance was issued because a number of concerns about the conduct of some debt management companies had been brought to the attention of the OFT by individual consumers, consumer organisations and the credit industry.³⁷⁶ The guidance sets out minimum standards to be met by debt management companies if they are to be judged fit to hold a consumer credit licence. The guidance lays down a number of standards and outlines practices which are prohibited within a number of categories including:

- Advertising, marketing and promotion.
- Contact with consumers.

³⁶⁹ Office of Fair Trading *Do you need a credit licence? An introduction to consumer credit licensing* (2008) at 26.

³⁷⁰ A distinct licence is available to agencies which provide credit information services excluding seeking to alter, secure the omission of or restrict the availability of the relevant information.

³⁷¹ Section 25(1) of the *Consumer Credit Act 1974* (UK).

³⁷² The OFT will consider whether such legislation in the UK or in any other European Economic Area country has been breached.

³⁷³ Office of Fair Trading *Do you need a credit licence? An introduction to consumer credit licensing* (2008) at 3. The "credit competence" criterion refers to whether the applicant has the skills, knowledge and experience required to carry out the activities covered by the licence to a reasonable standard.

³⁷⁴ See section 33A *Consumer Credit Act 1974* (UK).

³⁷⁵ Office of Fair Trading *Debt management guidance* (OFT366 2008).

³⁷⁶ *Ibid* at 1.

- Pre-contract information.
- Contract terms.
- Handling money.
- Giving advice.

While a detailed discussion of the content of the guidance is outside the scope of this Consultation Paper, it can be seen that detailed standards have been established in relation to debt management activities in the UK, as part of a rigorous licensing regime. This can be contrasted with the position under Irish law.

4.246 As noted above, voluntary industry codes of practice also exist in this sector. The Debt Managers Standards Association's code of practice applies specifically to fee-charging debt management companies.³⁷⁷ The Debt Resolution Forum code of practice and the Debt Standard Code of Conduct apply to debt management plans and other debt remedies (such as Individual Voluntary Arrangements) provided by commercial companies. In a 2009 survey of the sector, none of the debt management companies which caused customer complaints were subscribers to these codes, a fact which suggests that the codes have had some success in maintaining high standards in the industry.

(3) Conclusion

4.247 The Commission believes that a strong case exists for the introduction of a regulatory system for debt management companies. The clients of such companies are often in very vulnerable situations and the potential for abusive or predatory practices is therefore great. Evidence from other countries also indicates that concerns arise in relation to certain business practices adopted by some such companies. Also, there are currently no guarantees that the advice being provided by such companies is always in the best interests of the debtor or that it is of a high quality. The Commission therefore believes that such companies should be subject to a licensing regime. A licence should be required to operate such services and it should be a criminal offence to provide such services without a licence. Statutory definitions of debt advice and debt management services should be established and legislation should specify the activities which may be carried out under a debt advice or debt management licence.

4.248 *The Commission provisionally recommends that commercial debt management and debt advice companies should be subject to a licensing regime.*

4.249 All consumer credit lenders - including banks, retail credit firms, credit unions and moneylenders - are regulated by the Irish Financial Services Regulatory Authority (IFSRA). The Commission believes that it is appropriate that IFSRA should also be given responsibility for the licensing of debt management companies. IFSRA has the requisite knowledge of the consumer credit market and the relevant institutional expertise to make it a suitable body for the licensing and supervision of debt management companies. The Commission also believes that IFSRA should be given statutory powers to issue binding codes of conduct in respect of these companies similar to the *Consumer Protection Code* and the *Consumer Protection Code for Licensed Moneylenders* which it has issued in respect of credit institutions and moneylenders. Such codes could establish standards to be followed in relation to advertising, consumer relations, transparency of fees and money handling. The core principle that debt advice and management companies should always act in the best interest of the consumer could also be established through a code, and conflicts of interests could be prohibited.

4.250 *The Commission provisionally recommends that the proposed licensing regime for debt advice and debt management companies should be supervised by the Irish Financial Services Regulatory Authority. The Commission provisionally recommends that IFSRA should be given statutory powers to issue binding codes of conduct in respect of such companies.*

4.251 The issue of the quality of advice being provided should also be addressed. Standards should be established, and debt advisors should be required to obtain at least a minimum level of training and skills. These standards should be drawn up in conjunction with the industry. As the MABS has been

³⁷⁷ See Collard *An Independent Review of the Fee-Charging Debt Management Industry* (Personal Finance Research Centre, University of Bristol and Money Advice Trust 2009) at 2.

recognised as a model of best practice in Europe, the training standards and the money advisors handbook used by the MABS could provide guidance in the creation of such standards.

4.252 *The Commission suggests that standards should be established relating to the quality of advice provided by debt advice and debt management companies. Minimum levels of training and skills for debt advisors should be established.**

4.253 A difficult question arises as to whether the licensing regime should extend to non-commercial debt agencies which provide free advice services to debtors. This question would essentially involve a consideration of whether MABS money advisors and volunteers with charitable organisations providing support for debtors should be required to apply for licences. The European Commission report on a common operational definition for over-indebtedness recommends that volunteers as well as professional debt counsellors should be obliged to have a minimum level of training and skills.³⁷⁸ In countries such as Belgium where debt counselling services are provided by regional public authorities and non-profit organisations, a licensing system nonetheless exists. The Commission recognises that it would be beneficial to ensure that the standard of advice provided to debtors is of sufficient quality. The Commission also recognises however that a heavy regulatory burden should not be placed on voluntary organisations, and that the practices of professional MABS money advisors have already been recognised as being of a high standard. The Commission therefore invites submissions as to whether the proposed licensing regime for debt advice and debt management companies should apply to non-profit, non-fee-charging organisations as well as to commercial agencies.

4.254 *The Commission invites submissions as to whether the proposed licensing regime for debt advice and debt management companies should be extended to non-profit, non-fee-charging organisations.*

³⁷⁸ *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 86.

CHAPTER 5 PROVISIONAL RECOMMENDATIONS FOR REFORM: PERSONAL INSOLVENCY LAW

5.01 Chapter 5 presents provisional recommendations for the creation of a new system of personal insolvency law in Ireland. This Chapter proposes that a statutory non-judicial debt settlement scheme should be introduced in Ireland. It also provisionally recommends that judicial bankruptcy procedures should be significantly amended. Part A of this chapter presents the principles and theories which justify the existence of consumer insolvency systems and the principle of debt discharge which lies at the core of consumer insolvency law. Part B examines comparative models of personal insolvency law, and uses comparative analysis to formulate a detailed model of the proposed debt settlement system. Part C presents the Commission's provisional recommendations for the introduction of a non-judicial debt settlement system into Irish law. The Commission proposes that this system should supplement, rather than replace, the *Bankruptcy Act 1988*. The Commission therefore provisionally recommends that the 1988 Act should be substantially amended. Part C also presents the key principles which should inform this system, and so produces a model debt settlement framework, notably: earned discharge; open access to honest and terminally insolvent debtors; the maintenance of a reasonable standard of living for debtors throughout a repayment plan; a discharge period of reasonable duration; and binding debt settlement as opposed to voluntary debt renegotiation.

A Justifications for Consumer Insolvency Procedures

5.02 The primary purpose of a personal insolvency system¹ is to discharge the debts of the debtor and so provide him or her with a “fresh start”.² The debtor's obligations are settled and his or her assets are distributed amongst his or her creditors, with the debtor in return receiving protection from further pursuit by individual creditors.³ At the end of the procedure the debtor is then rehabilitated and able to act freely in economic life in a similar manner to all other members of society.⁴ The concept of a fresh start has a different meaning in European legal systems from the meaning it holds in the United States, where this principle originated. The approach in the US is frequently labelled the Anglo-Saxon or “Open Credit Economy” model,⁵ the characteristic feature of which is the rapid discharge of an individual's debts on the filing of a bankruptcy petition and liquidation of non-exempt assets, without the need to complete a payment plan. This contrasts with the traditional European approach to consumer insolvency, with many systems not providing for the discharge of debts at all until recent years, and with the vast majority of

¹ At this stage of the chapter the term “personal insolvency system” is used to include both an Anglo-Saxon style bankruptcy system and a European-style debt adjustment system. See Niemi-Kiesiläinen “Consumer Bankruptcy in Comparison: Do We Cure a Market Failure or a Social Problem?” 37 *Osgoode Hall LJ* 473 (1999) for a discussion of the distinction between these two models of personal insolvency law.

² See e.g. Howard “A Theory of Discharge in Consumer Bankruptcy” 48 *Ohio St. LJ* 1047 (1987); Whitford “Changing Definitions of Fresh Start in US Bankruptcy Law” *Journal of Consumer Policy* 20: 179, 1997.

³ Keay “Balancing Interests in Bankruptcy Law” (2001) 30 *Comm. L. World Rev.* 206.

⁴ See Reifner, Kiesiläinen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented by the Institute for Financial Services e.v. Erasmus University Rotterdam/School of Law University of Helsinki/Helsinki Collegium for Advanced Studies to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 165.

⁵ Niemi-Kiesiläinen “Consumer Bankruptcy in Comparison: Do We Cure a Market Failure or a Social Problem?” 37 *Osgoode Hall LJ* 473 (1999) at 476.

European systems continuing to insist on the completion of a payment plan by the consumer before a discharge will be awarded.⁶ In this regard the European systems have been considered by some authors to be so different as to warrant a different name to the Anglo-Saxon “consumer bankruptcy” model, with the term “consumer debt adjustment” being used to describe the European model.⁷ Also, due to the mandatory repayment plan included in most European systems, the term “earned start” is preferred to “fresh start” in describing such insolvency regimes.⁸

5.03 Despite these differences, the fundamental feature of all consumer insolvency systems is the discharge of an individual’s debts on completing the procedure. The form and scope of the discharge however varies between different legal systems, and this can be attributed to the various rationales which exist for the principle of discharge.⁹ The rationales chosen by a legal system as the foundations of its personal insolvency system will decide the specific rules governing the regime, such as the conditions for accessing the procedures, the duration of the pre-discharge period and the amounts of repayments to be made by the debtor.¹⁰ Thus this section discusses the various rationales which lie behind the discharge principle, and the remainder of the Chapter refers to these justifications and rationales when discussing specific aspects of the proposed debt settlement system.

(1) Debt Collection

5.04 The concept of a discharge as part of bankruptcy proceedings derives from bankruptcy’s origins as a method of debt collection.¹¹ Bankruptcy began as a means of compensating for inadequate debt collection remedies, and was designed not to relieve the debtor but to obtain and distribute his or her assets for the benefit of creditors. To “make” someone bankrupt was something a creditor “did” to a debtor, rather than a mechanism through which a debtor could find relief from financial difficulties. Thus the discharge mechanism originated as a method of encouraging debtors to cooperate in the discovery and distribution of their assets.¹² It must be noted that while bankruptcy retains a function of distributing a debtor’s non-essential assets among his or her creditors, the goal of debtor relief and the other rationales discussed in this section have increased in prominence at the expense of the view of bankruptcy as a collection device.

5.05 It can be seen from the description of the *Bankruptcy Act 1988* provided in the previous chapter that Irish law reflects this theory of bankruptcy law.¹³ This Act continues to view bankruptcy as something a creditor “does” to a debtor in order to collect a debt or even in order to punish a defaulting debtor. The rationale underlying the 1988 Act can be seen to be outdated from the following discussion of more modern theories of debt discharge.

⁶ *Ibid* at 475-6.

⁷ Niemi-Kiesiläinen *op cit.* at 475-6.

⁸ Reifner, Kiesiläinen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented by the Institute for Financial Services e.v. Erasmus University Rotterdam/School of Law University of Helsinki/Helsinki Collegium for Advanced Studies to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 166.

⁹ See Howard “A Theory of Discharge in Consumer Bankruptcy” 48 *Ohio St. LJ* 1047 (1987) at 1047-8.

¹⁰ As can be seen from the discussion of the *Bankruptcy Act 1988* above, under which the principles of deterrence and punishment result, for example, in a punitive discharge period of 12 years and extremely high costs which severely limit access to the regime.

¹¹ Howard “A Theory of Discharge in Consumer Bankruptcy” 48 *Ohio St. LJ* 1047 (1987) at 1049; Ramsay “Models of Consumer Bankruptcy: Implications for Policy and Research” *Journal of Consumer Policy* 20: 269, 1997 at 270.

¹² Howard *op cit.*; King “Moving Beyond the ‘Hard’-‘Easy’ Tug of War: A Historical, Empirical and Theoretical Assessment of Bankruptcy Discharge” [2004] *MULR* 22.

¹³ See paragraphs 3.163 to 3.173 above.

(2) A Functional Economic Theory of Discharge

5.06 The second rationale for the discharge of personal debt is the functional economic theory of discharge, as most notably proposed by Howard.¹⁴ This theory argues that the purpose of the discharge is to restore the debtor to participation in the open credit economy. As seen above,¹⁵ debt difficulties can reduce the participation of an individual in the economy and reduce an individual's productivity, which results in considerable costs to society. Thus this approach attempts to allow the debtor to return to an economically productive role in society.

(3) Entrepreneurship

5.07 A related justificatory rationale for insolvency discharge, albeit in the context of small business debtors rather than consumer debtors, is the entrepreneurship theory.¹⁶ Under this theory, personal insolvency laws acts as a form of limited liability whereby individuals who are aware that business failure will not result in a life of over-indebtedness will be more likely to take the risks necessary to start new business ventures which are essential for the growth of the economy and the generation of employment.¹⁷ The safety net of insolvency procedures thus encourages entrepreneurial activity.¹⁸ Empirical research supports this theory, demonstrating that bankruptcy law has a hugely significant impact on the levels of self-employment in an economy.¹⁹ In fact, bankruptcy laws are the most important contributor to high levels of self-employment, more so than other factors such as real GDP growth. Generous bankruptcy laws, particularly regarding the property which a debtor may retain in bankruptcy, support small-business formation by providing a form of implicit wealth insurance.²⁰ Nonetheless bankruptcy must not be too easily accessible, as this would encourage investment in inefficient business ventures.²¹

(4) Economically Efficient Allocation of Risk

5.08 A further justificatory rationale for insolvency discharge again originates in economic theory and is based on the concept of the efficient allocation of risk between lender and borrower.²² This theory argues that the risk of financial distress of insolvency should be placed on the party better able to bear the risk. This depends on two factors: which party is best placed to prevent the risk from occurring; and

¹⁴ Howard "A Theory of Discharge in Consumer Bankruptcy" 48 *Ohio St. LJ* 1047 (1987)

¹⁵ See paragraph 1.15 above.

¹⁶ King "Moving Beyond the 'Hard'-'Easy' Tug of War: A Historical, Empirical and Theoretical Assessment of Bankruptcy Discharge" [2004] *MULR* 22; Armour "Bankruptcy Law and Entrepreneurship" *Am Law Econ Rev* 2008 10 (303).

¹⁷ See e.g. Insolvency Service (UK) *Bankruptcy: A Fresh Start* (Insolvency Service 2003).

¹⁸ It has for this reason been said that "[t]he idea that a debtor should suffer for the rest of his life because he becomes over-indebted, is not acceptable anymore in a credit society that promotes the taking up of credit and values risk-taking positively." See Huls "Overindebtedness and Ovelegalization: Consumer Bankruptcy as a Field for Alternative Dispute Resolution" *Journal of Consumer Policy* 20: 143, 1997 at 144.

¹⁹ Armour *op cit.*

²⁰ Fan and White "Personal Bankruptcy and the Level of Entrpreneurial Activity 46 *J L & Econ* 543 (2003).

²¹ The entrepreneurship rationale was very influential in the development of recent reforms to the UK personal insolvency under the *Enterprise Act* (2003 c.40 which significantly lowered the discharge period in bankruptcy proceedings, as is discussed in more detail below. See also Insolvency Service (UK) *Bankruptcy: A Fresh Start* (Insolvency Service 2003).

²² Huls "Overindebtedness and Ovelegalization: Consumer Bankruptcy as a Field for Alternative Dispute Resolution" *Journal of Consumer Policy* 20: 143, 1997 at 163, citing Eisenberg "Bankruptcy Law in Perspective" 28 *UCLA L Rev* 953 (1981). See also Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented by the Institute for Financial Services e.v. Erasmus University Rotterdam/School of Law University of Helsinki/Helsinki Collegium for Advanced Studies to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 60-62.

which party is the superior insurer against the risk. As has been shown above, the traditional assumption that debtors are better placed than creditors to predict their ability to repay and so the risk of default and over-indebtedness has now been largely discredited. This is due to the recognition that for a variety of factors creditors are better placed to prevent over-indebtedness amongst their customers.²³ Lenders should thus bear the losses of over-indebtedness, except in the rare cases of “won’t pay” debtors where default is not something which can be prevented by the creditor. Secondly, as well as being better able to prevent the risk of default and over-indebtedness from occurring, creditors are generally the better insurers as they both are more aware of the need for insurance (due their better ability to predict default) and are able to purchase insurance more cheaply than their debtors.²⁴ This means that the negative consequences of default are more severe for debtors than creditors and so creditors should bear these losses.

(5) Social Welfare

5.09 It must be noted however that some of the losses which arise from situations of over-indebtedness are borne by neither debtor nor creditor but by the State.²⁵ Thus where over-indebtedness leads to home repossessions, health difficulties or unemployment, the State’s social welfare system must provide assistance to the debtor. The discharge of the debtor from his or her obligations thus minimises the debtor’s reliance on public support. In this regard it can be seen that social welfare values and policies may shape personal insolvency law, and debt relief can be compared to other social safety nets such as unemployment insurance and welfare support.²⁶

(6) Rehabilitation and Humanitarianism

5.10 A further major justification for discharge of debts is the rehabilitation of the debtor and the humanitarian theory, which focuses on society’s duty to rehabilitate the debtor and end the negative consequences of over-indebtedness on the lives of those affected.²⁷ The adverse effects of over-indebtedness on the debtor and his or her family have been described above, and include intense stress and emotional suffering, as well as physical and mental health problems.²⁸ Thus this theory views the relief of such problems as a duty which is owed by society to protect the dignity and end the suffering of its members. This duty forms part of society’s responsibilities for the consequences of the economic and social policies which have led to a huge growth in the supply of consumer credit in recent years.²⁹

5.11 A fundamental aspect of the humanitarian theory is the concept of debtor rehabilitation. Rehabilitation has been described as the primary aim of European consumer insolvency laws,³⁰ and is

²³ See paragraphs 3.52 to 3.55 above.

²⁴ Howard “A Theory of Discharge in Consumer Bankruptcy” 48 *Ohio St. LJ* 1047 (1987) at 1064.

²⁵ Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented by the Institute for Financial Services e.v. Erasmus University Rotterdam/School of Law University of Helsinki/Helsinki Collegium for Advanced Studies to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 62.

²⁶ Ramsay Models of Consumer Bankruptcy: Implications for Policy and Research” *Journal of Consumer Policy* 20: 269, 1997 at 279.

²⁷ See e.g. King “Moving Beyond the ‘Hard’-‘Easy’ Tug of War: A Historical, Empirical and Theoretical Assessment of Bankruptcy Discharge” [2004] *MULR* 22.

²⁸ See paragraphs 1.11 to 1.13 above.

²⁹ The responsibilities of states for the effects of their policies was stressed by the Council of Europe in its recent Recommendation on legal solutions to debt problems: *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems*: CM/Rec(2007)8.

³⁰ Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented by the Institute for Financial Services e.v. Erasmus University Rotterdam/School of Law University of Helsinki/Helsinki Collegium for Advanced Studies to Commission of the European

much more prevalent in European insolvency schemes than in the traditional Anglo-Saxon “fresh start” model. While a discharge of the debtor’s obligations is crucial to his or her rehabilitation, complete rehabilitation also involves several other factors. Usually a repayment plan is viewed as instilling discipline and money management skills which may not have been possessed by the debtor prior to participating in an insolvency procedure. Such repayment plans also seek to restore the dignity of the debtor through the self-empowerment of the debtor and the sense of accomplishment which is achieved when the plan is completed. In addition to such repayment plans, rehabilitation also includes the provision of appropriate debt counselling and financial education to over-indebted individuals.³¹ A mere discharge will not solve all of a debtor’s problems, and may even be detrimental to the goal of rehabilitation, if it fails to address the causes of over-indebtedness.³² For this reason debt counselling and education are important steps in the rehabilitation of the debtor.

5.12 Finally, the rehabilitation of the debtor requires that once the debtor has earned a discharge and a fresh start, he or she should be permitted to return to normal financial transactions and should not be subject to discrimination on the grounds of past financial difficulty.³³ While some restrictions must be placed on the debtor during the course of the insolvency procedure, these should be proportionate and should not extend beyond the course of that procedure. In addition, while some record of insolvency procedures must be included in a debtor’s credit history, this should not overly restrict the rehabilitation of the debtor.

5.13 The rehabilitation justification also shares common elements with the functional economic theory of discharge and the social welfare theory discussed above. The rehabilitation of the debtor allows him or her to be restored to a position of productivity whereby he or she can resume full participation in an open credit economy. Similarly, the rehabilitation of the debtor provides benefits to society in reducing the debtor’s reliance on state-provided social assistance.

(7) Consumer Protection

5.14 A final justification for the discharge of debts is that it provides a form of consumer protection.³⁴ This theory draws on the findings of behavioural economics described above which suggest that the “bounded rationality” of consumer borrowers mean that consumers systematically underestimate the risk of debt difficulties when borrowing. In this way it is acknowledged that over-indebtedness is a natural consequence of expanding consumer credit markets, and that relief must thus be made available to those individuals who inevitably fall victim to the dangers of over-indebtedness. Individuals should not be blamed for over-indebtedness where it is caused by external factors which they could neither control nor predict.³⁵

5.15 Viewed in this light, personal insolvency laws may be seen as compensating for the difficulties inherent in enforcing consumer protection legislation.³⁶ Consumers are traditionally reluctant to begin

Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 169.

³¹ *Ibid.*

³² Howard notes that “to mean anything separate and apart from ‘fresh start’... the concept of rehabilitation must include something beyond discharge itself.” Howard “A Theory of Discharge in Consumer Bankruptcy” 48 *Ohio St. LJ* 1047 (1987) at 1059.

³³ Reifner et al *op cit* at 169.

³⁴ See e.g. Ramsay Models of Consumer Bankruptcy: Implications for Policy and Research” *Journal of Consumer Policy* 20: 269, 1997 at 274; Jackson “The Fresh Start Policy in Bankruptcy Law” (1985) 98 *Harv LR* 1393.

³⁵ Huls “Overindebtedness and Ovelegalization: Consumer Bankruptcy as a Field for Alternative Dispute Resolution” *Journal of Consumer Policy* 20: 143, 1997 at 144.

³⁶ Ramsay *op cit.* at 278. Reifner et al note that the mass application of personal insolvency laws in the 1980s and 1990s in Europe has gradually replaced consumer protection law in the area of consumer credit: Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union*

court proceedings to vindicate their rights, and this is particularly true in the case of over-indebted individuals, who will lack the resources to fund litigation.³⁷

B Comparative Debt Settlement Systems

5.16 It is clear from the above that many policy justifications exist for allowing individual debtors to avail of debt relief. This has been recognised in most developed credit-based societies. The Commission now discusses the models of personal insolvency law operating in other countries with a view to recommending a statutory framework for a personal insolvency system in Ireland.

(1) Anglo-Saxon Model

5.17 The Anglo-Saxon or “Open Credit Economy” model is based on the principle of “fresh start”, under which the insolvent debtor’s debts should be quickly discharged and he or she should be reintegrated into society and the economy with minimum delay.

(a) The “Fresh Start” Principle of Bankruptcy Law in the United States of America

5.18 The classic example of this model is the “Chapter 7” bankruptcy procedure under the United States Bankruptcy Code.³⁸ According to this procedure, consumers are granted an immediate discharge of debts in exchange for distributing all their non-exempt property to their creditors.³⁹ In the majority of cases, the trustee in bankruptcy will find that the debtor has no non-exempt property available for seizure, and so the consumer obtains a discharge and fresh start after a period of about four months in total without surrendering any assets or future income. Until recent reforms, about 70% of debtors filed under this “Chapter 7” procedure. The other 30% of debtors entered the “Chapter 13” procedure,⁴⁰ which involves a repayment plan of three to five years, with the debtor obtaining discharge only on the completion of this plan. Debtors propose plans to creditors, subject to certain minimum requirements. One of these requirements is that the debtor must give up all of his or her “disposable income”, which means any income “not reasonably necessary” for the debtor’s household expenses. Only about one third of Chapter 13 debtors complete their plans and receive a discharge.

5.19 Reforms in 2005 have aimed to reduce the numbers of debtors availing of the Chapter 7 immediate discharge procedure and have introduced means-testing requirements which aim to instead push more debtors into the repayment plan procedure under Chapter 13.⁴¹

5.20 Bankruptcy and insolvency law in the United Kingdom is largely based on this model. The system in England and Wales is composed of various different remedies for insolvent debtors ranging from formal judicial bankruptcy proceedings to voluntarily negotiated debt management arrangements. It can be seen that personal insolvency procedures in England and Wales are characterised by multiple levels of procedures, generally generous discharge provisions and large involvement of private sector commercial actors.

(Report to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 47.

³⁷ Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 47.

³⁸ 11 USC §§101-1330 (1978), amended by Pub L. No 109-8.

³⁹ See e.g. Kilborn “The Hidden Life of Consumer Bankruptcy Reform: Danger Signs for the New US Law from Unexpected Parallels in the Netherlands” (2006) *Vand. J. Transnat’l L* 77 at 83. See also §§ 521-22, 541-42, 702, 725-27 of the US Bankruptcy Code.

⁴⁰ 11 USC § 1328(a) (2005) amended by Pub. L. No. 109-8.

⁴¹ *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, Pub. L. No. 109-8 § 106, 119 Stat. 23 (2005).

(b) **Personal Insolvency Law in England and Wales**

(i) **Bankruptcy**

5.21 Bankruptcy is the ultimate formal response to personal insolvency in England and Wales and is governed by Part IX of the *Insolvency Act 1986* (UK).⁴² This is a judicial procedure, and a bankruptcy order can be made by the English High Court or a relevant county court on the petition of either a debtor or creditor. Debtors filing for bankruptcy must lodge a statement of affairs with the court demonstrating an inability to pay their debts.⁴³ Bankruptcies are all initially administered by an official receiver who is a state official employed by the Insolvency Service, a branch of the Department for Business Industry and Skills.⁴⁴ A private trustee in bankruptcy can however be appointed by creditors or the Department to succeed the official receiver.⁴⁵

5.22 Debtors must surrender all non-exempt assets towards payment of debts and may be ordered by the court to make repayments from non-exempt income for up to a maximum of three years under an income payment order or income payments agreements.⁴⁶

5.23 In return, all of the debts for which the debtor was liable at the beginning of the bankruptcy are discharged.⁴⁷ The discharge has been made more generous by the enactment of the *Enterprise Act 2002* (UK). Under the amended *Insolvency Act 1986*, debts are automatically discharged no later than one year after the commencement of bankruptcy proceedings, a reduction from the previous period of three years.⁴⁸ In addition, discharge can be obtained earlier than one year if the official receiver gives notice to the court that the investigation of the debtor's conduct and affairs is unnecessary or has been completed.

5.24 The rationale of the *Enterprise Act 2002* was principally to reduce the stigma of bankruptcy for entrepreneurial business debtors.⁴⁹ Entrepreneurial activity was to be encouraged through the quick discharge and the removal of the array of legal restrictions to which bankrupts were subject. These generous provisions were balanced with measures providing for the payment of non-exempt income to creditors for a period of three years, both before and after discharge. Also, a new system of post-bankruptcy disqualifications was introduced to penalise dishonest or irresponsible debtors and deprive them of a true "fresh start", though not of a debt discharge.⁵⁰

5.25 While the 2002 reforms of the *Insolvency Act 1986* were drafted largely with business debtors in mind, consumer debtors can in theory avail of the bankruptcy procedures on the same terms as business debtors. The bankruptcy option however remains out of reach for most consumer debtors due to the costs of the procedure, with substantial deposits and fees payable on entering the procedure.

⁴² See Walters and McKenzie Skene Consumer Bankruptcy Law Reform in Scotland, England and Wales (July 6, 2006). Available at SSRN: <http://ssrn.com/abstract=914522> at 7ff.

⁴³ Section 272 *Insolvency Act 1986*.

⁴⁴ Section 287 of the 1986 Act.

⁴⁵ Sections 292-296 of the 1986 Act. Such a trustee must be a licensed insolvency practitioner and so a member of a regulated body of insolvency professionals.

⁴⁶ Section 310-310A of the *Insolvency Act 1986*. The debtor must cooperate fully with the official receiver or trustee and must submit to an initial investigation of his or her affairs: Sections 291, 333. Discharge is suspended where the debtor fails to comply with these duties: Section 279(3)-(4) *Insolvency Act 1986*.

⁴⁷ Sections 281, 382 of the 1986 Act. A small number of non-dischargeable debts such as criminal fines, debts arising from fraud, family maintenance payments and student loans are not capable of being discharged: see paragraphs 5.117 to 5.119 below.

⁴⁸ Section 279 of the *Insolvency Act 1986*.

⁴⁹ Walters and McKenzie Skene Consumer Bankruptcy Law Reform in Scotland, England and Wales (July 6, 2006). Available at SSRN: <http://ssrn.com/abstract=914522> at 9.

⁵⁰ Such restrictions prevent debtors from acting in capacities such as a company director or an insolvency practitioner and from obtaining credit above a prescribed amount without disclosing his or her status. They are a matter of public record and will affect the debtor's access to credit in the future.

(ii) Individual Voluntary Arrangements

5.26 The Individual Voluntary Arrangement (IVA) procedure under Part VIII of the *Insolvency Act 1986* (UK) is a formal alternative to bankruptcy, which is designed to be primarily used by business debtors. An IVA is a binding consensual arrangement entered into by the debtor and his or her creditors on terms contained in a proposal which has been drawn up with the assistance of an insolvency practitioner known as the “nominee”, who also supervises the arrangement and ensures that the debtor complies with its terms.⁵¹ To become binding, over 75% in value of the debtor’s creditors must approve the proposal at a creditors’ meeting.⁵² The precise terms of the IVA depend on what the creditors agree to accept, and creditors can demand modifications of the proposal before approving it also.⁵³ Unlike in bankruptcy, the debtor’s property does not automatically vest in a trustee, although the debtor will usually contribute a significant portion of his or her assets.⁵⁴ The period of contributions from income usually lasts for three to five years, at the end of which the remainder of the debtor’s obligations are discharged. An IVA in this way operates as a form of debt relief, and one which avoids the stigma of bankruptcy.

5.27 The court has a very limited supervisory role in relation to IVAs, although this role increases if the debtor first applies to court for a stay of enforcement pending the holding of the creditors’ meeting.⁵⁵ The main supervisory role is carried out by the nominee/supervisor, who must be a licensed insolvency practitioner and so subject to regulatory oversight and a code of practice.⁵⁶ The nominee must however file a report with the court indicating whether the proposal has a reasonable prospect of being approved and implemented,⁵⁷ and must notify the court of the outcome of the creditors’ meeting.

5.28 The *Enterprise Act 2002* introduced a fast-track IVA procedure administered exclusively by the Official Receiver.⁵⁸ This procedure is available only to undischarged bankrupts and is designed to channel such debtors out of bankruptcy and to have the bankruptcy annulled. This procedure is streamlined in that it involves no creditors’ meeting, but rather a postal voting system for creditors; and creditors may not propose modifications to the proposal.

5.29 IVAs are open to both business and consumer debtors. While the procedure was originally principally designed for business debtors, it is now primarily used by consumer debtors.⁵⁹ This is partly due to the fact that no court fees or deposits must be paid, and that IVAs have been aggressively marketed by firms of insolvency practitioners known as “IVA factories”.⁶⁰

(iii) Debt Relief Orders

5.30 The UK government carried out a consultative process in 2004 which sought to introduce low cost debt relief mechanisms for consumers with low levels of debt, no asset surpluses and no surplus income.⁶¹ The result of the consultation process was the introduction of the Debt Relief Order procedure

⁵¹ Walters and McKenzie Skene *Consumer Bankruptcy Law Reform in Scotland, England and Wales* (July 6, 2006). Available at SSRN: <http://ssrn.com/abstract=914522> at 9.

⁵² Sections 257-8 of the *Insolvency Act 1986*.

⁵³ Section 258(2)-(5) of the 1986 Act.

⁵⁴ Walters and McKenzie Skene *op cit.* at 12.

⁵⁵ Under section 253 of the *Insolvency Act 1986*.

⁵⁶ See Key and Walton *Insolvency Law: Corporate and Personal* (2003 Pearson Education Limited) at 34.

⁵⁷ Section 256(1)(a), section 265A(3)(a) of the *Insolvency Act 1986*.

⁵⁸ See sections 263A-G of the *Insolvency Act 1986*.

⁵⁹ PriceWaterhouseCoopers *Living on Tick: The 21st Century Debtor* (2006) at 7-8.

⁶⁰ See Walters and McKenzie Skene *Consumer Bankruptcy Law Reform in Scotland, England and Wales* (July 6, 2006). Available at SSRN: <http://ssrn.com/abstract=914522> at 14.

⁶¹ See Department of Constitutional Affairs *A Choice of Paths: better options to manage over-indebtedness and multiple debt* (CP 23/04); The Insolvency Service *Relief for the Indebted – An Alternative to Bankruptcy* (2005).

by legislation in 2007.⁶² A Debt Relief Order (DRO) is made administratively by the official receiver, and does not require court intervention.⁶³ The order prevents creditors from enforcing their debts and discharges the debtor's obligations after a period of one year. Creditors are notified of the making of an order, and have a right to object on specified grounds. The debtor must pay an entry fee before availing of the procedure, but this is considerably lower than the deposit required to commence bankruptcy proceedings. Before the debtor applies for the order, he or she must obtain debt counselling from approved intermediaries to enable him or her to decide if the procedure is appropriate in the circumstances. Applications for a DRO can only be made online.

5.31 Access to the procedure is subject to the debtor meeting criteria as regards his or her levels of liabilities, level of assets and levels of surplus income, which are to be regularly updated by secondary legislation. For the one year duration of the order, the debtor is subject to the same obligations as he or she would be in bankruptcy proceedings, and a similar regime of restrictions or prosecution will apply if the debtor is found to have acted fraudulently or irresponsibly. Both the debtor and creditors have a right to appeal to the court if they are dissatisfied with how the official receiver has managed the case.

(iv) Enforcement Restriction Order

5.32 A new scheme governing the procedure for Enforcement Restriction Orders is also contained in the 2007 legislation.⁶⁴ An ERO is a court order which restricts the ability of certain creditors to take enforcement action against a debtor without the permission of the court while the ERO is in force. The restricted enforcement actions include the bringing of bankruptcy proceedings or other enforcement remedies, but also the cutting off of supplies of gas or electricity.⁶⁵ The maximum period of the order is 12 months.⁶⁶

5.33 The order also places requirements on the debtor to make repayments towards certain debts while the order is in force. The ordering of repayments by the debtor is at the court's discretion, and is subject to the debtor having sufficient surplus income.⁶⁷ Regulations are due to be enacted to specify how surplus income is to be calculated. The debtor must also provide information concerning his or her income and assets at specified intervals, and information relating to any anticipated changes before the next statement is due.⁶⁸ Any failure to provide the required information will constitute an offence and can result in up to 14 days' imprisonment.⁶⁹ This imprisonment however is to be treated as if it were for a contempt of court for failing to obey a court order to provide information, rather than for a criminal offence.

5.34 To be eligible for an ERO, the debtor must have at least two "qualifying debts",⁷⁰ must be unable to pay at least one of these, and must be suffering from a sudden and unforeseen deterioration in his financial circumstances from which there must be a realistic prospect of improvement in financial

⁶² Section 108 *Tribunals, Courts and Enforcement Act 2007*, inserting sections 251A to 251X *Insolvency Act 1986*.

⁶³ See *Tribunals, Courts and Enforcement Act 2007 Explanatory Memorandum* at paragraphs 454-461.

⁶⁴ Section 107 *Tribunals, Courts and Enforcement Act 2007*, inserting a new Part 6A into the *County Court Act 1984*.

⁶⁵ By bringing a bankruptcy petition or other enforcement remedies or by stopping supplies of gas or electricity: sections 117C-117E of the *County Courts Act 1984*.

⁶⁶ Section 117H of the 1984 Act.

⁶⁷ Section 112F of the *County Courts Act 1984*.

⁶⁸ Section 117J of the *County Courts Act 1984*.

⁶⁹ Section 117K of the 1984 Act.

⁷⁰ These are unsecured debts and any debts which are not specified as excluded debts by regulations: section 117T *County Courts Act 1984 (UK)*.

terms within 6 months from when the order is made.⁷¹ The procedure is limited to non-business debts. The court retains discretion to revoke the order, such as where the debtor fails to comply with its terms.⁷²

(v) County Court Administration Orders

5.35 The County Court Administration Order procedure provides debtors with a limited means of dealing with debt problems outside the bankruptcy system by providing the debtor with protection from enforcement activities by creditors and by facilitating the repayment of multiple debts by instalment.⁷³ A debtor with two or more “qualifying debts”, whose total indebtedness does not exceed a threshold laid down in regulations and whose debts do not include any business debts may apply for an administration order by filing a request in his or her local country court. The debtor must detail his or her assets, income, expenses and debts, and a court officer uses this information to assess whether the debtor has the means to pay the debts in full by instalments. If so, the amount and frequency of payments are calculated and the court official notifies the debtor and creditors of these terms. If no objection is received within a prescribed period, the court officer may order an administration order

5.36 For the duration of the repayment period, no enforcement action⁷⁴ or bankruptcy proceedings⁷⁵ can be taken against the debtor without the permission of the court. Creditors subject to the order are also prevented from charging any interest, fee or charge in respect of the debt during the life of the order.⁷⁶ Also, creditors who are utility suppliers may not stop supplies of gas or electricity during the course of the order.⁷⁷ The maximum duration of an order is now fixed at 5 years. A court may specify a shorter period than five years, and if it does so it reserves the right to later extend the length of the order to a period of up to five years in total.⁷⁸ If the debtor fails to comply with the payment requirements under the order, the court may revoke it, leaving the debtor open to enforcement action and possible disqualification sanctions.⁷⁹ Recent reforms have attempted to make the administration order scheme more effective by providing certainty in relation to the length of the order, providing an opportunity for the debtor’s rehabilitation and giving the debtor an incentive to maintain the repayments.⁸⁰

5.37 In effect, the administration order procedure is a form of debt management solution designed to provide small debtors with limited assets with protection from enforcement as well as rescheduling and consolidation of their debts.⁸¹ It appears that some measure of debt relief can also be granted under such as order, as the relevant legislation provides that an order may provide for payment of debts either in full or to such extent as appears practicable to the court in the circumstances.⁸²

⁷¹ Section 117B of the *County Courts Act 1984*.

⁷² Section 117P of the 1984 Act.

⁷³ See Walters and McKenzie Skene Consumer Bankruptcy Law Reform in Scotland, England and Wales (July 6, 2006). Available at SSRN: <http://ssrn.com/abstract=914522> at 15; The procedure is governed by Part VI *County Courts Act 1984*, as amended by section 106 *Tribunals, Courts and Enforcement Act 2007* (UK).

⁷⁴ Section 114 of the *County Courts Act 1984*.

⁷⁵ Section 112(4) of the 1984 Act.

⁷⁶ Section 112H of the 1984 Act.

⁷⁷ Section 112I of the 1984 Act.

⁷⁸ Section 112K of the 1984 Act.

⁷⁹ See section 429 of the *Insolvency Act 1986* and the *Company Directors’ Disqualification Act 1986*.

⁸⁰ See *Tribunals, Courts and Enforcement Act 2007 Explanatory Memorandum* at paragraph 484.

⁸¹ Walters and McKenzie Skene Consumer Bankruptcy Law Reform in Scotland, England and Wales (July 6, 2006). Available at SSRN: <http://ssrn.com/abstract=914522> at 16.

⁸² Section 112(E) *County Courts Act 1984* (UK).

(vi) Debt Management Arrangements

5.38 Debt Management Arrangements are an informal response to debt problems which are independent of the legal system, and consist of the voluntary rescheduling and sometimes consolidation of a debtor's multiple obligations.⁸³ Such arrangements can be negotiated by the debtor with creditors him or herself, but are usually negotiated on behalf of a debtor by a voluntary or public sector debt counselling agency or by a commercial debt management company. Arrangements will usually provide for repayment in full over a long period of time or for part repayment for a temporary period until the debtor has sufficient resources to resume normal full repayment.

5.39 Such arrangements are useful for debtors who have a regular source of surplus income, and who possess assets such as a home, which may be kept as part of the agreement. These agreements are generally not legally binding and do not stay individual debt collection efforts. Debt relief or discharge is not usually granted under these schemes, and interest will continue to run unless creditors agree to waive it.

5.40 These arrangements are largely unregulated. Many commercial debt management agencies organise such payment plans for debtors and aggressively market their services.⁸⁴ These need not be qualified insolvency practitioners, unlike under the IVA procedure.⁸⁵

(2) Non-Judicial Debt Settlement in the National Enforcement Office: Sweden

5.41 Since reforms in 2007, the Swedish consumer bankruptcy system has consisted of a statutory non-judicial debt settlement scheme overseen by the National Enforcement Authority.

5.42 This is a non-judicial procedure which is administered by the state Enforcement Agency known as the *Kronofogdemyndigheten* or KFM. This Enforcement Agency was previously an arm of the Tax Service but is now a free-standing agency dedicated to the enforcement of civil judgments, as well as administering this debt adjustment system.⁸⁶ The KFM receives petitions from debtors who seek to avail of the procedure and reviews them to assess whether the applicant meets the criteria for entry to the system. If so, the KFM applies budgetary guidelines established by the Tax Service to formulate a payment plan dedicating all of a debtor's excess income to creditors, generally over a five-year period.⁸⁷ Until the 2007 reforms, the KFM could only propose a payment plan to creditors, and if any one creditor refused to accept the plan, the KFM became obliged to refer the case to the local district court for judicial bankruptcy proceedings. The Enforcement Agency however now has the power to issue binding settlements.

5.43 Strict conditions exist for accessing the debt adjustment procedure. The debtor is obliged to demonstrate that he or she is a deserving case for debt adjustment. First, the debtor is obliged to demonstrate "qualified insolvency", or an inability to pay his or her debts over a "foreseeable period" of at least five years.⁸⁸ Furthermore, debtors also must prove the reasonableness of their applications in light of their personal and economic conditions. In making the assessment as to an application's

⁸³ Walters and McKenzie Skene Consumer Bankruptcy Law Reform in Scotland, England and Wales (July 6, 2006). Available at SSRN: <http://ssrn.com/abstract=914522> at 17. See paragraphs 3.196 to 3.199 above for further discussion of informal debt management plans or arrangements.

⁸⁴ Walters and McKenzie Skene *op cit.* at 17

⁸⁵ Debt advice and debt management companies are however required to hold a consumer credit licence under the *Consumer Credit Act 1974* (UK): see paragraphs 4.239 to 4.246 above.

⁸⁶ See Andersson and Friden "Sweden" in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 231ff.

⁸⁷ See Kilborn Out With the New, in With the Old: as Sweden Aggressively Streamlines its Consumer Bankruptcy System, Have U.S. Reformers Fallen Off the Learning Curve?" (2007) 80 *American Bankruptcy Law Journal* 435 at 440.

⁸⁸ Kilborn *op cit.* at 444.

reasonableness, the KFM will take into account the “age” of the debt,⁸⁹ the circumstances giving rise to a debtor’s obligations, and the efforts made by the debtor to fulfil his or her obligations.⁹⁰ About 40% of all applications were rejected by the KFM during the period from 1994 to 2001, while this rate of rejection fell to approximately 30% in 2002 and 2003.⁹¹

5.44 If the KFM accepts a creditor’s petition, enforcement by creditors is automatically stayed in respect of all the claims subject to the debt adjustment. The KFM publishes notice of the opening of a debt adjustment case, and creditors must file statements of claim with KFM within one month. The KFM then draws up a payment plan to be proposed to creditors. Those creditors who fail to vote during this period are deemed to agree to the proposal. While creditors were initially reluctant to accept such plans, over time plans became more readily accepted, with an average of 70% of KFM plans accepted by creditors between 1998 and 2003.⁹²

5.45 The original legislation provided for a standard repayment period of five years, with a discretion given to the KFM to establish a shorter or longer period of repayment if necessary. Recent reforms have however specified that plans exceeding five years are no longer permitted.⁹³ The debtor is only required to make repayments out of salary in excess of an income exemption level, and the law provides that the income exemptions in the Swedish attachment of earnings system are to be used by the KFM as guidelines in setting this exemption level. If the debtor’s income does not exceed the exemption level, the KFM will present creditors with a “zero proposal”.⁹⁴ If creditors accept this, the debtor is immediately discharged from his or her debts. Apparently creditors are often willing to accept reality and agree to such a proposal in approximately a quarter of all cases.⁹⁵ In other payment plans where the debtor can make contributions from income, the dividend received by creditors is quite low, with more than half of plans in 2002 and 2003 yielding 10% or less of the amount owed.⁹⁶

5.46 If creditors or the debtor object to the settlement imposed by the Enforcement Authority, or to a decision refusing the debtor access to debt settlement, they may challenge the authority’s decision in court. Prior to 2007, these challenges were frequent and often were based on little substance.⁹⁷ The court hearing involved in this step was little more than a formality, as creditors very seldom appeared, and if they did they often presented no legal basis for objecting to the KFM’s repayment plan. Thus the plan

⁸⁹ This refers to the extent to which the debtor has struggled with his or her obligations before filing for debt adjustment. This test is designed to prevent debtors from availing of an “easy option” of debt adjustment without first making efforts to work out their debt problems.

⁹⁰ Kilborn *op cit.* at 446-7. This last factor effectively requires a debtor to have sold non-essential assets in an attempt to meet his or her obligations.

⁹¹ Kilborn “Out With the New, in With the Old: as Sweden Aggressively Streamlines its Consumer Bankruptcy System, Have U.S. Reformers Fallen Off the Learning Curve?” (2007) 80 *American Bankruptcy Law Journal* 435 at 446, citing Konsumentverket (Swedish Consumer Service) *Konsumerntverket, en samordnad uppfoljning av skuldsanerignsprocessen*, PM 2204:17 at 17.

⁹² Kilborn “Out With the New, in With the Old: as Sweden Aggressively Streamlines its Consumer Bankruptcy System, Have U.S. Reformers Fallen Off the Learning Curve?” (2007) 80 *American Bankruptcy Law Journal* 435 at 454, citing Konsumentverket (Swedish Consumer Service) *Konsumerntverket, en samordnad uppfoljning av skuldsanerignsprocessen*, PM 2204:17 at 17.

⁹³ Kilborn *op cit.* at 450.

⁹⁴ *Ibid* at 453.

⁹⁵ Kilborn *op cit.*, citing Konsumentverket (Swedish Consumer Service) *Konsumerntverket, en samordnad uppfoljning av skuldsanerignsprocessen*, PM 2204:17 at 14.

⁹⁶ *Ibid.*

⁹⁷ Kilborn “Out With the New, in With the Old: as Sweden Aggressively Streamlines its Consumer Bankruptcy System, Have U.S. Reformers Fallen Off the Learning Curve?” (2007) 80 *American Bankruptcy Law Journal* 435 at 453, citing Konsumentverket (Swedish Consumer Service) *Konsumerntverket, en samordnad uppfoljning av skuldsanerignsprocessen*, PM 2204:17 at 14.14.

proposed by the KFM was simply upheld and imposed on creditors by the court in 90-95% of all cases.⁹⁸ The right to challenge the authority's decisions in court has now been limited to cases where there is a specific legal basis for the challenge in an attempt to discourage needless court proceedings.

5.47 Prior to the 2007 reforms, the Swedish system first obliged a debtor to attempt to reach an informal voluntary arrangement with his or her creditors before accessing the debt settlement procedure.⁹⁹ Debtors most often sought the assistance of public budgeting and debt counselling services to assist them in negotiating repayment arrangements with creditors. The success rate of the plans completed under this scheme was low. Voluntary repayment plans were permitted to run for a longer period than the statutory debt settlement schemes, and so resulted in high failure rates, possibly as large as 70%.¹⁰⁰ Also, this process was not suited to heavily indebted debtors with limited repayment capacity, and so the obligation to try to negotiate a voluntary arrangement with creditors under step one became no more than a formality in such cases.¹⁰¹

5.48 This first step of voluntary negotiation was therefore abolished as it became viewed as a fruitless waste of time.¹⁰² This step delayed debt relief for debtors in need, particularly due to long waiting lists for access to debt counselling services and delays in responding to negotiation proposals by creditors. The first step also rarely achieved positive results due to inability of debtors to contribute much income to creditors. Debt counselling services however objected to the abolition of this first stage, as they argued that debtors needed such counselling and money management assistance before a formal repayment plan could be successfully attempted. Policymakers agreed with this view, but thought that debt counselling services should be reserved for cases with a high chance of achieving a voluntary debt settlement, with hopeless cases proceeding straight to step two.

5.49 Thus the current Swedish consumer insolvency system is centred on a non-judicial debt adjustment system administered by the state Enforcement Agency. Debt counselling plays a strong role, but is no longer mandatory.

(3) France: Non-Judicial Over-Indebtedness Commissions

5.50 The French consumer insolvency system bears many similarities to the Swedish system described above. It involves a non-judicial voluntary stage and a judicial stage. The non-judicial stage is overseen by bodies known as "Commissions on Individual Over-Indebtedness".¹⁰³ Debtors and creditors must first attempt to reach a voluntary arrangement, and if agreement is not reached the Commission will

⁹⁸ This step of a court hearing was envisaged as a means of protecting the consumer insolvency system from a challenge under Article 6 ECHR's right to a fair trial and of access to a court, as it was feared that a deprivation of creditors of their rights by an agency rather than a court could infringe this article's guarantees.

⁹⁹ See Kilborn "Out With the New, in With the Old: as Sweden Aggressively Streamlines its Consumer Bankruptcy System, Have U.S. Reformers Fallen Off the Learning Curve?" (2007) 80 *American Bankruptcy Law Journal* 435 at 440, citing *Ett Steg mot ett enklare och Snabbare Skuldsaneringsforfarande*, SOU 2004:81 at 57.

¹⁰⁰ Kilborn *op cit.* at 443, citing McGregor et al "Comparative analysis of Canadian, American and Swedish bankruptcy policy: why do governments legislate consumer debt?" (2001) 25 *Int'l J Cons Stud* 208 at 209, 215.

¹⁰¹ Kilborn "Out With the New, in With the Old: as Sweden Aggressively Streamlines its Consumer Bankruptcy System, Have U.S. Reformers Fallen Off the Learning Curve?" (2007) 80 *American Bankruptcy Law Journal* 435 at 458, citing Konsumentverket (Swedish Consumer Service) *Konsumentverket, en samordnad uppfoljning av skuldsaneringsprocessen*, PM 2204:17 at 12.

¹⁰² Kilborn "Out With the New, in With the Old: as Sweden Aggressively Streamlines its Consumer Bankruptcy System, Have U.S. Reformers Fallen Off the Learning Curve?" (2007) 80 *American Bankruptcy Law Journal* 435 at 458.

¹⁰³ Kilborn "Continuity, Change and Innovation in Emerging Consumer Bankruptcy Systems: Belgium and Luxembourg." (2006) 14 *American Bankruptcy Institute Law Review* 69. Available at SSRN: <http://ssrn.com/abstract=690802> or DOI: 10.2139/ssrn.690802

make recommendations to the courts as to the plan which should be imposed on the debtor and creditors. In addition, a “personal recovery” procedure exists for debtors who are “irremediably compromised” whereby the Commission transfers the debtor’s case immediately to the court for a fast-track discharge of his or her debts in return for the liquidation of the debtor’s non-exempt assets in favour of his or her creditors.

5.51 French debtors initiate “over-indebtedness” cases by filing a petition for relief with one of the “commissions on individual over-indebtedness” established in each of France’s 117 *départements*. Each commission is comprised of six voting members. These include the prefect, treasurer-general and director of fiscal services in each department, as well as a representative from each of the credit sector and consumer associations. The final member is a representative of the French central bank. The Commission is assisted by a lawyer and a social worker, who do not vote.

5.52 This Commission takes responsibility for the debtor’s application, not the debtor. The French Central Bank collects information from the debtor and third parties, prepares a payment plan and mediates negotiations between the debtor and creditors for the acceptance of this plan. The terms of the plan vary in each case, but certain minimum standards have been laid down by legislation. Since 1999 payment plans must leave debtors an income which corresponds to the exempted income level in enforcement proceedings. Since 2003, the maximum duration of payment plans is limited to 10 years.

5.53 Where any creditor refuses to accept the commission’s plan, the commission forwards the case to a court on the request of the debtor. The commission will include a recommendation for the court to impose “ordinary” or “extraordinary” measures of relief. In most cases, “ordinary” relief is granted, which significantly does not include debt discharge and is limited to extensions or deferrals of time to pay, reductions in accruing interest and discharge on the deficiency obligation remaining after the sale of a mortgaged asset. The maximum duration of a court-imposed plan has been limited to 10 years since 2004.

5.54 For particularly over-indebted individuals who are unable to repay any significant portion of their debts, the commission may recommend “extraordinary” measures. These include the deferral of all a debtor’s obligations for up to two years, with an examination of the debtor’s situation by the commission at the end of this period. If it has improved, the commission must recommend “ordinary” debt relief measures. If the debtor remains unable to pay, the commission must recommend a partial discharge of the debtor’s debts.

5.55 Only in 2004 was a procedure of full discharge introduced into French law. Since reforms in this year, the commission can refer the most hopeless debtors immediately to court for a new procedure of “personal recovery”. This procedure requires only that the debtor give up his or her non-exempt property for liquidation and distribution among creditors. It must be noted that very few debtors have any valuable non-exempt assets at this stage however. The court will then declare the case closed for “asset insufficiency” and most of the debtor’s remaining obligations are discharged. Access to this procedure is strictly restricted, and is only available for those whose financial situation is “irremediably compromised”. This is where it is “manifestly impossible” to address the debtor’s distress through the “ordinary” or “extraordinary” procedures described above. The introduction of this procedure demonstrates how the French system, just like the English, Dutch and Swedish systems described in this section, has had to come to terms with the fact that often debtors will have no assets or income available for distribution among creditors.

(4) *Netherlands: Traditional Debt Counselling and a New Judicial Debt Settlement System*

5.56 The Netherlands system of consumer insolvency has been presented as a model of best practice in debt settlement.¹⁰⁴ Traditionally, the Dutch response to consumer over-indebtedness was strongly focused on debt counselling, with a system of debt counselling in place long before debt settlement legislation was established. In this regard the position which existed in the Netherlands prior to recent reforms largely reflects the current position in Ireland.

¹⁰⁴ *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 95.

5.57 The current law takes the form of a two-tier system. Debtors must first attempt to reach a voluntary arrangement with creditors through the assistance of state-provided debt counsellors. If the parties cannot agree to a voluntary arrangement, the second step of judicial debt settlement may be commenced. The system is designed to encourage voluntary debt settlement and discourage the use of the judicial procedure, but as will be shown below the system is not entirely successful in this regard.¹⁰⁵

5.58 The debt counselling tradition in the Netherlands has existed since the late 1970s.¹⁰⁶ Counselling is a public sector responsibility, and much debt counselling is provided by municipal social agencies and municipal banks. It is mostly state-funded and is provided free of charge, but sometimes debtors must make small contributions, which are capped at a rate of 6% of the total repayments made by debtors under a payment plan.¹⁰⁷

5.59 Debt counselling is not regulated by national law, but most counselling agencies follow a code of practice developed by the Dutch Association of Municipal Banks (NVVK).¹⁰⁸ Under this code, counselling agencies will offer creditors payment plans obliging debtors to pay as much as possible over a three-year period, in return for which creditors will agree to discharge the remaining amount owed.¹⁰⁹ Before 2001, debtors were required to contribute all income in excess of 94% of the legally prescribed social assistance minimum income.¹¹⁰ Many plans impose other obligations on debtors in addition to repayments, and debtors may be obliged to cut back on expenditure, sell their cars or take a course in household financial management. Sometimes debtors will be required to deposit their incomes in an agency account, from which the agency will pay the household's recurring expenses before giving the debtor an allowance for food and personal necessities.¹¹¹ While the number of applications for voluntary debt management has increased consistently, in the 1990s the rate of payment plans began to decline.¹¹² In 1992, 50% of the 40000 applications succeeded in reaching a payment plan, while in 1996 only approximately 40% of the 55000 applications reached a successful outcome.¹¹³ The reasons for the failure of voluntary agreements are discussed below.

5.60 In response to the decline in voluntary arrangements, the Dutch legislature introduced a Consumer Bankruptcy Act in 1998 which aimed to stop the downward trend in voluntary debt settlement as well as introducing a statutory discharge of unpaid consumer debt to provide a fresh start to good faith debtors.¹¹⁴

5.61 Several pre-conditions must be met before access to judicial debt adjustment will be granted to a debtor. First, the debtor, with the assistance of a debt counsellor, must attempt to reach a voluntary

¹⁰⁵ See Huls, Jungmann and Niemeijer "Can Voluntary Debt Settlement and Consumer Bankruptcy Coexist? The Development of Dutch Insolvency Law" in Niemi-Kiesilainen (ed), Ramsay (ed) and Whitford (Ed) *Consumer Bankruptcy in Global Perspective* (Hart Publishing 2003) at 303ff.

¹⁰⁶ *Ibid* at 303.

¹⁰⁷ Kilborn "The Hidden Life of Consumer Bankruptcy Reform: Danger Signs for the New US Law from Unexpected Parallels in the Netherlands" (2006) *Vand. J. Transnat'l L* 77 at 88.

¹⁰⁸ Huls, Jungmann and Niemeijer "Can Voluntary Debt Settlement and Consumer Bankruptcy Coexist? The Development of Dutch Insolvency Law" in Niemi-Kiesilainen (ed), Ramsay (ed) and Whitford (Ed) *Consumer Bankruptcy in Global Perspective* (Hart Publishing 2003) at 304.

¹⁰⁹ *Ibid*.

¹¹⁰ Kilborn *op cit.* at 89.

¹¹¹ Huls, Jungmann and Niemeijer *op cit.* at 305.

¹¹² Huls, Jungmann and Niemeijer *op cit.* at 305.

¹¹³ Huls, Jungmann and Niemeijer *op cit.* at 305.

¹¹⁴ Huls, Jungmann and Niemeijer "Can Voluntary Debt Settlement and Consumer Bankruptcy Coexist? The Development of Dutch Insolvency Law" in Niemi-Kiesilainen (ed), Ramsay (ed) and Whitford (Ed) *Consumer Bankruptcy in Global Perspective* (Hart Publishing 2003) at 305.

settlement with creditors.¹¹⁵ The application for debt adjustment is made by the municipal debt counselling agency or an authorised body, and must provide reasons for the failure to reach a voluntary settlement. The court then uses this application to assess whether the debtor is applying for debt adjustment in good faith.

5.62 If the court is satisfied, it will impose debt adjustment. An automatic stay of enforcement proceedings comes into effect at this stage. The judge will fix the repayment period (usually three years),¹¹⁶ the amount of repayments and the amount to be discharged.¹¹⁷ The court appoints a trustee to collect and liquidate the debtor's available assets, with the proceeds deposited in an estate account. Most consumer debtors will have no non-exempt property or at least no such property of enough value to be worth selling, and so the greatest asset of the debtor will be future income.¹¹⁸ The amount of exempt income is not measured as a percentage of the debtor's total income, but rather as a percentage of the official social welfare assistance level for various types of debtors, regardless of the debtor's actual income.¹¹⁹ The default rule is that the debtor must contribute all income in excess of 90% of the social welfare minimum, subject to adjustments based on the debtor's household expenses.¹²⁰ A practice has however developed among bankruptcy judges whereby a reserve of 95% of the minimum will be available to debtors whose only income is derived from social welfare, while 100% of the minimum is protected for debtors with income from at least 18 hours of work per week.¹²¹

5.63 The Dutch Consumer Bankruptcy Law in theory allows the judge complete discretion to design a payment plan with whatever provisions seem "reasonable and fair."¹²² Legislation does however set out a standard three year repayment period,¹²³ and in practice the judge will merely set out the amount of income to be retained by the debtor over this period. On completion of the repayment plan, most remaining obligations of the debtor are discharged, with the exception of secured loans and student loans.¹²⁴ The court can refuse a discharge if the debtor has failed to comply with his or her obligations such as failing to cooperate with the trustee.

5.64 A fast-track discharge procedure exists for debtors who have no available income above the exemption level, in which case the trustee may after one year of the plan declare that it is not anticipated that the debtor can fulfil his or her obligations in full or in part. The court can in these circumstances grant an immediate discharge.¹²⁵

5.65 The Dutch formal judicial consumer bankruptcy system is largely self-funded, with all administrative costs and most of the trustee's fee paid from the assets and income of the debtor's estate,

¹¹⁵ Article 285 *Faillissementswet* (Bankruptcy Law) (Neth.).

¹¹⁶ Articles 287(3), 316 *ibid.*

¹¹⁷ Huls, Jungmann and Niemeijer *op cit.* at 305.

¹¹⁸ Kilborn "The Hidden Life of Consumer Bankruptcy Reform: Danger Signs for the New US Law from Unexpected Parallels in the Netherlands" (2006) *Vand. J. Transnat'l L* 77 at 98.

¹¹⁹ Kilborn *op cit* at 98.

¹²⁰ Article 295(2) *Faillissementswet* (Bankruptcy Law) (Neth.).

¹²¹ Kilborn "The Hidden Life of Consumer Bankruptcy Reform: Danger Signs for the New US Law from Unexpected Parallels in the Netherlands" (2006) *Vand. J. Transnat'l L* 77 at 99, citing Berekening van het vrij te laten bedrag bij toepassing van de wet schuldsanering natuurlijke person, rapport van de wekgroep rekenmethode VTLB Recofa (2005) §5.1-5.2.

¹²² Article 343(1) *Faillissementswet* (Bankruptcy Law) (Neth.).

¹²³ Article 343(2) of the Bankruptcy Law.

¹²⁴ Articles 352-358 *Faillissementswet* (Bankruptcy Law) (Neth.). The discharged obligations are rendered legally unenforceable, although they continue to exist as "natural obligations", with the debtor morally, but not legally, obliged to repay the debts if it later becomes possible to do so.

¹²⁵ Article 352(3) *Faillissementswet* (Bankruptcy Law) (Neth.).

which would otherwise be distributed to creditors.¹²⁶ This funding method serves a second purpose of seeking to promote non-judicial debt settlement over judicial bankruptcy by reducing the amount of the dividend received by debtors in the judicial procedure. In practice however this has not proved to be the case, as the differences in the amounts received by creditors have not been enough to dissuade them from rejecting voluntary settlements over the court procedure. Problems have also been identified due to delays among consumers in accessing debt counselling services at the voluntary debt settlement stage.¹²⁷ This illustrates again the importance of providing adequate debt counselling resources. Also, the voluntary negotiation stage is not proving to be very successful, with the levels of successful settlements reached falling as low as 9% in 2004.¹²⁸ The main reasons for the failure of voluntary plans are simply the refusal by creditors to accept the debt counsellor's offer or the lack of repayment capacity or steady income on the part of the debtor.¹²⁹ The Dutch system may be contrasted with the Swedish model in that access to judicial bankruptcy proceedings is not limited to cases where a recognised legal ground for opposing the proposed debt settlement exists, and so creditors have preferred to reject attempts at voluntary settlements and wait for judicial procedures instead. This is because judicial procedures are generally more consistent than voluntary settlements, and some creditors are in favour of the elements of control and the possibility of sanctions which exist in the judicial procedure.¹³⁰ This illustrates that if the policy of promoting non-judicial debt settlement is to be furthered, measures must be put in place to discourage or even limit the extent to which dissenting creditors can defeat non-judicial settlements and have recourse to the courts.

C Key Principles of a Consumer Debt Settlement Regime

5.66 From the above policy justifications for discharge, it is possible to identify some key principles which should inform a debt settlement or personal insolvency regime.

(1) The Need for Consumer Insolvency Law and the Discharge of Debts

5.67 Having considered the above policy justifications and comparative analysis, it is clear that any advanced legal system which operates within an economy driven by consumer credit must provide adequate and effective personal insolvency laws. While the Commission believes strongly in the role of preventive measures in addressing over-indebtedness, the Commission acknowledges that over-indebtedness cannot be completely prevented and that a need will remain to provide relief for those who become victims of over-indebtedness. Irish law does not currently provide such a personal insolvency system, and the ineffectiveness of the *Bankruptcy Act 1988* has been described in detail above. As a result of its ineffectiveness, only four people were adjudicated bankrupt in 2007,¹³¹ while over-indebtedness levels of Irish households for that period were estimated at approximately 7-10%.¹³² Only eight bankruptcy applications were received by the High Court in 2008.¹³³ Irish law, unlike the vast majority of its European peers, does not therefore provide access to an adequate and effective personal insolvency system, as required by the Council of Europe's Recommendation on legal solutions to debt

¹²⁶ Article 320(7) *Faillissementswet* (Bankruptcy Law) (Neth.).

¹²⁷ Kilborn "The Hidden Life of Consumer Bankruptcy Reform: Danger Signs for the New US Law from Unexpected Parallels in the Netherlands" (2006) *Vand. J. Transnat'l L* 77 at 94. Delays were also attributed to a failure of creditors to respond promptly to debt settlement propositions advanced to them by debt counsellors.

¹²⁸ *Ibid* at 95, citing Nederlandse vereniging voor volkskreet, Jaarverslag 2004 at 22-23.

¹²⁹ Kilborn *op cit.* at 97.

¹³⁰ Huls, Jungmann and Niemeijer "Can Voluntary Debt Settlement and Consumer Bankruptcy Coexist? The Development of Dutch Insolvency Law" in Niemi-Kiesilainen (ed), Ramsay (ed) and Whitford (Ed) *Consumer Bankruptcy in Global Perspective* (Hart Publishing 2003) at 309.

¹³¹ *Courts Service Annual Report 2007* (Courts Service 2007) at 100.

¹³² *Stamp A Policy Framework for Addressing Over-Indebtedness* (Combat Poverty Agency 2009) at 10.

¹³³ *Courts Service Annual Report 2008* (Courts Service 2009) at 69.

problems.¹³⁴ The Commission therefore takes the view that a new personal insolvency regime must be urgently introduced in Ireland.

5.68 The Commission believes that this should involve two steps. First, the *Bankruptcy Act 1988* should be replaced and a new bankruptcy system should be introduced in order to remove the failings of current bankruptcy procedures in Ireland. The making of detailed recommendations for a new bankruptcy law is beyond the scope of this Consultation Paper, and the Commission provisionally recommends that a thorough review of the 1988 Act should be undertaken. The principles discussed by the Commission in relation to the proposed introduction of a non-judicial debt settlement scheme will nonetheless also be relevant to the reform of the judicial bankruptcy system.

5.69 *The Commission provisionally recommends that the Bankruptcy Act 1988 should be significantly amended to ensure that it provides an adequate and effective system of personal insolvency law.*

5.70 Secondly, it is the Commission's view that in addition to the reform of the formal judicial bankruptcy system, a more informal non-judicial debt settlement system should be introduced in Ireland. This system would provide an out-of-court alternative to debt enforcement procedures where there is no dispute as to liability and where a debtor who has acted in good faith is insolvent and owes multiple obligations. Such a system is therefore necessary to remove "can't pay" debtors from the enforcement system, and to provide the best possible solutions for both creditors and debtors in cases of over-indebtedness. A non-judicial system is particularly suited to insolvent consumers, as the debts involved will likely be small and so would not justify the costs to the parties and to the State of court proceedings. The introduction of such a system therefore falls within the scope of this Consultation Paper.

5.71 *The Commission provisionally recommends that a non-judicial debt settlement system should be introduced into Irish law.*

5.72 The majority of legal systems discussed above possess both formal judicial and more informal non-judicial bankruptcy or debt settlement systems, and the Commission provisionally recommends that a similar approach should be adopted in Irish law. The Commission now presents the reasons why non-judicial debt settlement is to be preferred over judicial bankruptcy, and how these two systems should interrelate.

(2) A Preference for Non-Judicial Debt Settlement

(a) Reasons why non-judicial debt settlement is to be preferred over judicial bankruptcy

5.73 At present a strong trend in favour of non-judicial debt settlement systems is emerging in international policy discussion, particularly in Europe.¹³⁵ While some of the advantages of non-judicial procedures over formal court proceedings have been discussed above,¹³⁶ this section will now outline the arguments in favour of non-judicial debt settlement in more detail.

(i) Non-legal issues may be addressed

5.74 First, as can be seen from the discussion in Chapter One above, the problem of over-indebtedness involves both legal and non-legal or social issues.¹³⁷ Therefore court proceedings are not

¹³⁴ *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems: CM/Rec(2007)8* at paragraph 4.

¹³⁵ Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 171.

¹³⁶ See paragraphs 2.117 to 2.118 above.

¹³⁷ See Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 63; Huls *Overindebtedness and Ovelegalization: Consumer Bankruptcy as a Field for Alternative Dispute Resolution* *Journal of Consumer Policy* 20: 143, 1997 at 146.

necessarily appropriate for the resolution of the issues involved in the case of an over-indebted individual.¹³⁸ Thus non-judicial debt settlement procedures, involving an important role for licensed debt counsellors, may offer a broader and more flexible means of addressing the problems of the over-indebted individual.

(ii) Few justiciable issues arise in debt disputes

5.75 Secondly, a move away from a formal court-based approach to debt claims has been underway already for a number of years. In the vast majority of debt enforcement claims, the debtor will have no defence to the claim and there will be no legal issues to be resolved. Similarly, judgments obtained in uncontested debt claims are issued by court officers rather than judges. The awarding of large numbers of default judgments has largely become an administrative process rather than the adjudicative adversarial procedure for which our court systems were designed.¹³⁹ For these reasons proposals for the development of an administrative, rather than a judicial, approach to debt difficulties began to be made decades ago.¹⁴⁰

(iii) Reduced costs

5.76 Thirdly, the development of formal non-judicial debt settlement procedures could save costs for the parties involved and for the State. At present, Irish law on debt enforcement is characterised by a series of individual claims by different creditors against a single debtor, despite the fact that the majority of debtors will have multiple creditors, as shown in Chapter 1. The resources of the courts and of creditors are clearly wasted by the bringing of individual enforcement proceedings by several creditors against a single debtor. This becomes particularly clear when it is recognised that in the majority of cases of default¹⁴¹ the debtor is simply unable to pay, and any enforcement proceedings are likely to prove futile. Furthermore, such a system encourages competition between creditors to obtain a judgment against a debtor before others do so. This has the negative consequences of discouraging responsible arrears management and promoting adversarial relationships between creditors and debtors.¹⁴² The courts should also not be available to lenders who fail to practice responsible arrears management. It has been noted above that the major failing of the composition and arrangement procedures under the *Bankruptcy Act 1988* is that they require so much court involvement as to make the procedures prohibitively expensive for both debtors and creditors.¹⁴³ Thus non-judicial debt settlement procedures would permit a collective approach to the debt difficulties of an individual, and would facilitate a flexible settlement of debts which takes into account the interests of all creditors.¹⁴⁴

(iv) Reduced stigma in non-judicial proceedings

5.77 Fourthly, a further advantage of non-judicial proceedings is that these proceedings would be less intimidating and stigmatising for debtors. The stigma of financial failure remains a strong deterrent to consumer debtors, preventing them from engaging in bankruptcy or debt settlement procedures. Even in the US, where consumer bankruptcy is long-established and advertisements by bankruptcy lawyers promote bankruptcy as a solution to debt problems, the majority of consumer debtors who could benefit

¹³⁸ See International Federation of Insolvency Practitioners *Consumer Debt Report* (INSOL International 2001) at 25.

¹³⁹ This is a trend which has been developing for decades as the levels of consumer credit expanded: See e.g. Ramsay "Debtors and Creditors: Themes and Issues" in Ramsay (ed.) *Debtors and Creditors* (Professional Books Limited 1986) at 5.

¹⁴⁰ See e.g. Stanley and Girth *Bankruptcy: Problems, process, reform* (Brookings Institution 1971).

¹⁴¹ See paragraph 1.30 above.

¹⁴² Huls "Overindebtedness and Ovelegalization: Consumer Bankruptcy as a Field for Alternative Dispute Resolution" *Journal of Consumer Policy* 20: 143, 1997 at 146.

¹⁴³ See paragraphs 3.154 to 3.162 above.

¹⁴⁴ Huls *op cit* at 148.

from bankruptcy do not commence such proceedings.¹⁴⁵ This suggests that stigmatisation continues to play a significant role in discouraging use of bankruptcy proceedings, and this could pose a considerable problem in Ireland where there is no history of consumer bankruptcy. Non-judicial debt settlement procedures, conducted in private would reduce the stigma associated with debt settlement and so would encourage participation of over-indebted individuals in the procedures.

5.78 *The Commission provisionally recommends that Irish law should favour non-judicial debt settlement over court-based personal insolvency proceedings.*

(b) ***The Need for Court Involvement: A Two-Tiered Personal Insolvency System***

5.79 Despite the above advantages, it must be noted that certain aspects of a personal insolvency regime may require court involvement. Article 34.1 of the Constitution of Ireland provides that “[j]ustice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.” This statement is subject however to the qualification in Article 37.1 that

“[n]othing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature... by any person or body of persons duly authorised by law to exercise such functions and powers...”

The question thus arises as to whether a non-judicial debt settlement system would involve administering justice or whether it would exercise “limited functions and powers of a judicial nature.” The Commission will remain conscious of these requirements of the Constitution when proposing recommendations.

5.80 Insolvency procedures effectively involve limitations on creditors’ property rights and rights of access to a court, the contents of which have been described in detail above.¹⁴⁶ Thus there may need to be a judicial bankruptcy process to allow parties to vindicate these rights by challenging non-judicial debt settlements in the courts.¹⁴⁷ Similarly, in cases of business debtors, complicated issues of liability to employees and suppliers may arise, and investigations into the business practices of the debtor. This would lead to complicated proceedings which are more suited to courts than to a non-judicial debt settlement scheme. In cases of large debts the costs of court proceedings may also be more capable of being justified than in the case of smaller debts.

5.81 In this regard, the Commission notes that though non-judicial debt settlements are to be preferred, a role also remains for judicial insolvency procedures. This realisation has led the majority of European consumer insolvency regimes to adopt a two-tier system, whereby non-judicial settlement must be attempted before court-based insolvency proceedings can be commenced.¹⁴⁸ These systems provide a formal procedure for non-judicial debt settlement which contrasts with the informal, voluntary debt-counselling based approach to debt management arrangements which currently prevails in Ireland

¹⁴⁵ See e.g. Ramsay “Models of Consumer Bankruptcy: Implications for Policy and Research” *Journal of Consumer Policy* 20: 269, 1997 at 277. See also White “Why It Pays to File for Bankruptcy: A Critical Look at Incentives Under US Bankruptcy Laws and a Proposal for Change (1998) 65 *U. Chi. L Rev.* 685.

¹⁴⁶ See paragraphs 2.07 to 2.14 above. See also Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 63; Huls *Overindebtedness and Ovelegalization: Consumer Bankruptcy as a Field for Alternative Dispute Resolution* *Journal of Consumer Policy* 20: 143, 1997 at 171.

¹⁴⁷ It is to be noted that this was the reason why in Sweden creditors and debtors were given a power to challenge decisions of the Enforcement Authority made under the debt settlement scheme. It was thought that such a right was necessary to ensure compatibility with Article 6 ECHR: see paragraph 5.46 above.

¹⁴⁸ Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 63; Huls *Overindebtedness and Ovelegalization: Consumer Bankruptcy as a Field for Alternative Dispute Resolution* *Journal of Consumer Policy* 20: 143, 1997 at 171.

through the work of the MABS. It is to be noted that some countries such as the UK prefer to keep non-judicial and judicial procedures entirely separate, and attempts to reach an amicable settlement are not prerequisites for judicial proceedings in the UK.¹⁴⁹

5.82 The Commission believes that a two-tiered system of personal insolvency procedures is a sound model. The advantages of non-judicial debt settlement over court procedures have been outlined and the Commission believes that non-judicial debt settlement is the most appropriate mechanism for resolving debt difficulties. The Commission however recognises that court involvement may be necessary in some circumstances, and that allowing recourse to judicial insolvency procedures better respects the rights of creditors to have access to a court. The Commission thus concludes that Irish consumer insolvency law should involve both non-judicial debt settlement and judicial bankruptcy procedures. The Commission nonetheless retains the view that non-judicial procedures are to be preferred over judicial procedures where possible, and that the use of such procedures should be encouraged. This view is supported by the recommendation of the Council of Europe that its Member States should not only establish mechanisms for extra-judicial settlements, but that both debtors and creditors should be encouraged to participate in these settlements.¹⁵⁰ Many problems have been identified with the Irish judicial personal insolvency system, as contained in the *Bankruptcy Act 1988*. Thus, if a two-tier system of personal insolvency is to be adopted, these problems would have to be addressed, and significant changes to the 1988 Act would be necessary.

5.83 *The Commission provisionally recommends that the creation of a consumer insolvency system should involve both non-judicial debt settlement and judicial insolvency procedures. The Commission provisionally recommends that this should involve the creation of a non-judicial debt settlement system and significant amendment of the Bankruptcy Act 1988 to form a new personal insolvency statutory framework.*

(c) **Encouraging Non-Judicial Debt Settlement**

5.84 The Commission now considers how non-judicial debt settlement proceedings are to be encouraged over judicial bankruptcy proceedings. This discussion should be distinguished from the discussion below of how non-judicial debt settlement and voluntary debt arrangements are to be encouraged over debt *enforcement* proceedings, although some common issues arise.¹⁵¹

(i) **Option 1: non-judicial debt settlement as a precondition to judicial bankruptcy proceedings**

5.85 The first option is to require participation in non-judicial debt settlement as a precondition to accessing judicial procedures. This is the approach adopted in the majority of European jurisdictions, as is described in more detail above.¹⁵² It must be noted that if participation in non-judicial debt settlement is

¹⁴⁹ See paragraphs 5.21 to 5.40 above for a more detailed description of the various individual insolvency operations in the UK.

¹⁵⁰ *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems: CM/Rec(2007)8* at paragraph 4(d).

¹⁵¹ See paragraphs 6.129 to 6.142 below and the accompanying diagrams.

¹⁵² For example, in the Netherlands debtors must include with their insolvency petitions a declaration explaining why there is no realistic possibility of reaching an out-of-court debt arrangement, and this must be issued by a local debt counselling agency: *Faillissementswet* (Bankruptcy Law) art. 285 Neth. See Kilborn "The Hidden Life of Consumer Bankruptcy Reform: Danger Signs for the New US Law from Unexpected Parallels in the Netherlands" (2006) *Vand. J. Transnat'l L* 77 at 94. Similarly, until recently Swedish law a debtor could not access the formal State debt settlement scheme unless he or she had first attempted to reach an informal voluntary arrangement: *Ett Steg mot ett enklare och Snabbare Skuldsaneringsforfarande*, SOU 2004:81 at 57. See Kilborn "Out With the New, in With the Old: as Sweden Aggressively Streamlines its Consumer Bankruptcy System, Have U.S. Reformers Fallen Off the Learning Curve?" (2007) 80 *American Bankruptcy Law Journal* 435 at 440. It is to be noted that this precondition has now been removed from the Swedish debt settlement system.

to become a precondition of judicial bankruptcy proceedings, the non-judicial stage must be effective in resolving debt disputes, as is discussed below.¹⁵³

(ii) Option 2: Incentives for non-judicial debt settlement

5.86 Secondly, an alternative means of encouraging non-judicial debt settlement while retaining full access to judicial insolvency proceedings is to provide incentives to both debtor and creditor to engage in non-judicial settlement.¹⁵⁴ Creditors could be encouraged to participate in debt settlement by ensuring that the costs involved are much lower than those incurred in court-based proceedings, leading to higher dividends from repayment plans. The rights of creditors in a non-judicial settlement scheme should be the same as in legal bankruptcy proceedings, and the debtor should be adequately supervised to ensure the settlement plan is completed.¹⁵⁵ Similarly, incentives need to be provided for debtor participation. Equal protection must also be provided to the debtor as in court proceedings and so limitations on the assets and income of debtors which can be distributed to creditors and on the length of payment plans must be considered.

(iii) Option 3: disincentives for judicial proceedings

5.87 In addition to these incentives, disincentives for parties to use court proceedings may be considered. For example, Dutch law provides for lower dividends for creditors in judicial insolvency proceedings than in voluntary debt settlement.¹⁵⁶ Finally, a further means of discouraging the use of judicial proceedings over non-judicial settlement could be the imposition of cost sanctions on creditors who unreasonably refuse a proposed settlement. The Council of Europe Recommendation on this area of the law requires national law to effectively limit the means of creditors to hinder debt settlements unreasonably, and requiring an unreasonable creditor to pay the costs of legal proceedings is one method of achieving this result.¹⁵⁷

5.88 The Commission recognises that various options are available to encourage the use of non-judicial debt settlement over judicial insolvency proceedings. The Commission believes that the lower costs of non-judicial proceedings provide a strong incentive for their use, especially when compared with the current high costs of procedures under the *Bankruptcy Act 1988*. The Commission also acknowledges that it may be necessary to compel the use of non-judicial procedures rather than merely encourage such use. Despite these considerations, the Commission recognises that this issue will largely be determined by the attitudes of debtors and creditors to non-judicial debt settlement procedures. The Commission thus invites submissions from interested parties as to the appropriate means of encouraging the use of non-judicial debt settlement procedures over judicial insolvency or bankruptcy procedures.

5.89 *The Commission invites submissions on the appropriate means of encouraging (or compelling) the use of non-judicial debt settlement procedures over judicial bankruptcy procedures.*

¹⁵³ See paragraphs 5.90 to 5.91 below.

¹⁵⁴ See e.g. *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 97.

¹⁵⁵ *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008) at 97.

¹⁵⁶ Under the Law of 25 June 1998, Stb. 1998, 445 (Neth). See Huls, Jungmann and Niemeijer *op cit.*; Kilborn "The Hidden Life of Consumer Bankruptcy Reform: Danger Signs for the New US Law from Unexpected Parallels in the Netherlands" (2006) *Vand. J. Transnat'l L* 77 at 92ff. This measure however has proved unsuccessful due to the fact that the financial incentives to reach voluntary settlements were too small, and were outweighed by factors such as the greater consistency offered by court procedures, the desire to "punish" debtors by bringing publicised court proceedings against them, fears of recidivism in voluntary arrangements, and the fact that court proceedings provide for an increase in creditor dividends if a debtor's income increased, while voluntary agreements do not.

¹⁵⁷ *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* (Council of Europe CM/Rec(2007)8, 2007) at paragraph 4(e).

(d) **Non-Judicial Powers to Bind Dissenting Creditors**

5.90 It must be noted that if participation in non-judicial debt settlement is to become a precondition of judicial bankruptcy or enforcement proceedings, the non-judicial stage must be effective in resolving debt disputes. Experiences from countries such as Sweden illustrate that if non-judicial procedures are consistently unsuccessful, they merely delay the relief of debtors who are in need of such relief, and become a mere formality before recourse is had to judicial procedures.¹⁵⁸ In this regard for non-judicial procedures to be successful, they may need to include powers to impose settlements where agreement cannot be reached, and to limit access to judicial procedures where parties have no valid basis for objecting to the proposed non-judicial settlement. In effect, this is the situation which now prevails in Sweden, where creditors retain a right of full appeal on points of fact and law, but must formally initiate an appeal and provide a sound legal basis for challenging the outcome of debt settlement proceedings.¹⁵⁹ A wholly different model of non-judicial debt settlement under the Individual Voluntary Arrangement procedure in England and Wales also allows a voluntary settlement to become binding once a qualified majority of creditors have agreed to it, and new legislation in that country provides for the conferral of a power on approved debt management agencies to compel reluctant creditors to participate in debt repayment plans.¹⁶⁰ The Council of Europe has also suggested that a competent non-judicial body could be given the power to impose a debt settlement where a non-cooperating creditor can provide no legitimate reason for its refusal to participate in the settlement.¹⁶¹ The Commission believes that this would be a valuable means of making non-judicial debt settlement more effective, and is necessary to allow non-judicial debt settlement to operate as a real solution to debt problems. The voluntary negotiation of settlements between creditors and debtors through the assistance of money advisors should nonetheless remain a core principle of debt settlement, with the power to force settlements on recalcitrant creditors to be used where such creditors unreasonably refuse to cooperate.

5.91 *The Commission provisionally recommends that the law should provide a means of giving binding effect to debt settlements which have been accepted by a majority of creditors and to which some creditors have unreasonably objected.*

(3) **Statutory Debt Settlement v Voluntary Debt Settlement**

5.92 The Commission has clearly expressed its view that personal insolvency procedures must be introduced in Ireland, and that these procedures should be centred on the non-judicial resolution of debt difficulties as much as possible. This next sub-section considers whether non-judicial debt settlement should take a solely voluntary and amicable form, or whether a formal statutory debt settlement procedure should be instituted. This section contrasts purely amicable debt management agreements, such as those arranged with creditors by the MABS and described in Chapter 3 above;¹⁶² with formalised statutory debt settlement procedures, such as the IVA procedure operating in the UK, the French over-indebtedness commissions system, or the Swedish statutory debt settlement model, all of which are described above.

5.93 There are reasons why creditors may prefer statutory debt settlement to voluntary debt settlement. First, some creditors think that statutory proceedings are more beneficial to them than voluntary non-judicial procedures because they may set mandatory criteria which lead to a greater

¹⁵⁸ Kilborn "Out With the New, in With the Old: as Sweden Aggressively Streamlines its Consumer Bankruptcy System, Have U.S. Reformers Fallen Off the Learning Curve?" (2007) 80 *American Bankruptcy Law Journal* 435 at 455ff. See also the discussion of the arguable failure of the Dutch system to provide sufficient incentives to encourage non-judicial debt settlement at footnote 156 above.

¹⁵⁹ See Kilborn "Out With the New, in With the Old..." *op cit.* at 458, citing *Ett Steg mot ett enklare och Snabbare Skuldsaneringsforfarande*, SOU 2004:81.

¹⁶⁰ See Part V *Tribunals, Courts and Enforcement Act 2007*.

¹⁶¹ *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems: CM/Rec(2007)8 Explanatory Memorandum* at paragraph 35.

¹⁶² See paragraphs 3.196 to 3.199 above.

financial return.¹⁶³ Secondly, creditors may view the supervision of the debtor as being stricter under a formal statutory scheme.¹⁶⁴ Thirdly, statutory insolvency schemes may involve lower costs for creditors, as fewer resources must be expended on training staff in arrears management and debt settlement techniques, and the official trustee, rather than the creditor itself, will have the task of monitoring repayments. Fourthly, a further motivating factor for creditors is the fear of recidivism among debtors availing of voluntary debt settlement agreements.¹⁶⁵ Creditors may fear that a debtor who requests a voluntary debt settlement will request another settlement a few years later, and that the creditor will be subject to continuous chain of default and debt write-off. In contrast, most statutory debt settlement regimes are limited in their use, sometimes requiring debtors to wait a period of approximately ten years before availing of the procedure again, while other regimes offer access only once in a lifetime.¹⁶⁶

5.94 The Commission also believes that statutory debt settlement may benefit the debtor more than voluntary procedures. The existence of a formalised statutory procedure for debt settlement provides better recognition of the “right” of debtors to avail of debt settlement, and so debt relief would be less dependent on the clemency of creditors. Costs can be better controlled in formal debt settlement, and safeguards can be put in place regarding the length of time of repayment plans.¹⁶⁷ Also, voluntary plans may often be too demanding of debtors, as desperate debtors agree to unrealistic repayment plans where no other options are available. Statutory debt settlement can avoid these problems by taking account of a debtor’s means and by exempting certain essential assets and income from the settlement.

5.95 Statutory debt settlement procedures may also include some power to bind creditors who do not participate in a settlement, or creditors who unreasonably reject a proposed agreement, as is discussed in more detail above.¹⁶⁸ Purely voluntary proceedings would also not facilitate a stay of enforcement, instead relying on creditors to voluntarily refrain from bringing legal enforcement proceedings.

5.96 For these reasons, the Commission thus concludes that there are advantages to statutory debt settlement procedures over leaving non-judicial on a purely voluntary amicable basis. While negotiation between debtor and creditors remains at a core of debt settlement, statutory backing should be provided for debt settlement.

5.97 *The Commission provisionally recommends that non-judicial debt settlement procedures should take place under conditions specified in legislation and should not be entirely voluntary in nature.*

(4) The Structure of a Debt Settlement System: Debt Counselling and a Supervisory Agency.

(a) Debt Counsellors

5.98 The rehabilitation, functional economic, social welfare and consumer protection theories of bankruptcy discharge require the provision of debt counselling in insolvency proceedings so that the legal

¹⁶³ Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 63; Huls *Overindebtedness and Ovelegalization: Consumer Bankruptcy as a Field for Alternative Dispute Resolution* *Journal of Consumer Policy* 20: 143, 1997 at 65.

¹⁶⁴ Reifner et al *op cit.* at 65.

¹⁶⁵ *Ibid.*

¹⁶⁶ See paragraphs 5.143 to 5.144 below.

¹⁶⁷ Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 63; Huls *Overindebtedness and Ovelegalization: Consumer Bankruptcy as a Field for Alternative Dispute Resolution* *Journal of Consumer Policy* 20: 143, 1997 at 173.

¹⁶⁸ See paragraphs 5.90 to 5.91 above.

fresh start can be accompanied by a practical fresh start as debtors gain new financial management skills.

5.99 Debt counselling has traditionally been a fundamental part of the European model of consumer debt adjustment.¹⁶⁹ In addition, non-European systems such as Canada¹⁷⁰ and the United¹⁷¹ have also more recently introduced mandatory debt counselling as part of their consumer bankruptcy systems.

(i) The role of debt counsellors as mediators of the debt settlement scheme

5.100 The support for the provision of debt counselling provided by these indicates to the Commission that debt counselling should play a central role in the proposed debt settlement scheme. The preparation of an assessment of a debtor's means and the preparation of a realistic, affordable and sustainable repayment plan are essential activities of debt settlement which are within the core competence of money advisors. Also, money advisors are experienced in negotiating debt settlements with creditors. The advice of money advisors also provides debtors with the money management skills necessary to complete debt settlement programmes and prevent future financial difficulties. The Commission therefore believes that there is a strong argument for assigning the role of mediator in the proposed debt settlement scheme to money advisors.

5.101 *The Commission provisionally recommends that the role of mediator in the proposed statutory debt settlement scheme should be carried out by a money advisor.*

5.102 If the role of mediator in the scheme is to be filled by a money advisor, and if money advice is a compulsory element of the debt settlement scheme, it is essential that statutory rules exist to specify who is qualified to act as a money advisor for the purposes of the scheme. The issue of the regulation and accreditation of money advisors, debt counsellors and debt management agencies is described in more detail above, where the Commission provisionally recommends that a licensing regime should be introduced for debt management agencies.¹⁷² The Commission believes that only licensed agencies and advisors should be permitted to act as mediators under the proposed debt settlement scheme.

5.103 *The Commission provisionally recommends that only licensed agencies and money advisors should be permitted to act as mediators under the proposed debt settlement scheme.*

(ii) A supervisory role for money advisors: should the money advisor also act as administrator of debt settlement arrangements?

5.104 A further key role under the proposed debt settlement scheme will be the position of administrator of debt settlements, which involves the organisation of payments from the debtor to creditors and the supervision of compliance with the repayment plan. The Commission is conscious that while such a role could also be given to a money advisor, as it is under the IVA procedure in England and Wales,¹⁷³ certain concerns arise in relation to giving such a role to money advisors. First, concerns have been raised as to giving the role of debt counsellor, mediator and plan administrator to the same person or body.¹⁷⁴ There is a risk that the core functions of money advisors in providing financial education and

¹⁶⁹ See e.g. Niemi-Kaisiläinen "Consumer Bankruptcy in Comparison: Do We Cure a Market Failure or a Social Problem" (1999) 37 *Osgoode Hall LJ* 473 at 475.

¹⁷⁰ See *Bankruptcy and Insolvency Act* RSC ch B-3 §157.1 (1) (3). See Ramsay "Mandatory Bankruptcy Counselling: The Canadian Experience" (2001) 7 *Fordham J. Corp. & Fin. L.* 525.

¹⁷¹ *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, Pub. L. No. 109-8 § 106, 119 Stat. 23 (2005). See Gross and Block-Lieb "Empty Mandate or Opportunity for Innovation? Pre-Petition Credit Counselling and Post-Petition Financial Management Education" (2005) 13(2) *Am. Bankr. Inst. L. Rev.* 549.

¹⁷² See paragraphs 4.236 to 4.254 above.

¹⁷³ See paragraphs 5.26 to 5.29 above.

¹⁷⁴ Reifner, Kiesiläinen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 63; Huls *Overindebtedness and Ovelegalization: Consumer Bankruptcy as a Field for Alternative Dispute Resolution* *Journal of Consumer Policy* 20: 143, 1997 at 254.

money management skills may be diluted if they become administrators of such settlements. In this regard it has been suggested that a separate trustee or administrator should assume responsibility over the debtor's estate and receive repayment instalments.¹⁷⁵ Similarly, some lenders may view a debt counsellor or money advisor to be an advocate of the debtor rather than an independent and objective administrator of a debt settlement.¹⁷⁶ A contrary view argues that once the independence and professionalism of debt counsellors is assured, there is no objection to the appointment of the debt counsellor as a plan administrator.¹⁷⁷ As the Commission proposes that debt settlements be approved by the proposed enforcement office, an alternative proposal would be for this office could possibly also administer and supervise the settlements once the debt counsellor/money advisor has prepared a settlement plan.

5.105 *The Commission invites submissions as to the desirability of a money advisor operating as both mediator and settlement administrator under the debt settlement scheme. The Commission alternatively invites submissions on whether the role of a money advisor should be restricted to mediating a settlement, with another administrative body responsible for supervising and administering the settlement.*

(b) **The Role of the Enforcement Office**

5.106 As has been noted elsewhere in this section, for non-judicial debt settlement procedures to be effective, it is essential that certain powers are provided to a non-judicial body. These include a power to compel dissenting creditors to participate in a debt settlement and a power to stay enforcement proceedings. For this reason the Commission believes that an administrative body should oversee the debt settlement system and possess the ability to make such orders. The Commission proposes that this responsibility should be given to the proposed enforcement office described in more detail below.¹⁷⁸ This office should also hold the power to stay enforcement proceedings against an over-indebted individual pending the outcome of debt settlement proceedings. A right to challenge decisions of the office in the courts should exist, but this right may be limited to specific grounds. The system of debt settlement could then resemble the Swedish model discussed above, whereby debt settlement administrative functions are assigned to the same body which oversees and directs debt enforcement. This structure would provide a necessary link between the enforcement of debts and the treatment of over-indebtedness. The office could maintain records of both enforcement proceedings and debt settlements, which would assist creditors in making responsible lending, arrears management and enforcement decisions. It should be noted that the possible procedural interaction of the proposed debt settlement and enforcement systems is described in more detail below, and that diagrams are included to illustrate how the two systems would operate in practice.¹⁷⁹

5.107 The Commission invites submissions as to the structure which a system of debt settlement should take. The Commission particularly asks for views as to which actors should be involved in the process, and what respective roles should be attributed to money advisors and to the proposed enforcement office under the debt settlement procedure.

¹⁷⁵ *Ibid.*

¹⁷⁶ It has been suggested that once the independence and professionalism of debt counsellors is guaranteed, this is not a legitimate concern of creditors. See Huls "Overindebtedness and Overlegalization: Consumer Bankruptcy as a Field for Alternative Dispute Resolution" *Journal of Consumer Policy* 20: 143, 1997 at 152. This would appear to be the case in Ireland, where the Money Advice and Budgeting Services (MABS) in Ireland has a well-established professional working relationship with creditors, as evidenced by measures such as the operational protocol the MABS has agreed with the Irish Banking Federation: *IBF-MABS Operational Protocol: Working Together to Manage Debt* (June 2009), available at: <http://www.ibf.ie/pdfs/IBF-MABS-Protocol-June09.pdf>.

¹⁷⁷ Huls "Overindebtedness and Overlegalization: Consumer Bankruptcy as a Field for Alternative Dispute Resolution" *Journal of Consumer Policy* (1997) 20 143 at 152.

¹⁷⁸ See paragraphs 6.36 to 6.45 below.

¹⁷⁹ See paragraphs 6.129 to 6.142 below.

5.108 *The Commission invites submissions as to the structure which a proposed debt settlement system should take. The Commission invites submissions in particular on the respective roles of money advisors and the proposed enforcement office in the debt settlement procedure.*

(5) Earned Start

(a) “Earned Discharge”: A repayment plan as a condition of discharge

5.109 The Commission believes that the general rule of the proposed debt settlement scheme should be one of “earned discharge”, whereby the debtor will obtain a discharge of debts only after completing a repayment plan under which as much of his or her obligations as is reasonably possible must be repaid. This principle is a feature of European debt settlement systems and accords with the rehabilitative theory which is central to these regimes. The debtor earns a discharge of debts through a period of sacrifice during which he or she also gains financial management skills which will assist the debtor in ensuring that he or she can avoid debt difficulties in the future.

5.110 The debt collection theory of bankruptcy and the desire to have due regard to the interests of creditors also suggest that a debtor should be required to repay what he or she can towards his or her obligations. It must however be noted that the returns received by creditors from heavily over-indebted consumers will often be very low, and that the repayment plan may in many cases not be very economically beneficial.

5.111 Nonetheless, the requirement that a debtor complete a repayment plan can be justified by moral considerations, and this is an important factor in European insolvency systems.¹⁸⁰ As an acknowledgement of the exceptional nature of debt discharge, it is essential that it can only be achieved after a period of “good payment morality” has been observed by the debtor. The Commission believes that this is especially important in Ireland, where there has not been a tradition of widespread personal insolvency law and debt discharge.

5.112 The Commission provisionally recommends that a key principle of the personal insolvency regime should be that of an “earned start”. Debt discharge should be conditional on the completion of a repayment plan by debtors.

(b) An exception for “No-Income, No Assets” Debtors

5.113 The Commission however recognises that certain exceptions will have to exist for the cases of debtors who have no available income from which to satisfy a repayment plan. As noted above, personal insolvency systems in other countries have been forced to adjust from a requirement of a mandatory repayment plan to introduce an exceptional scheme for debtors who have no available income at all.¹⁸¹ This problem is discussed below when the question of the amount of a debtor’s income should be made subject to a repayment plan.¹⁸²

(c) Should other obligations be imposed on the debtor during the repayment period?

5.114 As part of the earned start philosophy, the Commission believes that it should be considered whether certain other obligations may be imposed on debtors throughout the period of the repayment plan. For example, financial education programmes are mandatory for individuals availing of debt relief in certain jurisdictions.¹⁸³ Systems such as Canada¹⁸⁴ and the United States¹⁸⁵ have also introduced

¹⁸⁰ See Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented by the Institute for Financial Services e.v. Erasmus University Rotterdam/School of Law University of Helsinki/Helsinki Collegium for Advanced Studies to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 167.

¹⁸¹ See for example the discussion of the introduction of Debt Relief Orders in England and Wales at paragraphs 5.30 to 5.31; the development of the “personal recovery” procedure “irremediably compromised” debtors at paragraph 5.55; and the “fast-track” procedure for debtors with no income under Dutch law at paragraph 5.64 above.

¹⁸² See paragraphs 5.169 to 5.170 below.

¹⁸³ See e.g. the Dutch and English insolvency procedures described above.

mandatory debt counselling as part of their consumer bankruptcy systems. Furthermore, in Germany, the discharge of debts is conditional on the completion of a “good behaviour period” by the debtor, which involves a repayment plan but also a requirement that the debtor make his or her best efforts to hold, actively seek, or not refuse, any suitable employment which is available to the debtor.¹⁸⁶

5.115 These provisions recognise the exceptional nature of debt discharge and are based on the view that insolvency procedures should have regard to moral considerations. They also serve a rehabilitative purpose in attempting to ensure that the legal fresh start received by the debtor on discharge is also a practical fresh start. The Commission believes that these are appropriate considerations for a personal insolvency system and therefore invites submissions as to whether such additional obligations should be placed on debtors during the period of the repayment plan.

5.116 *The Commission invites submissions as to whether other obligations in addition to the completion of a repayment plan should be imposed on debtors during the pre-discharge period.*

(d) ***Should certain debts be incapable of being discharged? The case of family maintenance debts, criminal fines etc.***

5.117 For a discharge to be a true fresh start, it must relieve the debtor from all debts. Most legal systems however recognise that certain debts may not be discharged. These may include family maintenance contributions¹⁸⁷ or compensation payments in cases where the debtor has committed a tort. Fines and criminal penalties are also not dischargeable in many countries. The following table, taken from a 2003 provides an example of the debts which are exempt from discharge under consumer insolvency laws under the consumer insolvency laws then existing European Union.¹⁸⁸

Member State	Maintenance	Taxes	Fines	Torts	Student Loans
Austria	Not discharged		Not discharged	Not discharged	
Belgium	Not discharged			Not discharged	
France	Not discharged		Not discharged		
Germany			Not discharged	Not discharged	
Luxembourg	Not discharged	Privileged status			
Netherlands		Privileged status			
Sweden	Not discharged, except for maintenance to child			Not discharged, but subject to the discretion of the court.	
UK	Not discharged		Not discharged		Not discharged

¹⁸⁴ See *Bankruptcy and Insolvency Act* RSC chB-3 §157.1 (1) (3). See Ramsay “Mandatory Bankruptcy Counselling: The Canadian Experience” (2001) 7 *Fordham J. Corp. & Fin. L.* 525.

¹⁸⁵ *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, Pub. L. No. 109-8 § 106, 119 Stat. 23 (2005). See Gross and Block-Lieb “Empty Mandate or Opportunity for Innovation? Pre-Petition Credit Counselling and Post-Petition Financial Management Education” (2005) 13(2) *Am. Bankr. Inst. L. Rev.* 549.

¹⁸⁶ § 295(1)(1) *Insolvenzordnung* (Ger). See Kilborn “The Innovative German Approach to Consumer Debt Relief: Revolutionary Changes in German Law, and Surprising Lessons for the United States” (2003-4) 24 *Nw. J. Int’l & Bus.* 257 at 280ff.

¹⁸⁷ Such as Austria, Belgium, France, Luxembourg, Sweden and the UK.

¹⁸⁸ Such as Austria, Belgium, France, Germany and the UK: see Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 183-186.

5.118 The Commission invites submissions as to whether certain debts should be excluded from discharge under the proposed debt settlement system, and as to which debts should be included in any such exemptions.

5.119 *The Commission invites submissions as to whether certain debts should be excluded from discharge and which debts should be included in this non-dischargeable category.*

(6) Open Access

5.120 Debt settlement and bankruptcy proceedings should be widely available to all genuine over-indebted individuals who need relief and unnecessary restrictions on access to these procedures should not exist. It is generally recognised that two factors should control access to insolvency procedures.¹⁸⁹ As the aim of such systems is to provide relief for the over-indebted, the primary criterion for access should be the over-indebtedness or insolvency of the debtor. Nonetheless, it is generally recognised that bankruptcy or debt settlement procedures can be abused, and that safeguards are necessary to prevent against this risk. Similarly, the risk of “moral hazard”, which refers to the danger that an easily accessible bankruptcy system may encourage individuals to incur large numbers of debts without intending to repay them, requires that access should not be available to debtors who act in such a fraudulent or possibly reckless manner. This reasoning leads to the need for a second entry criterion of good faith or honesty. The content of these access conditions will now be discussed.

(a) Access Conditions: Insolvency

5.121 Personal insolvency relief should only be available to those who are genuinely over-indebted or insolvent. As is described in Chapter 1 above, debtors can be grouped into categories of “can’t pay”, “could pay” and “won’t pay”. The insolvency requirement is used to filter debtors into these categories, so that the exceptional nature of debt relief is recognised and that only those who are genuinely over-indebted should be discharged from their debts.

(i) Forms of insolvency tests

(I) Insolvency as an inability to meet debts as they fall due

5.122 The traditional definition of insolvency is an inability to pay debts as they fall due.¹⁹⁰ This is the test used in countries such as the Netherlands, where judicial debt settlement is available to debtors who are unable to continue making normal payments on debts.¹⁹¹ Other legal systems, most notably in Nordic countries such as Sweden, use a slightly more stringent test. So under Swedish law to access non-judicial debt settlement procedures the debtor must demonstrate “qualified insolvency”, meaning that his or her inability to pay debts as they fall due is expected to continue through a “foreseeable period”, which in practice means a period of at least five years.¹⁹² It is to be noted that this test takes into account the criterion of persistence which forms part of the definition of over-indebtedness presented in Chapter 1 above.¹⁹³ Similarly, the Free Legal Advice Centres have argued that access to a statutory debt settlement scheme in Ireland should be confined to those whose total debts come to such an amount that on the

¹⁸⁹ Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 181. See e.g. Articles 284 and 288 of the Dutch *Bankruptcy Law* or *Faillissementswet* and Kilborn “The Hidden Life of Consumer Bankruptcy Reform: Danger Signs for the New US Law from Unexpected Parallels in the Netherlands” (2006) *Vand. J. Transnat’l L* 77 at 97.

¹⁹⁰ Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 181.

¹⁹¹ See Dutch *Faillissementswet* (Bankruptcy Law), art. 284, 288.

¹⁹² Kilborn, “Out With the New, in With the Old: as Sweden Aggressively Streamlines its Consumer Bankruptcy System, Have U.S. Reformers Fallen Off the Learning Curve?” (2006) 80 *American Bankruptcy Law Journal* 435 at 443.

¹⁹³ See paragraphs 1.08 to 1.09 above.

basis of current income and assets, it is unlikely that the debts will be paid off in full within a reasonable time frame.¹⁹⁴ In France, different levels of consumer bankruptcy procedures operate for debtors who are over-indebtedness to various different extents, and access to the most complete discharge facility is reserved to debtors who are “irremediably compromised” to the extent that it is “manifestly impossible” to remedy the debtor’s circumstances through other remedies such as payment plans or partial discharge.¹⁹⁵

5.123 It can thus be seen that various different definitions are used when forming the “insolvency” requirement for accessing debt settlement and bankruptcy procedures in various different legal systems. The principles to be drawn from the comparison of various regimes include firstly the concept that the debtor seeking to access debt settlement or bankruptcy proceedings must be unable to meet his or her obligations. This means that such proceedings will only be available to “can’t pay” debtors. Secondly, this inability to meet obligations must last for a significant period of time, so that temporary over-indebtedness is best addressed by voluntary debt arrangements rather than by the proposed statutory debt settlement scheme, which includes a discharge of debt.

(II) *Insolvency over a significant period of time: the exclusion of “could pay” debtors from debt settlement*

5.124 The Commission thus believes that the insolvency test should involve these two elements. First, debtors who are not insolvent and who can repay their debts should obviously be excluded, so that “won’t pay” debtors cannot abuse debt settlement as a means of avoiding their obligations. Secondly, the insolvency of a debtor must be likely to continue over a prolonged period of time. This would exclude “could pay” debtors, who are temporarily insolvent but may be able to pay their debts through financial sacrifices and improved money management practices. Other options, such as voluntary debt management agreements,¹⁹⁶ most often with the help of a money advisor, may be more appropriate for these debtors. Thus the requirement that the insolvency continue over time means that only “can’t pay” debtors will be permitted to access the last resort of debt settlement.

5.125 The Commission thus concludes that the insolvency test should involve an inability to pay debts over a significant period of time. The Commission nonetheless invites views as to any other considerations which should be taken into account in formulating an “insolvency” test for accessing debt settlement procedures.

5.126 *The Commission provisionally recommends that the “insolvency” condition for accessing debt settlement procedures should consist of a test as to whether the debtor is unable to meet his or her obligations, with this inability continuing over a significant period of time. The Commission invites submissions as to whether any other considerations should be taken into account in formulating this condition.*

(b) **Access Conditions: Good Faith**

5.127 The second condition for access to debt settlement and bankruptcy procedures in most legal systems is good faith.¹⁹⁷ This is an important condition in preventing the abuse of these procedures by dishonest debtors seeking to evade their obligations. It generally requires the debtor to have acted honestly in incurring his or her debts, and demands that the debtor make full disclosure of all obligations, assets and income when participating in debt settlement or bankruptcy procedures. The principle of good faith formed a key element of the pilot debt settlement scheme operated by the MABS and the IBF, under which debtors were required to make a full disclosure of all their assets and liabilities as a pre-condition to

¹⁹⁴ Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 123.

¹⁹⁵ *Code de la Consommation* (consolidated version June 2009) art. L330-1. See Kilborn “*La Responsabilisation de l’Economie: What the United States can Learn from the New French Law on Consumer Overindebtedness*” (2005) 26 *Michigan Journal of International Law* 619 at 657.

¹⁹⁶ Of the type discussed in Chapter 3 at paragraphs 3.182 to 3.188 and 3.196 to 3.199.

¹⁹⁷ Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 183.

availing of the scheme.¹⁹⁸ Again it can be seen that different legal systems adopt different approaches to this condition.

(i) A test of “honesty”?

5.128 In countries such as France¹⁹⁹ or the Netherlands it is simply prescribed that the debtor must act in good faith when applying for relief, but in other countries the good faith requirement is composed of more detailed obligations. In the Netherlands, an application for judicial debt adjustment in the Netherlands must be issued by the municipal debt counsellor and must indicate to the court why voluntary debt settlement has failed. This application is then used by the court to assess whether the debtor is applying for debt adjustment in good faith.²⁰⁰

5.129 Several difficulties arise when seeking to distinguish between different types of debtors, and these difficulties may suggest that a simple test of honesty may be appropriate. First, it is difficult to accurately draft legislation which enables clear distinctions to be drawn between the people who fall into the respective categories.²⁰¹ This is especially so since in practice there are many different types of debtors, and difficult decisions arise in cases such as where a debtor has acted honestly but has so overestimated his or her ability to pay as to be considered reckless.²⁰² In any case, it may be impractical for a court or debt settlement supervisor to assess the debtor’s conduct in every case, and the difficult adjudications which would be necessary may defeat the purpose of introducing a low-cost efficient debt settlement system.²⁰³ For this reason a narrower rule excluding only fraudulent debtors may be more effective.

5.130 Secondly, in addition to the above practical difficulties, it may be asked whether notions of an almost criminal nature, whereby the conduct of debtors is assessed and sometimes condemned as fraudulent, should form part of bankruptcy law or a debt settlement scheme at all.²⁰⁴ Much law reform in other legal systems over many years has been dedicated to removing such notions of criminality from bankruptcy law, and a criticism of the *Bankruptcy Act 1988* is that it fails to do enough to remove the punitive approach to bankruptcy.²⁰⁵ In this regard it may be concluded that the most appropriate means of dealing with fraudulent debtors may be through the general criminal law rather than through bankruptcy law.²⁰⁶

(ii) A more strenuous good faith test?

5.131 Additional criteria are considered as part of the good faith test in other jurisdictions. Thus in Sweden, debtors seeking access to non-judicial debt settlement must prove to the enforcement authority that due to the debtor’s “personal and economic conditions”, it is reasonable that a debt adjustment should be granted.²⁰⁷ Several factors are considered in deciding whether this reasonableness test has

¹⁹⁸ See paragraphs 3.189 to 3.195 above.

¹⁹⁹ See *Code de la Consommation* (consolidated version June 2009) art. L330-1.

²⁰⁰ See Dutch *Faillissementswet* (Bankruptcy Law), art. 284, 288; Huls, Jungmann and Niemeijer “Can Voluntary Debt Settlement and Consumer Bankruptcy Coexist? The Development of Dutch Insolvency Law” in Niemi-Kiesilainen (ed), Ramsay (ed) and Whitford (Ed) *Consumer Bankruptcy in Global Perspective* (Hart Publishing 2003) at 305.

²⁰¹ Keay “Balancing Interests in Bankruptcy Law” (2001) 30 *Common Law World Review* 206 at 228.

²⁰² Keay “Balancing Interests in Bankruptcy Law” (2001) 30 *Common Law World Review* 206 at 229. This is especially so when the conclusions of studies of consumer behaviour discussed above are considered, which show that consumers systematically make irrational borrowing decisions: See paragraphs 3.38 to 3.45 above.

²⁰³ Keay *op cit* at 229.

²⁰⁴ *Ibid.*

²⁰⁵ See paragraphs 3.163 to 3.171 above.

²⁰⁶ Keay *op cit.* at 229.

²⁰⁷ See *Ett steg mot ett enklare och snabbare skuldsaneringsförfarande*, SOU 2004:81 at 61, cited by Kilborn, “Out With the New, in With the Old: as Sweden Aggressively Streamlines its Consumer Bankruptcy System,

been satisfied. First, the enforcement authority considers the age of the debt, to assess whether the debtor has struggled with the debt and attempted to manage it for a period before seeking to have it discharged. In practice, three or four years must pass from the point of the debtor's first debt problems for an application for debt adjustment to be considered reasonable.²⁰⁸ Secondly, the authorities will consider the circumstances which caused the debtor's obligations. While the practical application of this criterion seems to have blocked access to individuals whose debts could be attributed to speculative investments, over-consumption does not appear to deny access to relief for consumers on this ground.²⁰⁹ Finally, the enforcement authority will consider the efforts the debtor has made to meet his or her obligations, and will deny access if the debtor has evaded creditors, fraudulently conveyed assets to friends or has voluntarily avoided full-time employment.²¹⁰ In Germany, the discharge of debts is conditional on the completion of a "good behaviour period" by the debtor, which involves a repayment plan but also a requirement that the debtor make his or her best efforts to hold, actively seek, or not refuse, any suitable employment which is available to the debtor.²¹¹ An alternative approach is adopted in England and Wales. Here dishonest conduct does not affect access to a discharge of debts, but debtors who have been found to have acted dishonestly or irresponsibly may be subjected to post-bankruptcy restrictions such as prohibitions on acting in various capacities such as a company director or from obtaining credit above a certain amount without disclosing his or her status.²¹² As noted above, Irish law currently applies such restrictions to all bankrupts, irrespective of whether or not he or she has been found to have acted dishonestly.²¹³

5.132 Thus it can be seen that various different approaches can be adopted to the good faith condition of access to debt settlement and bankruptcy procedures. The Commission invites submissions as to the approach which should be adopted in formulating a good faith test for access to the proposed debt settlement scheme.

5.133 *The Commission invites submissions as to the appropriate content of the "good faith" condition for accessing debt settlement procedures.*

(c) **Costs of Access to Insolvency Procedures**

5.134 The next issue concerns the costs of accessing debt settlement and bankruptcy procedures. A primary flaw of the *Bankruptcy Act 1988* is that it is prohibitively expensive and so bankruptcy procedures lie outside the reach of the vast majority of Irish debtors.²¹⁴ The Council of Europe has recommended that Member States must ensure effective access to debt counselling and debt adjustment, and that to attain this goal such procedures should be free of charge or at least provided at a low cost.²¹⁵ While the costs of debt settlement would vary depending on the precise structural form of the scheme, costs would necessarily include the costs of debt counselling and the preparation of a financial statement on behalf of the debtor, the costs of negotiations with creditors, the costs of the enforcement body which sanctions the

Have U.S. Reformers Fallen off the Learning Curve?" (2006) 80 *American Bankruptcy Law Journal* 435 at 445.

²⁰⁸ Kilborn, "Out With the New, in With the Old: as Sweden Aggressively Streamlines its Consumer Bankruptcy System, Have U.S. Reformers Fallen off the Learning Curve?" (2006) 80 *American Bankruptcy Law Journal* 435 at 446.

²⁰⁹ *Ibid* at 447.

²¹⁰ Kilborn *op cit.* at 448.

²¹¹ § 295(1)(1) *Insolvenzordnung* (Ger). See Kilborn "The Innovative German Approach to Consumer Debt Relief: Revolutionary Changes in German Law, and Surprising Lessons for the United States" (2003-4) 24 *Nw. J. Int'l & Bus.* 257 at 280ff.

²¹² See section 257 *Enterprise Act 2002*, inserting section 281A into *Insolvency Act 1986* (c.45).

²¹³ 3.169 to 3.170 above.

²¹⁴ See paragraphs 3.161 to 3.162 above.

²¹⁵ *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* (Council of Europe CM/Rec (2007)8, 2007) at paragraph 4(a) and *Explanatory Memorandum* at paragraph 31.

settlements reached, and the costs of administering the repayment plan. The Commission acknowledges that the views of stakeholders are very relevant as to the best means of funding a debt settlement scheme so as to ensure that the costs of the scheme do not prevent debtors from accessing relief. The Commission thus invites submissions on this issue.

5.135 *The Commission provisionally recommends that a fundamental principle of any debt settlement scheme is that debtors must not be excluded from obtaining relief due to the costs of procedures.*

(d) **Consumers v Business Debtors**

5.136 The next major issue relating to access to debt settlement concerns whether access should be open to all natural persons or whether it should be limited to consumers. This essentially concerns whether individual business debtors should be included in the debt settlement scheme.²¹⁶ While historically bankruptcy law applied solely to business debtors, and while the *Bankruptcy Act 1988* effectively excludes consumer debtors due to its high costs, the above analysis has shown that a consumer insolvency system is much needed in Ireland. The question then arises as to whether the statutory debt settlement scheme proposed to fulfil this role should also be made available to business debtors. If business debtors are to be excluded from the debt settlement scheme, their only option for debt relief would be to avail of judicial proceedings. This is problematic, as the *Bankruptcy Act 1988* also appears to exclude many small business debtors due to its high costs and outdated regime.

(i) **Differences between consumer and business debtors**

5.137 While the financial situation of consumer and business debtors may be largely similar, different issues arise in relation to these distinct categories of debtor and it may be necessary to deal with these issues using different procedures. Consumer debts are generally smaller than the debts involved in business bankruptcies. This may mean that large business insolvencies may justify the expense of court procedures or private insolvency practitioners. Business debtors will often owe obligations to creditors, employees and customers which may be too complicated to be addressed in the informal and non-adversarial debt settlement system which the Commission proposes.²¹⁷ The issues arising from large business debts and the causes of insolvency may require more investigation than would be necessary in the normally readily explicable cases of consumer over-indebtedness.²¹⁸ Also, many entrepreneurs may avail of the safeguard of limited liability to provide them with a safety net in the case of business failure.²¹⁹ Similarly, if the failed business is incorporated, a statutory regime for its winding-up and for reaching schemes of arrangement with creditors is already provided by the *Companies Act 1963*, and so debt settlement may not be appropriate.²²⁰ Also, traders and suppliers who lend to small businesses in the course of trade may prefer the certainty of court proceedings rather than negotiating voluntary

²¹⁶ Most often, but not always, the business debtor will have been operating as a sole trader, i.e. a natural person who is engaged in a trade, profession or business on his or her own account: see Courtney *The Law of Private Companies* (LexisNexis Butterworths 2004) at 2. An individual business debtor may not have been operating as a sole trader but may have become indebted due to personal guarantees provided in respect of loans incurred by an incorporated company.

²¹⁷ Niemi-Kiesiläinen and Henrikson *Report on Legal Solutions to Debt Problems in Credit Societies* CDCJ-BU (2005) 11 rev at 33.

²¹⁸ Keay "Balancing Interests in Bankruptcy Law" (2001) 30 *Common Law World Review* 206 at 228.

²¹⁹ Courtney notes that individual entrepreneurs often choose to incorporate a private limited company where permitted by law in order to avail of limited liability and avoid possible bankruptcy: Courtney *The Law of Private Companies* (LexisNexis Butterworths 2004) at 2. An individual operating as a sole trader rather than an incorporated association remains personally liable for the debts of his or her business: Courtney *op cit.* at 6.

²²⁰ Section 201 of the *Companies Act 1963* provides a procedure for reaching compromises or schemes of arrangements with creditors: see Courtney *The Law of Private Companies* (LexisNexis Butterworths 2004) at 1389ff. Part VI of the 1963 Act details the procedures for the winding-up of a company: see Courtney *op cit.* at 1415ff.

settlements.²²¹ Small business owners can also in many cases be expected to have stronger negotiating power than consumers.

(ii) An appropriate definition of “consumer”

5.138 These considerations would suggest that debt settlement should be limited to consumer debtors. If so, a question will arise as to how the term “consumer debtor” is to be defined. Under the *Consumer Credit Act 1995*, the traditional definition of a consumer used is “a natural person acting outside his trade, business or profession.”²²² This definition would exclude personal debts incurred through business activities. In contrast, the *IFSCRA Consumer Protection Code* provides for a much wider definition of “consumer”, including the following:

- i) a natural person acting outside their business, trade or profession;
- ii) a person or group of persons, but not an incorporated body with an annual turnover in excess of €3 million (for the avoidance of doubt a group of persons includes partnerships and other unincorporated bodies such as clubs, charities and trusts, not consisting entirely of bodies corporate);
- iii) incorporated bodies having an annual turnover of €3 million or less in the previous financial year (provided that such body shall not be a member of a group of companies having a combined turnover greater than the said €3 million); or
- iv) a member of a credit union;

It can be seen that this definition is much wider than that contained in the *Consumer Credit Act 1995*, and includes both individual entrepreneurs and incorporated and unincorporated associations.

(iii) Arguments for allowing access to debt settlement for business debtors.

5.139 Against these considerations is the fact that often in the case of debts incurred by sole traders business debts are mixed with consumer debts. It can for this reason be difficult to ascertain which debts result from business activity and which can be categorised as consumer debts.²²³ Often family property will be used as security for business loans, and this leads to further confusion between business and consumer debts.²²⁴ Thus it may be difficult to distinguish between consumer and business debtors in some cases, and for this reason the Free Legal Advice Centres (FLAC) suggested an alternative approach of adopting a case-by-case examination of whether debt settlement is appropriate.²²⁵

5.140 A further alternative approach may be to limit access to debt settlement in accordance with the amount owed by the debtor rather than the status of the debtor. This again would recognise the fact that situations of very large and possibly complicated debt issues may best be addressed in court rather than through the non-judicial debt settlement scheme. In this regard an approach similar to that adopted in the *Consumer Protection Code* would be an option, although the threshold for debt settlement may have to be lower than €3 million.

5.141 The Commission recognises that several different approaches can be taken to this issue, and invites submissions as to how this question of access to debt settlement procedures should be resolved.

5.142 *The Commission invites submissions as to whether a debt settlement scheme should be limited to consumer debtors, or whether small business debtors should also be included. The Commission also invites submissions as to whether, alternatively, limits on access should be based on the amount of of an individual indebtedness rather than on an individual’s legal status.*

²²¹ This point proved influential in the Australian Law Reform Commission’s decision to exclude business debtors from their proposals for a “Regular Payment of Debts” proposal: see The Law Reform Commission of Australia *Insolvency: The Regular Payment of Debts* (ALRC 6 1977) at 21-22.

²²² Section 2 *Consumer Credit Act 1995*.

²²³ Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 124.

²²⁴ *Ibid.*

²²⁵ Joyce *op cit.* at 124.

(7) Restrictions on Multiple Debt Settlements: Once in a Lifetime?

(a) Justifications for the once-in-a-lifetime rule

5.143 Another issue concerning access to debt settlement is the extent to which debtors availing of the procedure should be prevented from having recourse to the procedure in the future. The rehabilitative, social welfare and functional economic justifications for insolvency discharge suggest that once the debtor has completed the insolvency procedure and has been granted a discharge, he or she should be restored to the position of a productive member of society and the economy and should not suffer from over-indebtedness in the future. The causes of over-indebtedness should be addressed through debt counselling and financial education, and the debtor should possess the means of preventing debt difficulties in the future. For this reason, under most consumer insolvency systems, access to insolvency procedures and debt discharge is an “once-in-a-lifetime” experience, and debtors benefiting from the procedures are prohibited from availing of them again in the future.²²⁶ It has previously been argued that a similar basic rule should be adopted in relation to debt settlement procedures in Ireland.²²⁷

(b) The need for exceptions to the rule

5.144 The consumer protection rationale, which states that a consequence of liberal consumer credit markets is that there will always be a number of victims of over-indebtedness, nonetheless requires that certain exceptions to the “once-in-a-lifetime” rule may be necessary. Thus in certain countries recourse is permitted to debt discharge for a second time after a certain waiting period has expired since the first use of the procedure. For example, in the Netherlands access is prevented if the debtor previously availed of debt adjustment within the last ten years, while in Austria the waiting period is twenty years.²²⁸ An alternative approach is for the restriction on future access to discharge to be based on the reasons for the debtor’s over-indebtedness rather than on the length of time since proceedings were first accessed. For example, under Swedish law the general rule is that only one debt adjustment is permitted, but an exception to this rule exists where “extreme reasons” are present.²²⁹ These reasons include illness, premature retirement or long-term unemployment.²³⁰ In this context FLAC has argued that debt settlement legislation should be flexible when imposing limitations on repeated access to its procedures.²³¹ For example, a second discharge could be considered where the debtor proves that his or her over-indebtedness was not caused by irresponsible borrowing but by external circumstances.²³²

5.145 *The Commission invites submissions as to the restrictions which should be placed on the use of the proposed debt settlement scheme by individuals who have already availed of debt discharge under the scheme.*

(8) Debtor Participation

5.146 The success of open access provisions will ultimately depend on the willingness of debtors to apply for debt relief. The proposed measures discussed in Chapter 6 requiring attempts to reach a

²²⁶ See Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented by the Institute for Financial Services e.v. Erasmus University Rotterdam/School of Law University of Helsinki/Helsinki Collegium for Advanced Studies to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 183.

²²⁷ Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 126.

²²⁸ Reifner et al *op cit.* at 183.

²²⁹ See Kilborn “Out With the New, in With the Old: as Sweden Aggressively Streamlines its Consumer Bankruptcy System, Have U.S. Reformers Fallen Off the Learning Curve?” (2007) 80 *American Bankruptcy Law Journal* 435 at 444.

²³⁰ It should be noted however that the length of time since the previous debt adjustment will nonetheless be taken into account when assessing whether the reasons for over-indebtedness are sufficiently “extreme”.

²³¹ Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 126.

²³² *Ibid.*

statutory debt settlement or voluntary debt management plan before judicial proceedings may be commenced should serve to “trigger” debt settlement in many cases.²³³ Nonetheless it is desirable that hopelessly indebted debtors should also come forward at an early stage to resolve their debt difficulties.²³⁴

(a) Causes of low levels of debtor participation

5.147 It has been noted above that evidence from other jurisdictions demonstrates that not all debtors who are eligible for insolvency procedures avail of them. This can be attributed to a number of factors, including the stigma associated with bankruptcy, a lack of awareness among debtors of the availability of debt relief, and an inability of over-indebted individuals to cope with the stress of their situations. This problem could be particularly relevant in Ireland, as this country does not have a tradition of consumer insolvency facilities. While the Commission expects that the promise of debt discharge will encourage over-indebted individuals to avail of debt settlement procedures, it believes that efforts could be made to further encourage the use of this proposed new procedure.

(b) Removing the stigma of over-indebtedness/bankruptcy

5.148 First, debt settlement procedures should seek to eliminate the stigma associated with bankruptcy which does not reflect the fact that the over-indebtedness of an individual should not be a cause for blame. Thus it is arguable that none of the restrictions imposed on debtors in bankruptcy should apply in debt settlement. Instead the good faith test should be used as a means of preventing fraudulent debtors from wrongfully evading their obligations, and penalties may be imposed on those debtors found to have acted fraudulently. Also, stigmatising language should not be used. The term “debtor” rather than “bankrupt” should be used to refer to the individual availing of debt relief,²³⁵ while the use of the term “debt settlement” or “debt adjustment” may be preferable to the term “bankruptcy”, and would also distinguish non-judicial personal insolvency proceedings from formal judicial bankruptcy proceedings.

(c) Promoting awareness of debtor rights

5.149 The new debt settlement system should be widely publicised and debtors should be made aware of their rights. This could be done as part of creditors’ arrears management practices or as part of notification requirements in advance of debt enforcement proceedings, as discussed in other sections of this chapter.

5.150 *The Commission provisionally recommends that debtor participation in the proposed debt settlement scheme should be promoted, and that the scheme should avoid stigmatisation of the debtor in its terminology and in its procedures. The Commission also provisionally recommends that measures should be put in place to inform debtors of the existence of the new procedure. The Commission provisionally recommends that a programme of public awareness should be launched if the debt settlement scheme is introduced.*

(9) Reasonable Standard of Living

5.151 A basic principle of insolvency law is that the debtor’s assets are distributed to his or her creditors.²³⁶ Where a mandatory payment plan forms part of the procedure, the debtor’s future income is also made available for distribution to creditors. This reflects the view that a bankruptcy system should

²³³ See paragraphs 6.133 to 6.138 below.

²³⁴ See paragraphs 6.139 to 6.140 below.

²³⁵ See the discussion of similar reforms in the US in Ramsay “Comparative Consumer Bankruptcy” (2007) (1) *University of Illinois Law Review* 241 at 256.

²³⁶ See e.g. Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 187.

not just liquidate existing assets of the debtor, but also the future income of the debtor, which often amounts to a relatively valuable asset.²³⁷

5.152 Nonetheless, the law must respect the right of the debtor and his or her family to a decent standard of living.²³⁸ In this regard the Council of Europe has recommended that all Member States ensure that payment plans in debt adjustment are reasonable, and that they do not deprive the debtor and his or her family of “the ability to satisfy their basic needs with due regard to their human dignity.”²³⁹ As well as this humanitarian concern for the basic rights of the debtor and his or her family, the other justifications for bankruptcy discharge also argue for ensuring that the debtor retains a reasonable standard of living throughout the process. In particular, research has shown that increases in the assets²⁴⁰ and income²⁴¹ which the debtor is permitted to retain lead to increased entrepreneurial activity. Similarly, the social welfare and functional economic theories require that a debtor retains sufficient resources to reduce reliance on state welfare assistance and to return to a position of economic productivity. In this way the legal fresh start afforded to the debtor must be accompanied by a practical fresh start whereby the debtor is not left impoverished at the end of the insolvency process.

(a) **Exempted Assets**

5.153 Following this reasoning, certain assets essential to a reasonable standard of living must be protected. Various approaches to this question have been adopted in different legal systems. A European survey has found that it is generally agreed that normal household items should be exempt from liquidation.²⁴² Also, tools necessary to earn a livelihood are generally protected. After this category of assets the situation becomes more complicated. While some countries include a detailed list of exempt items in their insolvency laws,²⁴³ other legal systems merely provide that the items exempt are those necessary for a “modest standard of living”.²⁴⁴ It has been suggested that due to changing standards of living, such a general principled exemption rule may be more useful than a detailed list which may quickly become out of date.²⁴⁵ In this regard the general trend when reforming laws in this area appears to be in favour of general standards. Such a wide provision may however lead to uncertainty in debt settlement proceedings, and disputes may occasionally arise as to what assets would be covered by a general “reasonable standard of living” test.

5.154 Under the *Bankruptcy Act 1988*, the exempted assets provision takes the form of a combination of a list of certain categories of exempted items and a monetary limit on their value. Section 45(1) of the Act provides that

²³⁷ See Jackson “The Fresh-Start Policy in Bankruptcy Law” (1985) 98 *Harv L. Rev.* 1393 at 1431-35.

²³⁸ See e.g. Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented to the Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 252.

²³⁹ *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* (Council of Europe CM/Rec(2007)8, 2007) *Explanatory Memorandum* at paragraph 32.

²⁴⁰ Fan and White “Personal Bankruptcy and the Level of Entrepreneurial Activity” (2003) 46 *J. L. & Econ.* 543.

²⁴¹ White “Personal Bankruptcy: Insurance, Work Effort, Opportunism and the Efficiency of the ‘Fresh Start’” (University of California San Diego working paper 2005), available at: <http://www.econ.ucsd.edu/~miwhite/bankruptcy-theory-white.pdf>.

²⁴² Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented to the Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 187.

²⁴³ See e.g. the description of the Belgian position in Reifner et al at *ibid* at 186-7.

²⁴⁴ E.g. Germany, Austria, Denmark. See Reifner et al *op cit*.

²⁴⁵ Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union op cit.* at 187

“A bankrupt shall be entitled to retain, as excepted articles, such articles of clothing, household furniture, bedding, tools or equipment of his trade or occupation or other like necessaries for himself, his wife, children and dependent relatives residing with him, as he may select, not exceeding in value £2,500 or such further amount as the Court on an application by the bankrupt may allow.”

5.155 In addition to this problem, difficulties arise in relation to certain assets such as cars. There is no general consensus on the status of cars across Europe, but if they are viewed as tools of the trade they are generally exempted.²⁴⁶ It has been suggested that alternatively debt settlement legislation could require the sale of a car and its replacement with a less expensive model.²⁴⁷

5.156 *The Commission provisionally recommends that the maintenance of a reasonable standard of living for the debtor should be a fundamental principle of debt settlement and bankruptcy legislation. The Commission invites submissions on how this standard can be maintained by rules relating to the exemption of assets from the liquidation process. The Commission particularly invites submissions on whether a list of specific exempt items or a general standard is most appropriate. If a list-based approach is preferred, the Commission invites submissions as to which assets should be exempted.*

5.157 The Commission believes that in addition to introducing a new exempted assets provision for the proposed new debt settlement scheme, section 45(1) of the *Bankruptcy Act 1988* should be amended to have regard to the demands of modern living standards in judicial bankruptcy. The Commission invites submissions as to how this provision should be updated.

5.158 *The Commission invites submissions as to the assets which should be exempted from distribution to creditors under formal bankruptcy procedures.*

(b) ***The Protection of the Debtor's Home***

5.159 The issue of the forced sale of the home is an extremely complex question. A requirement to sell the family home would not comply with the humanitarian/rehabilitation and social welfare theories of insolvency discharge, and may not be economically rational in all circumstances.²⁴⁸ The other side of this argument is that a creditor will usually hold the debtor's home as security and their legitimate interests must be considered.

5.160 No general consensus exists across Europe as to the appropriate treatment of this issue.²⁴⁹ This can largely be attributed to the different housing policies prevailing in different countries. The most common response is not to provide special protection for the home. Thus under Dutch law payments towards a mortgage loan are explicitly excluded from exempted living expenses, and the practice code on exempted income and assets suggests that in most cases a debtor should sell his or her mortgaged home and find alternative accommodation.²⁵⁰

5.161 Some countries' laws however permit a debtor to keep his or her home under certain circumstances.²⁵¹ In Denmark, the debtor will only be required to sell the family home where the expenditure on housing is unreasonable and where the debtor can find less expensive accommodation

²⁴⁶ Reifner et al *op cit* at 187.

²⁴⁷ Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 124.

²⁴⁸ Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 124.

²⁴⁹ Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented to the Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 187.

²⁵⁰ Kilborn "The Hidden Life of Consumer Bankruptcy Reform: Danger Signs for the New US Law from Unexpected Parallels in the Netherlands" (2006) *Vand. J. Transnat'l L* 77 at 101.

²⁵¹ Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented to the Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 188.

elsewhere.²⁵² The Swedish Supreme Court has stated that a debtor must sell his or her home only if this would benefit the creditors either by realising a substantial equity in the home or by significantly reducing the debtor's living expenses.²⁵³ A similar argument has been previously presented in Ireland by the Free Legal Advice Centres, where it has been suggested that a debt settlement should aim to protect the debtor's home, but that the debtor may be required to sell his or her home and move to less expensive accommodation in certain circumstances where the debtor has a large equity in the home and the home's value is high.²⁵⁴ A similar approach exists in France, where the over-indebtedness commission or judge will only require the sale of the debtor's home where the debtor would not have to spend a similar sum on alternative accommodation.²⁵⁵ Under French law if the debtor does however sell his or her home and this does not satisfy the mortgage debt owed, the debtor receives a discharge of the deficiency obligation owing.²⁵⁶ In Norway, it appears that mortgage interest only is paid during the course of the debt settlement repayment period, and that the repayment of the principal is suspended until this period ends.²⁵⁷ An alternative approach could be for a part-payment of the principal, such as 50% of each instalment, with the remainder to be paid once the plan is completed.²⁵⁸

5.162 It should be noted that the protection of the debtor's home was a priority under the IBF-MABS *Pilot Debt Settlement Scheme* described above, and debt settlement plans were always designed with this goal in mind. In addition, section 61 of the *Bankruptcy Act 1988* provides that the Official Assignee may not sell the bankrupt's family home without a court order, and that the court may postpone the sale of the home having regard to the interests of the bankrupt's creditors, spouse and dependants.

5.163 The Commission recognises the importance of protecting a debtor's home, while also acknowledging the legitimate interests of creditors in enforcing their securities and in recovering as much of the debt owed as possible. The Commission thus invites submissions as to how these interests can be best reconciled through the approach taken by debt settlement legislation to the question of the sale of the debtor's home.

5.164 *The Commission invites submissions as to the approach the proposed debt settlement system should take to the debtor's home. The Commission in particular invites views as to the circumstances in which the debtor's home should be protected from sale, and the circumstances in which the debtor may be required to sell his or her home.*

(c) **Exempted Income**

(i) **Ensuring a reasonable standard of living and a sustainable repayment plan**

5.165 In addition to the protection of certain assets, the level of contributions from the debtor's income to creditors must be limited so as to ensure that the debtor is left with a reasonable standard of living. In this regard a "best effort" test has been proposed whereby the income contributions are limited to the amount which the debtor can be reasonably expected to pay.²⁵⁹ It is irresponsible and illogical to

²⁵² Reifner et al *op cit.* at 188.

²⁵³ Kilborn, "Out With the New, in With the Old: as Sweden Aggressively Streamlines its Consumer Bankruptcy System, Have U.S. Reformers Fallen Off the Learning Curve?" (2006) 80 *American Bankruptcy Law Journal* 435 at 448, citing HD case no. Ö1954-98, NJA 1999:97 s. 218.

²⁵⁴ Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 125.

²⁵⁵ Reifner et al *op cit.* at 188.

²⁵⁶ See Article L331-7 *Code de la consommation* (consolidated version June 2009); Kilborn "La Responsabilisation de l'Economie: What the United States can Learn from the New French Law on Consumer Overindebtedness" (2005) 26 *Michigan Journal of International Law* 619 at 647.

²⁵⁷ Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 125.

²⁵⁸ See Huls "Towards a European Approach to Overindebtedness of Consumers" (1993) 10(2) *J. Consum. Pol* 215 at 228-9.

²⁵⁹ Huls "Towards a European Approach to Overindebtedness of Consumers" (1993) 10(2) *J. Consum. Pol* 215 at 227.

force a debtor and his or her dependents to live in poverty throughout the plan, and it is economically irrational to require productive individuals to provide all the benefit of their work to creditors.²⁶⁰ There is also a risk that in such circumstances debtors will quickly lose motivation to continue to comply with the payment plan or even to continue employment.²⁶¹ In this regard the innovative German approach of providing reductions in the amount of repayments on completion of certain stages of the plan is an interesting method of ensuring a debtor's motivation is maintained.²⁶²

5.166 *The Commission provisionally recommends that repayment plans must protect a level of the debtor's income sufficient to provide a reasonable standard of living for the debtor and his or her family. The Commission also provisionally recommends that the repayment plan should be structured in a manner which encourages debtor compliance with the plan.*

(ii) How should the exempted income level be calculated?

5.167 Various methods are used in different legal systems for calculating the levels of income which are to be exempted. Most European insolvency laws use a measure based on the minimum level of social welfare payments.²⁶³ For example, Dutch legislation provides as a default rule that a debtor must contribute all income above 90% of the minimum social assistance amount.²⁶⁴ Judicial practice however has meant that this default rule is almost never applied and that generally debtors whose only income is social welfare are permitted to keep 95% of the social welfare minimum while debtors employed for at least 18 hours a week may retain 100% of the social welfare minimum. It has been noted that Dutch social welfare payments are regarded as comparatively generous²⁶⁵ and that it may not be appropriate to require a debtor to live below the minimum social welfare allowance in Ireland, the levels of which are designed to meet the bare subsistence needs of the unemployed.²⁶⁶ Also, to set the level of protected income at the minimum social welfare amount could reduce incentives for debtors to find or continue to work. German exemption levels in contrast are not calculated by reference to social welfare levels but take the form of monetary amounts which are expressly specified in statute.²⁶⁷ Detailed tables showing the non-exempt amount of wages at various levels are available from the German Ministry of Justice. It can thus be seen that various methods of calculating the level of protected income, and the Commission invites submissions as to the most appropriate method of calculating this amount.

5.168 *The Commission invites submissions on the most appropriate method of specifying the level of income which debtors should be permitted to retain under a statutory payment plan.*

²⁶⁰ Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented to the Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 253.

²⁶¹ Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 125.

²⁶² See Kilborn "The Innovative German Approach to Consumer Debt Relief: Revolutionary Changes in German Law, and Surprising Lessons for the United States" (2003-4) 24 *Nw. J. Int'l & Bus.* 257 at 283-4.

²⁶³ Reifner et al *op cit.* at 191.

²⁶⁴ Under the Law of 25 June 1998, Stb. 1998, 445 (Neth): see Kilborn "The Hidden Life of Consumer Bankruptcy Reform: Danger Signs for the New US Law from Unexpected Parallels in the Netherlands" (2006) *Vand. J. Transnat'l L* 77 at 98-100.

²⁶⁵ Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented to the Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 191.

²⁶⁶ Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 122.

²⁶⁷ *Beschlussempfehlung unde Bericht des Rechtsausschusses* (6. Ausschuss) BT-Dr. 14/7478, at 4-5 (Nov. 14 2001), cited in Kilborn "The Innovative German Approach to Consumer Debt Relief: Revolutionary Changes in German Law, and Surprising Lessons for the United States" (2003-4) 24 *Nw. J. Int'l & Bus.* 257 at 285-6.

(iii) An exception for “No Income, No Assets” debtors.

5.169 A further issue in this regard is that most consumer insolvency systems have now recognised that certain debtors will have no available income above that needed to preserve a reasonable standard of living. For example, while German law mandatorily requires a repayment plan as part of its debt adjustment system, in practice virtually no consumer debtor makes any repayments to creditors as their income levels are not above the minimum specified by law as necessary to maintain a modest standard of living.²⁶⁸ Similarly, legislation in the UK has recently introduced a Debt Relief Order as a mechanism similar to bankruptcy for debtors who have no income available to make repayments to creditors.²⁶⁹ The Commission thus realises that the “best effort” which a debtor can make in some situations will be no repayment at all, and so just as in other jurisdictions “zero payment” plans will be necessary in Ireland. The Commission believes that it would be unfair to prevent access to official debt settlement procedures for those debtors who have no repayment capacity at all. The Commission however stresses that this is an exceptional situation, and that a repayment plan must be attempted where possible. This issue is related to the “insolvency” requirement for access to debt settlement which is discussed below.²⁷⁰

5.170 *The Commission provisionally recommends that debt settlement and bankruptcy procedures should not be unavailable to debtors merely because such debtors cannot afford to make any repayment to creditors. The Commission thus provisionally recommends that “zero-payment” plans should be available in the case of a debtor who has no available income above that required for maintaining a reasonable standard of living.*

(10) Reasonable Time Frame

5.171 A similar fundamental principle to that of the reasonable standard of living is that the repayment plan should not be excessively long.²⁷¹ It has been described in detail above how the current 12 year discharge period under the Irish *Bankruptcy Act 1988* is grossly excessive when compared to other personal insolvency regimes and operates as a significant deterrent against the use of bankruptcy procedures by over-indebted individuals.²⁷² In addition, it has been shown above that even after 12 years a bankrupt may not be eligible for discharge under Irish law.

5.172 The great majority of the policy justifications for bankruptcy discharge described above suggest that the repayment period before discharge should be short.²⁷³ The social welfare theory supports prompt discharge in the public interest, in order to reduce the debtor’s reliance on social assistance and the consequent cost to the State of debt settlement and bankruptcy procedures. The entrepreneurship theory justifies a short repayment plan as a more lenient bankruptcy regime fosters risk-taking and entrepreneurial activity which supports the economy. Similarly, the functional economic theory suggests that debtors should be quickly reintegrated into the mainstream economy where they can productively contribute to the common good. The rehabilitative or humanitarian theory suggests that the period before discharge should be short, so that the debtor does not have to endure an overly-long period of financial, emotional and physical hardship.

5.173 While the consumer protection theory may suggest that the repayment period should be long so as to act as an educating tool for over-optimistic and economically irrational consumers, it is arguable that this goal can be better attained through debtor education and counselling. Finally, the debt collection theory of bankruptcy suggests that the repayment period should be long so as to allow creditors to recoup

²⁶⁸ Kilborn *op cit.* at 291ff.

²⁶⁹ See section 107 *Tribunals, Courts and Enforcement Act 2007* C. 15 2007, inserting a new Part 6A into the *County Courts Act 1984* C. 28 1984.

²⁷⁰ See paragraphs 5.121 to 5.126 below.

²⁷¹ See *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* (Council of Europe CM/Rec(2007)8, 2007) at paragraph 4(b).

²⁷² See paragraphs 3.166 to 3.168 above.

²⁷³ See King “Moving Beyond the ‘Hard’-‘Easy’ Tug of War: A Historical, Empirical and Theoretical Assessment of Bankruptcy Discharge” [2004] *MULR* 22.

as much of the money owed as possible. It must however be noted that the yields of repayment plans are generally very low, and in some cases no yields at all are produced.²⁷⁴ In this light a long repayment period cannot be justified from the point of view of providing creditors with an increased yield, and it has been argued that the benefits to society of reintegrating debtors into society is potentially more valuable to the public interest than providing a few creditors with a small benefit at the expense of both the debtor, his or her dependents, and society.²⁷⁵

5.174 Long repayment periods may also lead to debtors becoming disillusioned and thus failing to complete the repayment plan. This is of no benefit to the debtor, creditors or society in general. Also, the overly long discharge period under the *Bankruptcy Act 1988* results from the desire to deter people from entering bankruptcy proceedings. Fears of making bankruptcy too generous may be countered by strict access rules. In any case, such fears may be exaggerated due to the reality that most debt difficulties are caused by factors external to the debtor rather than by “strategic” debt evasion. It is thus irrational to design a bankruptcy or debt settlement system to cater for the small minority of fraudulent debtors at the expense of the vast majority of unfortunate debtors.²⁷⁶

5.175 The average period in European Member States is between 3-5 years, with some exceptions. A one-year discharge period has for example operated in the UK since 2002, while a ten-year period exists in France, although the new procedure for “irremediably compromised” debtors provides for immediate discharge on the liquidation of the debtor’s property.²⁷⁷ In the Netherlands the three-year period was chosen as the standard because the experience of credit counsellors of the standard three-year plans of voluntary settlement had operated effectively.²⁷⁸ It was felt by legislators that longer plans lead to losses of motivation by consumer debtors and recurring debt problems among participants in such plans. Furthermore, it was felt to be irresponsible to allow someone to live for longer than three years on the social welfare minimum or even on less than this amount.²⁷⁹ Also, it was thought important that the court-based system should be kept in line with non-judicial voluntary arrangements to encourage these over judicial bankruptcy.

5.176 The Commission therefore concludes that the repayment periods under both debt settlement legislation and bankruptcy law must be reasonable in length and that all policy rationales support the introduction of a short repayment period. The Commission invites submissions as to the precise length of the repayment period in the proposed debt settlement scheme.

5.177 *The Commission provisionally recommends that the duration of the repayment period under the debt settlement scheme should be three to five years. The Commission also invites submissions as to the appropriate length of this repayment period.*

(11) Non-Discrimination

5.178 The legal “fresh start” which the debtor receives on the discharge of his or her debts will not be a true fresh start in practice unless the debtor is not discriminated against at the end of the debt settlement procedure. The rehabilitative, functional economic, social welfare and entrepreneurship theories all suggest that the debtor should be restored to a position of an active and productive member of society at the end of the process. While the Commission acknowledges that certain restrictions on access to credit must be imposed on the debtor during the course of the debt settlement, the principle of

²⁷⁴ See e.g. Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented to the Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 167.

²⁷⁵ Kilborn “The Innovative German Approach to Consumer Debt Relief: Revolutionary Changes in German Law, and Surprising Lessons for the United States” (2003-4) 24 *Nw. J. Int’l & Bus.* 257 at 297.

²⁷⁶ Keay “Balancing Interests in Bankruptcy Law” (2001) 30 *Comm L World Rev* 206 at 234.

²⁷⁷ See paragraph 5.55 above.

²⁷⁸ Kilborn “The Hidden Life of Consumer Bankruptcy Reform: Danger Signs for the New US Law from Unexpected Parallels in the Netherlands” (2006) *Vand. J. Transnat’l L* 77 at 103.

²⁷⁹ *Ibid*, citing Dutch parliamentary debates.

fresh start must also be respected after the settlement has been successfully completed. This has implications on how the debtor's credit history is affected by successfully completing a debt settlement programme. The Commission invites submissions as to how the recording of the fact of the debtor's participation in a debt settlement programme can be balanced with the principle of non-discrimination.

5.179 *The Commission invites submissions as to how the impact of participation in a debt settlement scheme on a debtor's credit history can be reconciled with the principle of non-discrimination.*

CHAPTER 6 PROVISIONAL RECOMMENDATIONS FOR REFORM: ENFORCEMENT PROCEDURES

6.01 Chapter 6 proposes potential reforms to debt enforcement procedures in Ireland. Part A examines systems for the enforcement of judgment debts in other countries, and provisionally recommends that the Irish system should be wholly reformed. Part B presents the Commission's provisional recommendations for a new system for the enforcement of judgments in Ireland. The new system should be based upon the introduction of a new debt enforcement office and the removal of the majority of proceedings for the enforcement of judgment debts from the courts. This part also identifies the key principles which should underpin this new system, notably: proportionate and balanced enforcement in individual cases; increased access to information about a debtor's ability to pay; a holistic approach to debt difficulties through linking enforcement to the debt settlement system; increased efficiency and accountability in enforcement; and the encouragement of increased participation in enforcement proceedings among debtors. Part C concludes this chapter by discussing potential reforms of the individual enforcement methods, and by considering how these individual enforcement methods could operate under the proposed new system.

A Comparative Models of Enforcement Systems

6.02 Chapter 3 above concludes by highlighting some systemic problems in the Irish law on debt enforcement, as well as identifying problems with individual enforcement methods. This Chapter seeks to address both categories of problems, by first proposing a new overall enforcement system and subsequently discussing reforms to individual enforcement mechanisms. Part A begins by engaging in a comparative analysis of debt enforcement systems, with the aim of identifying possible models for systemic reform.

(1) Centralised Enforcement System

6.03 The first model of enforcement system which will be discussed is that adopted in Northern Ireland and Sweden which involves attributing the task of enforcement duties to a centralised public authority.

(a) Northern Ireland

6.04 The system for the enforcement of judgments and court orders in Northern Ireland has been described as "unique" and "pioneering" among common law legal systems.¹ Firstly, the entire law on debt enforcement in Northern Ireland is mostly derived from a single piece of legislation, the *Judgments Enforcement (Northern Ireland) Order 1981*.² Secondly, unlike most common law systems in which enforcement orders are made by the courts, judgments in Northern Ireland are enforced by a central body known as the Enforcement of Judgments Office (EJO).

6.05 Under the Northern Irish model, a creditor seeking to enforce a debt must first obtain a court judgment in much the same way as in Ireland. Once a judgment has been granted however the following procedure is very different. The judgment creditor seeking to enforce the judgment first registers it with the registry of judgments maintained by the EJO and applies to the EJO for enforcement. The first step then taken by the EJO when it receives an enforcement application is to issue a custody warrant against

¹ Capper *The Enforcement of Judgments in Northern Ireland* (SLS Legal Publications (NI) 2004) at 1; see also Capper "Taking Enforcement Seriously – Lessons from Northern Ireland" 2006 CJK 485.

² Replacing the *Judgments (Enforcement) Act (NI) 1969*.

the debtor's goods which places all non-exempt goods under the control of the EJO.³ The next step taken by the EJO is to conduct an examination of the debtor's means, a procedure which is described in more detail below.⁴

6.06 Unlike under the Irish system, the decision whether or not to enforce and the means by which enforcement should be effected do not lie entirely with the creditor. Instead, it is the EJO, after investigating the debtor's means, which decides whether or not the judgment can be enforced, and also chooses the most appropriate means of executing the judgment. The creditor can however petition for a particular enforcement measure. Once the EJO has obtained information on the debtor's circumstances, it makes a provisional decision. If the debtor has insufficient means to meet the debt, the EJO will issue a notice of unenforceability, which bars enforcement of the judgment in question and any subsequent judgments registered against the debtor. If enforcement is possible, the EJO will proceed to make one or more of the various enforcement orders available to it, which largely resemble the orders available to Irish courts (with the exception of the availability of an attachment of earnings order in Northern Ireland). The parties can make written objections to this provisional decision. As regards the enforcement orders made by the EJO, the most frequently granted method of enforcement is an order charging land,⁵ which is similar to a judgment mortgage in Ireland. The second most popular method of enforcement is the attachment of earnings order, while the appointment of a receiver by way of equitable execution is the third most granted order. Importantly, the seizure order, which resembles the procedure of execution against goods in Ireland, is only the fourth most widely used mechanism,⁶ a sharp contrast to the position in Ireland where this is the most frequently used mechanism. Once enforcement has been effected, the money collected is first applied towards the expenses of the Office in enforcing the judgment, before then paying in order the enforcement fee, interest on the judgment debt, and the judgment debt itself.⁷ The EJO is in this way designed to be funded by fees paid by users and not by State funds.⁸ A scale of fees to be charged for the various enforcement steps is set out in secondary legislation⁹ with the fees varying in proportion to the amount of the debt for which enforcement is sought. Once the debt has been satisfied, a certificate of satisfaction is issued by the office and this is recorded in the register of judgments.

6.07 Prior to the establishment of the EJO, judgments were enforced primarily through the Under-Sheriff and bailiffs working under his or her direction in the case of seizure against goods, and through the courts in the case of other enforcement mechanisms. The positions of Under-Sheriffs and bailiffs have now been removed, and enforcement is the sole responsibility of the staff of the EJO. The staff of the Office is composed of a Master, Chief Enforcement Officer, and approximately 80 other members of staff, 15 of whom are enforcement officers.¹⁰ Northern Ireland is divided into 14 districts, to each of which an enforcement officer is allocated. Five members of staff hold the title of Deputy Chief Enforcement Officer, and may carry out the same functions as the Chief Enforcement Officer.

6.08 The origins of the Enforcement of Judgments Office can be traced to the "Anderson Report" of 1965.¹¹ Much like the "Payne Report"¹² in England and Wales which recommended broad systematic

³ Article 25 *Judgments Enforcement (Northern Ireland) Order 1981*.

⁴ See paragraph 6.82 below.

⁵ See Capper "Taking Enforcement Seriously – Lessons from Northern Ireland" 2006 CJK 485 at 492.

⁶ See Capper "Taking Enforcement Seriously – Lessons from Northern Ireland" 2006 CJK 485 at 491.

⁷ Article 126 *Judgments Enforcement (Northern Ireland) Order 1981*.

⁸ Capper *The Enforcement of Judgments in Northern Ireland* (SLS Legal Publications (NI) 2004) at 29.

⁹ See *Judgment Enforcement Fees Order (Northern Ireland) 1996* (1996 No. 101), as amended by *Judgment Enforcement Fees (Amendment) Order (Northern Ireland) 2004* (2004 No. 341) and *Judgment Enforcement Fees (Amendment) Order (Northern Ireland) 2007* (2007 No. 380).

¹⁰ Capper *The Enforcement of Judgments in Northern Ireland* (SLS Legal Publications (NI) 2004) at 18.

¹¹ *Report of the Joint Working Party on the Enforcement of Judgments, Orders and Decrees of the Courts in Northern Ireland* (1965).

reforms in enforcement, the Anderson Report found major flaws in enforcement in Northern Ireland, particularly the over-reliance of the system on two unsatisfactory enforcement methods.¹³ First, the primary method of enforcement was through execution against goods, which was largely ineffective. Secondly, the instalment order and committal procedure under section 6A of the *Debtors (Ireland) Act 1872*¹⁴ was over-used, and this procedure was costly and ineffective, often resulting in the imprisonment of honest rather than evasive debtors.¹⁵ Other more effective forms of enforcement were not used due to the unavailability of information as to the resources of debtors. It can be noted that these problems still exist in Ireland, as do the problems of a lack of a “system” of enforcement and the existence of certain enforcement methods for purely historical reasons, as identified by the Payne Report.¹⁶ In response to these problems, the Anderson Report proposed that enforcement should be founded upon a preliminary examination of a debtor’s means, and that the enforcement office should then decide on the most appropriate method of enforcement, having regard to the interests of both creditors and debtors.¹⁷

6.09 Two principal advantages of the centralised enforcement system under the EJO have been identified.¹⁸ First, by transferring control of enforcement from the courts to a dedicated body this system highlights the separate nature of litigation and enforcement and emphasises that enforcement should not follow automatically from judgment. Further issues such as the needs of the debtor and his or her dependents must be considered before enforcement commences. The second major advantage of the EJO system is the primary role it gives to obtaining information about a debtor’s circumstances.¹⁹ The Northern Irish system recognises the importance of obtaining accurate information on a debtor’s entire financial situation and so is more equipped to address the issues of the multiply-indebted individual than a court-based procedure which often focuses on a single debt. Courts can for this reason make enforcement orders in situations where a debtor’s full financial picture is unknown. As a consequence, the Northern Irish system is better equipped to achieve more appropriate and proportionate enforcement than the current Irish system. This is illustrated by the great success of the EJO in reducing reliance on the enforcement mechanism of seizure of goods, which is now rarely used.²⁰

6.10 Despite these advantages, some criticisms of the system from the point of view of creditors have been identified by research conducted into the Northern Irish system, and these are discussed below when the Commission identifies arguments against organising the enforcement of judgments around a centralised enforcement office.²¹

¹² *Report of the Committee on the Enforcement of Judgment Debts* (Cmnd. 3909 1969).

¹³ See Capper *The Enforcement of Judgments in Northern Ireland* (SLS Legal Publications (NI) 2004) at 2.

¹⁴ See paragraph 3.296 to 3.297 above.

¹⁵ Capper *op cit.* at 3.

¹⁶ *Report of the Committee on the Enforcement of Judgment Debts* (Cmnd. 3909 1969) at paragraphs 291-311.

¹⁷ *Report of the Joint Working Party on the Enforcement of Judgments, Orders and Decrees of the Courts in Northern Ireland* (1965) at paragraph 41.

¹⁸ See Capper “Taking Enforcement Seriously – Lessons from Northern Ireland” 2006 *CJQ* 485 at 495.

¹⁹ See Capper “Taking Enforcement Seriously – Lessons from Northern Ireland” 2006 *CJQ* 485 at 495. The methods by which the EJO acquires information on the debtor’s circumstances are described in more detail below: see paragraph 6.82 below.

²⁰ Capper *op cit.* at 497.

²¹ See Capper *The Enforcement of Judgments in Northern Ireland* (SLS Legal Publications (NI) 2004) at 33ff, citing the “Hunter Report”: *Report of the Enforcement of Judgments Review Committee (Northern Ireland)* (1987). See paragraph 6.47 below for a discussion of these criticisms.

(b) **Sweden**

6.11 Sweden similarly adopts a centralised public approach to the enforcement of judgments, with enforcement seen as an executive function of the State.²² This function is carried out by the Swedish Enforcement Authority (“*Kronofogdemyndigheten*”) with the National Tax Board (*Riksskatteverket*). The law on the enforcement of judgments in Sweden is contained in the Code of Execution. This Code provides that the enforcement authority is a state authority independent from the courts established to enforce court judgments and decisions. The Authority also enforces certain other decisions, such as those made by administrative bodies or arbitration awards. The Enforcement Authority is divided into 10 regional agencies, which are sub-divided into 84 offices.²³ Each regional agency has a board and an executive director. The staff of the Enforcement Authority is made up of lawyers (primarily responsible for enforcement functions), executive civil servants and administrative staff.

6.12 The enforcement process in Sweden will usually begin with an application by a judgment creditor for an inquiry into the assets of the debtor. The creditor’s application must be founded upon a “*titre exécutoire*”, meaning a court judgment or one of the various types of enforceable decisions described above. While the methods by which the Enforcement Authority acquires information as to the debtor’s means are described in more detail below, for now it is to be noted that a creditor can apply for a complete or a limited inquiry. The complete inquiry involves an investigation of the debtor’s employment, income and assets to the extent necessary considering the substance of the application and the situation of the debtor.²⁴ The limited inquiry merely examines the possibility of attaching the debtor’s earnings. At this stage of the enforcement process the creditor will have to pay a basic fee, which is set at €100 for a complete inquiry or €50 for a limited enquiry. The authority has access to tax and social security records to conduct these enquiries.

6.13 Once this inquiry has been conducted, the Enforcement Authority will decide whether enforcement can be carried out at all, having regard to the means of the debtor. If so, the Enforcement Authority has wide-ranging powers of enforcement.²⁵ As under the Northern Irish system, the Authority, and not the creditor applicant, decides which enforcement mechanism is to be adopted. In making this decision, the Authority gives priority to the enforcement mechanisms which are least costly and which cause the least inconvenience to the debtor. This practice would appear to accord with the goals of appropriate and proportionate enforcement described in Chapter 2 above.

6.14 The Enforcement Authority is subject to both self-regulation and supervision by the courts.²⁶ As regards self-regulation, the Authority may correct a prior decision either by its own initiative or after a complaint has been made.²⁷ This allows decisions to be revisited without obliging the parties to go to court. Secondly, almost every decision made by the Authority is subject to the control of the courts. A creditor or debtor may appeal a decision of the Authority within three weeks from the date the debtor was served with the decision.²⁸ The right to appeal decisions of the Authority to the courts is intended to ensure that the enforcement system complies with the right of access to the courts as protected by Article

²² See Andersson and Fridén “Sweden” in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 229.

²³ See Andersson and Fridén “Sweden” in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 231.

²⁴ Andersson and Fridén *op cit.* at 233, citing Code of Execution Chap 4 s9c.

²⁵ See Andenas and Nazzini “Market Integration, the Harmonization Process, and Enforcement Practices in the EU Member States” in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 95.

²⁶ Andersson and Fridén “Sweden” in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 234.

²⁷ Code of Execution Chapter 4 sections 33-35.

²⁸ Code of Execution Chapter 18 sections 7(2) and 18.

6 ECHR.²⁹ Concerns have however been expressed as to the compatibility with this article of the use of coercive measures by the Authority without a prior court order.³⁰

6.15 The Swedish system of enforcement is regarded as being efficient, with approximately 75-80% of civil enforcement matters completed in less than three months.³¹ This efficiency has been attributed to three factors. First, the system is streamlined in a manner which places the emphasis on the rapid resolution of enforcement issues. A formal time limit of one year exists for the enforcement of judgments, and enforcement can be commenced promptly, even before a judgment is final. Legal presumptions relating to the ownership of seized goods also prevent delays caused by ownership disputes. Also, the dispute resolution process whereby debtors or creditors can challenge decisions of the Authority internally before commencing a court appeal mean that many disputed issues will be addressed expeditiously and efficiently outside the courts, with the option of an appeal to the courts remaining available if objections to the Authority's decisions remain. Secondly, there is a duty on the Enforcement Authority to obtain information about the debtor's ability to satisfy the debt, and the Authority possesses strong powers of access to tax and social security records to obtain this information, as discussed in more detail below.³² Finally, the Enforcement Authority is a non-profit public body, and so the costs to creditors are reasonable. A criticism does however arise in this regard as the Authority is partly-funded by the Swedish State, and so debtors and creditors are to a certain extent subsidised by the general public in the event that the costs of enforcement are not recovered.³³ This criticism however applies equally to court-based enforcement proceedings, where the costs of court proceedings are often borne by the State.

(2) Court-Based Enforcement

(a) England and Wales

6.16 The enforcement of judgments in England and Wales consists of the making of enforcement orders by the courts and the execution of these orders by a mixture of private and public officers.³⁴ The law on enforcement is contained in a variety of statutes, case law and rules of court.³⁵ The system is much more creditor-driven than in the centralised systems of enforcement described above.

6.17 Enforcement begins in England and Wales with the creditor's application to court.³⁶ As in Ireland, a creditor may apply for any available method of enforcement and may use multiple methods simultaneously if desired.³⁷ The primary method of enforcement in England and Wales remains the

²⁹ See Andersson and Fridén "Sweden" in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 236. The operation of the right of access to a court under Article 6 ECHR has been described above at paragraphs 2.07 to 2.14.

³⁰ Andersson and Fridén *op cit*.

³¹ Andenas and Nazzini "Market Integration, the Harmonization Process, and Enforcement Practices in the EU Member States" in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 97.

³² See paragraph 6.84 below.

³³ Andenas and Nazzini "Market Integration, the Harmonization Process, and Enforcement Practices in the EU Member States" in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 97.

³⁴ See e.g. Andenas "England and Wales" in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 131.

³⁵ Legislation in this area includes the *Attachment of Earnings Act 1971*, the *Charging Orders Act 1979*, the *Supreme Court Act 1981*, the *County Court Act 1984*, the *Taxes Management Act 1970*, the *Courts Act 2003* and the *Tribunals, Courts and Enforcement Act 2007*.

³⁶ Civil Procedure Rules part 70.

³⁷ The creditor may however only be paid once, and must inform the court or the sheriff in writing if any payment is received between the date of the relevant enforcement order and its execution: Civil Procedure Rules Part 70.2(2).

seizure and sale of the debtor's goods. As has been noted elsewhere in this Consultation Paper, this procedure has traditionally been known by many names such as seizure, distraint, distress, and execution against goods.³⁸ Legislative reforms in England and Wales in 2007 have however renamed the procedure "taking control of goods" as part of attempts to simplify and update the antiquated terminology in this area of the law.³⁹ Under this procedure, which largely resembles enforcement by the sheriff in Ireland, the court issues what were known as warrants of execution, warrants of distress and writs of *fiery facias*, but which have now been renamed warrants of control and writs of control.⁴⁰ These were then executed following a variety of procedures in accordance with various statutory and common law rules, by various different actors. The procedure has now however been streamlined into a single procedure for "taking control of goods", with the relevant statutory provisions amended and common law rules replaced.⁴¹ Reforms have also been made to the law governing the actors involved in the execution process.

6.18 Until reforms in 2007, the picture of the actors involved in enforcement by the seizure of goods was very complex. Seizures were carried out by a mixture of public officers such as the High Sheriff, Under-Sheriffs, and county court bailiffs.⁴² In addition, private bailiffs, both certified and uncertified, enforced certain limited classes of judgments. Some private bailiffs are members of trade associations such as the Enforcement Services Association or the Association of Civil Enforcement Agencies.

6.19 Reforms made in 2007, but not yet fully implemented, will change significantly the law in this area. A regulatory system for all enforcement agents is due to be introduced,⁴³ with the details of the system due to be introduced by secondary legislation. The UK government has undertaken a consultation process in this regard.⁴⁴ The conclusion of this consultation was that enforcement agents should be regulated by the UK Security Industry Authority. Pending the introduction of the new regulatory regime, the existing certification process for county court bailiffs has been replaced and extended.⁴⁵

6.20 Apart from taking control of goods, the various enforcement orders which can be made by a court in England and Wales largely resemble those available in Ireland, with the notable exceptions of administration orders⁴⁶ and attachment of earnings orders. Many of the procedures and terminology involved have however been updated in England and Wales. Thus the garnishee order has been replaced by a "Third Party Debt Order", and a clearer and more straightforward procedure for obtaining such an order has been introduced.⁴⁷ The *Charging Orders Act 1979* also introduced a new charging order procedure to replace the judgment mortgage mechanism of enforcement. The reforms to judgment mortgages introduced under the *Land and Conveyancing Law Reform Act 2009* brings the Irish procedure more in line with the charging order regime. No parallel exists in Ireland to the attachment of earnings mechanism introduced in England and Wales under the *Attachment of Earnings Act 1971*, except in the limited context of enforcing family law maintenance payments.⁴⁸

³⁸ See paragraph 6.367 below.

³⁹ See section 62 and Schedules 12 and 23 *Tribunal, Courts and Enforcement Act 2007*.

⁴⁰ Section 62(4) *Tribunal, Courts and Enforcement Act 2007*.

⁴¹ Schedule 13 and section 65 of the 2007 Act.

⁴² Originally under the *Sheriffs Act 1887*; this has now largely been replaced by the *Courts Act 2003*.

⁴³ See Lord Chancellor's Department *Effective Enforcement – Improved Methods for Recovery for Civil Court Debt and Commercial Rent and a Single Regulatory Regime for Warrant Enforcement Agents* (Cm5744 2003) at 25ff.

⁴⁴ See Department of Constitutional Affairs *Regulation of Enforcement Agents* (Consultation Paper CP2/07); Ministry of Justice *Regulation of Enforcement Agents* (Response to Consultation CP(R) 02/07).

⁴⁵ See Section 64 *Tribunals, Courts and Enforcement Act 2007*.

⁴⁶ See below at paragraphs 5.35 to 5.37.

⁴⁷ Under Civil Procedure Rules Part 72.

⁴⁸ *Family Law (Maintenance of Spouses and Children) Act 1976*.

6.21 The system of enforcement in England and Wales is widely regarded as ineffective.⁴⁹ A series of studies carried out in the late 1990s showed that approximately a third of judgment creditors received no payment at all at least six months after the court judgment.⁵⁰ Results of a study presented in 2000 showed that in relation to execution through the seizure of goods, only approximately 35% of warrants of execution were actually paid.⁵¹ This problem is heightened by the fact that seizure of goods remains the most frequently used form of enforcement, used in about five of every six cases of enforcement.⁵² The results of a further study of the enforcement of default judgments published in 2004 showed that only 13.3% of High Court claimants and 37% of county court claimants recovered the full amounts owed.⁵³ 62.2% of High Court and 50.4% of county court judgment creditors recovered no payment at all.

6.22 Several reasons have been advanced for the ineffectiveness of enforcement in England and Wales. First, the primary problem appears to be the lack of available information on the means and assets of the debtor from which the judgment may be enforced.⁵⁴ This in turn leads to an over-reliance by judgment creditors on execution against goods, when alternative methods of enforcement may be more appropriate. This is because this form of enforcement requires no more information than the debtor's name and address. It is for this reason that planned reforms in England and Wales propose to introduce a new procedure for obtaining information on the debtor's means called a Data Disclosure Order, as described below.⁵⁵ The second major criticism of the enforcement system in England and Wales is that the fee structure is inefficient and creates undesirable incentives.⁵⁶ The current position is that the judgment debtor must pay all the costs of enforcement, along with the amount of the debt owed. If the debtor cannot or is unable to ultimately repay the amount owed, this results in the judgment creditor obtaining debt recovery services from the public and private sector without paying for them fully. The judgment creditor thus has no interest in the cost of the enforcement service being provided, except to the extent that if the debtor has to pay high enforcement costs it may reduce the amount available to the creditor. For this reason reforms have been proposed whereby the judgment creditor is required to pay an upfront fee before enforcement begins.⁵⁷ This change in the fee structure is designed to encourage the judgment creditor to improve the quality of information it provides to the enforcement agent.

(b) **Austria**

6.23 In contrast to the discussion of the criticisms of the enforcement system in England and Wales, the Austrian system of enforcement provides an example of a court-based system which is largely

⁴⁹ Andenas "England and Wales" in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 151; Baldwin and Cunnington "The Crisis in Enforcement of Civil Judgments in England and Wales" [2004] *Public Law* 305.

⁵⁰ See Baldwin and Cunnington *op cit.* at 308.

⁵¹ Lord Chancellor's Department *Enforcement Review Report of the First Phase of the Enforcement Review* (2000) at 12.

⁵² Baldwin and Cunnington *op cit.* at 310.

⁵³ Baldwin and Cunnington "The Crisis in Enforcement of Civil Judgments in England and Wales" [2004] *Public Law* 305 at 318.

⁵⁴ Andenas "England and Wales" in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 151; *Key Principles for a New System of Enforcement in the Civil Courts* (Enforcement Review 2nd Consultation Paper, Lord Chancellor's Department 1999) at paragraphs 1.1 to 2.25.

⁵⁵ See paragraph 6.85 below.

⁵⁶ Andenas *op cit.* at 152.

⁵⁷ Lord Chancellor's Department *Effective Enforcement – Improved Methods for Recovery for Civil Court Debt and Commercial Rent and a Single Regulatory Regime for Warrant Enforcement Agents* (Cm5744 2003) at 48-49.

regarded as operating efficiently.⁵⁸ The Austrian law on enforcement is primarily contained in the Execution Code (*Exekutionsordnung*), with additional ancillary provisions contained in the Civil Procedure Code and secondary legislation. Enforcement in Austria is viewed as a public responsibility, and is very “court-orientated” when compared with international standards.⁵⁹ The enforcement procedure consists of the making of enforcement orders by the courts and execution by public bailiffs. Enforcement is the exclusive competence of the district courts, and the court in which the judgment was obtained plays no role in enforcement. The court’s actual work in enforcement is in practice performed by court clerks, who are court officers bound by the direction of the relevant judge. The judge may reserve certain enforcement matters to him or herself, such as enforcement against real property.

6.24 Under the standard procedure for applying for enforcement, the creditor must present the court judgment and an application for a warrant of execution. The court will compare the judgment with the creditor’s application for enforcement and if these correspond a warrant of execution will be issued. The court does not hear the debtor under this procedure.

6.25 An alternative online application procedure was introduced in 1995 for certain cases.⁶⁰ In the great majority of payment claims (monetary claims up to €10000), a creditor can now initially apply online for a payment order to be issued against the debtor. The debtor is provided with a right to appeal against this order within a period of 14 days, on the limited grounds that there is no judgment/court order etc corresponding to the order, or that the details of the judgment do not correspond with the details of the application for enforcement. If no appeal is made, the payment order becomes enforceable and the creditor can then apply online for enforcement. A warrant of execution is then granted without hearing the debtor, although once granted the warrant must be served on the debtor. Thus the prior procedure of a court examination of the judgment and application now only takes place if the debtor appeals. This new procedure has contributed greatly to improved efficiency in the Austrian system of debt enforcement.⁶¹ The debtor may appeal the grant of an execution warrant to a regional court on the ground that the district court which granted it erred in its legal assessments.⁶²

6.26 The decision as to which method of enforcement is to be applied in a particular case rests with the creditor, not the court.⁶³ Some provisions of Austrian law do however select certain methods of enforcement over others, primarily pursuing a policy of discouraging the seizure of debtors’ goods where other methods of enforcement are available. These rules are discussed below when discussing reforms of the mechanism of execution against goods.⁶⁴

6.27 Enforcement orders are executed by bailiffs, who are civil servants. Bailiffs’ work is in practice quite limited, and is restricted to the seizure and sale of the debtor’s assets. Reforms in 1995 increased the powers of the bailiff to allow the bailiff to negotiate repayment by instalments and allowed the bailiff more control over organising the sale of good seized.

6.28 Although there are no available statistics on the efficiency of the Austrian enforcement system, it would appear that the procedure for obtaining a warrant of execution is very expedient, and that most problems of execution are caused by the mere lack of means of the debtor rather than inefficiencies in the

⁵⁸ See Andenas and Nazzini “Market Integration, the Harmonization Process, and Enforcement Practices in the EU Member States” in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 57-61; Oberhammer “Austria” at 105-129.

⁵⁹ Oberhammer *op cit.* at 116.

⁶⁰ Oberhammer *op cit.* at 116.

⁶¹ See Oberhammer “Austria” in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 109.

⁶² *Ibid* at 126.

⁶³ Oberhammer *op cit.* at 115.

⁶⁴ See paragraphs 6.344 to 6.345 below.

enforcement system.⁶⁵ Attachment of earnings is generally regarded as the most efficient method of enforcement in Austria, and this efficiency can be attributed to the streamlined online enforcement application system, and the wide powers of the enforcing court to obtain information on the debtor from social security records, which are described in more detail below.⁶⁶

(3) Privatised Enforcement

(a) France

6.29 The French enforcement system will now be presented as an example of a privatised enforcement system.⁶⁷ French enforcement law is principally contained in the law of 9 July 1991,⁶⁸ with certain rules also contained in the Code of Civil Procedure.⁶⁹ In most cases enforcement is carried out without judicial intervention, with a special judge responsible for resolving disputes when difficulties arise in enforcement. While the creditor has total control of directing all stages of enforcement, it is authorised enforcement agents who must carry out enforcement itself, which is regarded as an executive function of the State.

6.30 Responsibility for enforcement in France lies solely with officers known as *huissiers de justice*. These are public officers responsible for various judicial tasks such as serving documents, as well as enforcement. While the *huissiers* are agents of the State, they are independent and private actors who run their own businesses and hire their own staff.⁷⁰ Their remuneration is sourced solely from the fees paid by creditors or debtors, and varies with the value of the claim. These fees are however regulated by the State. The *huissiers* are regulated by a professional “guild”, which is in turn supervised by the Ministry of Justice, and a *huissier* can be prosecuted by the Public Prosecutor (*Procureur de la République*) if a complaint is filed against him or her.

6.31 The *huissiers* are given authority for enforcement within a defined territory, although several *huissiers* can be in competition in a single territory. Any person who infringes the *huissier’s* authority commits a criminal offence.⁷¹ The *huissier* is under a duty to provide advice to both debtor and creditors, although he or she acts under the creditor’s mandate, and can only act when the creditor so instructs him or her. The choices of enforcement mechanism and of the assets against which enforcement should be made belong solely to the creditor.⁷² The creditor may however face sanctions where the commencement of enforcement has been abusive.⁷³ In relation to execution against the debtor’s property, French law provides that the debtor’s property (excluding exempted assets) is all available to creditors and the proceeds of sale are to be distributed proportionately among the creditors unless legitimate grounds for preference exist.⁷⁴ The standard methods of enforcement available in other countries are also used in France. An additional indirect enforcement mechanism known as an *astreinte* exists under French law. Under this mechanism, a court may order the debtor to pay a pecuniary penalty

⁶⁵ Oberhammer “Austria” in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 125.

⁶⁶ See paragraph 6.83 below.

⁶⁷ Andenas and Nazzini “Market Integration, the Harmonization Process, and Enforcement Practices in the EU Member States” in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 70-76; Niboyet and Lacassagne “France” at 155-167.

⁶⁸ Loi de 9 juillet 1991 (L.) JO 14 juillet 1991, 9228.

⁶⁹ Articles 673-779 *Code de procédure civile* (1806).

⁷⁰ See Andenas and Nazzini *op cit.* at 71.

⁷¹ Article 258 of the penal code.

⁷² Article L.22-1 of the law of 9 July 1991.

⁷³ Niboyet and Lacassagne “France” in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 157.

⁷⁴ Article 2093 Civil Code.

to encourage the debtor to comply with a court order.⁷⁵ The penalty usually increases as time passes without payment, and is paid to the creditor, not the court. The *astreinte* procedure is regarded as being an effective method of obtaining compliance with judgments seeking specific performance of obligations, but less successful when the judgment orders a debtor to pay money.

6.32 The French system contains elements which are regarded as being comparatively efficient while also exhibiting some inefficient aspects. The French system is based on a private and competitive model, but nonetheless contains public law elements. While the *huissiers* act as public officers when carrying out the public function of enforcing judgments, they are organised as private law firms and operate as independent, profit-making agents, and so enforcement is for the most part not funded by the State. The system of remedies against unlawful execution is modelled on the law of tort rather than public law supervision, although the execution judge overseeing the enforcement process adds public law regulatory elements to enforcement. The main problem of the French enforcement system is the difficulty in obtaining information on the debtor's assets, as enquiries may only be made by the French director of public prosecutions, as is described below.⁷⁶ Problems also arise as to the recovery of the costs of enforcement.⁷⁷ The creditor must pay a fee to the *huissier* on commencing enforcement, and may recover this from the debtor when enforcement is carried out. The creditor's legal fees or costs of private investigators incurred after the date of execution are not however recoverable, and so the creditor must bear significant costs in enforcement. The double role of the *huissier* as advisor to both debtor and creditor can be effective in negotiating settlements between debtor and creditor, or in obtaining the debtor's cooperation in enforcement. The duty owed to the debtor may however sometimes conflict with the duty to the creditor to obtain the enforcement of the judgment to the greatest extent possible.⁷⁸ The French system therefore has positive and negative aspects.

(4) Conclusions: A Dedicated, Centralised System

6.33 The comparative study of European enforcement systems from which much of the above information has been drawn was conducted by the British Institute of International and Comparative Law as part of a project funded by the European Commission.⁷⁹ This study drew some conclusions as regards the best practices in enforcement on the completion of its comparative analysis, which will now be discussed.⁸⁰ The study created some categories under which to compare systems in an attempt to find the most efficient model of enforcement system. Thus the study contrasted private systems with public systems; competitive systems with uncompetitive systems, and monolithic systems (where enforcement is carried out by a single body or single category of bodies) with pluralistic systems (where enforcement is carried out by more than one agency). While the distinctions of private/public and competitive/non-competitive were inconclusive as regards comparative levels of efficiency, it was found that monolithic enforcement systems are generally more efficient than pluralistic models. A monolithic system tends to focus expertise and resources on a single body and is also more user-friendly.⁸¹ From a cross-border

⁷⁵ Article L.33 of the law of 9 July 1991.

⁷⁶ Andenas and Nazzini "Market Integration, the Harmonization Process, and Enforcement Practices in the EU Member States" in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 76. See paragraph 6.86 below.

⁷⁷ Andenas and Nazzini *op cit.* at 76.

⁷⁸ Andenas and Nazzini "Market Integration, the Harmonization Process, and Enforcement Practices in the EU Member States" in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 98.

⁷⁹ See in general Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005).

⁸⁰ Andenas and Nazzini "Market Integration, the Harmonization Process, and Enforcement Practices in the EU Member States" *Enforcement Agency Practice in Europe* *ibid* at 97-101.

⁸¹ Andenas and Nazzini "Market Integration, the Harmonization Process, and Enforcement Practices in the EU Member States" in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 99.

enforcement point of view a monolithic system also facilitates cooperation between national enforcement agencies.

6.34 While no clear advantages emerged in favour of either a public or private model, it was found that public enforcement systems are most effective where the enforcement agency is specialised and dedicated to enforcement.⁸² The Swedish system was found to be a model of best practice in this regard, where the enforcement authority was found to perform well because it is focused mainly on enforcement, allowing priority and resources to be dedicated to this task, and allowing expertise to be built up in this area by its staff. This was contrasted with systems of court-based enforcement, where the heavy workloads of courts mean that enforcement is not a high priority and where little specialisation in the area of enforcement exists. It was thus concluded that an enforcement system operates best if enforcement functions are entrusted to dedicated non-judicial enforcement agencies.

6.35 In addition to these conclusions, certain other particular areas of best practice were noted. First, the mechanisms for obtaining information on the debtor's means were identified as key, and it was concluded that best practices involve providing specialised enforcement bodies with access to accurate information about the debtor's means, assets and employment.⁸³ Such information should be drawn from public and private databases which are not limited to enforcement law, but which include tax or social security records. Secondly, the *astreinte* procedure of periodic penalties arising in the case of continued non-compliance with court judgments was found to be an effective mechanism, but primarily for the enforcement of judgments requiring the defendant to perform or refrain from performing some act, rather than a judgment requiring the debtor to pay money of the kind with which this Consultation Paper is concerned.⁸⁴ Finally, it was noted that an expeditious administrative and non-judicial procedure for quickly and cheaply resolving disputes arising in enforcement was suggested as an important means of ensuring efficiency in enforcement while also protecting the rights of the judgment debtor.⁸⁵

B A New Model of Enforcement System

(1) A Centralised Enforcement System under a Dedicated Enforcement Office

6.36 From the criticisms of the current position of Irish law on the enforcement of judgments in Chapter 3, and the discussion of systems of enforcement in other countries above, it becomes clear that the Irish system falls below the highest comparative standards in debt enforcement. The systemic problems in debt enforcement procedures mean that Irish law does not provide proportionate, balanced, inexpensive and efficient means of enforcement. The Commission believes that to remedy these systemic flaws an overhaul of the Irish approach to debt enforcement is required. Following the example of the relatively successful Northern Irish and Swedish systems, and applying the conclusions of the British Institute for International and Comparative Law's comparative study of enforcement practice in Europe, the Commission provisionally recommends that a centralised system of enforcement should be adopted in Ireland under a dedicated Enforcement Office. The Swedish centralised system has been praised for its efficiency and has been described as a model of best practice in Europe.⁸⁶ Similarly, the

⁸² Andenas and Nazzini "Market Integration, the Harmonization Process, and Enforcement Practices in the EU Member States" in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 100.

⁸³ Andenas and Nazzini "Market Integration, the Harmonization Process, and Enforcement Practices in the EU Member States" *op cit.* at 98.

⁸⁴ Andenas and Nazzini "Market Integration, the Harmonization Process, and Enforcement Practices in the EU Member States" in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 99.

⁸⁵ Andenas and Nazzini "Market Integration, the Harmonization Process, and Enforcement Practices in the EU Member States" in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 100-101.

⁸⁶ Andenas and Nazzini *op cit.* at 100.

Northern Irish system has been commended by law reform bodies across the world.⁸⁷ The advantages of such a centralised approach to debt enforcement will now be discussed.

6.37 First, a centralised system of enforcement would provide a means of monitoring multiple enforcement proceedings against a single debtor and so could prevent debtor harassment while also protecting creditors from wasting funds on futile enforcement proceedings. At present there is no means of assessing all of the enforcement proceedings being taken against a debtor. The Northern Irish register of judgments could serve as a model in this regard, in providing a comprehensive record of the judgments obtained and enforcement procedures commenced against a debtor.

6.38 Secondly, an enforcement office could assist in addressing the fundamental problem of assessing the means of a debtor. An enforcement office could facilitate this procedure in a number of ways. First, if debtor disclosure is relied upon as a means of obtaining this information, the Commission believes that debtors would be more willing to participate in proceedings taking place in an enforcement office rather than in a public hearing in the debtor's local District Court or even the High Court. Secondly, if debtor information is to be obtained from registers such as tax or social security records, a system of accessing such information could operate more successfully where a centralised enforcement body was receiving the information rather than a range of different courts. Branches of the enforcement office could be linked by a centralised data-sharing network to facilitate this system. Also, if an enforcement office was holding this information and making decisions as to whether enforcement is possible and which method should be adopted, it would mean that the information would only be available to the Office and not to creditors, thus facilitating a more proportionate means of data-sharing, having regard to the debtor's right to privacy.

6.39 This leads to the third advantage of the enforcement office model: the ability to ensure that proportionate and appropriate enforcement mechanisms are adopted in each case. At present, there is an over-reliance on enforcement by the sale and seizure of the debtor's goods, which may not always be appropriate. In certain cases the debtor's income or bank account may be a more appropriate means of satisfying the judgment, involving less hardship for the debtor and a higher return for creditors. If an enforcement office was permitted to ascertain the assets of the debtor and select the means of enforcement, this problem could be resolved and the method of enforcement which was least restrictive of the debtor's rights, most effective in recovering the amount owed, and most proportionate in terms of cost and consequence to the debt owed could be selected. This would benefit both creditors and debtors.

6.40 Fourthly, if a thorough enquiry into the debtor's means is conducted, the problems of over-indebted individuals could be addressed at an earlier stage than is presently the case. Under both the Northern Irish and Swedish models, the enforcement agencies can decide after examining the debtor's means that enforcement is not possible in a given case.⁸⁸ If an enforcement office could carry out a similar operation in Ireland, it could thus refer any over-indebted insolvent debtors to the debt settlement procedures proposed above, thus preventing futile enforcement proceedings from taking place and facilitating a settlement which is in the best interests of both creditors and debtors. Links between the enforcement office and the Money Advice and Budgeting Service could be established to facilitate this process.

6.41 Fifthly, an enforcement office can provide increased efficiency through the prioritisation of enforcement and specialisation. Through economies of scale and specialisation, enforcement procedures could be streamlined under an enforcement office, and could be made more informal and less complicated than court procedures. Innovations such as the online enforcement application operating in Austria could be considered. The Commission believes that the costs of enforcement, both to the parties involved and to the State, could be reduced in this manner. Also, a centralised enforcement office could facilitate the monitoring of the efficiency of enforcement mechanisms. The efficiency of enforcement in

⁸⁷ See e.g. New South Wales Law Reform Commission *Enforcement of Money Judgments: Draft Proposal* (WP15 1975); Ontario Law Reform Commission *Report on the Enforcement of Judgment Debts and Related Matters* (Part 1, 1981).

⁸⁸ See paragraph 6.05 above.

civil claims, particularly through the procedure of execution against goods, is not currently monitored and assessed. This contrasts with the enforcement of public revenue claims, where the Revenue Commissioners' centralised system allows for the monitoring of the efficiency of enforcement.⁸⁹ Centralising the private enforcement system would bring civil claims more in line with public claims, and so introduce increased equality between public and private creditors.

6.42 Sixthly, a centralised system of enforcement would help to provide consistency in enforcement proceedings. A repeated complaint of creditors is that enforcement proceedings are lacking in legal certainty, with judicial practice varying from court to court, particularly in District and Circuit Courts. This leads to increased complexity and expense in enforcement proceedings. A single, simplified procedure could be introduced for all enforcement proceedings in the enforcement office. The possibility of online enforcement applications should be explored in this regard.

6.43 Finally, with regard to Ireland's obligations under European Community law and the developments at a European level towards the facilitation of cross-border debt recovery, the Commission believes that a national centralised enforcement office would facilitate greater cooperation with enforcement authorities of other Member States.

6.44 For the above reasons, the Commission believes that a centralised system of enforcement should be introduced in Ireland. A central aspect of this new system should be a dedicated enforcement office which should be entrusted with sole responsibility for the enforcement of judgments, and which should be provided with all powers necessary to carry out this function.

6.45 *The Commission provisionally recommends that a centralised enforcement system under the control of a dedicated enforcement office should be introduced in Ireland.*

6.46 It must however also be noted that arguments exist against the introduction of such a centralised system of enforcement in the Northern Irish/Swedish model. The Payne Report in England had recommended the introduction of such a system, but this proposal was never introduced due to the cost of such a radical change of the enforcement structure. Also, the comments in the previous Report of the Commission on the law relating to the Sheriff should also be considered:⁹⁰

“There is a real danger that the establishment of such an agency would merely increase the delay and expense encountered at present, with the possibility of additional searches having to be made in the relevant office when the sale of a property was being contemplated. While such a system has been in operation for some years in Northern Ireland, the Commission understands that, even allowing for the disturbed and abnormal conditions that have prevailed in that jurisdiction for the past two decades, the efficiency of the debt collection process has not noticeably improved as a result.

6.47 Furthermore, what (admittedly dated) research has been conducted into the operation of the EJO has identified some criticisms of the system from the point of view of creditors.⁹¹ While some problems can be attributed to political instability in Northern Ireland during certain periods of the operation of the EJO, other more general criticisms involve the delays experienced by some creditors in first receiving notice of the outcome of the investigation into a debtor's means⁹² and secondly in obtaining enforcement itself.⁹³ This can be attributed to resource limitations and to the “first come, first served” priority system which inevitably causes delays for those creditors who have obtained judgments later than others. Recent upgrading of the EJO's information technology systems is however expected to reduce complaints in this regard. Secondly, a general criticism of the enforcement system is the generally low

⁸⁹ See the discussion of the enforcement of Revenue debts at paragraphs 6.54 to 6.58 below.

⁹⁰ *Report On Debt Collection: (1) The Law Relating to Sheriffs* (LRC 27–1988) at 8.

⁹¹ See Capper *The Enforcement of Judgments in Northern Ireland* (SLS Legal Publications (NI) 2004) at 33ff, citing the “Hunter Report”: *Report of the Enforcement of Judgments Review Committee (Northern Ireland)* (1987).

⁹² See Capper “Taking Enforcement Seriously – Lessons from Northern Ireland” 2006 *CJQ* 485 at 491.

⁹³ See Capper *The Enforcement of Judgments in Northern Ireland* (SLS Legal Publications (NI) 2004) at 34-35.

level of returns received by many creditors.⁹⁴ Again this can be largely attributed to the “first come, first served” principle which means that by the time the judgment of a second or third creditor’s claim is enforced, any available assets of the judgment debtor will often have been already seized. Dissatisfaction with this arrangement may have led to increased resort to insolvency proceedings by subsequent creditors,⁹⁵ and lay behind the proposed reform of the system to introduce a “fair shares” enforcement scheme for distributing the debtor’s assets among creditors on a pro rata basis.⁹⁶ This proposed reform was never implemented however.

6.48 In relation to the fee structure under the Northern Irish system, criticisms have again been identified. It should be recalled that the activities of the office are funded from fees charged to users of its services. When the “Hunter Report” reviewed the operation of the fee structure it made two main criticisms.⁹⁷ First, enforcement fees were said to be prohibitively high for small debts. Secondly, it was suggested that the level of fees should be more closely related to results. While there is justification for proportionately high fees for smaller debts as the work involved in enforcement is generally the same irrespective of the amount of the debt, the fees must not be large as to prevent enforcement of small claims, particularly as the judgment creditors involved in small claims may often be of limited means.⁹⁸ Small claims to a certain extent subsidise large claims, which is difficult to justify, especially as larger creditors can protect themselves against the costs of failed enforcement through responsible lending and responsible arrears management practices.⁹⁹

6.49 Thus it can be seen that criticisms have been made of the centralised enforcement systems, and these should be considered before final recommendations are made.

(2) Organisational Structure of the Proposed Enforcement Office

6.50 The introduction of an enforcement office would require close consideration as to the organisational structure of the office. As the office would take responsibility for the execution of all judgments, the current functions of courts and court officers in making various enforcement orders; and of the Sheriffs, County Registrars and Court Messengers in carrying out execution against goods would be transferred to the office. The enforcement office would involve a centralised supervisory office, which would coordinate regional branches.

6.51 A particular issue for consideration raised by the transfer of enforcement functions to the proposed office would be the removal of execution functions from County Registrars and the Court Messengers under their supervision. The dissatisfaction which exists in relation to the enforcement of judgments by County Registrars has been described in the Chapter 3.¹⁰⁰ That chapter notes that the Commission previously recommended that to address the problems in this area the responsibility of County Registrars for enforcing judgments should be ended, and that a system of nationwide sheriffs should be introduced.¹⁰¹ This recommendation has been criticised as being made without adequate consideration and in the absence of empirical evidence and deep discussion of the policy questions at issue.¹⁰² The Commission therefore recognises that consultation is necessary on this issue as part of a

⁹⁴ See Capper *The Enforcement of Judgments in Northern Ireland* (SLS Legal Publications (NI) 2004) at 35-36.

⁹⁵ *Ibid* at 36.

⁹⁶ See Capper *The Enforcement of Judgments in Northern Ireland* (SLS Legal Publications (NI) 2004) at 37

⁹⁷ Report of the Joint Working Party on the Enforcement of Judgments, Orders and Decrees of the Courts in Northern Ireland (1987).

⁹⁸ Capper *op cit.* at 31. In this regard the decision of the European Court of Human Rights in *Apostol v Georgia* that enforcement fees should not be so high as to disproportionately restrict a judgment creditor’s right of access to a court should be recalled: see paragraphs 2.12 to 2.13 above.

⁹⁹ Capper *op cit.* at 32.

¹⁰⁰ See paragraphs 3.342 to 3.350 above.

¹⁰¹ *Debt Collection: (1) The Law Relating to Sheriffs* (LRC 27-1988) at 12.

¹⁰² Keating and Donnelly “Reforming the Law on Debt Enforcement and the Role of the Sheriff” [2009] *Commercial Law Practitioner* (forthcoming)

consideration of the organisational structure of the proposed enforcement office. The Commission now presents various options for how the proposed office could be organised and how it would function, and invites submissions as to the most appropriate option.

(a) ***The transfer of enforcement functions to designated enforcement officers under the proposed enforcement office.***

6.52 The first option would be to establish an entire new agency and to appoint new enforcement officers to staff this office. Such staff would be civil servants, remunerated on the basis of a salary. The County Registrars' current roles in enforcing judgments would therefore be transferred to the enforcement office and the seizure and sale of debtors' assets as currently conducted by Court Messengers would be carried out by enforcement officers, who would be staff of the office. Enforcement would be centralised by a head office rather than localised and the proceeds of seizure and sale would be recorded so that the efficacy of this procedure could be monitored.

(b) ***The transfer of enforcement functions to Sheriffs and Revenue Sheriffs under the coordination of the proposed enforcement office.***

6.53 Another possible structure for the proposed enforcement office would involve subsuming the offices of Sheriffs and Revenue Sheriffs under a centralised coordinating structure to form the enforcement office. County Registrars' enforcement functions would then be transferred to the offices of the Sheriffs and Revenue Sheriffs. The current staff of the Sheriffs and Revenue Sheriffs offices would in this way become members of the new enforcement office. The functions given to Sheriffs would then extend beyond their current role in execution against goods to include the operation of other enforcement methods such as attachment of earnings and instalment orders. In order to expand upon how this option might operate, a brief description of the enforcement functions of Revenue Sheriffs in relation to revenue debts is now provided.

6.54 Enforcement by Revenue Sheriffs is widely regarded as being more effective than enforcement by County Registrars, and this appears to be supported by the statistical information available, as seen in the tables presented in Chapter 3.¹⁰³

6.55 Revenue sheriffs are appointed by the Minister of Justice to enforce certificates of tax liability issued by the Collector General under s962 of the *Taxes Consolidation Act 1997*.¹⁰⁴ There are 16 Revenue Sheriffs, with each operating within a designated territory or bailiwick. The Revenue Commissioners have a close working relationship with the Revenue Sheriffs. The Commissioners will usually prepare a detailed report on the taxpayer in question for the Sheriff, and will remain in contact throughout the period in which the file is active, using electronic means to notify the Sheriffs of any changes in circumstances of the defaulting taxpayer.¹⁰⁵ Once the matter has been referred to the Sheriff, he or she deals directly with the defaulting taxpayer in relation to all matters, including the negotiation of an arrangement for payment. This must be within the boundaries of acceptable arrangements which the Revenue Commissioners have authorised the Sheriff to accept, however. The performance of the Revenue Sheriffs is closely monitored by the Revenue Commissioners in the enforcement of revenue debts. Quarterly reports are produced to assess the effectiveness of each Sheriff, with factors such as the speed of resolving cases and the amounts recovered used to rank the relative performances. A league table is then drawn up by the Commissioners to compare the Sheriffs' performances. The Commission understands that this system of monitoring provides very effective incentives to Sheriffs to increase efficiency in their enforcement functions. The system of execution employed by the Revenue Commissioners therefore involves high levels of accountability and transparency. The centralised

¹⁰³ See paragraphs 3.344 to 3.345 above.

¹⁰⁴ This procedure allows execution without first obtaining a court judgment. If the Revenue Commissioners have initiated court proceedings in respect of a debt and have obtained judgment, execution by order of *fiery facias* may take place in the usual manner, but such execution will be effected by the relevant County Registrar or Sheriff rather than by a Revenue Sheriff.

¹⁰⁵ Donnelly and Walsh *Revenue Investigations and Enforcement* (Butterworths 2002) at 119.

supervisory role of the Commissioners ensures that the performance levels of Sheriffs are closely monitored for efficiency.

6.56 In addition to this monitoring system, a further factor which is said to increase efficiency in enforcement by Revenue Sheriffs is the fact that they are remunerated solely on the basis of poundage, rather than through a salary. This provides a strong incentive for them to be efficient and to recover as much money as possible.

6.57 The Revenue Commissioners' enforcement management system could provide a model for the reform of the current debt enforcement system. This could involve the transfer of the enforcement functions of County Registrars to Sheriffs and Revenue Sheriffs under the umbrella of a centralised enforcement office, with these functions allocated from the central office on a regional basis. The current functions of courts and court officers under existing enforcement procedures could also be transferred to the offices of the Sheriffs and Revenue Sheriffs. This would involve the operation of several new functions for these offices, including the examination of debtors' assets and the assessment of the most appropriate method of enforcement in a particular case. The offices would also be responsible for making and administering attachment of earnings orders, instalment orders and garnishee orders. The Commission invites submissions as to the desirability of assigning these functions to the offices of Sheriffs and Revenue Sheriffs.

6.58 The proposed central coordinating office could occupy a similar supervisory role to the Office of the Collector General under the Revenue Commissioners' enforcement management system. The enforcement office could then manage and supervise enforcement activities. Similar statistics, performance reports and league tables could be prepared by the enforcement office to those currently prepared by the Revenue Commissioners. This would involve continued separate status for Sheriffs (in Cork and Dublin) and Revenue Sheriffs (in all other counties) independent of the enforcement office, but would allow for the supervision, organisation and coordination of these officers by a centralised body. Applications for enforcement could be sent to this central office and allocated from there to the regional offices operated by the Sheriffs.

(c) ***The employment of private enforcement agents by the proposed enforcement office.***

6.59 Another alternative approach would involve the introduction of private enforcement officers to carry out the functions of execution against goods. This would involve responsibility for other methods of enforcement being assigned to the proposed enforcement office, with the actual work of the seizure and sale of debtors' goods being carried out by private, commercial agencies. Enforcement functions are assigned to licenced and regulated private actors in both England and Wales and France.

6.60 In England and Wales, execution against goods is carried out by a mixture of public and private actors. These include High Sheriffs, Under Sheriffs, public county court bailiffs, certified private bailiffs and non-certified private bailiffs. Some private bailiffs are members of trade associations such as the Enforcement Services Association or the Association of Civil Enforcement Agencies. Bailiffs seizing goods for the enforcement of rent, road traffic penalties and council tax must be certified. These private bailiffs are not employed by the Court Service, but are viewed as court representatives and act under a certificate of the court, and are so subject to some court control. Non-certified bailiffs are limited to enforcing judgments which are not confined by law to Under Sheriffs or certified bailiffs.

6.61 Reforms made under the *Tribunals, Courts and Enforcement Act 2007*, but not yet fully implemented, will change significantly the law in this area. A regulatory system for all enforcement agents is due to be introduced,¹⁰⁶ with the details of the system due to be introduced by secondary legislation. The UK government has undertaken a consultation process in this regard.¹⁰⁷ The conclusion of this consultation was that enforcement agents should be regulated by the UK Security Industry

¹⁰⁶ See Lord Chancellor's Department *Effective Enforcement – Improved Methods for Recovery for Civil Court Debt and Commercial Rent and a Single Regulatory Regime for Warrant Enforcement Agents* (Cm5744 2003) at 25FF.

¹⁰⁷ See Department of Constitutional Affairs *Regulation of Enforcement Agents* (Consultation Paper CP2/07); Ministry of Justice *Regulation of Enforcement Agents* (Response to Consultation CP(R) 02/07).

Authority. Pending the introduction of the new regulatory regime, the existing certification process for county court bailiffs has been replaced and extended.¹⁰⁸ Regulations are to be introduced establishing a scale of fees which will outline how much enforcement agents may charge for their services.¹⁰⁹ The policy documents which preceded the 2007 Act indicated that the level of fees charged would be set by the body regulating enforcement agents, but would allow some room for negotiation so as to promote competition between enforcement agents and acknowledge the varying levels of difficulty involved in different cases.¹¹⁰

6.62 An overview of the system of enforcement in France has been provided above.¹¹¹ It was noted that the French enforcement system is solely privatised, with private professionals known as *huissiers de justice* performing official enforcement functions for profit under State regulation. The procedure for execution against goods in France is thus carried out by these *huissiers*. These officials thus resemble the private enforcement officers acting in England and Wales and are also remunerated from the fees paid by creditors and debtors. These fees are regulated by the State.

6.63 The proposed enforcement office would be responsible for making enforcement orders, and so it would only be under an order obtained by a creditor from the enforcement office that a private enforcement agent could proceed to carry out its functions. As the Commission recommends below that execution against goods should be less widely used,¹¹² private enforcement agents may therefore not play a large role in the overall system of enforcement.

6.64 The privatisation of execution could be expected to alleviate the strain on the resources of County Registrars currently caused by enforcement, and could also lead to increased efficiency as private agencies compete with each other to provide the most effective enforcement service. The performance-monitoring role of the enforcement office discussed in the previous paragraph could apply equally if enforcement functions were privatised. The enforcement office could prepare performance reports and league tables to monitor efficiency. Private enforcement agents would be remunerated from fees charged for the services provided, with these fees first paid by the creditor and eventually recovered from the debtor. The levels of fees charged by such agents could be regulated by law.

6.65 Against these advantages there is a risk that competitive agencies may resort to dubious means to recover debts more effectively than their rivals, and very strict regulation would be a necessary consequence of the privatisation of execution functions. A licensing regime would be necessary, with the holding of a licence being a precondition to acting as an enforcement agent. In this regard the recent reforms in England and Wales discussed above should be considered. Also it should be noted that legislation passed in Scotland in 2007 provided for the creation of a new regulatory body to supervise private enforcement agents, but these provisions were not commenced. It has been indicated by the Scottish government that they will not be given effect. The provisions had provided for the establishment of the "Scottish Civil Enforcement Commission".¹¹³ This body was to maintain a register of enforcement agents, and to publish a code of practice in relation to the exercise of their functions. The authority was also to be given a supervisory role in relation to informal debt collection, and was to promote good practice and publish a code of conduct for informal debt collection. It was also to be responsible for recommending the appointment of enforcement agents, who were then appointed by the Lord President of the Scottish Court of Session. In advance of making such a recommendation, the authority would assess whether the candidate was a fit and proper person to be appointed as an enforcement agent. The

¹⁰⁸ See Section 64 *Tribunals, Courts and Enforcement Act 2007*.

¹⁰⁹ See Schedule paragraph 62 of the 2007 Act.

¹¹⁰ Lord Chancellor's Department *Effective Enforcement – Improved Methods for Recovery for Civil Court Debt and Commercial Rent and a Single Regulatory Regime for Warrant Enforcement Agents* (Cm5744 2003) at 47-53.

¹¹¹ See paragraphs 6.29 to 6.32 above.

¹¹² See paragraphs 6.333 to 6.353 below.

¹¹³ See Part 3 of the *Bankruptcy and Diligence etc. (Scotland) Act 2007*.

authority was to be empowered to make rules regarding the qualifications and procedures for applying for a position as an enforcement agent.

6.66 Doubts also exist as to the ability of privatisation of execution functions to provide a more efficient system of enforcement. The results of a comparative study of European enforcement systems concluded that private competitive systems of enforcement are not necessarily more effective than public, non-competitive systems.¹¹⁴ Also, this study found that “monolithic” systems, where there is only one enforcement agency or category of enforcement agency, generally operate more effectively than pluralistic systems, under which there is a mixture of enforcement agencies. As the privatisation of execution functions would result in a mixture of private and public enforcement agents (Sheriffs, Revenue Sheriffs and possibly private enforcement agents in relation to the act of execution against goods itself; the enforcement office overseeing execution and all other forms of enforcement), this approach may not be as effective as a monolithic centralised system. Also, as has been noted above, the procedure of execution against goods under a partly privatised system in England and Wales has not been operating successfully.¹¹⁵ This system has been criticised as producing very low returns for creditors and consisting of a complex mixture of public and private actors.¹¹⁶

(d) **Conclusions**

6.67 The Commission recognises that various options exist for addressing the widely perceived difficulties in the current attribution and division of enforcement functions between the courts, Sheriffs and County Registrars. The Commission invites submissions from interested parties as to how this problem can be best addressed.

6.68 *The Commission invites submissions as to desirability of continuing to assign execution functions to County Registrars. If the responsibility for executing judgments is to be removed from County Registrars, the Commission invites submissions as to how this best should be achieved, and to whom these functions should be assigned. The Commission invites submissions particularly as to the desirability of transferring the enforcement functions currently carried out by County Registrars to either Revenue Sheriffs or to private agents.*

6.69 The above suggestions of the Commission are provisional recommendations as regards the organisational structure of the proposed enforcement office. The Commission realises that this issue requires executive considerations of funding and human resources which are beyond the scope of this Consultation Paper. The Commission thus invites submissions as to how the structure of the proposed enforcement office should be organised, and how the enforcement roles currently held by County Registrars, Sheriffs and Revenue Sheriffs should be reallocated under the proposed new system.

6.70 *The Commission invites submissions as to the appropriate organisational structure of the proposed enforcement office, and how the roles of existing enforcement officers should be allocated under the proposed new system.*

(3) Access to Information on the Means of Debtors

(a) **The Importance of Information on Debtors’ Means**

6.71 The problem of the lack of information on the income, assets and liabilities of debtors has been identified above as a fundamental flaw in the current system of debt enforcement.¹¹⁷ This is a problem in

¹¹⁴ Andenas and Nazzini “Market Integration, the Harmonization Process, and Enforcement Practices in the EU Member States” in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 98.

¹¹⁵ See e.g. Baldwin and Cunningham “The Crisis in Enforcement of Civil Judgments in England and Wales” [2004] *Public Law* 305.

¹¹⁶ Although this second criticism of the complex system of various enforcement agents has been addressed by the *Tribunals, Courts and Enforcement Act 2007*, as noted above.

¹¹⁷ See paragraphs 2.112 to 2.114 and 3.332 to 3.335 above.

most legal systems,¹¹⁸ and comparative studies of enforcement procedures have identified the lack of transparency in relation to debtor's assets as the most important problem in enforcement.¹¹⁹

6.72 The unavailability of information relating to a debtor's means has been shown to lead to several adverse consequences. Firstly, it leads to wasted costs and unnecessary stress as futile enforcement proceedings may be brought against debtors who simply have no means of paying the amount owed. Creditors and courts therefore do not possess the information necessary to distinguish between "can't pay" and "won't pay" debtors. Secondly, it prevents proportionate and appropriate means of enforcement from being used, as creditors and courts are unable to ascertain which method of enforcement is appropriate to a particular case. Thirdly, if a creditor is lacking information in relation to the debtor's ability to pay, and so cannot bring legal enforcement proceedings, it often employs a professional debt collector to handle the case, which shows a trend for creditors to seek "private justice" due to the failure of the legal enforcement system to provide adequate remedies, a situation against which the Council of Europe has warned.¹²⁰ Finally, the European Commission has noted that problems of cross-border debt recovery caused by a lack of information relating to the debtor's whereabouts or assets may constitute an obstacle to the proper functioning of the Internal Market and so jeopardise the interests of both businesses and consumers.¹²¹ For these reasons, the Commission believes that a fundamental goal of the reform of debt enforcement procedures should be to make more information available concerning the means of debtors.

6.73 *The Commission provisionally recommends that a fundamental aim of the reform of debt enforcement procedures should be to make available more information on the means of the debtor.*

(b) Comparative Methods of obtaining Debtor Information

(i) Methods of obtaining debtor information in Ireland

6.74 The means of obtaining information on the debtor in Ireland should be considered at two stages: at the arrears management stage before the creditor has decided to initiate legal proceedings; and at the enforcement stage after a court judgment has been granted against the debtor.

6.75 First, it can be said that there is no official means of obtaining information on the debtor's means before enforcement proceedings have been commenced. The creditor may search public registers such as the Land Registry, Registry of Deeds or the Companies Registration Office to investigate whether the debtor has assets registered in his or her name. The Commission understands that this is a practice often used by creditors. The Register of Judgments maintained in the Central Office of the High Court may also provide a source of information to creditors by indicating if any judgments against the debtor have previously been registered. It has however been noted above that this register is incomplete and so may be of limited value.¹²² Also, it has been reported that creditors may use private investigative agents to ascertain information about a debtor.¹²³ Creditors such as banks and credit unions

¹¹⁸ See e.g. Commission of the European Communities *Green Paper: Effective Enforcement of Judgments in the European Union: The Transparency of Debtors' Assets* (COM(2008) 128 final); Andenas and Nazzini "Market Integration, the Harmonization Process, and Enforcement Practices in the EU Member States" in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 53.

¹¹⁹ Correa Delcasso "Efficiency in the Methods of Enforcement of Judgments: Public v Private Systems" in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 47.

¹²⁰ *Recommendation of the Committee of Ministers to member states on enforcement* (Council of Europe Rec(2003)17, 2003).

¹²¹ Commission of the European Communities *Green Paper: Effective Enforcement of Judgments in the European Union: The Transparency of Debtors' Assets* (COM(2008) 128 final) at 3.

¹²² See paragraphs 3.365 to 3.366 above.

¹²³ European Judicial Network *The Transparency of a Debtor's Assets before obtaining an Enforceable Title*, available at:

will rely on the information provided by consumers when applying for credit, but this information may be of little use if the circumstances of the debtor have since changed, as is most often the case when default occurs.¹²⁴

6.76 Secondly, at the stage of the enforcement of a judgment more formal methods of obtaining information on a debtor's means are available. As noted above, procedures exist for "discovery in aid of execution" which allow for the examination of a debtor before a court so as to gain information concerning his or her means.¹²⁵ The wording of the relevant Circuit Court rule and the case law on this issue however state that this procedure cannot be used in the Circuit Court where the judgment being enforced is one for the payment of money.¹²⁶

6.77 The High Court examination procedure allows a creditor to apply to the Court for an order that the debtor appear before the court and be examined orally as to the assets and means available to satisfy the judgment debt. The Court's order may require the production of any books or documents relevant to the examination. The Court may also summon "any other person" to appear before it, for example where a person holding a bank account jointly with the debtor is needed to specify which amount in the account could be attributed to the debtor.¹²⁷ It appears that the examination procedure can be used before execution against goods has been attempted and has failed.¹²⁸ The procedure for initiating the examination is quite complex. First a draft of the enforcement order and a grounding affidavit specifying certain details concerning the judgment being enforced, the failure of the debtor to satisfy the judgment and the reasons why the creditor seeks discovery in aid of execution must be filed in court. The Court will then grant the order, which must be served personally on the judgment debtor. If the debtor refuses to answer the creditor's questions, he or she commits a contempt of court and is subject to being imprisoned.¹²⁹ The awarding of the costs of the examination procedure is at the discretion of the judge.¹³⁰ Where the examination does not provide any evidence which could conceivably be of assistance in enforcing the judgment debt, costs may not be granted to the creditor.¹³¹ The judgment creditor must pay the travelling expenses of those attending the examination.

6.78 It is to be noted that this examination procedure is very rarely used, and just one examination hearing took place in the High Court in 2007, as compared to 1208 *feri facias* orders issued out the Central Office of that court.¹³² This would suggest that the examination procedure in the High Court is not an effective method of obtaining information about the means of a debtor.

http://ec.europa.eu/civiljustice/publications/docs/transparency_before_title_en.pdf

¹²⁴ See paragraphs 1.30 to 1.35 above.

¹²⁵ See paragraphs 3.237 and 3.250 above. Ord. 42, r.36-37 *Rules of the Superior Courts* in respect of the High Court and Ord. 36, r.7 *Circuit Court Rules* for the Circuit Court. A similar procedure exists in the District Court under section 15 *Enforcement of Court Orders Act 1926* and Ord. 53 r.3 *District Court Rules*, but in the case of the District Court this examination operates as part of the instalment order procedure only, and is only available where the debtor is a natural person.

¹²⁶ Ord. 36 r.7 states that this examination procedure is available "if any difficulty arise in or about the execution or enforcement of any judgment or order *other than a judgment or order for the recovery or payment of money...*" Similarly, the case of *Aerospan Board Centre (Dublin) Ltd. v Dean Furniture Ltd.* [1989] 7 ILT 79 appears to state that the procedure is not available in the Circuit Court in respect of a judgment for the payment of money: see Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 50.

¹²⁷ See Glanville *op cit.* at 50-1, discussing *J. Lennon Sparkes v Maher* [1953-54] Ir. Jur. Rep. 2.

¹²⁸ Glanville *op cit.*, citing the case of *Butterly v Cumming* [1898] 1 IR 196.

¹²⁹ Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 53. The examination may be rigorous, and resembles a cross-examination: see *Patterson v Doyle* 4 LR Ir 33.

¹³⁰ Ord. 42 r. 38 RSC.

¹³¹ Glanville *op cit.* at 53.

¹³² *Courts Service Annual Report 2007* (Courts Service 2008) at 92.

(ii) Information-gathering mechanisms: comparative analysis

6.79 The European Commission's comparative study of European enforcement systems noted that the methods of obtaining information in European countries can be categorised into two main mechanisms.

(I) Debtor declarations

6.80 The first approach involves the making of a declaration by the debtor of his or her means. This is the approach which exists in Ireland under the "discovery in aid of execution" procedure described above. The debtor's declaration can either include an identification of all of the debtor's assets – as in Ireland – or may be limited to assets the value of which is sufficient to satisfy the judgment.¹³³ The form of the declaration may also vary from a response by the debtor to an examination of a debtor's means through an oral hearing,¹³⁴ or merely through the filling out by the debtor of certain mandatory forms.¹³⁵ The debtor declaration system of obtaining information is obviously limited by the extent to which the debtor cooperates in the process.¹³⁶ As noted above,¹³⁷ the level of participation in enforcement proceedings among debtors is very low, and this means that any method of obtaining information which relies on debtor cooperation will have limited success. This flaw in the instalment order procedure has been highlighted above.¹³⁸ All national enforcement systems which use a debtor declaration as a means of obtaining information concerning the debtor's means impose sanctions on debtors who do not cooperate with the procedure. In Ireland, a debtor who fails to comply with a court examination may be imprisoned for contempt of court, and in most European jurisdictions which operate the debtor declaration system a debtor may be imprisoned for non-compliance, while the making of an incorrect or false declaration will constitute a criminal offence.¹³⁹ In some countries such as Germany, a public record of debtors' declarations is maintained which means that the debtor's creditworthiness becomes a matter of public record.¹⁴⁰

6.81 There are reasons why the debtor declaration approach is not adopted in other countries. First, the debtor's declaration may be viewed in some countries as an undesirable form of "personal enforcement", backed by a threat of imprisonment, which is seen by some as inappropriate in civil proceedings.¹⁴¹ Secondly, the declaration procedure resembles the taking of evidence, which may be inappropriate in some systems where enforcement is separated from court procedures and is instead carried out by administrative bodies.¹⁴² This is a weaker objection, however, as a debtor declaration procedure is carried out by administrative enforcement officials in some systems where enforcement is separate from the court procedure.¹⁴³

¹³³ This is the situation in countries such as Portugal: see Hess *Study No. JAI/A3/2002/02 on making more efficient the enforcement of judicial decisions within the European Union* (European Commission 2004) at 35.

¹³⁴ As is the case in the Irish procedure described above.

¹³⁵ This is the situation in countries such as Austria, Germany, Spain and Sweden: see Hess *op cit.* at 35.

¹³⁶ See Hess *Study No. JAI/A3/2002/02 on making more efficient the enforcement of judicial decisions within the European Union* (European Commission 2004) at 37.

¹³⁷ See paragraphs 3.328 to 3.331 above. The issue of encouraging greater debtor participation will be discussed in more detail at paragraphs 6.143 to 6.178 below.

¹³⁸ See paragraph 3.338 above.

¹³⁹ Hess *op cit.* at 37.

¹⁴⁰ *Ibid.*

¹⁴¹ Hess *op cit.* at 38. See also *Key Principles for a New System of Enforcement in the Civil Courts* (Enforcement Review 2nd Consultation Paper, Lord Chancellor's Department 1999) at paragraph 3.2.

¹⁴² Hess *op cit.* at 38.

¹⁴³ Hess *op cit.* at 38.

6.82 The Enforcement of Judgments Office in Northern Ireland acquires information from a debtor declaration. As noted above, an examination of the debtor's means is an essential precondition to enforcement in Northern Ireland. The enforcement office initiates the enquiry, which in the majority of cases involves an enforcement official visiting the debtor's residence to interview the debtor and complete a questionnaire.¹⁴⁴ In the 35% of cases where this is not possible due to impracticalities or a lack of debtor cooperation, an examination of the debtor takes place at the enforcement office, with the attendance of the debtor compelled under pain of arrest if the debtor fails to appear.¹⁴⁵ The procedural rules provide that the examination is to be conducted in private¹⁴⁶ (although the creditor is permitted to attend to ask questions), but the Master of the EJO may take responsibility for the examination, in which case a Practice Direction specifies that it must be held in public.¹⁴⁷ Once the examination is completed, the creditor will be provided with a report enabling it to choose whether to proceed with enforcement and whether it should object to the provisional enforcement decision of the office. Another more basic method of obtaining information on the debtor's means in Northern Ireland is the comprehensive register of judgments maintained by the EJO, which is described in more detail below.¹⁴⁸

(II) *Data-sharing mechanisms*

6.83 The second approach to obtaining information about a debtor involves the use of databases and registers.¹⁴⁹ For example, in the Netherlands and Belgium, bailiffs are permitted to access information about the debtor's address and employment from social security records. In Austria and Spain the enforcement courts may request information about the debtor's employment from social insurance registers. The conditions governing access to registers vary considerably from country to country.¹⁵⁰ Issues of data protection and respect for the privacy of the debtor obviously arise when information registers are used to identify the means of a debtor, and different systems use different mechanisms to respect these rights.

6.84 As noted above, in Sweden the enforcement of judgments is carried out by a dedicated administrative authority.¹⁵¹ The Swedish enforcement authority possesses various means of obtaining information as part of these enquiries, including both debtor declarations and comprehensive access to information registers. For present purposes, it should be noted that the authority has wide access to public records and computer databases.¹⁵² The authority may consult tax records, social insurance records, registers of share-holding in public companies, and registers recording the ownership of cars, ships, weapons and real property. The Swedish system of judgment enforcement is generally regarded as being efficient, with approximately 75-80% of enforcement matters completed in less than three

¹⁴⁴ Rule 15 *Judgments Enforcement Rules (Northern Ireland) 1981* (SR 1981/147) (NI).

¹⁴⁵ Article 27 *Judgments Enforcement (Northern Ireland) Order 1981*.

¹⁴⁶ Rule 23(3) *Judgments Enforcement Rules (Northern Ireland) 1981* (SR 1981/147) (NI).

¹⁴⁷ Practice Direction of 27 September 2000. The Master conducts the examination in relation to certain classes of debtor where the Chief Enforcement Officer refers it to the Master.

¹⁴⁸ See paragraphs 6.187 to 6.193 below.

¹⁴⁹ See Hess *Study No. JAI/A3/2002/02 on making more efficient the enforcement of judicial decisions within the European Union* (European Commission 2004) at 39; Commission of the European Communities *Green Paper: Effective Enforcement of Judgments in the European Union: The Transparency of Debtors' Assets* (COM(2008) 128 final) at 4.

¹⁵⁰ Commission of the European Communities *Green Paper: Effective Enforcement of Judgments in the European Union: The Transparency of Debtors' Assets* (COM(2008) 128 final) at 4.

¹⁵¹ See Andersson and Fridén "Sweden" in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 229ff.

¹⁵² Andersson and Fridén *op cit*.

months, at a relatively low cost.¹⁵³ The methods of obtaining debtor information in this system, and in particular the far-reaching access to public records are considered to contribute to this efficiency.¹⁵⁴

6.85 The primary method of obtaining information on the debtor's means in the UK is through an examination of the debtor by the court which largely resembles the procedure in Ireland. This method of obtaining information on debtors' means has long been subject to widespread criticism, due to the fact that the information obtained through this procedure is often incomplete or inaccurate due to inadequate court questionnaires, lack of documentary evidence to verify the information provided, and a general reluctance of debtors to readily provide information.¹⁵⁵ In response to these criticisms and the conclusion that the courts should be given a more proactive role in obtaining information about debtors,¹⁵⁶ the UK government has proposed the introduction of a new court power called a Data Disclosure Order (DDO).¹⁵⁷ This would be a court procedure under which information to assist with the enforcement of judgments could be obtained from parties other than the debtor. It would only be available where the judgment debtor has failed to respond to a court judgment or enforcement order. It was envisaged that the DDO would primarily serve as an alternative to the committal procedure where a judgment debtor refuses to comply with an order to obtain information.¹⁵⁸ The order would be sent only to designated third parties, such as the Department of Social Security, the Inland Revenue and credit reference agencies on behalf of banks and building societies. Any information obtained from these orders would not be forwarded to the creditor or enforcement agent, but would be retained by the court so as to respect data protection legislation and the debtor's right to privacy. A notice would instead be sent to the creditor or enforcement agent indicating which enforcement options could be facilitated by the DDO should the creditor or enforcement agent wish to apply for them.¹⁵⁹ Warnings would be provided to the debtor in the summons and judgment form sent to him or her indicating that a failure to respond may result in the creditor applying for a DDO.¹⁶⁰ Those institutions who process information in the first place must notify individuals when obtaining information from them that should they fail to comply with a judgment debt, their information could be accessed by a DDO and used in enforcement proceedings.¹⁶¹ It appears that the proposed Data Disclosure Order mechanism has not yet been implemented into UK law.

6.86 In France, *huissiers* may request the public prosecutor ("Procureur de la République") to obtain information on a debtor for enforcement purposes.¹⁶² The requirement to go through the prosecutor is based on the need to respect the privacy of the debtor. This system of obtaining information has been criticised as unsuccessful due to the heavy workload of the department of the public prosecutor and the

¹⁵³ Andenas and Nazzini "Market Integration, the Harmonization Process, and Enforcement Practices in the EU Member States" in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 97.

¹⁵⁴ *Ibid.*

¹⁵⁵ Lord Chancellor's Department *Key Principles for a New System of Enforcement in the Civil Courts* (Enforcement Review 2nd Consultation Paper, 1999) at paragraph 2.4.

¹⁵⁶ *Ibid* at paragraph 2.6.

¹⁵⁷ See Lord Chancellor's Department *Effective Enforcement – Improved Methods for Recovery for Civil Court Debt and Commercial Rent and a Single Regulatory Regime for Warrant Enforcement Agents* (Cm5744 2003) at 55-68.

¹⁵⁸ *Effective Enforcement op cit.* at 58.

¹⁵⁹ *Ibid* at 61.

¹⁶⁰ *Effective Enforcement op cit.* at 62.

¹⁶¹ Lord Chancellor's Department *Effective Enforcement – Improved Methods for Recovery for Civil Court Debt and Commercial Rent and a Single Regulatory Regime for Warrant Enforcement Agents* (Cm5744 2003) at 62.

¹⁶² Andenas and Nazzini "Market Integration, the Harmonization Process, and Enforcement Practices in the EU Member States" in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 76.

significant expenditure of time and resources necessary to carry out investigations of a debtor's circumstances. The information obtained will often be outdated by the time it is supplied by the public prosecutor to the *huissier*. In response to these inefficiencies, private investigative organisations have emerged as an alternative source of information for creditors.

(iii) European Union Developments

6.87 The Commission of the European Communities has expressed concern that difficulties in cross-border debt recovery constitute an obstacle to the functioning of the Internal Market by stalling the free circulation of payment orders within the European Union.¹⁶³ The Commission has therefore conducted a consultation process on how the enforcement of judgments could be improved in the EU through increased transparency of the assets of debtors. In 2004, the Commission commissioned a study into the various enforcement systems in the 15 EU Member States at that time,¹⁶⁴ which in turn has been followed by a Green Paper¹⁶⁵ and a Report of the European Parliament.¹⁶⁶ Several policy recommendations as to how information on debtors' means could be more readily attained throughout the EU have emerged from these documents.¹⁶⁷

6.88 First, the drafting of a manual of European enforcement laws has been recommended to detail the various sources of information about a debtor's assets in each Member State. It was noted that this measure could however be expensive.¹⁶⁸ Secondly, it was recommended that the information available in public registers (such as the register of the Companies Registration Office in Ireland) should be increased and transferred to an electronic form. Increased access to population registers, tax, social insurance and police records for enforcement organs was also suggested as a potential reform measure, although it was noted that access to these resources would be influenced by national public policy and so would best be dealt with at a national level.¹⁶⁹ Concerns about debtor privacy were also emphasised in this regard.¹⁷⁰ The possibility of allowing creditors or enforcement organs to access credit history databases was also discussed, particularly with the aim of providing information about the debtor's bank account to aid its attachment.

6.89 A further recommendation was the introduction of an instrument called a "European Assets Declaration", under which a debtor could be required in certain circumstances to disclose his or her financial circumstances and any assets throughout the European Union.¹⁷¹ The declaration would take a standard form throughout the EU and minimum standards could be set so that the content of the declaration would be broadly similar in each Member State. It was intended that this declaration would

¹⁶³ European Commission *Effective Enforcement of Judgments in the European Union: The Transparency of Debtor Assets* (Green Paper COM(2008) 128 final 2008) at 1.

¹⁶⁴ Hess Study No. JAI/A3/2002/02 on making more efficient the enforcement of judicial decisions within the European Union (European Commission 2004).

¹⁶⁵ *Effective Enforcement of Judgments in the European Union: The Transparency of Debtor Assets op cit.*

¹⁶⁶ European Parliament *Report on the effective enforcement of judgments in the European Union: the transparency of debtors' assets* (2008/2233(INI)).

¹⁶⁷ Hess Study No. JAI/A3/2002/02 on making more efficient the enforcement of judicial decisions within the European Union (European Commission 2004) at 51.

¹⁶⁸ European Parliament *Report op cit.* at paragraph T.7.

¹⁶⁹ Hess Study No. JAI/A3/2002/02 on making more efficient the enforcement of judicial decisions within the European Union (European Commission 2004).at 53.

¹⁷⁰ European Parliament *Report on the effective enforcement of judgments in the European Union: the transparency of debtors' assets* (2008/2233(INI)) at paragraph T.6.

¹⁷¹ European Parliament *Report on the effective enforcement of judgments in the European Union: the transparency of debtors' assets* (2008/2233(INI)) at 54.

not replace national disclosure requirements, but rather compliment them. In this regard some doubt was expressed as to its utility.¹⁷²

6.90 Finally, a recommendation for an alternative model for the cross-border exchange of information based on the direct exchange of information between national enforcement organs has been proposed.¹⁷³ Where enforcement is court-based this could be achieved under the EC Evidence Regulation,¹⁷⁴ and where enforcement is carried out by a body other than a court an alternative system of direct requests of information between competent enforcement organs could be applied.¹⁷⁵ An alternative approach of information exchange modelled on the current system of cooperation between Member States in fiscal and social matters¹⁷⁶ could also be adopted. This system would be particularly appropriate where national systems provide enforcement organs with access to registers as a means of obtaining information concerning a debtor's assets. It was noted however that since not all Member States possess enforcement authorities, this proposal may not be successful.¹⁷⁷ Finally, the Parliament suggests that the introduction of a form of Community provisional measure could be considered. This instrument would allow a creditor to obtain, before judgment has been granted, an order requiring a debtor to disclose assets which may be available for enforcement and/or an order preserving assets of the debtor pending enforcement.¹⁷⁸

6.91 Overall, these policy documents are in favour of EC action to address the problem of a lack of creditor information, and propose that at least common minimum standards on the availability of information should be introduced so as to improve the transparency of information in Member States where this is a problem. The Law Reform Commission is conscious of the continued developments in the area of improving the transparency of debtors' financial circumstances at a European level, and will have regard to these developments in making final recommendations. The Commission will nonetheless propose some provisional recommendations in this area and invite submissions as to how Irish law could be modified to allow increased access to information about a debtor's means.

(iv) Conclusions on Debtor Information

6.92 Comparative studies of enforcement procedures in Europe have concluded that the primary factor determining the efficiency of enforcement procedures is the level of information about the debtor's financial situation available in a particular system.¹⁷⁹ It has been stated that best enforcement practice is achieved by specialised bodies who are dedicated to the enforcement of judgments and who are able to rely on publicly held up-to-date information about the debtor's assets or employment.¹⁸⁰ Systems relying

¹⁷² *Ibid* at paragraph T.15.

¹⁷³ Hess *op cit.* at 57.

¹⁷⁴ Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

¹⁷⁵ Hess Study No. JAI/A3/2002/02 on making more efficient the enforcement of judicial decisions within the European Union (European Commission 2004) at 58.

¹⁷⁶ See e.g. Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and customs duties.

¹⁷⁷ European Parliament Report on the effective enforcement of judgments in the European Union: the transparency of debtors' assets (2008/2233(INI)) at paragraph T.4.

¹⁷⁸ European Parliament Report on the effective enforcement of judgments in the European Union: the transparency of debtors' assets (2008/2233(INI)) at T.17ff.

¹⁷⁹ Correa Delcasso "Efficiency in the Methods of Enforcement of Judgments: Public v Private Systems" in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 50.

¹⁸⁰ Andenas and Nazzini "Market Integration, the Harmonization Process, and Enforcement Practices in the EU Member States" in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 98.

on debtor declarations such as the English and German regimes are considered to be inefficient as the examination or declaration procedure is cumbersome and non-compliance by the debtor makes the declaration difficult to enforce.¹⁸¹ The Swedish and Austrian models in contrast are regarded as efficient due to the access afforded to enforcement organs to publicly-held databases containing tax records or details of the debtor's employer.¹⁸² Thus best practice may involve having recourse to such databases which exist for purposes other than enforcement. This may involve amendments to data protection legislation however.¹⁸³

6.93 Various options thus exist for obtaining greater information on debtor's financial means. At a basic level, an improved comprehensive register of judgments could inform creditors of existing judgments against a debtor and so caution creditors against commencing enforcement proceedings at all. This register would also be available to judges or the proposed enforcement office when deciding whether or how to enforce a judgment debt, by making the enforcing officer aware of the debtor's existing judgment debts. Such a register may not be entirely successful and the experience from Northern Ireland shows that creditors have not tended to use the judgments register before commencing enforcement proceedings.¹⁸⁴ Measures could however be put in place to ensure that greater use is made of the judgments register to prevent multiple individual enforcement proceedings commencing against a debtor.

6.94 The debtor declaration system currently operating in Ireland could be improved and made more efficient. It has been noted above that the discovery in aid of execution procedure is very rarely used in the High Court and that the examination hearing procedure in the District Court in the vast majority of cases takes place in the absence of the debtor. Amendments could be made to this system by for example, compelling the debtor to appear for an examination under power of arrest. Alternatively, attempts could be made to improve debtors' voluntary participation in enforcement proceedings, as are discussed in later in this chapter.¹⁸⁵ The promotion of greater involvement from the MABS will be important in this regard.

6.95 As a further alternative, access to tax and social security records could be made available to the proposed enforcement office in cases where the debtor fails to provide information concerning his or her means to the body. Data could be distributed to the office from these databases in a centralised electronic manner. Due regard to data protection legislation and the debtor's constitutional and ECHR right to privacy would be necessary, and in this context it may be desirable that the enforcing creditor should not be given access to this information, but rather that it be held by the enforcing body. Similarly, to ensure that the interference with debtors' rights is limited to the minimum possible, access to this information may be restricted to certain circumstances such as where enforcement would otherwise be frustrated, and the use of such other methods of obtaining information may be reserved for circumstances where other means of obtaining information have proved unsuccessful.

6.96 The Commission believes that information should be obtained voluntarily from the debtor where possible, but acknowledges that other methods of data-sharing may be necessary as a last resort. The Commission invites submissions from stakeholders as to the best possible means of making available greater information concerning the debtor's financial circumstances so as to facilitate effective and proportionate enforcement.

6.97 *The Commission invites submissions concerning the most appropriate methods of obtaining information about a debtor's means in enforcement proceedings.*

¹⁸¹ *Ibid.*

¹⁸² Andenas and Nazzini "Market Integration, the Harmonization Process, and Enforcement Practices in the EU Member States" in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 98.

¹⁸³ See paragraphs 4.71 to 4.76 above.

¹⁸⁴ See Capper *The Enforcement of Judgments in Northern Ireland* (SLS Legal Publications (NI) 2004) at 42.

¹⁸⁵ See paragraphs 6.143 to 6.178 below.

(4) The Enforcement Procedure: Interaction of the Courts, Enforcement and Debt Settlement

6.98 A question which must be addressed is how the proposed enforcement office would interact with the courts system. A fundamental principle of this Consultation Paper is that most debt cases, and in particular consumer debt cases, should be resolved outside of the environment of the courts. This is reflected in the discussion of the non-judicial debt settlement scheme above, where the reasons for favouring the non-judicial resolution of debt issues over court proceedings have been discussed.¹⁸⁶ The same reasoning suggests that enforcement, as well as debt settlement, can be best carried out by a centralised non-judicial body. The courts system is designed for the adjudication of legal disputes and contains the procedures and safeguards necessary for this function. In enforcement cases there is no dispute as to the legal rights of the parties involved, as these have already been decided by the courts. For this reason debt enforcement proceedings have largely already become an administrative process, with court officers rather than judges issuing enforcement orders. For this reason it appears that there is no cause for enforcement, and in particular the enforcement of uncontested debt claims, to be carried out by the courts, which were not designed for processing large numbers of debt claims.

(a) Judicial v Executive Functions

6.99 The Commission now considers the relationship which could exist between the courts and the proposed enforcement office. Provisions of the Constitution of Ireland and the European Convention on Human Rights provide that certain functions must be exercised by the judicial branch of the State. The Irish Constitution provides in Article 34 that

“[j]ustice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.”

This statement is subject however to the qualification in Article 37.1 that

“[n]othing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature... by any person or body of persons duly authorised by law to exercise such functions and powers...”

The question then arises as to whether the transfer of enforcement functions from the courts to an administrative agency would risk violating either of these principles. Having regard to the case law discussed below, the Commission believes that the enforcement of court judgments is an executive function and so the transfer of enforcement functions to the proposed enforcement office would not conflict with these provisions.

6.100 The interpretation of the nature of enforcement powers provided by case law of the Irish courts supports this view. First, in *Deaton v Attorney General*, Kenny J of the High Court stated

“[t]he power of carrying a judgment into effect has never been one that the Courts in this country possessed as the execution of judgments has always been a function of the executive.”¹⁸⁷

6.101 This decision was followed by the High Court in the decision of *Deighan v Hearne*.¹⁸⁸ This case concerned a challenge to tax legislation under which an inspector of taxes’ assessment of tax due¹⁸⁹ could become final and conclusive if the defaulting taxpayer failed to object to the assessment,¹⁹⁰ allowing the Revenue Commissioners to enforce the assessment through execution against goods by the County Sheriff. The plaintiff argued that execution was an integral part of the administration of justice and so Article 34 was violated by the statutory provisions which allowed execution against the plaintiff’s goods

¹⁸⁶ See paragraphs 5.73 to 5.78 above.

¹⁸⁷ [1963] IR 170, 175.

¹⁸⁸ [1986] IR 603 (HC).

¹⁸⁹ Under section 184 *Income Tax Act 1967*.

¹⁹⁰ Section 416 *Income Tax Act 1967*.

without a court order for execution. Murphy J in the High Court rejected this argument, stating that it was not supported by authority and that it conflicted with well established usage. This decision was upheld on appeal by the Supreme Court.¹⁹¹

6.102 In *Orange v Revenue Commissioners*,¹⁹² the High Court held that the attachment by the Revenue Commissioners of a debt owed to a tax defaulter by a third party in a similar manner to a garnishee order did not constitute the exercise of a judicial function by the executive.¹⁹³ As the tax claim of the Revenue Commissioners was an admitted liability, there was nothing for a court to determine. The fact that a court order is needed in garnishee proceedings was held to be irrelevant, and to be attributable to the history of the procedure and the fact that a court is seised of proceedings already from the pre-judgment stage. If the third party who was alleged to owe a debt to the debtor or defaulter in question disputed the existence of this debt, court proceedings would however be necessary to resolve the dispute. Where the third party however admitted the debt and agreed to pay it to the Revenue Commissioners under statutory authority, no justiciable controversy arises and the matter can be addressed by an administrative organ.

6.103 These cases all suggest that the enforcement of judgments is not a judicial power, and that it is in contrast an executive function. In so far as the enforcement of judgments is seen as an executive function, the transfer of the supervision of enforcement from the courts to an executive agency would appear to correspond more closely with the principle of the separation of powers than the current position whereby the court retains the primary role in enforcement. This was a point previously made in criticism of the role of county registrars in the execution of judgments, where it was suggested that court officials should not participate in the executive action of enforcement.¹⁹⁴

6.104 A contrasting view has however been expressed which argues that Article 6 ECHR requires that if a decision is to be made as between which method of enforcement is to be adopted, this decision must be made by a judge rather than by a court official.¹⁹⁵ The exercise of evaluating and weighing evidence and applying discretion given by law is a function which Article 6 requires must be exercised by a judge.¹⁹⁶ If the making of a choice between the various available methods of enforcement, and even more so the choice as to whether or not a judgment is enforceable at all, are judicial functions, they may be “limited functions and powers of a judicial nature” so as to be exercisable by non-judicial bodies authorised by law under Article 37.1 of Constitution of Ireland. If however article 6 ECHR requires that only a judge may be given the power to exercise discretion as to how enforcement should or should not proceed, then the solution to these problems may be to appoint a judge to the enforcement authority and provide it with the status of a court.

6.105 The Commission realises that complex issues arise in relation to the overlap of judicial and executive functions under the proposed enforcement office. These issues will be reconsidered before the Commission makes final recommendations in its Report.

(b) ***Judgment v Enforcement***

6.106 Article 34 and 37.1 nonetheless place some limitations on the powers of the proposed enforcement agency. First, the actions of the office must be limited to the enforcement of judgments, and thus a court judgment must exist before a creditor can apply to the office for enforcement. As noted above, the right to have access to a court is protected by both by Article 40.1 of the Constitution of Ireland and Article 6 ECHR.¹⁹⁷ Under this right, a defendant, the debtor in debt claim proceedings, must have an opportunity to contest the claim advanced against him or her before the creditor can enforce the claim. It

¹⁹¹ [1990] 1 IR 499.

¹⁹² [1995] 1 IR 517.

¹⁹³ *Ibid* at 522.

¹⁹⁴ Law Reform Commission *Report On Debt Collection: (1) The Law Relating to Sheriffs* (LRC 27–1988) at 8.

¹⁹⁵ Jacob *The Legality of Debt Enforcement* (Justice Discussion Paper 2003) at 39.

¹⁹⁶ *Ibid* at 38.

¹⁹⁷ See paragraphs 2.07 to 2.14 above.

is only once this claim has been adjudicated and its validity affirmed by a court judgment that the State will make available its executive organs to enforce it.¹⁹⁸

6.107 This reasoning has led to the abolition of a procedure in Northern Ireland under which enforcement could commence without judgment in certain limited cases. A procedure for the enforcement of certain debts without a prior court judgment indicating that the debt is due exists under Northern Irish legislation.¹⁹⁹ The procedure is limited to the enforcement of certain debts, mostly those owing to various public bodies.²⁰⁰ This procedure was applied in cases where the debtor admitted, or was taken to have admitted, the debt in question. A Practice Direction of 2000²⁰¹ provides that no new cases are to be accepted under this procedure without a direction from the Master of the EJO because the procedure constitutes an infringement of the rights of debtors under Article 6 ECHR. This has been considered by commentators as being a correct interpretation of Article 6, and that this provision of the ECHR requires a judicial determination of whether a debt is due before enforcement can be commenced.²⁰² This reasoning would also seem to accord with the requirements of the Constitution of Ireland that justice be administered by courts.

6.108 It would thus appear that before enforcement can properly take place there must be a judicial determination of the amount of the debt owing and that a court judgment must be obtained. This means that a court judgment must be obtained in a debt claim before an enforcement application can be sent to the proposed enforcement office.

6.109 *The Commission provisionally recommends that the existence of an enforceable court judgment must be a necessary precondition for an application to the enforcement office in all cases.*

(c) ***Increasing the efficiency of the procedure for obtaining a court judgment***

(i) ***Complicated and cumbersome procedures***

6.110 With the above considerations in mind, the Commission believes that the goal of achieving increased efficiency in enforcement proceedings also necessitates the reform of the procedure for obtaining judgment in debt claims. The procedure for obtaining judgment has been criticised in the previous chapter.²⁰³ The documents required and the procedural steps to be followed before judgment may be awarded are considerably complex and cumbersome. Also, these requirements vary depending on whether proceedings are brought in the District, Circuit or High Courts.

6.111 The Commission believes that the procedure for obtaining judgment in uncontested personal debt claims must be streamlined. While the Commission firmly takes the view that everything possible should be attempted to resolve debt claims before legal proceedings are commenced, once a case reaches this stage it cannot be delayed merely due to inefficiency. Inefficiency and consumer protection must not be confused. Also, while the debtor must be given every chance to defend him or herself in cases where he or she chooses to do so, proceedings should not be unreasonably complicated and so delayed where the claim is uncontested. In this regard, the Commission will now discuss how the procedure for obtaining judgment in personal debt claims has been simplified in England and Wales.

¹⁹⁸ It is for this reason that the court in *Orange v The Revenue Commissioners* found that an attachment of the plaintiff's bank account could be effected without a court order because the plaintiff's liability to the Revenue Commissioners and the third party bank's liability to the plaintiff were admitted and not contested. As Geoghegan J noted, if a controversy arose between the third party and the Revenue Commissioners it would have to be determined by a court: [1995] 1 IR 517, 522.

¹⁹⁹ Part VII of *Judgments Enforcement (Northern Ireland) Order 1981*.

²⁰⁰ Rule 7(b) *Judgment Enforcement (Recovery of Admitted Debts) Rules (NI) 1985* (SR 1985/78).

²⁰¹ *Practice Direction No. 1 of 2000, the Human Rights Act 1998: Interim Directions*.

²⁰² Capper *The Enforcement of Judgments in Northern Ireland* (SLS Legal Publications (NI) 2004) at 166.

²⁰³ See paragraphs 3.328 to 3.326 above.

(ii) Comparative procedures: reforms in England and Wales

6.112 From April 1999, new “unified” rules for debt claims have been operating in England and Wales. These rules were introduced as part of the Lord Woolf reforms under the *Civil Procedure Act 1997*, a fundamental principle of which was that the rules for commencing proceedings should be simplified and should be identical for both the English High Court and County Courts.²⁰⁴ A single “claim form” is thus required to bring proceedings in these courts, the terminology of “summons” having been abolished by the reforms.

6.113 The Practice Direction on Protocols supporting the Civil Procedure Rules provides that parties should follow “a reasonable procedure... to avoid litigation” under pain of costs sanctions.²⁰⁵ This reasonable procedure “normally” includes sending a letter before commencing action. Once this has been done, creditors must request the court to issue a claim. This request is processed by the court and served on the debtor by the court, rather than by the creditor. The claim is deemed to be served 2 days after posting. The claim form must include “particulars of claim”, setting out such information as a statement of facts grounding the claim; a statement of truth verifying the claim; a form for the defendant to acknowledge service of the claim; and a form for the defendant to admit the claim.

6.114 Creditors must wait for 14 days before requesting judgment by default. Debtors have a number of options within this time. First, debtors can file a defence or if a defence cannot be prepared in time, debtors can file an acknowledgement of the claim within 14 days and subsequently file a defence within 28 days of service. Debtors retain the right to file a defence at any time before the creditor requests judgment by default.

6.115 The debtor may also admit the claim. Where the debtor admits the claim he or she will make an offer of part payment or payment by instalments, or request time to pay the amount due. The debtor must submit a statement of means for this purpose. The creditor can then accept or reject this offer. If the creditor accepts, it can request judgment in the terms offered. Where the creditor rejects the offer the case moves to the stage of “determination”, where a court officer²⁰⁶ will enter judgment for the amount owed but will determine an equitable payment rate based on the debtor’s means. Either party may apply for a re-determination of this issue before a judge within 14 days of service of the payment order. A debtor can apply to the County Court at any time to have the order varied, such as where the debtor’s income has significantly dropped. If the creditor does not respond to this application within 14 days, the variation is automatically granted. A court officer decides on the amount of the variation, and again this decision can be appealed to a judge.

6.116 If the debtor does not respond to the claim form at all within 14 days, or where the debtor’s admission contains no offer of payment, the creditor may request the court to enter judgment by default, in which case the creditor decides the terms of repayment. The creditor can seek payments by instalment or payment forthwith. Once a payment has been missed, the creditor may proceed to apply for the enforcement of the judgment.

6.117 The Free Legal Advice Centres have praised this procedure as engaging the debtor in the process to a much greater extent than the system in Ireland.²⁰⁷ The admission form and request for time to pay allow the debtor to make an offer and even if this offer is not accepted the court’s decision will be based on the debtor’s means. In Ireland, the failure to defend a claim removes the only opportunity for a debtor to be heard until the creditor applies for enforcement. The English procedure seems to grasp the fundamental reality of the debtor’s means of repaying, while in Ireland the judgment procedure makes no such allowances. The procedure also removes the need for a separate instalment order procedure, encompassing the payment by instalments into the judgment itself.

²⁰⁴ See Loughlin and Gerlis *Civil Procedure* (2nd ed. Cavendish Publishing Limited 2004) at 131.

²⁰⁵ Her Majesty’s Court Service *Practice Direction – Protocols* at paragraphs 4.1-4.10.

²⁰⁶ If the amount is less than £50,000. If the amount is more than this the determination must be made by a judge.

²⁰⁷ Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 71.

6.118 In addition to improved debtor participation, the English procedural rules also appear to be more modern and efficient than the dated Irish procedure. A new system for requesting a claim online known as Money Claim Online has been operating in recent years.²⁰⁸ This allows claims for a specified sum of money amounting to less than £100,000 to be made online. The claimant completes a claim form online and pays the court issue fee by credit or debit card. The defendant can respond to the claim in the same manner as above by filing forms at court or can file an acknowledgement of service, admission, defence or counterclaim online. Both parties can monitor the claim and the claimant can request judgment in default online.

6.119 A further recent innovation in England and Wales is the introduction of a Claim Production Centre and the County Court Bulk Centre which process County Court debt claims in bulk.²⁰⁹ These units were established to allow large creditors to issue large number of debt claims in bulk, and so to remove administrative and procedural work from local courts. The centres are based at Northampton County Court. Again this system is only open to those claiming a specified sum of money amounting to less than £100,000. A creditor must seek permission before issuing a claim through these centres, and claims are then issued through the centres in the name of Northampton County Court. Where a defence is filed, the centre serves a copy on the claimant who then has 28 days to consider its position before deciding to proceed. This process has led to 50% of defences being resolved informally without any need to proceed. Where the claimant wishes to proceed, proceedings are transferred to the debtor's local county court where the debtor is an individual. Judgments and execution warrants are also issued from the centres, with warrant requests sent automatically to the debtor's local court overnight. Creditors are offered reduced court fees for using these centres in place of local courts.

(iii) The Commission's proposals

6.120 It is necessarily difficult to conduct a comparative analysis of civil procedure rules due to the great differences existing between national systems. The Commission has however presented the reforms in England over the last two decades as an example of how a procedure similar to the one currently operating in Ireland can be streamlined. This model also shows how procedures can be made more reflective of the reality of debt enforcement proceedings, which are substantially different from the traditional adversarial disputes which are the primary focus of civil procedure rules.

6.121 The Commission believes that the procedure for obtaining judgment in debt collection cases can be streamlined considerably.

(i) A single procedure for commencing debt claims in all courts.

6.122 First, the procedure for commencing proceedings in personal debt cases should be simplified greatly, and a single procedure should be adopted in the District, Circuit and High Courts. This procedure should include an identical pre-trial procedure in each Court, with creditors obliged to comply with the proposed arrears management rules discussed above²¹⁰ and Pre-Litigation Notice requirements in advance of commencing proceedings. The contents of the proposed Pre-Litigation Notice are discussed below.²¹¹ Creditors would also have to indicate proof of compliance with these requirements. Once this has been shown, however, court officials would not be entitled to impose additional requirements at their discretion, as appears to be the current practice.

6.123 The civil summons, ordinary civil bill and summary summons should be replaced by a single Personal Debt Summons. Standard rules of service should be introduced for the service of this summons in the District, Circuit and High Courts. The Commission is however reluctant to reduce the requirements currently existing in relation to the service of proceedings as it believes the rules of service to be essential

²⁰⁸ See Loughlin and Gerlis *Civil Procedure* (2nd ed. Cavendish Publishing Limited 2004) at 137; See also: <https://www.moneyclaim.gov.uk/csmco2/index.jsp>

²⁰⁹ Loughlin and Gerlis *Civil Procedure* (2nd ed. Cavendish Publishing Limited 2004) at 137; see also <http://www.hmcourts-service.gov.uk/cms/cpc.htm>.

²¹⁰ See paragraphs 4.186 to 4.195 above.

²¹¹ See paragraphs 6.161 to 6.171 below.

to ensuring that the debtor has a fair chance to contest proceedings. The Commission is aware that work of the Courts Service is currently ongoing in relation to the reform of rules of service, and makes no provisional recommendation in relation to service.

(II) *Simplification of the documentation required to make a debt claim*

6.124 The number of forms required to be presented to the court to obtain judgment should also be harmonised and reduced. This will first be achieved by reducing the need for creditors to present a requisition for the issue of execution²¹² or a praecipe and an order of *fieri facias*²¹³ as these documents will be replaced by a single enforcement application form, as described below. Similarly, an affidavit of debt sworn by the creditor could be sufficient to prove the debt and an additional certificate of the plaintiff or solicitor indicating the amount due²¹⁴ may be unnecessary.

6.125 The above suggestions are means by which the Commission provisionally believes the procedure for obtaining judgment in debt claims could be streamlined. They are therefore tentative in nature and intended to provide a basis for discussion. The Commission invites submissions from interested parties on the feasibility of these proposed reforms and their ability to improve efficiency in debt collection proceedings. The Commission also invites submissions as to other ways in which the current procedure for obtaining judgment could be made more efficient.

6.126 *The Commission invites submissions as to the desirability of introducing the following reforms of the procedure for obtaining judgment in personal debt claims. These proposed reforms include:*

- *A single procedure for commencing debt claim proceedings in District, Circuit and High Courts.*
- *A harmonisation of the documents needed to make a debt claim in these three courts.*
- *A reduction in the documents needed to prove a debt claim: for example, an affidavit of debt could possibly suffice instead of also requiring a solicitor's certificate to be presented.*

The Commission also invites submissions as to further options which could be explored in improving the efficiency of current procedures.

(III) *Other methods of making the procedures more efficient*

6.127 The Commission also believes that a move to an electronic system of filing personal debt claims should be considered. The Commission acknowledges that the bulk production process in England and Wales appears to lower costs considerably and process uncontested debt claims efficiently. As long as the rights of debtors to defend claims and to have access to a court if desired are respected, the Commission believes that much could be gained in efficiency and in savings to public resources from reforms along these lines.

6.128 *The Commission invites submissions as to the desirability of introducing online claim applications and bulk claim processing procedures.*

(d) ***The interaction of debt settlement and enforcement: stays of enforcement for debt settlement***

The following subsection discusses how the proposed debt settlement and debt enforcement systems would interact. Four diagrams illustrating the various options in this regard are contained in an appendix to this chapter.

(i) ***Attempts to negotiate a voluntary debt management plan or statutory debt settlement as a precondition to enforcement***

6.129 As was noted in the section of this chapter discussing the proposed new debt settlement scheme, non-judicial debt settlement is to be promoted over court proceedings when dealing with cases of consumer debt. In the vast majority of consumer debt cases, default is caused by an inability to repay

²¹² In the Circuit Court: Order 36 rule 18 *Circuit Court Rules 2001*.

²¹³ In the High Court.

²¹⁴ Under Order 26 Rule 2 *Circuit Court Rules 2001*.

debts rather than an attempt to evade. Similarly, in most cases of debt difficulties the debtor has more than one creditor, and so a fair balance must be struck between the interests of all creditors rather than allowing one to enforce without regard to the legitimate interests of the others. Therefore the best solution in these cases may be to commence debt settlement procedures, or in less severe cases to seek to reach a voluntary arrangement with all creditors. It is thus desirable that enforcement may be stayed while attempts at alternative dispute resolution are made.

6.130 The view has been expressed that case law of the European Court of Human Rights suggests that such stays of enforcement are compliant with the protection of the creditors' rights.²¹⁵ Indeed, it has been argued that a disproportionate interference with debtors' rights may occur if enforcement is permitted without first attempting alternative dispute resolution (ADR) such as mediation.²¹⁶ The judicial staying of litigation for the purposes of ADR has been adopted in other countries,²¹⁷ and has been adopted in Irish legislation in other areas.²¹⁸ This issue of compulsory ADR has also been considered previously by the Commission²¹⁹ and the Commission's future report on Alternative Dispute Resolution will again discuss the issue. Therefore the policy of postponing enforcement while attempts at alternative solutions are explored appears to be both permissible and desirable. Various possible methods of achieving this goal will now be discussed.

6.131 The Commission provisionally recommends that before enforcement may be commenced, attempts at debt settlement or the negotiation of voluntary repayment arrangements must be made, in appropriate cases.

6.132 *The Commission provisionally recommends that in personal debt enforcement proceedings, attempts at negotiating a voluntary debt rescheduling arrangement or a statutory debt settlement should be mandatory preconditions for enforcement.*

(I) *Option 1: Staying court proceedings to allow statutory debt settlement/voluntary debt rescheduling to take place.*

6.133 It has been noted above that the judgment creditor's right of access to the courts and property rights require that the enforcement of court judgments must not be frustrated.²²⁰ These rights are not absolute however, and must be balanced with the rights of the debtor and with the public interest in addressing the problem of over-indebtedness. Also, it must be recognised that where a debtor has insufficient means to satisfy a judgment debt, the reality of the situation is that enforcement cannot succeed.

6.134 In this regard the Commission believes that a fair approach would be to require attempts to negotiate a voluntary debt management plan or a statutory debt settlement to take place before court proceedings to obtain judgment against the debtor can be commenced. The best means of achieving this goal may be to require creditors to demonstrate that they had attempted to reach such an arrangement before they would be permitted to begin court proceedings.

²¹⁵ Jacob *The Legality of Debt Enforcement* (Justice Discussion Paper 2003) at 35, citing the decision of *Nuutinen v Finland*, Application No. 32842/96, 27th June 2000.

²¹⁶ *Ibid.*

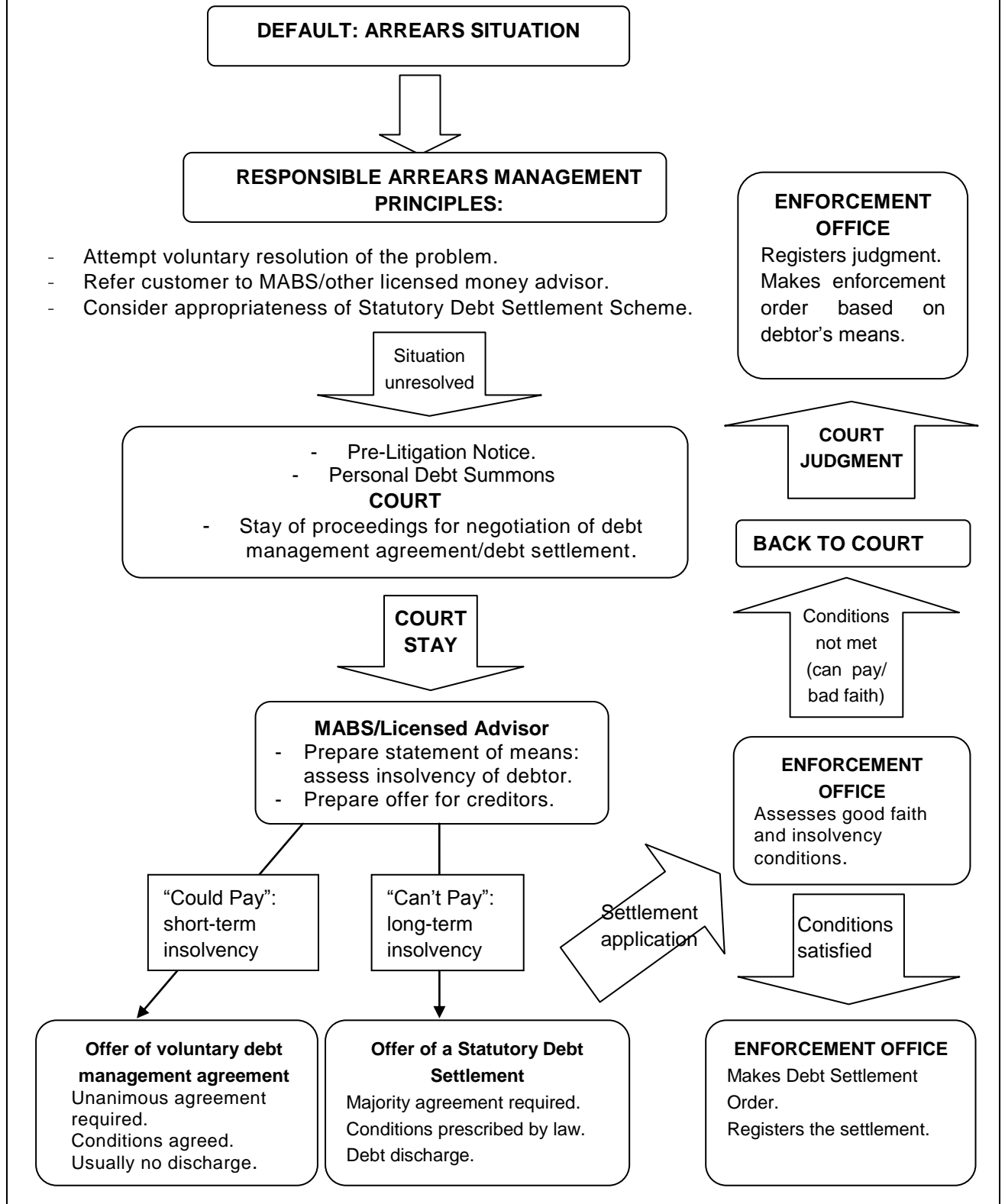
²¹⁷ See e.g. Article 214 of the Greek Civil Code, discussed in Sir Anthony Clarke "The Future of Civil Mediation" speech delivered at the *Second Civil Mediation Council National Conference 2008*, available online at: http://www.judiciary.gov.uk/docs/speeches/mr_mediation_conference_may08.pdf

²¹⁸ See section 15 *Civil Liability and Courts Act 2004* (No. 31 of 2004).

²¹⁹ *Consultation Paper: Alternative Dispute Resolution* (LRC CP 50-2008) at paragraphs 3.67 to 3.98.

²²⁰ See paragraphs 2.07 to 2.22 above.

OPTION 1: COURT PROCEEDINGS STAYED TO ALLOW NEGOTIATION OF DEBT SETTLEMENT/DEBT MANAGEMENT AGREEMENT TO TAKE PLACE



(II) *Option 2: Allowing a creditor to obtain a court judgment to establish priority, but staying enforcement to allow debt settlement/rescheduling to take place*

6.135 An alternative approach could be to permit creditors to obtain a court judgment, but to stay enforcement while the negotiation of a voluntary repayment plan or statutory debt settlement is attempted. This would allow the creditor to establish a position of priority in the event that enforcement is

ultimately considered appropriate, while delaying enforcement while other options are examined. Only after the proposed enforcement office has assessed the debtor's means and ability to make repayments, and has verified that the case is inappropriate for debt settlement or voluntary debt rescheduling, would enforcement proceed.

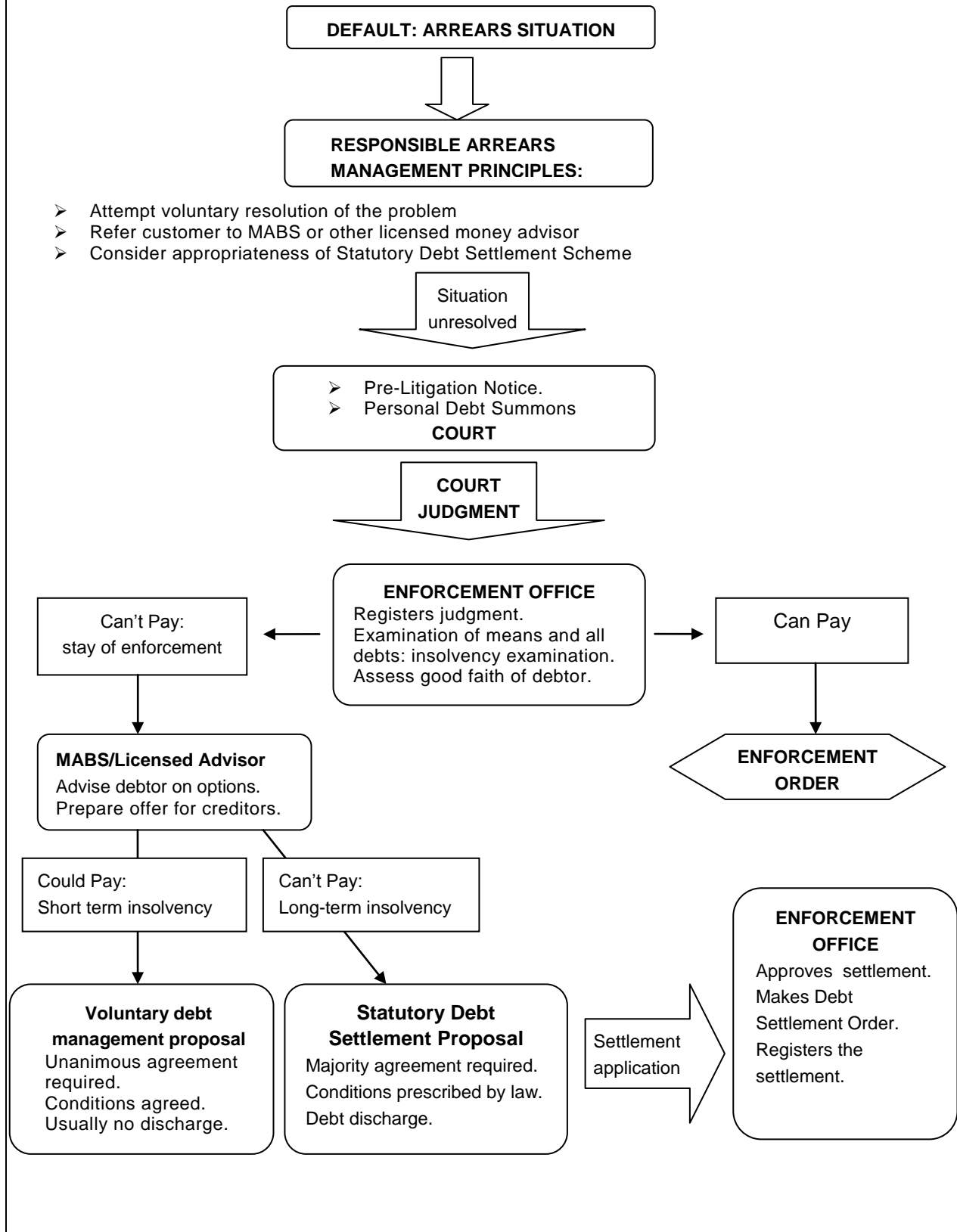
6.136 The Commission believes that the procedure could operate as follows. Where the creditor in a consumer debt case has obtained a judgment and applies to the enforcement office for enforcement, the office will enquire into the debtor's means. The office will then assess whether enforcement (if the debtor has the means to pay the debt) or a debt management plan (for temporarily insolvent good faith debtors) or debt settlement (for permanently insolvent good faith debtors).

6.137 This would be similar to the procedure to the issuing of "certificates of unenforceability" by the Enforcement of Judgments Office in Northern Ireland,²²¹ and also to the administrative Debt Relief Orders made by the office of the Official Receiver in England and Wales.²²² While the Commission has expressed the view that the staying of proceedings by a court for the purposes of facilitating ADR would appear to be compatible with the Irish Constitution and the ECHR, the Commission recognises that the staying of the enforcement of a judicial decision by an administrative agency may conflict with the Constitutional protection of the principle of the separation of powers. This is a complex issue to which the Commission will return in its Report. A possible solution would be for the judgments obtained in personal debt claims to indicate that their enforcement is subject to the availability of resources on the part of the judgment debtor. An alternative method may be to provide debtors and creditors with the power to challenge in court any decision of the enforcement office.

²²¹ See Capper *The Enforcement of Judgments in Northern Ireland* (SLS Legal Publications (NI) 2004) at 71-75.

²²² See paragraphs 5.30 to 5.31 above.

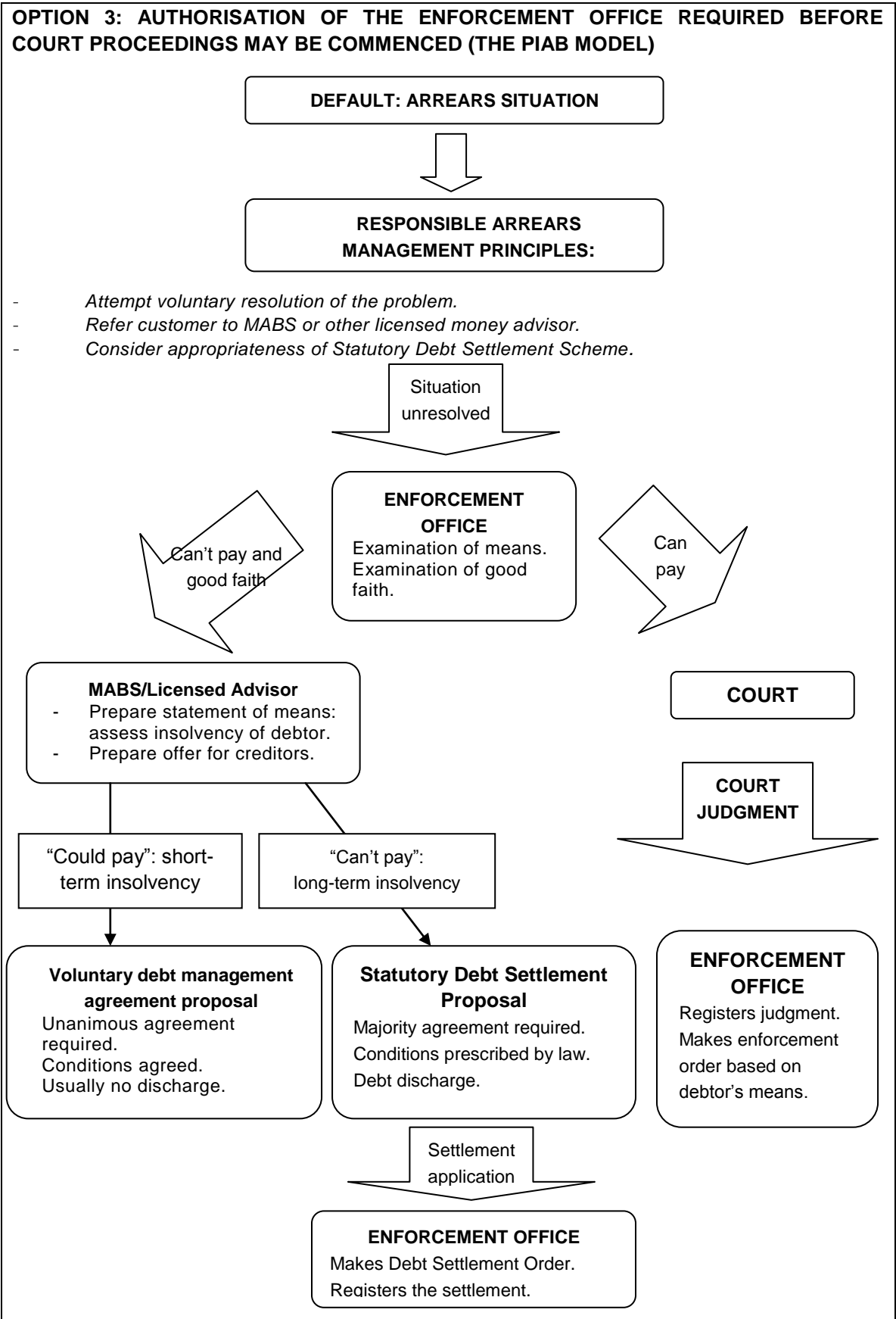
OPTION 2: JUDGMENT OBTAINED BUT ENFORCEMENT STAYED TO ALLOW DEBT SETTLEMENT/DEBT MANAGEMENT AGREEMENT NEGOTIATIONS TO TAKE PLACE



(III) Option 3: Prior authorisation of the enforcement office before court proceedings may be commenced

6.138 A further alternative approach would involve a situation analogous to the procedure under the *Personal Injuries Assessment Board Act 2003*. This would involve introducing a requirement that a

creditor first seek the permission of the enforcement office before court proceedings may begin. After examining the debtor's means, the enforcement office could then decide whether a debt management plan, debt settlement or enforcement proceedings were appropriate, and could postpone judicial proceedings while attempts were made to reach a settlement.



(IV) *Debt settlement at the debtor's initiative*

6.139 An alternative route to the statutory debt settlement scheme could be through the debtor's initiative, whereby enforcement proceedings could be avoided entirely through the debtor's application for debt settlement. This is an important procedure and would mark a change to the view of insolvency law as a debtor's remedy rather than an enforcement method for creditors. The advantage of this approach is that it reflects the policy of early intervention whereby over-indebted individuals may obtain relief as early as possible. It is also a simpler procedure which avoids the need for court proceedings. For these reasons debtor participation in debt settlement is to be encouraged.

6.140 Disadvantages of this approach include its susceptibility to abuse by solvent "won't pay" debtors seeking to avail of debt settlement as a means of avoiding their obligations. Also, debt settlement is not appropriate for "could pay" debtors, who are more suited to voluntary debt management arrangements, without debt discharge. It is for this reason that the access criteria to the debt settlement scheme must be firmly applied when debtors apply for relief themselves. These concerns are however mitigated by the fact that debtor applications will usually involve the assistance of the MABS or other licensed money advisor, who will be in a position to recommend the appropriate course of action based on an assessment of the debtor's financial circumstances.

DEBTOR'S APPLICATION FOR DEBT SETTLEMENT/DEBT MANAGEMENT AGREEMENT

DEFAULT: ARREARS SITUATION

RESPONSIBLE ARREARS MANAGEMENT PRINCIPLES:

- Attempt voluntarily resolution of the problem.
- Refer customer to money advice.
- Consider appropriateness of Statutory Debt Settlement Scheme.

Debtor visits money advisor

MABS/Licensed Money Advisor

- Advise debtor on options.
- Prepare offer for creditors.
- Applies for stay pending negotiation.

Could Pay: short term

Can't Pay: Long term

Offer of voluntary debt management agreement

Unanimous agreement required.
Conditions agreed.
Usually no discharge.
Enforcement cannot be stayed?

Offer of a Statutory Debt Settlement

Majority agreement required.
Conditions prescribed by law.
Debt discharge.

Settlement Application

ENFORCEMENT OFFICE

Assesses application.

Conditions not met

Conditions met

Application rejected

ENFORCEMENT OFFICE

Settlement approved.
Settlement registered.
Court application to stay further

COURT

Application for enforcement relief while counselling/negotiation takes place.

OR

ENFORCEMENT OFFICE

Application for stay of enforcement while counselling/negotiation takes place

(ii) Alternative methods of encouraging voluntary debt management plans and statutory debt settlement over debt enforcement proceedings

6.141 In addition to the compulsory staying of enforcement proceedings pending attempts at debt settlement/rescheduling, other methods of encouraging non-judicial debt settlement and voluntary debt arrangements over judicial bankruptcy proceedings have been discussed in detail above.²²³ It should be considered whether such measures could also be appropriate in the context of debt enforcement proceedings, rather than judicial bankruptcy proceedings. These include making parties who fail to engage in non-judicial debt settlement liable for the costs of judicial bankruptcy or enforcement proceedings. While the Commission has expressed its provisional conclusion that mandatory attempts at the non-judicial resolution of debt disputes should be a precondition to judicial bankruptcy or enforcement proceedings, the Commission invites submissions as to the desirability of this approach, and as to alternative means of promoting the non-judicial resolution of debt disputes prior to legal enforcement.

6.142 *The Commission invites submissions as to the appropriate method of encouraging non-judicial debt settlement prior to court-based enforcement.*

(5) Debtor Participation

6.143 A major problem identified in relation to the current state of debt enforcement proceedings is the low level of participation from debtors in the legal process.²²⁴ Debtor participation is important to allow an accurate assessment of the debtor's means to be made so as to allow enforcement to be stayed if the debtor is unable to pay or to allow the most appropriate method of enforcement to be chosen if the debtor can pay.

6.144 The Commission acknowledges that the engagement of debtors with their creditors and their debt problems is largely a question of arrears management. The Commission notes that the current arrears management practices of lenders, such as the IFSRA *Code of Conduct on Mortgage Arrears 2009* and the voluntary *IBF-MABS Operational Protocol* establish practices and policies of debtor-creditor communication which should increase debtor participation in the debt recovery procedure at an early stage. The Commission's proposed Statutory Code of Practice on Arrears Management would also facilitate this aim. The following discussion thus centres on those cases which have reached the stage of statutory debt settlement or legal enforcement.

6.145 Various approaches to tackling the problem of debtor engagement have been considered in other countries. These are now discussed before the Commission examines options for reform in this area.

(a) Research Projects in England and Wales

6.146 In 2005, a pilot programme began in England and Wales which sought to explore the reasons for low levels of debtor engagement and to assess the impact of providing debtors with a document called a Pre-Action Notice (PAN) before the commencement of court proceedings.²²⁵ The form of the notice and the methodology used in the pilot were based on previous research on the understanding of debtor behaviour which can be drawn from the findings of behavioural economics.²²⁶ Under the pilot programme, debtors were sent a notice as a final action by creditors before commencing court proceedings. The notice presented three options for the debtor: to pay immediately; to contact the creditor to discuss rescheduling the debt; or to obtain free independent money advice from organisations

²²³ See paragraphs 5.84 to 5.89 above.

²²⁴ See paragraphs 3.328 to 3.331 above.

²²⁵ Lea, Mewse and Wrapson, *Study into Debtor Behaviour in Support of Pre-Action Notice (PAN) Pilot: Final Report* (Her Majesty's Court Service 2007). Available at: <http://www.justice.gov.uk/consultations/docs/cp2207-exec.pdf>

²²⁶ Summers, Read and Fylan *Literature in the Areas of Behavioural Economics and Psychology Relevant to the Understanding of an Individual's Propensity to Engage with their Creditors* (2005), available at: http://www.dca.gov.uk/review_debt_research.pdf

listed in the notice. Creditors were expected to delay enforcement where the debtor decided to seek money advice.

6.147 The PAN took two different forms, although the text content was the same in both. One version was sent by the County Court Bulk Centre and bore the letterhead of the courts, while the other was issued by the creditor directly to the debtor and contained the creditor's letterhead. As part of the study some of the participating creditors also sent their standard demand letters to compare the effectiveness of the PAN scheme with the normal practice.

6.148 The findings of the study were that the Pre-Action Notices had no overall effect on the levels of engagement with the creditor. The conclusion was drawn that the practice adopted by creditors participating in the survey already gave sufficient and appropriate warning of court action, at least to the same level as the Pre-Action Notice.²²⁷ Debtors interviewed had little memory of the PAN, a fact attributed to the high levels of correspondence from creditors received by debtors and the practice of some debtors not to open letters which appear to relate to their debts.

6.149 Despite these results, the study showed that warnings of court action were treated seriously by those debtors who open these communications.²²⁸ This did not always lead to a response however, as other factors influenced the tendency of debtors to respond, such as past and current debt experience, beliefs about court action, and beliefs about the ability to get out of debt. The most common response to the PAN of those who participated in interviews had been to contact their creditor. It was shown that those who have no financial resources at all were more likely to ignore warnings and accept court proceedings. These debtors believed they would be unable to negotiate any repayment arrangements with creditors and also held a belief that the court may treat them more sympathetically than creditors, especially as the court would consider their other debts.

6.150 Debtors showed a good understanding of the priority of debts and their priorities reflected those recommended by debt advice agencies.²²⁹ As regards debt advice, debtors were well aware of the work of the UK Citizens Advice Bureaux, but less well aware of other free advice agencies. Often debtors relied on advice from family and friends, while some used fee-charging money advisors. The main factor determining whether a debtor would seek advice was the extent of the debtor's financial problems: only when the situation was completely unmanageable would debtors seek advice.²³⁰

6.151 The ultimate conclusion of the study was that the Pre-Action Notice did not increase debtor engagement any more than the normal practices of those creditors participating in the study. Neither did the notice increase the probability of the debtor seeking money advice. The study therefore did not recommend that the PAN be made mandatory, but instead proposed two other proposals for increasing debtor engagement. First, creditors must respond as soon as they observe changes in debtor behaviour in relation to bill repayment, such when payments are missed or paid late.²³¹ Creditors should offer alternative repayment methods such as payments each month instead of once every three months or deductions from income. Secondly, the study concluded that the entirety of a debtor's obligations should be considered, both when the debtor is receiving money advice and when the debtor is seeking to reach a settlement with creditors.²³²

²²⁷ Lea, Mewse and Wrapson, *Study into Debtor Behaviour in Support of Pre-Action Notice (PAN) Pilot: Final Report* (Her Majesty's Court Service 2007) at 2.

²²⁸ Lea, Mewse and Wrapson, *Study into Debtor Behaviour in Support of Pre-Action Notice (PAN) Pilot: Final Report* (Her Majesty's Court Service 2007) at 2.

²²⁹ *Ibid* at 3.

²³⁰ Lea, Mewse and Wrapson *op cit.* at 4.

²³¹ Lea, Mewse and Wrapson *op cit.* at 4.

²³² Lea, Mewse and Wrapson, *Study into Debtor Behaviour in Support of Pre-Action Notice (PAN) Pilot: Final Report* (Her Majesty's Court Service 2007) at 5.

6.152 After this study had concluded, the Ministry of Justice carried out a consultation process to assess how the problem of debtor participation and engagement in the process could be addressed.²³³ Parties to the consultation included advice agencies, creditor representative bodies, utility service providers and institutional lenders. The Ministry of Justice consultation thus presented several options for addressing this issue. These included the introduction of a debtor protocol, which would lead to cost penalties for debtors who do not engage in the process. This was rejected as it was thought it would penalise the most vulnerable debtors who had most difficulty in coping with their debts, and as it would have little practical effect where debtors could not afford to pay the penalties. Also, respondents rejected the possible introduction of a streamlined process for obtaining judgment for those creditors who demonstrated that they followed specified pre-action steps to attempt to resolve the issue out of court. This procedure would have allowed creditors who could demonstrate unsuccessful prior attempts to reach a settlement to apply directly for a court judgment without being obliged to first enter a claim and wait for the debtor to respond. This possibility was rejected by respondents as it was felt it would disproportionately affect those debtors who are hardest to reach because they are least able to deal with their debts.

6.153 The option which received most support was to strengthen the relevant Civil Procedure Rules to require the sending of a pre-action letter including specified details of advice providers and the financial consequences of litigation. 88% of respondents agreed that the civil procedure rules should oblige claimants to issue a pre-action letter in all debt claims.²³⁴ This letter would differ from the PAN as it would be issued by the creditor, rather than by the court. Money advisors noted that most creditors already send such letters, but that some do not and so a mandatory requirement to send such a letter should be imposed.²³⁵ A small majority of respondents believed that all of the contents of this letter should be prescribed by law, while all believed that at least the minimum content should be specified by law. The problem of “information overload”²³⁶ and the fact that a letter may not be read if it is too long was noted, a finding which reflected the comments of money advisors and the results of the PAN study described above.²³⁷ Others believed that the content of the letter should be varied to the specific circumstances of the debtor in question, and should highlight the benefits of debt advice rather than just warning of the negative consequences of court action.²³⁸

6.154 The conclusions drawn from this consultation were therefore that:

- i) Creditors should be obliged to issue a letter before commencing legal proceedings indicating prescribed information about how debts could be paid and about available debt advice.
- ii) Creditors should allow sufficient time for advice to be obtained where appropriate, and costs sanctions should be imposed where creditors did not do this.
- iii) Confirmations of pre-action behaviour should be included in the particulars of claim.

It has been noted above that section 54 of the *Consumer Credit Act 1995* currently obliges certain information to be provided in a letter to a consumer debtor before court proceedings commence. Despite this, the information provided is not as detailed as the proposed requirements discussed in this consultation and so reforms could be made in this regard, as is discussed below.

²³³ Ministry of Justice *The Debt Claim Process: Helping People in Debt to Engage with the Problem* (Consultation Paper CP 22/07); Ministry of Justice *The Debt Claim Process: Helping People in Debt to Engage with the Problem* (Response to Consultation CP(R) 22/07).

²³⁴ Ministry of Justice *The Debt Claim Process: Helping People in Debt to Engage with the Problem* (Response to Consultation CP(R) 22/07) at paragraph 21.

²³⁵ *Ibid* at paragraph 26.

²³⁶ See paragraph 3.42 above.

²³⁷ Ministry of Justice *The Debt Claim Process: Helping People in Debt to Engage with the Problem* (Response to Consultation CP(R) 22/07) at paragraphs 32-33.

²³⁸ *Ibid* at paragraph 38.

(b) **Scotland**

6.155 Under the *Debtors (Scotland) Act 1987*, debtors were provided with a range of legal rights in debt proceedings. A 2001 report published by the Scottish Executive in however noted that in practice many debtors were unaware of these rights.²³⁹ This report concluded that information relating to debtors' rights should be available widely long before court proceedings begin. To achieve this aim, it was suggested that better access should be provided to money advice for debtors, with telephone access to advice to be particularly promoted. In addition, the report criticised the archaic language used in enforcement proceedings and that a reformed system should use plain language, in a format which debtors can readily understand.²⁴⁰ The report therefore recommended that an advice and information package should be provided to debtors at the beginning of the debt recovery process.²⁴¹ It was stated that this should provide information enabling debtors to understand the operation of the legal process and allow them to assess their options.

6.156 These recommendations have since been enacted into Scottish law. Legislation enacted in 2002 provides that execution against goods cannot take place until the creditor has provided the debtor with a debt advice and information package.²⁴² Similarly, a 2007 Act provides that an attachment of earnings shall not come into effect unless the creditor has provided the debtor with a debt advice and information package within 12 weeks of the date on which the attachment of earnings order is served.²⁴³

(c) **Recommendations of FLAC**

6.157 The Free Legal Advice Centres (FLAC) also proposed similar recommendations in its 2003 report on debt enforcement procedures.²⁴⁴ This report criticised the complicated nature of the Civil Summons (District Court) or Civil Bill (Circuit Court) documents which are currently served on debtors. The report thus indicated that if a formal legal document must be served on the debtor to initiate a claim, it should be accompanied by a booklet written in plain and easily understandable language explaining clearly the procedures involved in the legal process and the potential consequences and outcomes.²⁴⁵

6.158 A second FLAC report on this area in 2009 made further recommendations to improve access to information for defendants in debt cases.²⁴⁶ The findings of this FLAC report in relation to the low levels of debtor participation are discussed in Chapter 3 above.²⁴⁷ First, it was recommended that all court documents connected with debt and debt enforcement procedures should be simplified and written in clear understandable language.²⁴⁸ The various options available to the debtor should be clearly explained in these documents. In addition it was recommended that an explanatory booklet written in plain language and printed in a prominent font size should be sent by the creditor or its solicitor with the legal proceedings initiating the claim.²⁴⁹ This booklet should explain the nature and purposes of the proceedings and the potential consequences if the debtor does not respond. Contact details of the MABS

²³⁹ *Striking the Balance: A New Approach to Debt Management* (The Scottish Executive 2001) at 8.

²⁴⁰ *Striking the Balance: A New Approach to Debt Management* (The Scottish Executive 2001) at 9.

²⁴¹ *Ibid* at 19.

²⁴² Section 10(3) of the *Debt Arrangement and Attachment (Scotland) Act 2002*.

²⁴³ Section 201 of the *Bankruptcy and Diligence etc. (Scotland) Act 2007*.

²⁴⁴ See Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 113-4.

²⁴⁵ *Ibid* at 114.

²⁴⁶ Free Legal Advice Centres (FLAC) *To No One's Credit: The Debtor's Experience of Instalment and Committal Orders in the Irish Legal System* (FLAC 2009) at 142.

²⁴⁷ See paragraphs 3.328 to 3.331 above. The results of this study provided statistics on the low participation rates of debtors in enforcement proceedings, the lack of understanding of court procedures among debtors and debtor's lack of awareness of the availability of money advice services.

²⁴⁸ *To No One's Credit op cit.* at 143.

²⁴⁹ *Ibid*.

and civil legal aid services should be included in the booklet, as well as information explaining the role of these services. It was recommended that this booklet should also be published on the website of the Courts Service, and that it should be available in a number of different languages. Particular importance was placed on providing debtors with information on the options available to them, and especially of money advice. The effectiveness of money advice in resolving debt disputes and the failure of the current legal system to make debtors aware of the availability of such advice is discussed in Chapter 3 above.²⁵⁰ The report concluded that steps should be taken to increase awareness of money advice services for those experiencing debt difficulties. FLAC recommended that these steps should take two forms. First, the availability of money advice should be promoted and advertised nationally as a source of assistance for people suffering debt troubles.²⁵¹ This would serve the principle of early intervention and would facilitate the provision of assistance to debtors before they become over-indebted. Secondly, money advice should be promoted as an alternative to court proceedings in consumer debt cases.²⁵² To this end protocols should be established by bodies such as the Irish Financial Services Regulatory Authority, the Legal Aid Board and the Courts Service. FLAC also recommended that legally enforceable statutory codes should be introduced ensuring that those with debt arrears are referred for money advice at the earliest possible opportunity.²⁵³ It was suggested that such codes should also specify agreed procedures for cooperation between creditors and money advisors in resolving debt disputes. These recommendations were made alongside suggestions for training for members of the judiciary on over-indebtedness issues, and the continued supply of resources to the MABS.

6.159 The 2009 report also identified some other problems in relation to the early stages of the debt enforcement process. First, the study conducted by FLAC found that over half of the debtors surveyed had received draft summonses in advance of receiving the actual summonses commencing legal proceedings.²⁵⁴ The purposes of these draft summons was said to be to threaten legal proceedings in an attempt to induce payment from debtors. FLAC noted that the practice of serving draft summonses led to uncertainty among debtors as to whether or not legal proceedings were underway, and caused confusion and distress when further documents were served. FLAC therefore recommended that the practice of issuing draft summonses should be discontinued. If in the alternative such summonses continue to be used, they should at least make it very clear that the summons is a draft only and that legal action has not been commenced.

6.160 Another problem identified by FLAC was that 13 of the 38 debtors surveyed claimed not to have received notification of the fact that a judgment had been obtained against them.²⁵⁵ While Order 41 rule 8 of the *Rules of the Superior Courts* requires “every judgment or order made in any cause or matter requiring any person to do an act thereby ordered...” to be “served upon the person required to obey the same”, it appears that there is no other legal requirement on judgment creditors to serve the judgment debtor with notice of the judgment. FLAC recommends that creditors should be obliged to notify judgment debtors of the judgment. The debtor’s options should be outlined in the notice, and the potential enforcement measures which may be taken against the debtor in the event of non-compliance should also be stated. Information on assistance available to the debtor, such as money advice, should also be provided.

(d) ***The Commission’s Proposals***

6.161 As noted in Chapter 4, the Commission takes the view that consideration should be given to arrears management legislation with the aim of increasing the level of engagement between debtor and

²⁵⁰ See paragraph 3.330 above.

²⁵¹ *Free Legal Advice Centres (FLAC) To No One’s Credit: The Debtor’s Experience of Instalment and Committal Orders in the Irish Legal System* (FLAC 2009) at 145.

²⁵² *Ibid.*

²⁵³ *Free Legal Advice Centres (FLAC) To No One’s Credit: The Debtor’s Experience of Instalment and Committal Orders in the Irish Legal System* (FLAC 2009) at 146.

²⁵⁴ *Ibid* at 151.

²⁵⁵ *To No One’s Credit op cit.* at 151.

creditor, with the help of money advisors, at an early stage. The Commission recognises however that this may not always be the case, and so believes that further efforts to encourage debtor participation at the stage of legal proceedings are needed. The next paragraphs therefore propose several provisional recommendations for methods in which the law could be reformed to encourage greater participation of debtors in enforcement proceedings.

(i) The provision of information to consumer debtors in advance of court proceedings

6.162 The Commission believes that the consensus present in the above recommendations is that debtors should be provided with clear and simple information concerning the legal process, their legal rights, the methods of resolving the debt difficulty, and most importantly information relating to providers of assistance in the form of money advice. The Commission recognises that section 54 of the *Consumer Credit Act 1995* requires creditors to send debtors a letter providing certain information in advance of commencing legal proceedings, but the Commission believes that more information should be provided.

6.163 Section 54 of the *Consumer Credit Act 1995* requires that before a creditor commences proceedings to enforce an agreement covered by the Act, it must first issue to the borrower a default notice at least 10 days before the proposed legal action, outlining the following:

- details of the agreement sufficient to identify it;
- the name and address of the creditor or owner, as the case may be;
- the name and address of the consumer;
- the term of the agreement to be enforced; and
- a statement of the action it intends to take to enforce the term of the agreement, the manner and circumstances in which it intends to take such action and the date on or after which it intends to take such action.

6.164 The Commission thus recommends that certain additional information should be provided to debtors as part of a final warning letter before legal proceedings are commenced. This information should be presented in a user-friendly manner in a clear and comprehensible form, and should be expressed in plain language.

6.165 *The Commission provisionally recommends that before legal proceedings are commenced, creditors should be obliged to send debtors a pre-litigation notice providing the debtor with certain specified information, expressed in plain language.*

(ii) The content of the information provided to debtors in advance of court proceedings

6.166 In particular, information on ways the debtor can resolve the debt problem through an offer of part-payment or debt rescheduling should be provided. Information on how the debtor can access debt advice and lists of local advice providers should also be included. The benefits of engagement with the creditor and of seeking money advice should be notified to the debtor, and this may for example include notice of the debtor's possible eligibility for statutory debt settlement. The Commission is however also aware that the document received by the debtor should not contain too much information, as this would reduce the change of the information being understood. The Commission thus invites submissions from interested parties as to the contents of the information which is provided to debtors in advance of legal proceedings.

6.167 *The Commission invites submissions as to the contents of the information provided to debtors in the proposed pre-litigation notice.*

(iii) Should the contents of the information provided to debtors in advance of court proceedings be prescribed by law?

6.168 The Commission is also aware that the appropriate information to be provided to debtors may vary depending on the circumstances of individual cases. Despite this, there is some core information, such as details of money advice services, which must be included in all cases. The Commission therefore invites submissions as to whether the contents of the information to be provided should be prescribed by law, or whether an approach requiring certain minimum standards of information to be provided, while allowing some flexibility is to be preferred.

6.169 *The Commission invites submissions as to whether the contents of the information provided should be prescribed by law.*

(iv) Proof of compliance with the Pre-Litigation Notice rules as a precondition to court proceedings

6.170 The Commission believes that creditors seeking to commence legal proceedings should be obliged to demonstrate that they have sent the debtor the required information notice within a reasonable period in advance of proceedings. Mirroring the position in the *District Court Rules 1997* under which a plaintiff must indicate compliance with the terms of the *Consumer Credit Act 1995* in the civil summons used to commence a claim for the enforcement of an agreement covered by the Act,²⁵⁶ creditors should be obliged to prove compliance with the requirement of issuing the pre-litigation notice.

6.171 *The Commission provisionally recommends that creditors should be obliged to indicate compliance with the requirement of a pre-litigation notice in the relevant debt claim summons.*

(v) The practice of issuing draft summonses

6.172 The Commission accepts FLAC's argument that the issuing of draft summonses is potentially confusing for debtors. The Commission invites submissions as to the extent to which this practice currently exists. An aim of the introduction of an obligatory Pre-Litigation Notice is that it, together with the proposed arrears management code of practice, would regularise the pre-litigation actions of creditors, while still affording creditors some room to continue to use their individual arrears management techniques. In this sense it should replace the use of documents such as draft summonses.

6.173 *The Commission provisionally recommends that the current practice by creditors of sending draft summonses to debtors should be replaced by the issuing of the proposed Pre-Litigation Notice.*

(vi) Notifying judgment debtors of the award of judgment against them

6.174 The Commission accepts the recommendations of FLAC that all debtors should be notified of the award of a judgment against them. A requirement to serve the debtor with notice of a judgment should be expressly included in the respective rules of court.

6.175 *The Commission provisionally recommends that a requirement that a judgment creditor serves notice of the judgment given against a judgment debtor should be expressly included in rules of court.*

(e) Other means of encouraging debtor participation: avoiding a public examination of means

6.176 The Commission understands that other efforts may be necessary to make the legal enforcement process more accessible to debtors. In this regard, the examination of a debtor's means in public has been recognised by FLAC as a major obstacle to debtor participation.²⁵⁷ The Commission thus sees merit in the proposal for the examination of a debtor's means to be conducted in private. While the Commission recognises that objections have previously been made to this proposal on the grounds that it infringes the requirement of Article 34.1 of the Constitution of Ireland that justice be administered in public, the Commission has already expressed its view that the enforcement of judgments may be an executive rather than a judicial function.²⁵⁸ If this view is incorrect, the Commission notes that exceptions have been made to this rule under the *Courts (Supplemental Provisions) Act 1961* and various other legislative instruments, and that a similar exception could be introduced in relation to the examination of a debtor's means for the purposes of enforcement if necessary. It has been noted above that in Northern Ireland the examination of a debtor's means is usually in private, with creditors permitted to attend and ask questions to the debtor.

6.177 In addition to conducting an examination of means in private, efforts could be made to allow information relating to a debtor's means to be obtained otherwise than by court proceedings. In Northern Ireland, enforcement officers conduct interviews at debtors' residences to obtain this information. This is

²⁵⁶ See Order 40 Rule 1 *District Court Rules 1997*.

²⁵⁷ See Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 115.

²⁵⁸ See paragraphs 6.99 to 6.105 above.

an expensive but effective method of achieving debtor involvement. The information provided to debtors in the pre-litigation notice could also provide some limited advice on preparing a statement of means. The Commission thus recognises that various options exist for avoiding the intimidating situation for debtors of exposing his or her financial means in public. The Commission invites submissions as to how this situation could be best avoided so as to prevent debtors from being dissuaded from participating in the legal process.

6.178 *The Commission invites submissions as to how an examination of a debtor's means could be conducted otherwise than in public, in order to encourage debtors to be forthcoming in providing this information.*

(6) *Balanced and Proportionate Enforcement: How to Choose the Appropriate Method of Enforcement*

6.179 The principles of balanced and proportionate enforcement are identified as key to the reform of the Irish system of enforcement in Chapter 2.²⁵⁹ Enforcement mechanisms must be necessary and appropriate in a given case and should interfere with debtors' rights as little as possible. Also, the cost of enforcement and its effect on the parties involved should be proportionate to the debt owed. Under the current system, the creditor largely has full choice over the form of enforcement to be applied in a given case. This means that the most appropriate form of enforcement may not be chosen in every case, especially as creditors may not have access to sufficient information to allow an appropriate choice to be made.

6.180 A question then arises as to how this goal should be achieved. The Commission believes that greater access to information on debtor's assets is a fundamental step in achieving this aim, and that by itself greater information should facilitate the most appropriate method of enforcement to be adopted in each case. Despite this view, a question arises as to whether the choice as to which enforcement mechanism is to be used in a given case should remain with creditors, or whether it should be given to the new enforcement office.

6.181 Under the Northern Irish and Swedish models, this choice is given to the enforcement agency.²⁶⁰ This position has been very successful in Northern Ireland in reducing reliance on what was an ineffective mechanism of execution against goods, which has now fallen from the most widely-used method of enforcement to the fourth most widely-used. Similarly, in Sweden the enforcement agency chooses the method of enforcement to be deployed, giving priority to the method which are least expensive and which cause the least hardship to the debtor. These approaches appear to reflect the Commission's policies of reducing reliance on execution against goods and of ensuring the most appropriate, least restrictive and most proportionate method of enforcement is adopted in each case.²⁶¹ Reform proposals in New Brunswick also criticised automatic enforcement without considering the manner in which this should be done.²⁶² This report saw the removal of the choice of enforcement method from the creditor as essential to ensuring balance in enforcement between the legitimate interests of debtors and creditors.

6.182 In contrast, under other enforcement systems the choice of enforcement mechanism remains with the creditor. The Payne report on enforcement in England and Wales recommended that even in a system in which enforcement was centralised under an enforcement office, the method of enforcement should be chosen by the creditor.²⁶³ The rationale behind this view was that:²⁶⁴

²⁵⁹ See paragraphs 2.93 to 2.100 above.

²⁶⁰ See above paragraphs 6.05 and 6.09 (Northern Irish position) and 6.13 (Swedish position).

²⁶¹ See Capper "Taking Enforcement Seriously – Lessons from Northern Ireland" 2006 *CJQ* 485 at 495.

²⁶² New Brunswick Department of Justice, Law Reform Division, *Third Report of the Consumer Protection Project*, Vol. II, *Legal Remedies of the Unsecured Creditor after Judgment* (1976) at 223.

²⁶³ *Report of the Committee on the Enforcement of Judgment Debts* (Cmnd. 3909 1969) at paragraph 381.

²⁶⁴ *Ibid* at paragraph 380.

“...a private debt does not cease to be private by being transformed into a judgment debt. The use of judicial institutions to covert a claim for a debt or damages into a judgment debt does not impose a duty of collecting that debt upon the State. The creditor retains the initiative as to how he should proceed to enforce judgment.”

The Ontario Law Reform Commission relied on this reasoning in deciding that enforcement under its proposed centralised enforcement office should remain creditor-initiated.²⁶⁵ The Ontario Commission believed that balance between creditors and debtors could be better achieved by statutory enforcement exemptions rather than through administrative discretion.²⁶⁶ This report also was concerned about the delay and cost which an examination of means and a decision on the appropriate enforcement method would produce.²⁶⁷ In this regard it could be noted that this is not so much an objection to taking the choice of enforcement method away from creditors, but rather an objection to obtaining information on the debtor’s means and assets, which will inevitably lead to delays. The Commission has expressed its views above that access to information about a debtor’s means is an essential element of an effective enforcement system. Any delays which result should be justified by the higher returns for creditors and reduced hardship for debtors which increased information should bring.

6.183 It is important to note that more recent policy and reform documents have favoured greater creditor choice in enforcement. As part of the review of the enforcement of judgments in England and Wales what was then the Lord Chancellor’s Department conducted a consultation process which concluded that creditors should in general retain control of decisions about the method of enforcement.²⁶⁸ A large majority of respondents to the consultation were in favour of this conclusion.²⁶⁹ In contrast, lay litigants or litigants in person were in favour of a system whereby the method of enforcement was chosen by the enforcing body, as these litigants lack the knowledge to make an effective choice of enforcement method.²⁷⁰ While special procedures could be introduced for such judgment creditors, the conclusion reached was that creditors should retain control of the choice of enforcement method.

6.184 Similarly, more recent reform proposals in England and Wales which provide for methods of obtaining increased information about the assets of debtors retain creditor choice as to how enforcement is conducted. The proposed Data Disclosure Order has been described in detail above.²⁷¹ The proposed procedure would involve a compromise of sorts between the various approaches discussed above. It provides that a court may obtain information about the debtor’s means and use this information to inform creditors of the methods of enforcement which can be seen to be appropriate from this information. The ultimate decision as to which of these methods is used would however remain with the creditor.²⁷² If the Data Disclosure Order recovers no information enabling enforcement to proceed, enforcement will be discontinued. This would suggest that if information is recovered indicating that the debtor’s lack of means makes enforcement impossible, the option of continued enforcement will not be presented to the

²⁶⁵ Ontario Law Reform Commission *Report on the Enforcement of Judgment Debts and Related Matters* (Part 1, 1981) at 110-111.

²⁶⁶ *Ibid* at 113-114.

²⁶⁷ *Ibid* at 113.

²⁶⁸ *Key Principles for a New System of Enforcement in the Civil Courts* (Enforcement Review 2nd Consultation Paper, Lord Chancellor’s Department 1999).

²⁶⁹ Small numbers of respondents suggested variations on this position, such as a rule under which the enforcing body would inform the creditor of the best option, while leaving the final choice to the creditor: *Key Principles for a New System of Enforcement in the Civil Courts* (Enforcement Review 2nd Consultation Paper, Lord Chancellor’s Department 1999) at paragraph 4.3.

²⁷⁰ *Ibid* at paragraph 4.4.

²⁷¹ See paragraph 6.85 above.

²⁷² Lord Chancellor’s Department *Effective Enforcement – Improved Methods for Recovery for Civil Court Debt and Commercial Rent and a Single Regulatory Regime for Warrant Enforcement Agents* (Cm5744 2003) at 61-62.

creditor. Thus this approach adopts a compromise between the current Irish system under which the creditor may apply for any enforcement method(s), and the Northern Irish and Swedish systems, where the enforcing agency chooses the appropriate method.

6.185 The Commission believes that the aims of balanced and proportionate enforcement can best be achieved if a neutral body decides upon the most appropriate method of enforcement in a given case. The Commission however also recognises that creditors may wish to retain control over enforcement and that there are legitimate reasons supporting the retention of creditor choice. The Commission thus invites submissions as to whether the final decision on the method of enforcement to be applied in a given case should remain with the creditor or should instead lie with the proposed enforcement office.

6.186 *The Commission invites submissions as to whether the choice of the enforcement method to be applied in a given case should remain with the creditor or whether this choice should be the responsibility of the proposed enforcement office.*

(7) Register of Judgments

6.187 Chapter 3 notes that an advantage of a centralised enforcement system is that it would facilitate a register of judgments and enforcement proceedings which could be consulted by creditors before commencing enforcement.²⁷³ The register could avoid the present problem of multiple enforcement proceedings being brought against a single debtor, often when the debtor is unable to satisfy even one claim. This register would also facilitate responsible lending in a limited manner by allowing lenders to consult the register before issuing credit, although credit reporting systems play a much more important role in this process.²⁷⁴

6.188 The current system of registering judgments has been shown in Chapter 3 to be incomplete and subject to the voluntary registration of judgments by creditors. Reputational concerns may mean that certain creditors, particularly institutional lenders, may wish to avoid publicising the fact that they have brought court proceedings against a customer; often consumer debt judgments will not be registered. The registration of judgments is at present used as much as an indirect means of enforcing a judgment as an information-provision device, with creditors using the threat of registration of the judgment as a means of inducing debtors to pay the sums owed.

6.189 The introduction of a complete and comprehensive judgments register could reduce these problems to a certain extent. The obligatory registration of all judgments would eliminate gaps in the system, and provide an accessible means for creditors and the courts to assess the extent to which enforcement has already been attempted against the debtor. The effective operation of the proposed debt settlement scheme, and the stay on enforcement proceedings which it necessitates would also be greatly assisted by the existence of a single register of all enforcement proceedings which have been commenced against a debtor. A stay of enforcement and the commencement of debt settlement could then be indicated in the register in such cases.

6.190 There has been criticism of the existence of such “debtor’s registers” in some countries such as Germany. This criticism is based on the view that pressing the debtor to pay by threatening to publish a judgment is irreconcilable with the constitutional principles of proportionality and the protection of the debtor’s privacy.²⁷⁵ For this reason proposals have been made in Portugal to restrict access to a debtor’s register to enforcement agents.²⁷⁶ A similar approach under the proposed enforcement office-led system could be to restrict access to the register of judgments to the office. Alternatively, creditors with a

²⁷³ See paragraphs 3.365 to 3.366 above.

²⁷⁴ See the discussion of credit reporting as a means of facilitating responsible lending at paragraphs 4.41 to 4.97 above.

²⁷⁵ See Hess *Study No. JAI/A3/2002/02 on making more efficient the enforcement of judicial decisions within the European Union* (European Commission 2004) at 38; citing Gaul, “Grundüberlegungen zur Neukonzipierung und Verbesserung der Sachaufklärung in der Zwangsvollstreckung” [1995] 108 *Zeitschrift für Zivilprozess* 3.

²⁷⁶ Hess *op cit.* at 38.

legitimate interest in accessing the register, such as for enforcement purposes, could be allowed restricted access to the register via the enforcement office.

6.191 This is a legitimate concern, and must be given due consideration. Arguments to the contrary nonetheless exist. Article 34.1 of the Constitution of Ireland requires that justice is to be administered in public and Article 6 ECHR similarly provides that judgment shall be pronounced publicly. The view has been expressed that so long as the register of judgments is accurate this requirement should prevail over the debtor's right to privacy.²⁷⁷ Furthermore, debtors may benefit from creditor access to the register in that harassment via attempted enforcement could be avoided. Also, at the stage of enforcement a debtor's credit history would already indicate a debtor's poor creditworthiness, and it is questionable whether a register of judgments could significantly increase the intrusion into a debtor's privacy. Also, the introduction of a comprehensive credit register would remove the power of creditors to threaten registration as all judgments would automatically be registered, and so pressure could no longer be exerted on debtors in this way.

6.192 The Commission believes that there would be many advantages to the introduction of a comprehensive judgments register. The Commission understands nonetheless that this could involve a larger interference with the privacy rights of debtors than is currently the case, which may require regulation of access to this register. Thus while the Commission provisionally recommends that a comprehensive and mandatory register of judgments should be introduced, it invites submissions as to whether a comprehensive judgments register should be introduced, and how access to this register should be regulated.

6.193 *The Commission provisionally recommends that a comprehensive register of judgment debts should be introduced. The Commission invites submissions as to how access to this register should be controlled.*

C Individual Enforcement Mechanisms

6.194 The following section proposes provisional recommendations for the reform of individual enforcement mechanisms. The Commission wishes to reiterate the principle of proportionate and appropriate enforcement which is identified in Chapter 2 as being a fundamental principle informing the Commission's provisional recommendations throughout this Consultation Paper.²⁷⁸ This principle was also confirmed by the 2009 High Court judgment of *McCann v Judge of Monaghan District Court and Ors*²⁷⁹ Therefore when examining individual enforcement mechanisms it is important to recognise that the most appropriate and proportionate mechanism varies with the circumstances of an individual case, particularly the circumstances of the debtor. Therefore while the enforcement mechanisms are now presented approximately in the order of increasing severity, the circumstances of an individual's situation may dictate that this order will not be true in all cases.

(1) A Single Enforcement Application

6.195 The Commission believes that under the proposed new enforcement office system, the procedures for applying for enforcement should be simplified. A single procedure should exist for applications for all types of enforcement. Such an approach exists in Northern Ireland, and has been recommended by reform proposals in the Canadian Province of Alberta. These procedures are now briefly discussed.

6.196 As described above, in Northern Ireland the enforcement procedure begins when a judgment creditor lodges with the Enforcement of Judgments Office a notice of intent to apply for enforcement.²⁸⁰ After this notice has been launched with the office, the judgment debtor is given 10 days to pay the

²⁷⁷ See Jacob *The Legality of Debt Enforcement* (Justice Discussion Paper 2003) at 43.

²⁷⁸ See paragraphs 2.93 to 2.100 above.

²⁷⁹ [2009] IEHC 276 at 81-82.

²⁸⁰ Capper *The Enforcement of Judgments in Northern Ireland* (SLS Legal Publications (NI) 2004) at 42.

amount owed.²⁸¹ If payment is not made within this period, the judgment creditor may issue an application for enforcement. At present the application is submitted to the Enforcement of Judgments Office by post, although changes to allow applications to be sent electronically are being considered.²⁸² The creditor must include certain information with the application, such as a copy of the judgment and a certificate of costs endorsed by a taxing officer. A review of enforcement law in Northern Ireland recommended that creditors should be required to submit with their application any information they possess about the means and assets of the debtor.²⁸³ The review also suggested that creditors should propose a particular method of enforcement, although the final decision as to the method to be used would rest with the office. The office currently requests this information about the debtor's means from creditors on a voluntary basis.²⁸⁴ When an application for enforcement is received by the office it is then given a serial number, and multiple applications in respect of a single debtor are dealt with on a "first come, first served" basis. The enforcement office then conducts an examination of the debtor's means and decides on the appropriate method of enforcement. A provisional decision is first made, and if no objection is received the decision is confirmed.

6.197 The Alberta Law Reform Institute similarly recommended in a report in 1991 that all enforcement applications should be made through a single commencement document.²⁸⁵ The institute had originally proposed that enforcement should consist of a single remedy by which all real and personal property of the debtor would be "caught" and made available for enforcement. The institute changed this approach in recognition of the view that different enforcement mechanisms are needed in respect of different categories of assets, such as physical goods, bank accounts, future earnings etc. The idea of a single enforcement remedy therefore changed into a recommendation that a single procedure should exist for applying for enforcement, and that all enforcement activities, and not just execution against goods, should be carried out by the office of the sheriff rather than by the courts.²⁸⁶ It was proposed that a single document would suffice for applications for all enforcement methods. This document would be simple and would only include the court clerk's certification that judgment has been entered against the debtor and such particulars of that judgment as are required for enforcement, such as the names and addresses of the parties. The proposed Alberta procedure differed from that in Northern Ireland as the decision as to which method of enforcement should be used was to remain with the judgment creditor. Additional documents were also required for certain enforcement mechanisms, such as a sworn affidavit in the case of a garnishee order.

6.198 The Commission believes that enforcement proceedings could be greatly simplified by the introduction of a single application procedure. As described in Chapter 3 above, at present different procedural requirements exist when applying for different methods of enforcement. Procedural steps also vary depending on the level of court in which an application is made. The Commission believes that a single procedure should exist for applying for enforcement, and that a standard set of documents should be the only requirement for creditors to meet. To make the enforcement procedure more efficient, creditors should be obliged to provide any information they possess on the assets and means of the debtor, as well as their preferred method of enforcement. The enforcement office will nonetheless examine the debtor's means, and may make the final decision as to the method for enforcement. While other procedural steps may be required in certain circumstances, such as where a garnishee contests the existence of a debt to the judgment debtor, the Commission believes that the introduction of a single

²⁸¹ This delay provides the debtor with the opportunity to settle the dispute without becoming liable for the costs of enforcement and to avoid the further publication of the judgment. It also gives the debtor the opportunity to satisfy the creditor that he or she is unable to pay and that further enforcement steps would be futile.

²⁸² Capper *The Enforcement of Judgments in Northern Ireland* (SLS Legal Publications (NI) 2004) at 48.

²⁸³ See the "Hunter Report": *Report of the Joint Working Party on the Enforcement of Judgments, Orders and Decrees of the Courts in Northern Ireland* (1987) at paragraph 8.3.

²⁸⁴ Capper *op cit.* at 49.

²⁸⁵ *Enforcement of Money Judgments Volume 1* (Alberta Law Reform Institute Report No. 61, 1991) at 29, 36-38.

²⁸⁶ *Enforcement of Money Judgments Volume 1* (Alberta Law Reform Institute Report No. 61, 1991) at 29.

procedure and single set of documents for enforcement applications should bring simplicity and efficiency to the current complex variety of different procedures.

6.199 *The Commission provisionally recommends that enforcement proceedings should be commenced by a single application procedure, irrespective of the method of enforcement which is ultimately chosen.*

(2) Instalment Orders

(a) Importance of the instalment order procedure

6.200 General dissatisfaction exists in relation to the operation of the instalment order procedure at present, with the system not operating effectively for debtors or creditors. The most severe deficiencies in the procedure for the arrest and imprisonment of debtors for failing to comply with an instalment order were found to be unconstitutional in the Irish High Court decision of *McCann v Judge of Monaghan District Court and Ors.*²⁸⁷ These have now been replaced with a new procedure under the *Enforcement of Court Orders (Amendment) Act 2009.*²⁸⁸ Furthermore, many of the problems identified in the instalment order system and in the procedures for the arrest and imprisonment of debtors have been addressed by the proposed reforms to the overall system of debt enforcement discussed above.²⁸⁹ Nonetheless, some specific difficulties in this area remain to be addressed.

6.201 The Commission believes that the instalment order procedure remains a valuable and important method of debt enforcement, which can further the principles of appropriate and proportionate enforcement. The instalment order procedure is often more appropriate than other methods of enforcement, as while a debtor may not have non-exempt goods available for seizure, he or she will more often be able to repay a judgment debt by instalments. Furthermore, the principle of proportionality in enforcement, as affirmed in the *McCann* decision,²⁹⁰ requires that less restrictive enforcement methods must first be attempted before more coercive methods of enforcement may be used. As the instalment order system provides debtors with the chance to independently repay their obligations in a non-coercive manner, it is less restrictive of debtors' rights than other enforcement methods. The principle of proportionality requires that restrictions on the rights of debtors must also be necessary to achieve the legitimate aim of enforcing contractual obligations. Therefore, where more restrictive enforcement methods are unnecessary, they must not be used if the debt could be paid in a reasonable time by instalments.

6.202 For these reasons, the Commission believes that an important role remains for the instalment order procedure as the first method of enforcement to be used in personal debt cases. While the procedure will not always be the most appropriate or proportionate method of enforcement, the Commission believes that the general rule in personal debt enforcement proceedings should be that enforcement through the instalment order procedure must be first attempted, or at least considered and shown to be inappropriate, before other enforcement mechanisms may be used. The Commission believes that such a rule is necessary to conform to the principle of proportionate enforcement. The Commission nonetheless acknowledges that creditors should be permitted to have recourse to other methods of enforcement where it can be shown that the instalment order procedure would be inappropriate or ineffective due to the exceptional circumstances of the case. This could occur for example if information was already available identifying non-exempt assets of the debtor which were readily capable of seizure. Also, suspended enforcement orders could be used in conjunction with instalment orders, so that if the debtor fails to comply with an instalment order, other enforcement mechanisms such as attachment of earnings, garnishee orders or execution against the debtor's goods

²⁸⁷ [2009] IEHC 276.

²⁸⁸ See paragraphs 3.290 to 3.294 above.

²⁸⁹ See paragraphs 6.36 to 6.193 above.

²⁹⁰ [2009] IEHC 276. See in particular pages 81-87 of the judgment of Laffoy J. While the discussion of proportionality in enforcement is restricted in this judgment to assessing the proportionality of restrictions on the debtor's right to liberty, the principle applies equally when enforcement procedures infringe other rights of the debtor.

could automatically come into effect. The Commission however wishes to emphasise that the appropriate method of enforcement varies with the circumstances of each individual case and the assets of the individual debtor. Therefore the Commission believes that while instalment orders are to be favoured where they are the least restrictive method of enforcement, the law should not be overly rigid and the most appropriate enforcement mechanism should be assessed in each case.

6.203 *The Commission provisionally recommends that, subject to appropriate exceptions, enforcement through an instalment order must first be attempted, or at least considered, before other enforcement mechanisms may be used. The Commission provisionally recommends that an exception to this rule should exist where enforcement by instalment order is inappropriate, and the Commission invites submissions as to the circumstances in which this exception should apply. The Commission also recommends that suspended execution orders against goods, garnishee orders and attachment of earnings orders should be capable of being used in conjunction with instalment orders; and that these suspended orders could come into effect automatically in the case of a failure to comply with an instalment order.*

6.204 The Commission recognises that different considerations apply in relation to enforcement against legal persons such as companies than those which apply in enforcement against individual persons. The instalment order procedure is not currently available in enforcement proceedings against legal persons, and enforcement by the attachment of earnings would also be unavailable in such cases. Therefore different approaches must be adopted to ensure appropriate and proportionate enforcement against legal persons, and the above rule affording priority to enforcement by instalment orders should not apply.

(b) ***Problems and recommendations for reform***

6.205 Reports published by the Free Legal Advice Centre in both 2003²⁹¹ and 2009²⁹² have been strongly critical of the instalment order and committal procedures under the *Enforcement of Court Orders Acts 1926 and 1940*. These reports highlighted a number of failings of the current law, and made several recommendations for change, which will now be discussed.

(i) ***Criticisms of the general system of enforcement***

6.206 The 2003 FLAC report *An End Based on Means?* made several criticisms of the general system of debt enforcement in Ireland, and many of the recommendations for reform of this system have been discussed above. Thus recommendations for the introduction of an enforcement office²⁹³ and a comprehensive credit register have been considered above.²⁹⁴ Similarly, recommendations to increase debtor participation in enforcement proceedings through providing debtors with readily understandable documentation and information in advance of enforcement proceedings have been discussed. This is in addition to a consideration of the introduction of a system facilitating the making of offers by debtors to creditors in uncontested debt claims and allowing for enforcement hearings to be heard otherwise than in public.²⁹⁵

(ii) ***Facilitating offers of instalments in uncontested claims***

6.207 With the aim of furthering the voluntary repayment of debts so far as is possible, the Commission believes that efforts should be made to encourage and facilitate the payment of judgment debts by instalment orders. As described above, in debt proceedings in England and Wales, the debtor is afforded the opportunity to admit the debt and make an offer of payment by instalments at the beginning

²⁹¹ Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003)

²⁹² Free Legal Advice Centres (FLAC) *To No One's Credit: The Debtor's Experience of Instalment and Committal Orders in the Irish Legal System* (FLAC 2009).

²⁹³ See paragraphs 6.36 to 6.49 above.

²⁹⁴ See paragraphs 4.80 to 4.97 above for a discussion of credit reporting and the debate surrounding the benefits of national credit registers.

²⁹⁵ See paragraphs 6.161 to 6.171 above.

of legal proceedings.²⁹⁶ If the offer is accepted by the creditor, it is approved by the court and effectively becomes an instalment order. If the creditor rejects the offer, the court will award judgment to the creditor and will determine an equitable rate of repayment, based on the debtor's means. The debtor is entitled to apply for a variation of the rate of repayment at any time.

6.208 Both the FLAC reports of 2003 and 2009 argued that a similar system should be adopted in Irish law.²⁹⁷ The current procedure for entering judgment for payment by instalments on consent was criticised for two main reasons. First, the procedure is under-used, most likely due to a lack of awareness among debtors of the availability of an option to consent to payment by instalments.²⁹⁸ Secondly, the use of the procedure appears to depend on the good will of the solicitor for the creditor, who must draft the consent form to accept an affordable instalment, and must file the relevant affidavits in the court office.²⁹⁹ FLAC recommended that the procedure should be reformed so that an instalment payment plan based on an agreement between creditor and debtor, reached with the assistance of a money advisor, could be made at this stage without the need for court proceedings. Any proposal should be based on verifiable and comprehensive information on the debtor's finances, so that an unrealistic instalment plan is not put in place. Where the debtor has multiple creditors, they should be informed that proposals to satisfy the debtor's obligations are being made and an instalment plan could be put in place to address all of these obligations.

6.209 The Commission supports the view that consensual arrangements to repay debts by instalment should be facilitated at the earliest possible stage of legal proceedings. The Commission therefore recommends that a procedure be put in place to enable the debtor and creditor to arrange an instalment plan in advance of obtaining judgment, rather than at the post-judgment stage in which instalment orders are currently made. The Commission recommends that debtors should be made aware of this facility, and that information relating to it should be included in the proposed Pre-Litigation Notice discussed above.³⁰⁰ The Commission invites submissions as to the best means of organising this instalment offer procedure.

6.210 The Commission provisionally recommends the introduction of a reformed procedure to enable debtors to make offers of payment by instalments on receipt of a summons for debt proceedings. The Commission invites submissions as to the detailed form this procedure should take.

(iii) No instalment order should be made without adequate information as to the debtor's means.

6.211 Both FLAC reports recommended that no instalment order should be made without an examination of the debtor's means.³⁰¹ This recommendation was designed to avoid the making of unrealistic and unaffordable orders which are likely to lead to default. The 2009 report found that in a significant majority of the 38 cases surveyed, no examination of means was carried out in advance of making an instalment order, nor were the debtor's financial details provided to the court.³⁰² It should be noted that while the reforms introduced by the *Enforcement of Court Orders (Amendment) Act 2009* have ensured that no order for the arrest and imprisonment of a debtor can be made without assessing the debtor's means (in the presence of the debtor) and deciding that the debtor is able to pay the relevant

²⁹⁶ See paragraphs 6.112 to 6.115 above.

²⁹⁷ Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 114; Free Legal Advice Centres (FLAC) *To No One's Credit: The Debtor's Experience of Instalment and Committal Orders in the Irish Legal System* (FLAC 2009) at 150.

²⁹⁸ *To No One's Credit op cit.* at 150.

²⁹⁹ *Ibid.*

³⁰⁰ See paragraph 6.162 to 6.171 above.

³⁰¹ Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 114; *To No One's Credit: The Debtor's Experience of Instalment and Committal Orders in the Irish Legal System* (FLAC 2009) at 152-153.

³⁰² *To No One's Credit op cit.* at 152.

instalment order,³⁰³ no such restriction is placed on the power to make an instalment order.³⁰⁴ The Commission supports the arguments of FLAC that it a waste of court time and creditors' resources, as well as a cause of unnecessary distress for debtors, to allow an instalment order to be made in the absence of information regarding a debtor's means. The requirement to make an accurate assessment of the debtor's means should exist where a court is making an instalment order, and not merely at the stage where the court decides whether an order for arrest and imprisonment may be granted. The Commission believes that this problem is caused by the general problem of accessing accurate information on the means and assets of debtors. The Commission believes that the recommendations it has made above in relation to this problem could address the practice of the making of instalment orders in the absence of information on a debtor's means.³⁰⁵

6.212 *The Commission provisionally recommends that an instalment order should not be made in the absence of accurate information about the debtor's means and ability to pay.*

(iv) The problem of multiple instalment orders

6.213 A related point raised by FLAC was that the lack of a comprehensive assessment of means before making an instalment order has led to situations where multiple instalment orders are made against debtors who may be finding it difficult to comply with even one order.³⁰⁶ Debtors can in this way find themselves repeatedly subject to legal proceedings. The report argued that the introduction of a centralised enforcement office and comprehensive judgments register would allow awareness of all legal proceedings commenced against a debtor, and so would avoid this problem. The Commission discusses in detail the possibility of introducing such measures above.³⁰⁷ In addition to these measures, FLAC recommended that multiple instalment orders should be capable of being consolidated into a single order, with creditors being paid on a *pro rata* basis.³⁰⁸ This would be similar to the consolidated attachment of earnings mechanism discussed above,³⁰⁹ or the administration order procedure in England and Wales.³¹⁰ While debt settlement may be more appropriate for those debtors who are multiply indebted, the Commission recognises that mechanisms must exist for certain "won't pay" debtors who owe multiple obligations. The Commission therefore believes that a consolidated instalment order may be useful, and the Commission invites submissions on this subject.

6.214 *The Commission invites submissions as to whether a consolidated instalment order mechanism should be introduced to allow multiple instalment orders to be paid through a series of single payments where appropriate.*

(v) Informing debtors of the right to vary an instalment order

6.215 The FLAC reports also argued that a debtor who is subject to an instalment order should be informed of his or her right to ask for a variation of the order if his or her ability to comply with the order

³⁰³ Sections 6(3) to 6(8) of the *Enforcement of Court Orders Act 1940*, as inserted by section 2 of the *Enforcement of Court Orders (Amendment) Act 2009*.

³⁰⁴ Under section 17 of the *Enforcement of Court Orders Act 1926*, a District Court judge may make an instalment order "[i]f the debtor fails to lodge a statement of means or fails to attend for examination in accordance with an examination order or refuses to submit himself to cross-examination by or on behalf of the creditor..." This section has not been amended by the 2009 Act.

³⁰⁵ See paragraphs 6.71 to 6.97 above.

³⁰⁶ Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 114; *To No One's Credit: The Debtor's Experience of Instalment and Committal Orders in the Irish Legal System* (FLAC 2009) at 158.

³⁰⁷ For a discussion of the possible introduction of an enforcement office, see paragraphs 6.36 to 6.49 above; for comprehensive judgments register, see paragraphs 6.187 to 6.193 above.

³⁰⁸ *To No One's Credit op cit.* at 158.

³⁰⁹ See paragraphs 6.322 to 6.326 above.

³¹⁰ See paragraphs 5.35 to 5.37 above.

changes, as many debtors are currently unaware of this right.³¹¹ It should be noted however that the court currently holds a power to vary the order of its own motion where appropriate. The 2009 reforms require the debtor to be expressly provided with certain information, such as his or her entitlement to free legal aid and the potential consequences of failing to comply with an instalment order, but no requirement exists to inform the debtor either in a summons or court hearing of the right to seek a variation of the instalment order. The Commission believes that debtors should be made aware of this right, and that the information to be provided to debtors, as discussed above,³¹² should include information relating to the debtor's right to seek a variation of an instalment order.

6.216 *The Commission provisionally recommends that debtors should be provided with clear and readily understandable information on their right to seek a variation of the instalment order where their ability to comply with the order changes.*

6.217 The FLAC report of 2009 also argues that debtors should be provided with information on the consequences of their failure to comply with an instalment order, on the possibility of seeking legal aid and money advice, and on the right of the debtor to appeal an order for arrest and imprisonment.³¹³ This information should be supplied at each stage of the enforcement process, so that the debtor is aware of his or her rights and the potential consequences at each procedural step. The Commission supports this policy of ensuring as far as possible that the debtor is made aware of his or her rights and that the procedures involved are explained in a readily understandable manner. The Commission has indicated above that specified information should be provided to debtors at the beginning of litigation, and in making its final recommendations on this subject in its Report, the Commission will consider the relevant information which should be provided to debtors at each stage of enforcement.

(vi) Legal aid and money advice

6.218 Finally, the FLAC report made recommendations in relation to the availability of legal aid and money advice to debtors during debt enforcement proceedings generally, and particularly in instalment order and imprisonment proceedings.³¹⁴ It was recommended that money advisors should be provided with McKenzie Friend status and should be given the power to provide assistance to debtors in legal proceedings. The testimony of money advisors as to the resources of a debtor should be admissible in debt proceedings. Also, debtors should be provided with legal advice automatically upon the receipt of legal proceedings, and should particularly be entitled to legal representation in imprisonment proceedings where their liberty is at stake. Since the FLAC report, section 6A of the *Enforcement of Court Orders Act 1940*, as inserted by section 2 of the *Enforcement of Court Orders (Amendment) Act 2009*, has been introduced to provide free legal aid to debtors whose liberty is at risk in imprisonment proceedings. Free legal aid is not however provided generally in all steps of the procedure under this Act, although the debtor retains the right to apply to the Civil Legal Aid Board for legal aid. This application may often be refused in the case of debt proceedings however, as defences to such claims generally hold little merit.³¹⁵

6.219 The Commission believes that the introduction of non-judicial debt settlement, and the transfer of enforcement functions to a specialist enforcement office, will allow for increased involvement of money advisors in debt settlement and enforcement proceedings. It is envisaged that money advisors will have a particularly large role in negotiating debt settlements under the proposed debt settlement system.³¹⁶ If

³¹¹ Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 115; *To No One's Credit: The Debtor's Experience of Instalment and Committal Orders in the Irish Legal System* (FLAC 2009) at 153.

³¹² See paragraphs 6.162 to 6.169 above.

³¹³ *To No One's Credit: The Debtor's Experience of Instalment and Committal Orders in the Irish Legal System* (FLAC 2009) at 153-155.

³¹⁴ Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 115-117.

³¹⁵ See Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 25, who notes that if the debt is uncontested and there is no legal defence to the creditor's claim, the debtor's legal aid application will fail the "merits" test applied by the Legal Aid Board when assessing clients deserving of legal aid.

³¹⁶ See paragraphs 5.98 to 5.105 to above.

debt enforcement issues are resolved through non-judicial debt settlement and enforcement by a non-judicial body, questions as to whether debt advisors should be given “McKenzie Friend” status become less relevant. Also, the Commission believes that the enforcement office, by obtaining information about the debtor’s means and also potentially choosing the method of enforcement which is most appropriate for both the debtor and creditor in a given, will adopt a neutral position between debtor and creditor in a manner which a judge who is currently obliged to grant creditors their chosen methods of enforcement cannot. The need for formal legal aid for debtors may therefore be reduced in such cases.

(3) Garnishee Order/Attachment of Debts

6.220 A garnishee order can be an effective method of enforcing debts, but is rarely used in practice. It will be recalled that this is an order which permits a debt owed to the judgment debtor from a third party to be diverted and paid to the judgment creditor to satisfy the judgment debt. The procedure is most often used where the third party is the judgment debtor’s bank and the debt in question is owed in respect of the balance in the judgment debtor’s account. Therefore this procedure is often referred to as the attachment of a bank account.

6.221 Court service statistics indicate that just 20 conditional and 10 final garnishee orders were made by the High Court in 2007, as opposed to 1, 208 orders of *feri facias*.³¹⁷ The Commission believes that, following the principles of appropriate and proportionate enforcement, the garnishee order mechanism should be more widely used. In many cases the attachment of a bank account or other debt will provide a more productive means of satisfying a judgment than the debtor’s goods. In this regard it may be noted that the European Commission in seeking to improve the efficiency of the cross-border enforcement of judgments has identified facilitating the attachment a debtor’s bank account as a fundamental method of achieving this aim.³¹⁸

6.222 Nonetheless, the garnishee procedure involves an interference with the judgment debtor’s property and privacy rights.³¹⁹ Confidential information relating to the financial status of the debtor must to a certain extent be made known to a third party.³²⁰ This can be seen in the Revenue Commissioners’ policy of only using their powers of attachment in appropriate cases where the interference with the debtor’s rights is justified. Nonetheless, it is arguable that the garnishee mechanism may still be less restrictive of debtor’s rights than the highly intrusive procedure of execution against goods. Therefore, the Commission believes that the use of this procedure should be facilitated in appropriate cases.

(a) Absence of information

6.223 As identified above, a primary reason why the garnishee procedure is not more widely used is that it depends on the judgment creditor having access to information on debts owing to the judgment debtor.³²¹ In most cases the necessary information will comprise details of the debtor’s bank account. Due to a lack of information, creditors may seek inappropriate and ineffective alternative enforcement methods where a debtor in fact has funds available in a bank account which could be used to satisfy the debt. The Commission believes that this problem is caused by the general failing of the current enforcement system to provide information on the debtor’s means and assets. Therefore the reforms

³¹⁷ The Courts Service *Annual Report 2007* (The Courts Service, 2008) at 92.

³¹⁸ See Commission of the European Communities *Green Paper on Improving the Efficiency of the Enforcement of Judgments in the European Union: the Attachment of Bank Accounts* (COM(2006) 618 final).

³¹⁹ In the case of the attachment of a bank account, the duty of confidentiality owed by the bank to its customer must be restricted. See paragraph 4.92 above for a discussion of this duty. The attachment of a bank account may also have implications regarding the reputation of the bank’s customer in the eyes of the garnishee bank, particularly where the customer is a business debtor. The Commission recognises that for this reason caution must be exercised in making this remedy available.

³²⁰ See e.g. Donnelly and Walsh *Revenue Investigations and Enforcement* (Butterworths 2002) at 130.

³²¹ See paragraph 3.361 above.

discussed above in relation to obtaining such information should facilitate increased use of the garnishee procedure where appropriate.³²²

6.224 The final recommendations made in relation to access to information on the debtor's means will have implications for the duties which will be placed on banks and building societies served with garnishee orders. In this way, banks and building societies could potentially be obliged to share customer information with the proposed enforcement office, or could be obliged to conduct searches for accounts connected to the debtor in question. As these issues depend on the approach to obtaining debtor information which is recommended in its final report, the Commission will wait until the publication of that report to discuss these matters further.

(b) ***The requirement to first attempt execution against goods***

6.225 A related problem which has been identified in the previous chapter is that uncertainty exists as to whether a judgment creditor seeking to obtain a garnishee order must first attempt execution against the debtor's goods and obtain a return of "no goods".³²³ The current practice is for creditors to first attempt execution against goods, and to indicate that this has been attempted in the grounding affidavit when applying for a garnishee order. A report of the Committee on Court Practice and Procedure noted this practice, stating that a judgment creditor seeking a garnishee order will normally state in a grounding affidavit that an order of *fieri facias* has been issued to the sheriff and that a return of "no goods" has been given.³²⁴ The Committee noted that this practice originated in the view that the creditor could not have shown justification for the costs of an application for a garnishee order unless he or she could show a return of "no goods" after attempting the "ordinary" common law method of execution. It was then noted that no such requirement exists in rules of court. The Committee noted "nowadays it is a comparatively rare occurrence to find goods against which one can execute under an order of *fieri facias*", and concluded that the creditor should be entitled to ignore the remedy by way of order of *fieri facias* and to proceed immediately to enforce his judgment by any other means at his disposal. It was felt that this should especially be the case where the creditor had reason to believe that the debtor had no goods available for seizure.

6.226 The Commission endorses this view and believes the law should be clarified to indicate that there is no requirement to first attempt execution against goods before a garnishee order may be made. The requirement to first show an attempted seizure of the debtor's goods originated in the view of execution against goods as the "default" enforcement mechanism, a view which the Commission believes is no longer justifiable.³²⁵ If the choice of enforcement method is to lie with the proposed enforcement office, the office should be permitted to make a garnishee order in an appropriate case without first attempting execution against goods. Similarly, if the choice of enforcement method is to remain with the creditor, a garnishee order should be available without first attempting execution against goods where the information obtained by the office finds a garnishee order to be appropriate.

6.227 *The Commission provisionally recommends that creditors should be entitled to apply for a garnishee order without first attempting enforcement through execution against goods.*

(c) ***Exempted living costs***

6.228 An important consideration when reforming the garnishee order mechanism is the hardship which may be caused to the debtor and his or her dependents by diverting funds owing to the debtor to the judgment creditor. This is particularly so if the diverted funds are held in the debtor's bank account, as denying the debtor access to such funds may leave the debtor without sufficient means to provide for the living costs of him or herself and his or her dependents. In this regard it is essential that the law applies a similar policy in relation to garnishee orders as it does in bankruptcy, execution against goods

³²² See paragraphs 6.92 to 6.97 above.

³²³ See paragraphs 3.301 and 3.360 above.

³²⁴ The Committee on Court Practice and Procedure *Eighteenth Interim Report: Execution of Money Judgments, Orders and Decrees* (The Stationary Office Dublin 1972) at 13.

³²⁵ See paragraphs 6.347 to 6.351 below.

and attachment of earnings orders, and provides that certain funds of the debtor necessary for essential living expenses should remain exempt from attachment. This is partly discussed below in relation to the issue of protecting from attachment certain earnings of the debtor which have been deposited in a bank account.³²⁶

6.229 Under the current law, case law provides that a garnishee order will not be made where it would be inequitable to do so.³²⁷ Similarly, Circuit Court Rules provide that if a judge is satisfied that the attachment of salary or wages will not leave sufficient amount to the judgment debtor to maintain him or herself and his or her dependents, the order may be set aside or varied to leave a sufficient maintenance amount for the debtor.³²⁸ The *Rules of the Superior Courts* do not provide for a similar rule however.

6.230 The question of the possible hardship caused to debtors by garnishments of their bank or building society accounts was discussed by the enforcement review in England and Wales.³²⁹ The review proposed that the problem should be addressed by giving debtors the right to apply to court for an “interim hardship payment”. The debtor could make this application by completing a form providing information about his or her circumstances and explaining why a hardship payment is necessary. The debtor could also apply for an order by attending court, where an officer of the court could ask the debtor to complete an oral examination questionnaire if appropriate. The judge would assess this application and decide whether or not money should be released to the debtor. The judge would balance the hardship suffered by the debtor with the disadvantage to the creditor of not being able to recover all that is owed. If the judge orders some money to be released, the bank or building society would be ordered (and served with the order by fax) to immediately release the sum. The costs incurred by the bank in making the sum immediately available would be deducted from the sum before it is provided to the debtor. The review suggested that only one application for an “interim hardship payment” should be allowed. These recommendations have been adopted under the relevant procedural rules in England and Wales.³³⁰

6.231 A review of enforcement law in Scotland also addressed this subject, and noted how the absence of specific protection from attachment of money held in a debtor’s bank account contrasted with the protection of a minimum level of a debtor’s income under attachment of earnings legislation.³³¹ The report also warned against the combined impact on the debtor which could result from an attachment of a debtor’s bank account being made after an attachment of earnings had taken place. Three options for limiting the amount of funds which could be attached were discussed. The first option was to specify that a protected minimum balance could not be attached.³³² It was noted that this would be very difficult to

³²⁶ See paragraphs 6.287 to 6.290 below.

³²⁷ *Martin v Nadel* [1906] 2 KB 26.

³²⁸ Order 38 Rule 10 CCR.

³²⁹ Lord Chancellor’s Department *Enforcement Review Report of the First Phase of the Enforcement Review* (2000) at paragraphs 210-215.

³³⁰ *Civil Procedure Rules* 72.7. In Northern Ireland, the relevant legislation (Article 69 of the *Judgments Enforcement (Northern Ireland) Order 1981*) provides that an attachment order attaches “all debts due or accruing to the judgment debtor from any person... for the purpose of satisfying the amount recoverable...” The “Hunter” report had recommended reforms similar to those made in England and Wales, whereby a debtor could apply to the Enforcement of Judgments Office for a hardship payment: *Report of the Enforcement of Judgments Review Committee (Northern Ireland)* (1987) at paragraphs 21.6-21.8. This recommendation was not adopted in legislation, but it appears that the practice of the EJO is to provide for payment of the attached debt into the office, and to allow the debtor to apply for a hardship payment under the general procedure for relief from enforcement: Rule 59 of the *Judgments Enforcement Rules (Northern Ireland) 1981* (SR 1981/147) (NI). See Capper *The Enforcement of Judgments in Northern Ireland* (SLS Legal Publications (NI) 2004) at 140, 180-181.

³³¹ *Enforcement of Civil Obligations in Scotland – A Consultation Document* (The Scottish Executive 2002) at 117.

³³² *Ibid* at 118.

calculate, and would vary with differences in debtors' income and the regularity of payments received by the debtor (e.g. the minimum balance could not be set at a minimum amount necessary to sustain the debtor for a week if he or she is paid monthly). Also, such an approach would have to consider whether the debtor has more than one bank account, and if so would necessitate the sharing of balance information between the debtor's banks. The second option considered involved exempting certain funds from attachment based on their sources, so that earnings or social welfare benefits which had been lodged into bank accounts would be exempt from attachment.³³³ It was concluded that this would be very complex, particularly as attempts are made to identify which funds in an account were derived from earnings or welfare payments. The report concluded that the only straightforward way to implement this option would be to create dedicated accounts into which only earnings and welfare payments could be paid. Finally, the report considered that a final option would be to prevent the attachment of a debtor's bank account entirely where the debtor is already subject to attachment of earnings.³³⁴ It was noted that such a rule would be difficult to operate in practice due to the lack of knowledge of creditors of the existence of other ongoing enforcement proceedings against a debtor. Ultimately legislation passed in 2007 provides for the protection of a minimum balance in consumer debtors' bank accounts.³³⁵ The minimum balance which is exempt from attachment is specified in the legislation as representing the net monthly earnings from which no deduction would be made under an attachment of earnings order. Thus the Scottish approach to this issue has opted for consistency between the exemption levels under attachments of earnings and attachments of bank accounts.

6.232 The Commission believes that an express provision should be included in legislation to ensure that garnishee orders do not deprive debtors of the necessary funds to provide a minimum standard of living for debtors and their dependents. As can be seen from the above analysis, various methods can be adopted to achieve this aim. One option is to specify a certain level of funds which is exempt from attachment, as has been done in Scotland. Another approach is to allow all the funds owed to the debtor to be attached, but to allow the debtor to apply to have a certain portion of these funds released where the attachment results in hardship. The Commission invites submissions as to which of these approaches best strikes the balance between vindicating the rights of creditors and protecting debtors from hardship.

6.233 *The Commission provisionally recommends that legislation should ensure that garnishee orders do not deprive debtors of the funds necessary to maintain a minimum standard of living for themselves and their dependents. The Commission invites submissions as to the best approach to ensure this aim, while also vindicating the rights of creditors to have access to funds owed to the debtor.*

(d) ***The question of joint bank accounts***

6.234 One of the more difficult questions in this area is whether a bank account held jointly by the judgment debtor with another party should be capable of being attached. As noted in the previous chapter, the current legal position is that such joint bank accounts may not be attached by a garnishee order.³³⁶ One rationale behind this position is that since a bank's liability to the holders of a joint bank account is joint, an order to enforce a judgment against one of the account holders cannot be made as it may render the bank unable to meet the demands of the other joint account holder.³³⁷ This rule was

³³³ *Enforcement of Civil Obligations in Scotland – A Consultation Document* (The Scottish Executive 2002) at 119-121.

³³⁴ *Enforcement of Civil Obligations in Scotland – A Consultation Document* (The Scottish Executive 2002) at 121-122.

³³⁵ See section 73F of Part 9 of the *Bankruptcy and Diligence etc. (Scotland) Act 2007* (2007 asp 3), inserting a new part 3A into the *Debtors (Scotland) Act 1987*.

³³⁶ *Hirschorn v Evans* [1938] 2 KB 801; *Belfast Telegraph Newspapers v Blunden* [1995] NI 351. This prohibition applies even where the signature of any single account holder is a sufficient discharge to the bank for payment of monies on deposit.

³³⁷ Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 125.

established in the decision of the English Court of Appeal of *MacDonald v Tacquah Gold Mines Co.*, where Fry LJ stated that if debts due to two persons could be made the subject of a garnishee order:

“the result would be to enable a judgment creditor to attach a debt due to two persons in order to answer for the debt due to him from the judgment debtor alone, which would be altogether contrary to justice.”³³⁸

6.235 Another rationale for the rule is that it prevents the financial circumstances and debts of each joint account holder from being disclosed to the other, thus respecting the common law duty of confidentiality between banker and client.³³⁹

6.236 It is important to note however that the Revenue Commissioners’ special statutory powers of attachment extend to joint bank accounts.³⁴⁰ For these purposes the deposit held in the bank account will be deemed to be held to the benefit of the tax debtor and the other party in equal shares, unless evidence to the contrary is produced within 10 days of the receipt of notice of the attachment by the parties.³⁴¹ A bank served with an attachment notice must provide both account-holders with details of the notice, including the amount of the Revenue Debt.³⁴² The procedure therefore obliges the bank to communicate details of the tax debtor’s Revenue affairs to the joint account-holder.³⁴³

6.237 The question of whether the traditional common law prohibition on the attachment of bank accounts should be removed has posed a difficult problem in the reform of enforcement systems in other countries. In Northern Ireland, the Master of the High Court made a decision stating that the new judgments enforcement system effected a change in the common law rule and created an entirely new enforcement mechanism, which permitted joint accounts to be attached. This decision was however overturned by the Northern Irish Court of Appeal in the judgment of *Belfast Telegraph Newspapers Ltd v Blunden*.³⁴⁴ The Court of Appeal held that a statute should not be taken as effecting a fundamental alteration in the general law unless it uses words pointing unmistakably to that conclusion. Secondly, the Court stated that common law rights are not to be taken away except by clear words to that effect, and the common law position was thus not changed by the relevant Northern Irish legislation. The Court however expressed dissatisfaction at the conclusion it was obliged to reach, and argued that the law should be changed to allow the attachment of joint bank accounts, saying that the outcome in the case was neither just nor convenient.

6.238 Commentators have argued that even where the share of the judgment debtor in a joint account is not readily ascertainable attachment should be allowed, as in the large majority of such cases either account holder is almost invariably in a position to withdraw all of the deposit with the other party unable to object to this.³⁴⁵ The judgment debtor in such a case should similarly not have a right to object to the attachment of the account. In the absence of a change in the law, it has been argued that judgment debtors would be free to evade their obligations through “that most traditional of avoidance

³³⁸ (1884) 13 QBD 535, 539.

³³⁹ See Breslin “Revenue Power to Attach Debts under Section 73 Finance Act, 1988: Implications For Credit Institutions” (1995) 2(7) *Commercial Law Practitioner* 167.

³⁴⁰ See section 1002(1)(b) of the *Taxes Consolidation Act 1997*.

³⁴¹ Section 1002(1)(e) of the 1997 Act. The attachment is limited to the amount of the deposit deemed to be held to the benefit of the debtor, and all of this amount may be attached if the Revenue debt owed exceeds this amount: Section 1002(2)(e)(III) of the 1997 Act. It appears therefore that no provision is made to ensure that a certain amount of the deposit is left available to the debtor.

³⁴² Section 1002(2)(e) of the 1997 Act.

³⁴³ The harshness of this provision has been criticised: see Breslin “Revenue Power to Attach Debts under Section 73 Finance Act, 1988: Implications For Credit Institutions” (1995) 2(7) *Commercial Law Practitioner* 167.

³⁴⁴ [1995] NI 351. See Capper “Garnishee Orders: the Untouchability of Joint Accounts” (1997) 48 *NILQ* 162.

³⁴⁵ Capper “Garnishee Orders: the Untouchability of Joint Accounts” (1997) 48 *NILQ* 162 at 166-7.

measures” of selling their assets and placing the proceeds in joint names with someone else.³⁴⁶ A proposed solution was put forward by the Master of the Northern Irish EJO, who suggested that the joint deposit holder should be permitted to object to a provisional order attaching the account and that a hearing should in such a case be held to calculate the respective shares of the joint account holders.³⁴⁷

6.239 The review of enforcement law in England and Wales made similar arguments in favour of changing the law to allow joint bank accounts to be attached.³⁴⁸ It argued that the prohibition on attachment created a “safe haven” for debtors allowing them to render judgments unenforceable by transferring funds into joint accounts. The review recommended that joint accounts should be capable of attachment, subject to a limit of 50% of the funds being taken.³⁴⁹ This power would be subject to a power of the non-judgment debtor account holder to object to the attachment. These proposals were largely supported by the consultation process carried out under the review. Concerns were however raised in relation to accounts which require two signatures to access the funds, but the review concluded that any complications in such cases could be resolved in the hearing deciding the distribution of funds.

6.240 As the enforcement review in England and Wales progressed, however, these recommendations were abandoned and it was decided not to change the legal position regarding joint accounts.³⁵⁰ The arguments for rejecting a change in the law were divided into three categories. First, problems were identified in how joint accounts were to be defined.³⁵¹ Secondly, problems in relation to allocating ownership of funds in joint accounts were identified. Financial institutions indicated that they would be unable to determine precisely the proportions of an account belonging to each of the account holders, and a formula to enable this would need to be contained in legislation. Any calculation of the exact amount of funds owned by individual parties would be costly and time-consuming, and so contrary to the goals of simplifying enforcement procedures.

6.241 Finally, the problem of addressing the rights of “innocent” third parties was identified. It was stated that in order to protect the rights of the non-debtor account holder, it would be necessary to give notice to such person of the proposed attachment. The costs for either the bank or the courts of providing this notice were highlighted as a concern, as were the procedural complications which the notification process would introduce. The potential breach of the judgment debtor’s right to privacy in respect of his or her personal information through notifying the third party was also identified.³⁵² The review concluded that the significant burdens which a reform in the law would impose on the courts and financial institutions, and the complexity which would be introduced into the garnishee procedure, meant that a reform of the law was not justified. The review also noted that even if joint accounts became attachable, debtors could still evade judgments by moving assets into an account held entirely by another, and so reforms may not be worthwhile.

³⁴⁶ Capper *op cit.* at 166-7.

³⁴⁷ Capper “Garnishee Orders: the Untouchability of Joint Accounts” (1997) 48 *NILQ* 162 at 166-7.

³⁴⁸ *Enforcement Review: Report of the First Phase of the Enforcement Review* (Lord Chancellor’s Department 2000) at paragraphs

³⁴⁹ Where the account was jointly held by two people. If there were more than two joint account-holders, the limit on the amount which could be attached would decrease.

³⁵⁰ Lord Chancellor’s Department *Effective Enforcement – Improved Methods for Recovery for Civil Court Debt and Commercial Rent and a Single Regulatory Regime for Warrant Enforcement Agents* (Cm5744 2003) at 88-91.

³⁵¹ It was noted that a detailed statutory definition of “joint account” would be required to limit garnishee orders to appropriate joint accounts. Particular difficulties were identified in relation to accounts where a party is authorised to act as an agent, trustee accounts and business partnership accounts. In business partnership accounts the account may not be in the debtor’s name, and partnership debts would have to be separated from the debts owed solely by or to the debtor.

³⁵² This would be especially problematic if the debtor succeeded in objecting to the making of a final attachment order, as his or her confidential information would have been revealed in circumstances where it was ultimately not necessary to do so, thus violating the principle of proportionality.

6.242 The arguments for and against a reform of the law to permit joint bank accounts to be attached have been outlined in the preceding paragraphs. The Commission recognises that this is a difficult and complex subject, and invites submissions from stakeholders as to whether the law should be reformed to allow joint bank accounts to be attached to satisfy judgment debts.

6.243 *The Commission invites submissions as to whether joint bank accounts should be capable of being attached to satisfy a judgment debt.*

(e) **Updating the legal basis of garnishee orders**

6.244 As part of the introduction of a new system of enforcement, current legislation governing individual enforcement mechanisms and their procedural rules should be replaced with a single legislative instrument. Therefore the provisions of the *Common Law Procedure Amendment (Ireland) Act 1856* should be repealed and should be replaced with new legislation.

6.245 As noted in the previous chapter, while the correct legal position appears to be that garnishee orders are not available in respect of future earnings, Ord. 38 r. 10 of the Circuit Court Rules envisages the garnishment of earnings. This provision provides that a judge may vary the amount of wages or salary attached if not enough money is left to maintain the debtor and his or her dependents. As part of the updating of the legislation governing all enforcement mechanisms, the anomaly created by this provision should be removed. If a general attachment of earnings mechanism is introduced, this should be the sole mechanism for attaching future earnings. The legal position relating to the (lack of) ability to garnish future earnings should be clarified. The respective scopes of attachment of earnings orders and garnishee orders should be clearly specified in legislation so that it is clear which mechanism must apply in a given case.

6.246 *The Commission provisionally recommends that legislation and rules of court relating to garnishee orders should be repealed and replaced as part of legislation introducing a new system for the enforcement of judgments. The Commission provisionally recommends that the respective scopes of attachment of earnings orders and garnishee orders should be clarified in legislation.*

(f) **Terminology**

6.247 As noted in the previous chapter, the terminology of “garnishee order” is unnecessarily complicated and confusing. This terminology should be updated so that the name reflects the nature of the procedure involved in a readily understandable manner. This has been recognised in other jurisdictions. In England and Wales, for example, the review of enforcement law found that the term “garnishee” was obscure, and explored various alternative terms.³⁵³

6.248 The first option proposed by the enforcement review was the term “attachment”, so that a garnishee order in respect of a bank account would for example be referred to as the “attachment of a bank account”. It was suggested that this term more accurately described the process involved. It should be noted in this regard that Northern Irish legislation has adopted this term in relation to what were formerly known as garnishee orders.³⁵⁴ Similarly, the provisions of the *Rules of the Superior Courts* relating to garnishee orders are headed “attachment of debts”, but the term “garnishee order” is also used, and the term “garnishee” is still used to describe the third party debtor.³⁵⁵ The mechanism in Irish legislation by which the Revenue Commissioners may seize debts owed to a defaulting taxpayer is also

³⁵³ Lord Chancellor’s Department *Enforcement Review Report of the First Phase of the Enforcement Review* (2000) at paragraphs 221-222.

³⁵⁴ Article 69 of the *Judgments Enforcement (Northern Ireland) Order 1981*, which is headed “attachment of debts order”, provides that “[t]he [Enforcement of Judgments] Office may make an order attaching all debts due or accruing to a judgment debtor from any person (“the garnishee”) within the jurisdiction for the purpose of satisfying the amount recoverable on foot of the judgment or part of it; and any such order shall operate so as to bind all such debts.” It can be seen that while the term “garnishee order” has been replaced, the term “garnishee” is retained to refer to the third party whose debt to the judgment debtor is to be attached.

³⁵⁵ See Order 45 *Rules of the Superior Courts*.

referred to in legislation as “attachment”.³⁵⁶ This legislation also does not use the term “garnishee” to refer to the third party who owes a debt to the judgment debtor, instead identifying this third party as a “relevant person”.³⁵⁷ In the consultation undertaken as part of the enforcement review in England and Wales, many respondents objected to the use of the word attachment on the grounds that it would cause the procedure to be confused with that of attachment of earnings.³⁵⁸ The enforcement review believed this risk of confusion to be small, stating that in Scotland almost all enforcement methods are identified as “attachments” of various kinds. The review nonetheless proposed an alternative term of “third party debt order”, which it believed to be a comprehensive description of the mechanism. This was the term ultimately chosen when the garnishee order was renamed under the new procedure of Part 72 of the *Civil Procedure Rules*.

6.249 The Commission believes that the term “garnishee order” is outdated and confusing. It should be replaced with a plain language term which enables parties to readily understand the process involved. The Commission invites submissions as to the most appropriate new term, presenting “attachment of debt order” and “third party debt order” as examples of terms which could be chosen.

6.250 *The Commission provisionally recommends that the term “garnishee order” should be replaced with a term which more clearly describes the process involved. The Commission invites submissions as to the most appropriate new term, such as “attachment of debt order” or “third party debt order”.*

(g) European Union developments in relation to the attachment of bank accounts.

6.251 As part of efforts to improve the efficiency of the enforcement of judgments throughout the European Union, the European Commission has conducted a consultation on the subject of the attachment of bank accounts.³⁵⁹ While related to the issues discussed above, it appears so far that this project will not have implications for the reform of national rules on the attachment of bank accounts. According to the European Commission Green Paper, the responses to the Commission’s consultation and a report of the European Parliament on the subject,³⁶⁰ the proposed European instrument for attaching bank accounts would be a standardised European procedure, independent of Member States’ national enforcement rules. Also, the instrument would not be an enforcement mechanism, but rather would have protective effect only and would block the debtor’s funds in a bank account without transferring them to a creditor. The proposed reforms would therefore not involve a harmonisation of Member States’ national enforcement legislation.

6.252 Therefore, at least at present, it appears that the European project in relation to the attachment of bank accounts will not directly impact on domestic law, and so the Commission is free to make recommendations in this area. The Commission will nonetheless aim to ensure that any final recommendations are informed by, compatible with, and reflective of, the principles being developed at a European level.

³⁵⁶ See Section 1002 of the *Taxes Consolidation Act 1997*.

³⁵⁷ A “relevant person” is defined as “a person whom the Revenue Commissioners have reason to believe may have, at the time a notice of attachment is received by such person in respect of a taxpayer, a debt due to the taxpayer.” Section 1002(1)(a) *Taxes Consolidation Act 1997*.

³⁵⁸ Lord Chancellor’s Department *Enforcement Review Report of the First Phase of the Enforcement Review* (2000) at paragraphs 221-222.

³⁵⁹ Commission of the European Communities *Green Paper on Improving the Efficiency of the Enforcement of Judgments in the European Union: the Attachment of Bank Accounts* (COM(2006) 618 final); Commission of the European Communities *Summary of Replies to the Green Paper on Improving the Efficiency of the Enforcement of Judgments in the European Union: the Attachment of Bank Accounts*.

³⁶⁰ European Parliament Committee on Legal Affairs *Report on the Green Paper on Improving the Efficiency of the Enforcement of Judgments in the European Union: the attachment of bank accounts* (2007/2026(INI)).

(4) Attachment of Earnings

6.253 An attachment of earnings order is an order directed to a person who appears to the court to have the debtor in his employment, rather than to the judgment debtor him or herself. It operates as an instruction to that person to make periodical deductions from the debtor's earnings and to pay the amounts deducted to a court officer as specified in the order.³⁶¹ This is a method of enforcement used in many legal systems, and Ireland is one of few countries in Europe which does not possess such a mechanism for the enforcement of (non-family maintenance) debts.³⁶²

6.254 In Ireland, an attachment of earnings order may only be obtained to enforce a court order directing a party to make periodical payments for the maintenance of his or her spouse and any dependent children.³⁶³ Under section 10 of the *Family Law (Maintenance of Spouses and Children) Act 1976*,³⁶⁴ an attachment of earnings order may be issued by the court in order to secure payments under a previous order that the maintenance debtor make certain payments to his or her spouse and/or dependent children. While this mechanism has been extended to the enforcement of compensation orders under the *Criminal Justice Act 1993*,³⁶⁵ a general attachment of earnings mechanism for the enforcement of all civil debts has not yet been introduced in Ireland.

6.255 Calls for the introduction of a general attachment of earnings mechanism have been made from time to time. This may be due to the fact that this method of enforcement is widely used in most developed legal systems and due to widespread dissatisfaction with the methods of enforcing judgments in Ireland. Attachment of earnings was introduced in England and Wales³⁶⁶ as a means of removing the role of imprisonment from the system of debt enforcement.³⁶⁷ Similarly in Ireland the arguments for the introduction of such a procedure are based on its desirability as a replacement for the reliance on instalment orders and accompanying orders for arrest and imprisonment under the current system.

(a) The case for attachment of earnings orders

(i) Previous proposals for the introduction of an attachment of earnings procedure

6.256 The previous calls for the introduction of an attachment of earnings mechanism for the enforcement of all civil judgment debts are now presented. First, Private Member's Bills were debated in the Dáil in 1998, 2004 and 2007 which proposed the introduction of a system of attachment of earnings as a substitute for imprisonment where a debtor has failed to comply with an instalment order.³⁶⁸ These Bills were ultimately not passed by the Oireachtas, but the debate on the question of attachment of earnings highlighted the introduction of such a procedure as a subject which must be considered as part of the reform of the law in this area.

6.257 Secondly, in 2003 the Free Legal Advice Centres published a comprehensive report discussing the possibility of introducing a system of attachment of earnings into Irish law.³⁶⁹ This study originated as

³⁶¹ Lord Mackey of Clashfern *Halsbury's Laws of England* Volume 17(1) (4th ed Reissue Butterworths 2002) at paragraph 282.

³⁶² See Laws and Mansfield *Debt Collection Practices Across Europe: A Report by the Consumer Debt Network Collection Watch Project* (Money Advice Trust, 1999) at 3.

³⁶³ See Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 12.

³⁶⁴ As amended by section 13 *Social Welfare Act, 1989* (No. 4/1989), section 43 *Family Law Act 1995* (No. 26/1995); *European Communities (Civil and Commercial Judgment) Regulations 2002* (S.I. No. 52/2002).

³⁶⁵ See section 7 *Criminal Justice Act 1993*.

³⁶⁶ By the *Attachment of Earnings Act 1971*.

³⁶⁷ The introduction of attachment of earnings as a replacement for imprisonment resulted from the recommendations of the "Payne Report": *Report of the Committee on the Enforcement of Judgment Debts* (Cmnd. 3909 1969).

³⁶⁸ See *Enforcement of Court Orders Bill 1998* [PMB] (Bill No. 31/1998), *Enforcement of Court Orders Bill 2004* [PMB] (Bill No. 36/2004) and *Enforcement of Court Orders Bill 2007* [PMB] (Bill No. 1/2007).

³⁶⁹ Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003).

a response to a Government proposal to introduce attachment of earnings in cases of non-payment of civil debt and fines. The report also sought to highlight the unsatisfactory resolution of many cases of uncontested civil debt, while proposing suggestions as to how the system of debt enforcement could be reformed.³⁷⁰ The primary focus of the report was to review attachment of earnings systems in other countries with a view to proposing a model system of attachment of earnings in Ireland. To this end questionnaires were distributed to money advice and debt counselling agencies throughout Europe to assess their respective experiences of the operation of systems of attachment of earnings. The views of the Money Advice and Budgeting Services (MABS), the Irish Banking Federation (IBF) and the Irish Finance Houses Association (IFHA) on the desirability of introducing such a system into Irish law were also obtained. This report did not unequivocally support the introduction of an attachment of earnings system, instead recommending that debt disputes should be resolved in a non-judicial forum.³⁷¹ The report nonetheless concluded that imprisonment should be removed from the debt enforcement system, and that if this was to occur a new method of enforcement would be necessary to replace it, necessitating the introduction of a system of attachment of earnings. The report therefore proposed several recommendations for a model attachment of earnings system, which will be discussed in more detail below. Key principles outlined by FLAC included:

- attachment of earnings orders should be used proportionately and should only be available where default in the payment of an instalment order has taken place;
- sufficient income should be left to debtors to enable them to provide for themselves and their dependents; and
- the attachment of earnings procedure should not interfere with the relationship between the debtor and his or her employer.

6.258 In addition to these arguments as to the desirability of introducing an attachment of earnings mechanism, arguments have been made recently that its introduction is a constitutional necessity in light of the High Court decision in *McCann v Monaghan District Court Judge and Ors.*³⁷² It will be recalled that the High Court in *McCann* found that the procedure for the arrest and imprisonment of a debtor on his or her failure to satisfy an instalment order was a disproportionate interference with the debtor's right to liberty.³⁷³ In particular, Laffoy J held that

“[i]n circumstances in which a debtor has some resources to meet the debt, a statutory scheme which does not require the creditor to seek redress by attaching those resources, does not impair the debtor's right to liberty as little as possible.”³⁷⁴

6.259 The consequences of this passage were discussed by certain Senators during Seanad debates on the *Enforcement of Court Orders (Amendment) Bill 2009*. The Senators argued that this finding had the consequence of requiring a further step to be introduced between default in repaying an instalment order and the imprisonment procedure.³⁷⁵ Ultimately an attachment of earnings system was not included in the *Enforcement of Court Orders (Amendment) Act 2009*, as it was decided to await the publication of this Commission's Consultation Paper and Report before considering introducing such a system into legislation.

6.260 The Commission's discussions with interested parties have also shown that there is wide support for the introduction of an attachment of earnings procedure as a replacement for imprisonment in the debt enforcement system. The Commission understands that the opposition to the role of imprisonment in debt disputes in the Irish legal system prior to the *McCann* decision was widespread, and was shared by bodies representing both creditors and debtors. Such bodies recognised that an

³⁷⁰ *Ibid* at 9.

³⁷¹ Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 118.

³⁷² [2009] IEHC 276 at 81.

³⁷³ [2009] IEHC 276 at 79-87.

³⁷⁴ [2009] IEHC 276 at 82.

³⁷⁵ Seanad Éireann Parliamentary Debates Official Report Vol. 196 No. 12, 8 July 2009 at 935-950.

alternative enforcement method was nonetheless required, and attachment of earnings was widely considered to be an appropriate substitute for imprisonment.

(ii) Attachment of earnings in family maintenance cases

6.261 As noted above, an attachment of earnings procedure exists under Irish law for the enforcement of maintenance debts under the *Family Law (Maintenance of Spouses and Children) Act 1976*. This Act allows a court, usually in judicial separation or divorce proceedings, to make a “maintenance order” where a “spouse has failed to provide such maintenance of the applicant spouse and any dependent children of the family as is proper in the circumstances.”³⁷⁶ Prior to 1996, maintenance orders were enforced through committal orders of the kind used to enforce civil debt under the *Enforcement of Court Orders Acts 1926 and 1940*. The 1976 Act however introduced attachment of earnings as an alternative method of enforcing maintenance debts. Originally an attachment of earnings order could only be obtained where the debtor had defaulted in making repayments under a maintenance order, but amendments to the 1976 Act now provide that an attachment of earnings order may be granted at the same time as a maintenance order for periodic payments. Section 10 of the 1976 Act as amended allows a beneficiary of the maintenance order to apply to court for an attachment of earnings order. The court may then make such an attachment order to secure payments under a prior maintenance order made against the debtor if it is satisfied that the maintenance debtor is a person to whom earnings fall to be paid. Section 10(3) of the 1976 Act³⁷⁷ provides that before making such an order the court will permit the maintenance debtor to make representations as to whether he or she would make the payments to which the relevant order relates. This new section, introduced by the *Family Law Act 1995*, appears to place an onus on the maintenance debtor to show that he or she will be able to comply with the maintenance order without the need for an attachment of earnings order to be made.³⁷⁸

6.262 The attachment of earnings order specifies the amount which is to be deducted from the maintenance debtor’s income, which is known as the normal deduction rate.³⁷⁹ In addition, the order specifies the protected earnings rate, which is the minimum rate below which the maintenance debtor’s income should not be reduced, having regard to the resources and needs of the maintenance debtor.³⁸⁰ The levels at which these respective rates are set give rise to controversy in most systems of attachment, and will be discussed in more detail below. In order to assist in setting these rates, the court may order the maintenance debtor to provide the court with a statement in writing of information relating to his or her earnings, expenses, and details relating to anyone paying him or her earnings.³⁸¹ In addition, the court may require anyone appearing to be the employer of the maintenance debtor to present to the court a statement of specified particulars of the maintenance debtor’s earnings and expected earnings.³⁸² Once made, the attachment of earnings order must then be served on the maintenance debtor’s employer, who is under a duty to comply with it once ten days have passed since its service.³⁸³ An employer also falls under a duty to inform the court if the maintenance debtor specified in the order is not in his or her employment, or if the debtor ceases to be in his or her employment.³⁸⁴ The maintenance debtor is under a similar duty to notify the court on leaving or changing his or her employment within ten days of so doing.³⁸⁵ If the debtor is changing employment, this notification must include details of the debtor’s new

³⁷⁶ Section 5 of the 1976 Act.

³⁷⁷ As amended Section 43 *Family Law Act 1995*.

³⁷⁸ See Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 52.

³⁷⁹ Section 4(a) of the 1976 Act.

³⁸⁰ Section 4(b) of the 1976 Act.

³⁸¹ Section 13(1)(a) of the 1976 Act.

³⁸² Section 13(b) of the 1976 Act.

³⁸³ Section 11(1) of the 1976 Act.

³⁸⁴ Section 11(2) of the 1976 Act.

³⁸⁵ Section 14(a) of the 1976 Act.

earnings and expected earnings.³⁸⁶ If the debtor's new employer has knowledge of the attachment of earnings order, he or she must notify the court of his or her status as the debtor's employer and provide details of the debtor's earnings.³⁸⁷ The court may vary or discharge the order on the application of the maintenance creditor, debtor or the District Court clerk if it thinks fit.³⁸⁸

6.263 Anecdotal evidence provided to the Commission indicates that the attachment of earnings systems works reasonably well in the family law context. While there is a lack of empirical research on the effectiveness of the system, a study conducted by the Combat Poverty Agency analysing the first ten years of the system of attachment found the results achieved by the procedure to be quite mixed.³⁸⁹ Of a sample of 705 orders payable to the District Court clerk made between 1976 and 1986, 28% were never paid, 48% were in arrears of six months or more, 10% were in arrears of less than 6 months, while only 13% were paid up to date. It was noted that these findings must be placed in the context of maintenance orders generally, where there is usually a high rate of default in any case.³⁹⁰ Despite the above, it should be noted that attachment of earnings was nonetheless more successful than the system of committal which had previously been the primary method of enforcing maintenance orders.

(iii) Advantages

6.264 The Commission now turns to discuss the advantages of the introduction of an attachment of earnings mechanism for the enforcement of all judgment debts. A first advantage of such a mechanism is that it targets the assets of the debtor which are most likely to yield proceeds for creditors: the debtor's future income. It is noted below that a major failing of the procedure of execution against goods is that debtors often will not possess assets capable of being seized and sold to satisfy the debt, leaving the Sheriff or County Registrar to make a return of "no goods".³⁹¹ Thus while historically a debtor's most valuable assets were found amongst his or her personal property, today future income is a more valuable asset. This is particularly the case since technological advances have made attachment of earnings much more efficient.³⁹² Secondly, attachment of earnings has been identified as an appropriate enforcement mechanism for "could pay" debtors, who are willing to pay but who may lack the structure and money management skills necessary to schedule their repayments.³⁹³ It must be noted however that it would be preferable for such debtors to be facilitated through creditors' responsible arrears management practices and provided with a more structured repayment programmes to assist their payments, rather than resorting to formal enforcement in such cases.³⁹⁴ Thirdly, as lenders providing unsecured loans will consider the borrower's future income as part of creditworthiness assessments, it would seem appropriate that such income could then be made available to lenders in the case of

³⁸⁶ Section 14(b) of the 1976 Act.

³⁸⁷ Section 14(c) of the 1976 Act.

³⁸⁸ Section 17(1) of the 1976 Act.

³⁸⁹ Ward *Financial Consequences of Marital Breakdown* (Combat Poverty Agency 1990). A summary of the findings of this survey is presented in the FLAC report: Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 54.

³⁹⁰ Joyce *op cit*.

³⁹¹ See paragraph 6.347. See also The Committee on Court Practice and Procedure *Eighteenth Interim Report: Execution of Money Judgments, Orders and Decrees* (The Stationary Office Dublin 1972) at 13.

³⁹² See Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report presented by the Institute for Financial Services e.v. Erasmus University Rotterdam/School of Law University of Helsinki/Helsinki Collegium for Advanced Studies to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 58.

³⁹³ See Wilson and Ford "Recovering Debt: The Effectiveness of Attachment of Earnings?" (1992) *CJQ* 363 at 382.

³⁹⁴ See the discussion of responsible arrears management in this context above at paragraph 1.80.

default.³⁹⁵ In this way the economic view of consumer credit as essentially an anticipation of future income from work undertaken earned in the form of wages can be seen.³⁹⁶

6.265 Finally, the introduction of an attachment of earnings system would provide an alternative to imprisonment by making available another coercive method of enforcement. The Seanad debates in 2009 discussed above also raised this point. It was argued that attachment of earnings has a greater value to creditors than imprisonment, as it provides a possibility or likelihood of having at least some of the debt repaid, while imprisonment does not provide such likelihood.³⁹⁷ The point was also made that attachment of earnings is a less expensive enforcement method than imprisonment, which causes the State to incur great cost.³⁹⁸ The argument that it is not just desirable to introduce a system of attachment of earnings, but rather that is constitutionally necessary to do so, has been discussed above.³⁹⁹

(iv) Disadvantages

6.266 A primary criticism of the mechanism of attachment of earnings is the negative impact that the procedure may have on the relationship between the debtor and his or her employer. As the right to a livelihood is protected by the Constitution of Ireland, this concern must be seriously considered.⁴⁰⁰ This major disadvantage led many commentators in the United States to call for the prohibition of attachment of earnings in the late 1960s and early 1970s,⁴⁰¹ and led to federal legislation providing a measure of employee protection from dismissal on the grounds of being subject to an attachment of earnings order for non-payment of debt.⁴⁰² The primary concern is that employers may see the fact that an attachment order has been made against an employee as a sign that the employee is irresponsible or not trustworthy. For example, a study conducted in the United States before consumer credit laws protected employees from dismissal on this ground showed that 27 of 40 companies studied had an established practice of dismissing employees whose wages had been attached a number of times.⁴⁰³ Subsequent employee protection legislation in the United States and in most developed countries has reduced this practice, but certain evidence exists that the dismissal of employees on the grounds of their becoming subject to an attachment of earnings order still takes place. Recent studies in England and Wales have noted that “anecdotal evidence suggests that it is not unknown for debtors to be dismissed when they become subject to an attachment of earnings order”,⁴⁰⁴ and earlier studies noted that it remains the policy of some firms, such as security firms or companies where money is handled, to dismiss employees against whom judgments have been obtained.⁴⁰⁵ It is difficult to assess the true extent of this problem. Research conducted by the Scottish Executive for example found no significant problems regarding this issue, and

³⁹⁵ See Reifner et al *op cit.* at 88.

³⁹⁶ *Ibid.* It must however be recognised that the primary purpose of income is not merely to repay consumer credit agreements, but for the consumption needs of debtors and their dependents.

³⁹⁷ Seanad Éireann Parliamentary Debates Official Report Vol. 196 No. 12, 8 July 2009 at 944, per Senator Alex White.

³⁹⁸ Seanad Éireann Parliamentary Debates Official Report Vol. 196 No. 12, 8 July 2009 at 944, per Senator Jim Walsh.

³⁹⁹ See paragraph 6.258 to 6.259 above.

⁴⁰⁰ See paragraphs 2.58 to 2.62 above.

⁴⁰¹ See for example Kerr “Wage Garnishment Should Be Prohibited” [1968-1969] 2 *Prospectus* 372.

⁴⁰² §1674(a) *Consumer Credit Protection Act 1968* (15 USC) (US) prohibits employers from discharging any employee by reason of the fact that his or her earnings have been subjected to garnishment for any one indebtedness.

⁴⁰³ See Kerr “Wage Garnishment Should Be Prohibited” [1968-1969] 2 *Prospectus* 372 at 376.

⁴⁰⁴ Lord Chancellor’s Department *Enforcement Review: Report of the First Phase of the Enforcement Review* (July 2000) at paragraph 147.

⁴⁰⁵ See Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 74-75, citing Wolfe *Debt Advice Handbook* (3rd ed. Child Poverty Action Group 1998) at 197.

concluded that employers generally neither recorded incidents of attachment of earnings nor took action against debtors who were subject to such orders, although exceptionally action was taken where the debtor had responsibility for handling money in his or her job.⁴⁰⁶ Despite these findings, a further study shows that whatever the true impact on the employment relationship, debtors still retain anxiety as to the potential effect of an attachment of earnings order on their job security and to the embarrassment which will be caused by knowledge of their debt difficulties entering their workplaces.⁴⁰⁷ Ultimately this study found that few of the debtors surveyed who had argued that they should not be made subject to attachment orders due to fears of jeopardising their job security actually lost their jobs after the order was made.⁴⁰⁸

6.267 Even if dismissal due to attachment of earnings is rare, the point has been made that there is a risk that an employer may, either consciously or subconsciously, gain an unfavourable impression of the employee due to his or her knowledge of the employee's debt difficulties, and that if this does not threaten the debtor's employment, it may affect his or her prospects in relation to accessing promotion or training.⁴⁰⁹ Also, at a basic level an attachment of earnings order involves an intrusion into debtors' privacy rights, as details of their financial circumstances must necessarily be communicated to employers. The need to respect debtors' privacy rights in this context has been discussed above, and this issue must be considered seriously in the context of assessing the desirability of introducing an attachment of earnings system.⁴¹⁰ It must however also be noted that any enforcement mechanism necessarily involves a degree of coercion and thus a restriction of the rights of debtors, and that in this context attachment of earnings may be less restrictive than other methods of enforcement, such as the seizure and sale of debtors' assets. Also, the interferences of attachment with the employment relationship could be limited by introducing legislative safeguards to protect employees subject to such orders, as discussed further below.⁴¹¹

6.268 A second criticism of the attachment of earnings mechanism is that it may leave the debtor without sufficient income to provide a reasonable standard of living for the debtor and his or her dependants. This is a very severe consequence of attachment of earnings orders and the introduction of such orders should be restricted so that families must not be deprived of the basic level of income needed to ensure a reasonable standard of living.⁴¹² The level of income which should be protected from attachment is a complex topic, and is discussed further below.⁴¹³

6.269 Thirdly, a related criticism of attachment of earnings orders is that they may reduce incentives for the debtor to seek, or to continue in, employment.⁴¹⁴ If the level of the debtor's income protected from attachment is very low, the debtor may consider that continued employment is not worthwhile. A review of the operation of attachment of earnings in family maintenance cases in Ireland found that in 26% of the cases studied the maintenance debtor left employment at some point after the attachment order.⁴¹⁵ It has

⁴⁰⁶ *Enforcement of Civil Obligations in Scotland – A Consultation Document* (The Scottish Executive 2002) at 96. This report noted that the Scottish Law Commission had previously concluded that there was little evidence that dismissal resulted from attachment of earnings on any significant scale.

⁴⁰⁷ Wilson and Ford "Recovering Debt: The Effectiveness of Attachment of Earnings?" (1992) *CJQ* 363 at 373-4.

⁴⁰⁸ *Ibid* at 374.

⁴⁰⁹ *Joyce An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 122.

⁴¹⁰ See paragraphs 2.36 to 2.41 above.

⁴¹¹ See paragraphs 6.291 to 6.296.

⁴¹² See *Joyce An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 119. See also Fletcher / *Can't Have my Wages Garnisheed!* [1998-1999] 50 *South Carolina Law Review* 525 at 533-4.

⁴¹³ See paragraphs 6.274 to 6.290.

⁴¹⁴ *Joyce op cit.* at 53-54, 119-120. See also Zaborowski and Zweifel "Getting Out of Debt: Garnishment of Wage in Whose Interest?" (1999) 8 *European Journal of Law and Economics* 207.

⁴¹⁵ *Joyce An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 54, citing Ward *Financial Consequences of Marital Breakdown* (Combat Poverty Agency 1990).

been suggested that this high figure can be explained by reference to the fact that in 54% of the cases studied, the protected income rate was set at a level lower than the maintenance debtor would have received if on unemployment assistance, while in 76% of cases the amount was less than would have been received from unemployment benefit. Caution must however be expressed with regard to these findings, as maintenance debts are in many ways quite different to other civil debts, most notably due to the highly emotional circumstances under which they often arise. Also, it can be seen that despite the level of protected earnings being set below social welfare levels in the majority of cases, the numbers of debtors who left their employment were much lower, showing that many debtors stayed in employment despite the low levels of their earnings. Some authors have rejected the view that most debtors would leave their employment rather than pay maintenance debt as a clear exaggeration.⁴¹⁶ It nonetheless must be ensured that such orders are not permitted to discourage debtors from seeking and continuing in employment.

6.270 Finally, a considerable criticism of attachment of earnings is that it is a method of enforcement which creates external costs for third parties, in that the debtor's employer becomes subject to the administrative burden of making (and in some case calculating) deductions from the employee debtor's income and passing them on to creditors or court officers.⁴¹⁷ These costs may in fact be a more important reason for a link between attachment orders and job insecurity than the concerns discussed above that employers may view indebted employees as being irresponsible. This is particularly true in small enterprises with less sophisticated payroll systems.⁴¹⁸ Studies in Scotland showed that while employers were receiving compensation for their participation in the attachment procedure, often this was insufficient to cover the costs incurred.⁴¹⁹ This is significant in light of the Irish Supreme Court decision of *In the Matter of Article 26 and in the Matter of the Employment Equality Bill 1996*.⁴²⁰ Here the Court held that a provision of a Bill which imposed an obligation on employers to provide special treatment or facilities to cater for potential or current employees with disabilities was an unjust attack on the property rights of employers and a failure to protect the employers' right to earn a livelihood.⁴²¹ This was because the Bill required private employers, rather than society in general, to bear the cost of implementing a policy aimed to achieve social justice.⁴²² For an attachment of earnings mechanism to be successful, significant burdens must not be imposed on employers, and options such as allocating the costs involved to the debtor or creditor should be considered.⁴²³

(v) Conclusions

6.271 The Commission has thus presented the arguments against and in favour of the introduction of an attachment of earnings mechanism for the enforcement of general judgment debts. The Commission believes that many of the arguments against the introduction of such a system can be limited by restricting the use of the mechanism to appropriate cases, and by introducing legislative safeguards to protect the debtor and his or her dependents, while also providing an effective enforcement procedure.

⁴¹⁶ Capper *The Enforcement of Judgments in Northern Ireland* (SLS Legal Publications (NI) 2004) at 80.

⁴¹⁷ See e.g. *Enforcement of Civil Obligations in Scotland – A Consultation Document* (The Scottish Executive 2002) at 96; Wilson and Ford "Recovering Debt: The Effectiveness of Attachment of Earnings?" (1992) *CJQ* 363 at 369.

⁴¹⁸ Lord Chancellor's Department *Enforcement Review: Report of the First Phase of the Enforcement Review* (July 2000) at paragraph 147.

⁴¹⁹ *Enforcement of Civil Obligations in Scotland op cit.* at 96.

⁴²⁰ [1997] 2 IR 321.

⁴²¹ See Hogan and Whyte *JM Kelly: The Irish Constitution* (LexisNexis Butterworths 2003 at paragraphs 7.3.99 to 7.3.102.

⁴²² The Court noted that "... the difficulty [with the relevant provision of the Bill] is that it attempts to transfer the cost of solving one of society's problems on to a particular group": [1997] 2 IR 321, 367.

⁴²³ See e.g. Fletcher *I Can't Have my Wages Garnisheed!* [1998-1999] 50 *South Carolina Law Review* 525 at 532.

The Commission nonetheless invites submissions from interested parties as to the desirability of introducing an attachment of earnings mechanism for the enforcement of judgment debts.

6.272 *The Commission invites submissions as to the desirability of introducing an attachment of earnings mechanism for the enforcement of all judgment debts against individuals receiving regular income.*

(b) **Features of a possible attachment system:**

6.273 The Commission now discusses the necessary elements of any potential attachment of earnings system. In particular, the Commission will discuss how some of the problems encountered in attachment mechanisms, as identified above, should be addressed by specific legislative rules. In this section the Commission will draw on the research conducted by the Free Legal Advice Centres in this area.⁴²⁴

(i) **Exempted income levels**

6.274 A primary issue, and one which has led to differing approaches in various legal systems, is how to calculate the level of income which should be exempt from attachment. The general principle applying in all jurisdictions is that the debtor should be permitted to keep sufficient income to maintain a reasonable standard of living for the debtor and his or her dependents.⁴²⁵ In addition to this principle of protecting the human dignity of the debtor, income exemptions may also further the interests of some creditors by providing debtors with incentives to remain in employment and by making compliance with the attachment repayments more sustainable and realistic.⁴²⁶ Sufficient levels of protected income also result in benefits to the general public, as the State is not required to provide for shortfalls in the debtor's ability to provide for him or herself and his or her dependents. It is important in this regard to consider the concern that if excessive attachments are permitted, the debtor may lose financial incentives to remain in employment, and may instead seek to find employment in the black economy, where his or her earnings would not be capable of attachment. The FLAC report discussed above highlighted the need to prevent a system of attachment of earnings from creating employment disincentives.⁴²⁷ A useful summary of the purposes of exemptions from attachment as identified by courts in the United States has included the following considerations:⁴²⁸

- To provide a debtor with the necessary income to survive.
- To protect the dignity of the debtor and his or her cultural and religious identity.
- To afford a means of financial rehabilitation.
- To protect the family unit from impoverishment.
- To spread the burden of the debtor's support from society to his creditors.

6.275 There are primarily two methods of calculating the amount of a debtor's income which should be exempt from attachment. First, some legal systems, such as Germany, Finland, and now England and Wales, use fixed tables to specify the amounts of income subject to attachment. Secondly, other systems such as Ireland, and the system in England and Wales prior to recent reforms, allow the level of attachable income to be calculated by an official in individual cases on a discretionary basis.⁴²⁹ Thirdly, some systems such as that operating in Sweden adopt elements of both of these approaches, setting

⁴²⁴ See Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 118-122.

⁴²⁵ See e.g. Kennett et al "Enforcement of Judgments" [1998] *European Review of Private Law* 321 at 350.

⁴²⁶ See e.g. Zaborowski and Zweifel "Getting Out of Debt: Garnishment of Wage in Whose Interest?" (1999) 8 *European Journal of Law and Economics* 207 at 219-222.

⁴²⁷ See paragraph 6.268 above.

⁴²⁸ Walker "Wyoming's Statutory Exemption on Wage Garnishment: Should it Include Deposited Wages?" [2006] 6 *Wyoming Law Review* 53 at 58.

⁴²⁹ Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 94-100.

fixed minimum protected income levels, but adding allowances for transport, accommodation and medical costs to this level.⁴³⁰

6.276 Variations also exist within these categories as to how these systems operate. Systems adopting a fixed deduction system may calculate the protected income rate either by reference to social welfare levels or by reference to specified income bands. The number of dependents of the debtor, and the income of the debtor's spouse or partner, are factors considered in some legal systems, but not in others. Under the discretionary systems, the protected income level will be different in individual cases as the circumstances of the debtor vary. It should be noted that under the discretionary approach in England and Wales, guidelines existed to assist court officials in calculating the level of protected income, and these specified certain categories of income and expenditure which should be taken into account when determining the protected income level. In this way these guidelines served to bring a level of certainty and consistency to the protected income level.⁴³¹ These guidelines referred to social welfare payment levels as the starting point for determining the exempted income, with other allowances corresponding to social welfare premium payments also included in the protected amount. Allowances were also made for travel costs, while any other income, including the earnings of the debtor's spouse, was to be deducted from the protected income level. An amount of disposable income is then calculated, with the attachment usually set at between 50% and 66% of this amount.

6.277 The table below, extracted from a 2005 survey commissioned by the Council of Europe, provides an overview of attachment of earnings systems in Europe.⁴³²

Country	Portion of income attached – standard debt	Portion of income attached – maintenance debt	Additional Comments
Belgium	Progressive scale		Minimum subsistence level protected; court has discretion.
Croatia	1/3	1/2	
Cyprus	Court decides		
Czech Republic	1/3	2/3	All income above 150% of the minimum subsistence level is attachable
Denmark	1/5		Creditor must be a public authority
England and Wales	Progressive scale: fixed tables (legislation not yet commenced)		Minimum subsistence level protected.
Estonia			Minimum subsistence level protected.
Finland	1/3	1/3	Minimum subsistence level protected.
France	Progressive scale	Progressive scale not applied	Minimum subsistence level protected.
Germany			Minimum subsistence level.

⁴³⁰ *Ibid* at 100.

⁴³¹ See Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 75-76, 98-99.

⁴³² Niemi-Kiesiläinen and Henrikson *Report on Legal Solutions to Debt Problems in Credit Societies* CDCJ-BU (2005) 11 rev at 47.

Country	Portion of income attached – standard debt	Portion of income attached – maintenance debt	Additional Comments
Greece	1/2		Creditor must be a public authority or maintenance creditor.
Italy	1/5		
Lithuania	1/5 – 1/2 of minimum monthly wage. 7/10 of income exceeding minimum monthly wage.	1/2	Court has discretion
Luxembourg	Progressive scale: 10%-100% of income above minimum subsistence		Minimum subsistence level protected
Norway	All above minimum subsistence.		Time limit of 2-5 years.
Portugal	1/3		Minimum subsistence level protected.
Slovakia	1/3	2/3	
Slovenia	2/3		
Spain	30-90% of income above min. subsistence		Minimum subsistence.
Sweden	All above minimum subsistence		Minimum subsistence level protected.
Switzerland	All above minimum subsistence		Time limit of one year.
Turkey	1/4 of minimum subsistence level		

6.278 The respective advantages and disadvantages of the differing approaches to fixing protected income levels are now discussed, beginning with the advantages of fixed deduction levels. First, fixed tables of protected income provide certainty to the attachment of earnings procedure.⁴³³ Research in England and Wales highlighted a lack of consistency in the amount considered by courts to be a reasonable allowance for the debtor under the discretionary approach.⁴³⁴ This means that creditors find it difficult to estimate repayment amounts under attachment of earnings orders, which leads to difficulties for creditors in deciding whether to accept offers from debtors in advance of making an application for attachment of earnings.⁴³⁵ Secondly, it may also be argued that the issue of the level of income necessary to provide a reasonable income is one which lies outside the expertise of judges and court officials, and so fixed tables specified in legislation through consultation with experts in the field may be a more appropriate means of ensuring that appropriate levels of income are exempt from attachment.

6.279 Thirdly, the enforcement review in England and Wales concluded that the discretionary approach of County Courts to calculating protected earnings rates resulted in a slow and ineffective procedure, and that the necessary step of establishing the debtor's means in each case caused

⁴³³ Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 99.

⁴³⁴ Lord Chancellor's Department *Effective Enforcement – Improved Methods for Recovery for Civil Court Debt and Commercial Rent and a Single Regulatory Regime for Warrant Enforcement Agents* (Cm5744 2003) at 72.

⁴³⁵ *Ibid.*

unnecessary delay and often produced inaccurate information.⁴³⁶ Therefore a new “fixed table” procedure was recommended, whereby the relevant deduction rates would be specified in regulations, and “broad assumptions” on debtors’ average expenditure could be made. A right to apply to court for a review would however be available to creditors or debtors who can prove that the fixed table deduction rates fall well above or below what the debtor can actually afford.⁴³⁷ These reforms were included in the *Tribunals, Courts and Enforcement Act 2007*; although it appears that the relevant provisions of the Act have not yet been commenced. Fourthly, fixed tables of income rates may reduce the administrative burden of attachments on employers by removing the need for employers to input and regularly check the levels of protected earnings rates and normal deduction rates set in each individual case.⁴³⁸ This was a key argument made by the enforcement review in England and Wales as it recommended a switch to fixed tables over the discretionary approach on the grounds that it would be less burdensome for employers.

6.280 Several advantages of a discretionary approach over a fixed rate approach also exist however. The first obvious criticism of a fixed table approach is that it may be too rigid to take account of the individual circumstances of the debtor in question.⁴³⁹ This criticism was recognised by the enforcement review in England and Wales, which acknowledged that the expenditure of some households will be greater or lower than estimated in the fixed tables.⁴⁴⁰ This study in turn recommended a mechanism for the review of the rate attached, as described above. The criticism may nonetheless be raised that a debtor may be unaware of this power to review the protected income rate, or may be unwilling to bring court proceedings to challenge it. It has already been shown above that debtors generally have a low participation rate in court proceedings. The question of how fixed tables can accommodate the situation of a multiply-indebted individual would also need to be addressed if such a system was adopted. Secondly, fixed tables may quickly become outdated and it would be necessary to subject them to regular review or link them to indices such as the Consumer Price Index in order for them to keep pace with changes in the cost of living. Thirdly, arguments have been made that fixed tables may lead to lower protected earnings rates and that the most vulnerable would be worse under a fixed table system rather than under a system based on a discretionary calculation of protected income.⁴⁴¹ This need not necessarily be so however. Calculations conducted by the enforcement review England and Wales in contrast found that fixed tables would lead to reduced payments for those in receipt of lowest incomes, and increased payments for those on higher incomes.⁴⁴² Fixed tables can also be used to guarantee that a certain minimum income level must always be exempt from attachment in a way that a discretionary approach cannot.⁴⁴³

6.281 It can therefore be seen that there are advantages and disadvantages to both fixed protected income rates and discretionary rates. While fixed tables of attachable income rates provide certainty and reduce the administrative burden for employers, they are less equipped to deal justly with the unique circumstances of debtors in individual cases. The Commission invites views as to which of these

⁴³⁶ Lord Chancellor’s Department *Effective Enforcement – Improved Methods for Recovery for Civil Court Debt and Commercial Rent and a Single Regulatory Regime for Warrant Enforcement Agents* (Cm5744 2003) at 73.

⁴³⁷ *Ibid* at 76.

⁴³⁸ *Effective Enforcement op cit.* at 76.

⁴³⁹ See e.g. Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 99.

⁴⁴⁰ Lord Chancellor’s Department *Effective Enforcement – Improved Methods for Recovery for Civil Court Debt and Commercial Rent and a Single Regulatory Regime for Warrant Enforcement Agents* (Cm5744 2003) at 76.

⁴⁴¹ See Lord Chancellor’s Department *Effective Enforcement – Improved Methods for Recovery for Civil Court Debt and Commercial Rent and a Single Regulatory Regime for Warrant Enforcement Agents* (Cm5744 2003) at 75; Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 99.

⁴⁴² *Effective Enforcement op cit.* at 75-76.

⁴⁴³ *Ibid* at 75.

approaches is to be preferred. The Commission also invites submissions as to how the levels of protected income should be calculated, either in the form of legislative fixed tables or in guidelines for officers setting the level of protected and attachable income.

6.282 *The Commission invites submissions as to how the level of protected income which cannot be made subject to an attachment of earnings order should be calculated. The Commission in particular invites submissions as to whether this level should be set in statute, or whether it should be decided by the enforcement officer in each individual case.*

(ii) Attachment of social welfare

6.283 A difficult question arises in relation to the possible application of attachment of earnings orders to debtors whose sole source of income is composed of social welfare payments. FLAC has argued that social welfare payments are intended to provide for the subsistence needs of the unemployed and so should not be allowed to be diverted to any other purpose.⁴⁴⁴ A previous report into imprisonment under the systems for enforcing fines and debts cautioned against the attachment of social welfare payments due to the fact that persons depending on such payments may be living in, or close to, poverty.⁴⁴⁵ Likewise, it appears that in some jurisdictions social welfare payment rates are used to set the levels of protected income, meaning that it is considered inappropriate to attach such payments and so leave the debtor with less income than that provided by social welfare payments.⁴⁴⁶ In the Canadian province of British Columbia, legislation expressly provides that “[i]ncome assistance, hardship assistance and supplements are exempt from garnishment, attachment, execution or seizure under any Act.”⁴⁴⁷

6.284 In certain other countries the attachment of social welfare payments is possible, although it should be noted that this may not happen in practice as the protected earnings rate may not be less than the social welfare payment rate.⁴⁴⁸ Finnish law permits the attachment of social welfare payments, but provides that if the debtor has been unemployed for a long time, the attachment may be postponed for a period of up to four months, provided this does not seriously endanger the creditor’s possibility of receiving payment.⁴⁴⁹

6.285 It can therefore be seen that various approaches have been adopted to the question of the attachment of social welfare payments in different legal systems. This is a sensitive issue, which involves questions of social policy as well as legal issues. The Commission therefore invites submissions as to whether or not attachment of earnings orders should be available to attach social welfare payments.

6.286 *The Commission invites submissions as to whether social welfare payments should be subject to attachment under attachment of earnings orders.*

⁴⁴⁴ Joyce *op cit.* at 122.

⁴⁴⁵ Redmond *Imprisonment for Fine Default and Civil Debt* (Nexus Research Co-operative 2002) at 53.

⁴⁴⁶ Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 89-94. In Denmark and France, the minimum protected earnings level is equivalent to the minimum social security payment rate, meaning that social security payments are exempt from attachment. In the Netherlands, the protected earnings rate is set at 90% of the relevant social security payments to which the debtor and his or her dependents would be entitled.

⁴⁴⁷ Section 29(1) *Employment and Assistance Act 2002* [SBC 2002] Chapter 40 (British Columbia). This legislation does not however prevent social welfare payments from being subject to a right of set-off: section 29(2).

⁴⁴⁸ Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 89-94. The FLAC report notes that social welfare payments are attachable in theory in countries such as Belgium, Spain and Finland. In Portugal,

⁴⁴⁹ See the description of the attachment of earnings system on the Finnish Judicial System website, available at: <http://www.oikeus.fi/19893.htm>.

(iii) Bank account exemptions

6.287 A problematic question which has arisen in other countries is whether the protection of a minimum level of a debtor's income should extend to when this income has been paid to the debtor and has been deposited in the debtor's bank account.⁴⁵⁰ In some legal systems, legislation providing for levels of income exempt from attachment has been interpreted as only protecting wages which are "accrued and unpaid", while providing no protection against the attachment of the same funds when they have been paid to the debtor and lodged in his or her bank account.⁴⁵¹ A contrasting conclusion has been reached in other legal systems, based both on differences in the wording of the relevant legislation and on public policy considerations such as the fact that the income exemption could be rendered meaningless unless the debtor had the opportunity to deposit and spend the wages.⁴⁵²

6.288 For this reason several legal systems have adopted legislation to protect certain levels of debtors' bank account balances from garnishment. Different approaches have been adopted to achieve this end, particularly in various American states. For example, in Oregon exempt income remains exempt when deposited in the debtor's account as long as the exempt funds remain identifiable and amount to less than \$7500.⁴⁵³ New York law provides that wages earned up to 60 days before the garnishment of a bank account are exempt from garnishment.⁴⁵⁴ In Iowa, detailed graduated exemption rules apply to exempt different levels of funds held in bank accounts from garnishment based on the net earnings of the debtor.⁴⁵⁵ Various approaches have also been adopted in European systems to prevent the excessive garnishment of a debtor's bank account, and these are discussed in relation to the reform of the garnishee order procedure below.⁴⁵⁶

6.289 While the question of exemptions from garnishment will be discussed further when discussing the reform of the garnishee order procedure below, the Commission recommends that the link between income exemptions in the context of attachment of earnings and exemptions from the garnishment of bank accounts should be recognised, and that consistency should exist between these two exemptions. Problems have arisen in other jurisdictions due to difficult questions of interpretation of attachment of earnings law, and these problems should be avoided in introducing an attachment of earnings system to Ireland by ensuring that the question of exemptions from garnishment of funds in bank accounts is expressly addressed. The Commission invites submissions as to how the level of exempt funds should best be calculated.

6.290 *The Commission provisionally recommends that the link between exemptions from attachment of earnings and exemptions from the garnishment of bank accounts should be recognised, and that a consistent approach should be adopted to these two exemption levels. The Commission also provisionally recommends that the status of deposited earnings should be expressly addressed in*

⁴⁵⁰ See e.g. Kennett et al "Enforcement of Judgments" [1998] *European Review of Private Law* 321 at 351; Walker "Wyoming's Statutory Exemption on Wage Garnishment: Should it Include Deposited Wages?" [2006] 6 *Wyoming Law Review* 53.

⁴⁵¹ See e.g. *In re Walsh* 96 P.3d 1 (Wyo. 2004), in which the Wyoming Supreme Court held that the legislation exempting a portion of the debtor's income from attachment (Wyo. Stat. Ann. §1-15-408(a) (2005)) applies only to wages that are "accrued" or "payable", thus not preventing the attachment of a debtor's earnings which have been paid and deposited in the debtor's bank account: see Walker *op cit.* at 54.

⁴⁵² See the decision of *In Re Norris* 203 B.R. 463 (Bankr. D. Nev. 1996), interpreting legislation of the State of Nevada (Nev. Rev. Stat. §21.090(1)(g) (2004)) which largely resembled the Wyoming statute cited above: see Walker *Wyoming's Statutory Exemption on Wage Garnishment: Should it Include Deposited Wages?* [2006] 6 *Wyoming Law Review* 53 at 71.

⁴⁵³ Or. Rev. Stat. §18.348 (2004): see Walker *op cit.* at 77-78.

⁴⁵⁴ N.Y. Civil Practice Law and Rules. §5205(d) (Consol. 2004): see Walker *op cit.* at 77.

⁴⁵⁵ Iowa Code §642.21 (2004): see Walker *op cit.* at 76-77.

⁴⁵⁶ See paragraphs 6.228 to 6.233 below.

legislation to extend the protection of exempted unpaid income to paid and deposited income. The Commission invites submissions as to how the exempt level of funds should best be calculated.

(iv) Employee protection

6.291 The interference in the employer-employee relationship caused by attachment of earnings orders has already been discussed above.⁴⁵⁷ The Commission has noted that any system of attachment of earnings must recognise this problem, and that legislative safeguards must exist to limit the effect of this enforcement mechanism on the employment relationship. In response to this issue, the FLAC report on this area of the law recommended that protection should be provided to debtors through employment legislation.⁴⁵⁸ In particular, the report recommended that the *Unfair Dismissals Act 1977* and the *Unfair Dismissals (Amendment) Act 1993* should be amended so that dismissal on the grounds of being subject to an attachment of earnings order should be added to the list of unfair reasons for dismissal.⁴⁵⁹

6.292 In the United States, the *Consumer Credit Protection Act 1968* attempted to address these concerns. This Act provides that “[n]o employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment of any one indebtedness.”⁴⁶⁰ An employer who wilfully violates this provision may be subject to a fine, imprisonment or both.⁴⁶¹ The reference to “one indebtedness” refers to a single debt, and includes a situation where a creditor makes multiple attempts to attach earnings to pay this single debt.⁴⁶² This provision has been strongly criticised as not providing sufficient protection to employees, particularly as it permits an employer to dismiss an employee on the grounds of an attachment of earnings order where the employee has been subject to other attachments previously.⁴⁶³ This is of particular concern when it is recognised that most debtors who become subject to enforcement proceedings owe multiple debts. The provision has also been criticised on the ground that employers may be able to evade it by providing a reason other than the attachment of earnings as a reason for the dismissal of an employee.⁴⁶⁴ It has been argued that employees suffering from debt difficulties may be unable to bring the legal proceedings necessary to find the true cause for the dismissal.

6.293 A slightly higher level of protection is provided to employee debtors under the *Canada Labour Code*, which provides that “no employer shall dismiss, suspend, lay off, demote or discipline an employee on the ground that garnishment proceedings may be or have been taken with respect to the employee.”⁴⁶⁵

6.294 In the Australian state of Victoria, wide protection is provided to employee debtors. The *Supreme Court Act 1986* provides that:

“[a]ny person who dismisses an employee or injures an employee in the employee's employment or alters an employee's position to the prejudice of the employee by reason of the circumstance that an attachment order has been made in relation to the employee or that the

⁴⁵⁷ See paragraphs 6.266 to 6.267 above.

⁴⁵⁸ Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 99.

⁴⁵⁹ Section 6 of the *Unfair Dismissals Act 1977*, as amended by section 5 of the *Unfair Dismissals (Amendment) Act 1993*, provides that a dismissal shall be deemed to be unfair if it is made on the grounds of the employee's membership of a trade union or of the travelling community; the employee's race, colour, sexual orientation, age, religious opinions or pregnancy; or if the employee is a party to civil proceedings or made a complaint in criminal proceedings brought against the employer.

⁴⁶⁰ §1674(a) *Consumer Credit Protection Act 1968* (15 USC) (USA).

⁴⁶¹ §1674(b) *Consumer Credit Protection Act 1968* (15 USC) (USA).

⁴⁶² See Fletcher *I Can't Have my Wages Garnisheed!* [1998-1999] 50 *South Carolina Law Review* 525 at 529.

⁴⁶³ See e.g. Kerr “Wage Garnishment Should Be Prohibited” [1968-1969] 2 *Prospectus* 372 at 386-389.

⁴⁶⁴ *Ibid* at 388-9.

⁴⁶⁵ Article 238 *Canada Labour Code* R.S.C. 1985, c. L-2 s. 238; R.S.C. 1985, c. 9 (1st Supp.), s. 13

employee is required to make payments under an attachment order may be dealt with as for contempt of court.”⁴⁶⁶

6.295 It can be seen that legislation introducing an attachment of earnings mechanism should include safeguards to protect the job security of employee debtors who are made subject to attachment orders. This could be achieved by prohibiting employers from dismissing employees on the ground of being subject to an attachment order. Alternatively, further protection could be provided by preventing discrimination, and not mere dismissal, on the grounds of being subject to an attachment of earnings order. The Commission invites submissions as to the best approach to ensure that the employment of a debtor who is subject to an attachment of earnings order is adequately protected.

6.296 *The Commission invites submissions as to the best means of ensuring that a debtor who is subject to an attachment of earnings order is protected from being subject to dismissal or discrimination on the grounds of being subject to such an order. The Commission invites submissions in particular on whether a prohibition on the dismissal of an employee on the grounds of being subject to an order would provide sufficient protection, or whether a wider prohibition on discrimination on the grounds of such an order would be preferable.*

(v) Costs of attachment of earnings for employers

6.297 It has been noted above that a significant reason why employers may seek to dismiss employees who have been made subject to attachment of earnings orders is that the administrative costs to employers of such orders may constitute a burden on employers’ resources.⁴⁶⁷ In this regard it has been argued that if the costs of attachments for employers are lowered, this will aid the policy of protecting employees, as employers will have less incentive to dismiss those who become subject to attachment orders.⁴⁶⁸ This is relevant to the criticism that attachment of earnings orders force employers to act as debt collection agencies for the creditors of their employees, and may impose the costs of debt enforcement on the employer and society in general, while creditors receive all of the benefit.⁴⁶⁹ It is therefore important that employers are not exposed to excessive costs through their obligations to comply with attachment of earnings orders.

6.298 This has been recognised by the recent enforcement review in England and Wales, which cited the reduction of the burden on employers as a significant argument in favour of introducing fixed tables of attachment deductions in place of the discretionary approach in operation at the time.⁴⁷⁰ A consultation of businesses and payroll organisations conducted as part of this review found that 95% supported the introduction of fixed tables due to the reduction in administrative burdens for employers this reform would create.⁴⁷¹ Also, in England and Wales payments under County Court attachment of earnings orders are in the majority centralised in a single payment office. Reform proposals indicated that, if possible, it

⁴⁶⁶ Section 23 *Supreme Court Act 1986* (No. 110 of 1986) (Vict.). Similarly, in the state of Queensland legislation on the enforcement of maintenance debts by attachment of earnings provides that:

“[a]ny person who dismisses an employee or injures the employee in his or her employment, or alters the employee’s position to his or her prejudice, by reason of the circumstances that an attachment of earnings order has been made in relation to the employee or that the person is required to make payments under such an order in relation to the employee shall be guilty of an offence against this Act.” See section 60(1) of the *Maintenance Act 1965* (Qld). 1.01 On conviction, the maximum penalty which can be imposed on an offender is \$200 or 6 months imprisonment.

⁴⁶⁷ See paragraph 6.270 above.

⁴⁶⁸ Fletcher *I Can’t Have my Wages Garnisheed!* [1998-1999] 50 *South Carolina Law Review* 525 at 532.

⁴⁶⁹ Kerr “Wage Garnishment Should Be Prohibited” [1968-1969] 2 *Prospectus* 372 at 387.

⁴⁷⁰ Lord Chancellor’s Department *Effective Enforcement – Improved Methods for Recovery for Civil Court Debt and Commercial Rent and a Single Regulatory Regime for Warrant Enforcement Agents* (Cm5744 2003) at 76.

⁴⁷¹ *Ibid* at 78.

would be desirable to allow employers to pay deductions on all attachment of earnings orders of all courts into a single office, in order to reduce the administrative burden on employers.⁴⁷²

6.299 In Northern Ireland, the costs of attachment to the employer are compensated by a power of the employer to deduct a sum prescribed by rules of court from the debtor's pay each time an attachment is made.⁴⁷³ The employer must provide the debtor with a statement in writing of the total amount of this deduction.⁴⁷⁴ It has been noted that this deduction can add appreciably to the debt for those employee debtors who are paid weekly rather than monthly.⁴⁷⁵

6.300 Concerns about the administrative costs to employers have also influenced proposed reforms in Scotland. Under section 71 of the *Debtors (Scotland) Act 1987*, employers may deduct a fee of 50p from an employee's earnings each time he or she is required to operate an attachment of earnings. Reforms proposed by the Scottish Executive recommended that the level of this fee should be doubled.⁴⁷⁶ This report noted that employers fulfil an important public function by administering attachments of earnings for which they obtain little, or often no reward.⁴⁷⁷ This report did however also note that often employers choose not to charge this fee for administering the attachment order.

6.301 The Commission believes that it is important that employers are not over-burdened by the cost of administering attachment of earnings orders, and recognises that the protection of the constitutional rights of employers may not permit the costs of attachment to be borne by employers. The Commission thus invites submissions as to how employers can best be compensated for the tasks they perform in administering attachment of earnings orders.

6.302 *The Commission provisionally recommends that employers should not be burdened with excessive administrative costs through their obligations to comply with attachment of earnings orders. The Commission invites submissions as to how employers can be compensated for the tasks they perform in administering attachment of earnings orders.*

(vi) Proportionate use of attachment of earnings orders

6.303 It has been noted above that attachment of earnings orders, even when accompanied by appropriate safeguards, necessarily involve a considerable restriction of the rights of debtors. In order to further the principle of proportionate and appropriate enforcement, as affirmed in the recent High Court decision of *McCann v Monaghan District Court Judge and Ors*,⁴⁷⁸ it may be necessary to limit the use of attachment of earnings orders to situations where other less restrictive enforcement mechanisms have failed or can be shown to be ineffective. While a primary feature of the proposed new enforcement office-based system is that it should facilitate the use of the most appropriate method of enforcement in each individual case, restrictions on the use of attachment of earnings may nonetheless be necessary. This would especially be the case if the choice of method of enforcement is left to the judgment creditor.⁴⁷⁹ Even if the choice of method lies with the enforcement office, guidelines may be necessary to limit the use of attachment of earnings.

6.304 The FLAC report has argued that restrictions should be placed on the use of attachment of earnings orders so that they may not be obtained automatically on the granting of a judgment against a

⁴⁷² Lord Chancellor's Department *Enforcement Review: Report of the First Phase of the Enforcement Review* (July 2000) at paragraphs 163-165.

⁴⁷³ See Capper *The Enforcement of Judgments in Northern Ireland* (SLS Legal Publications (NI) 2004) at 86.

⁴⁷⁴ Article 74(4) *Judgments Enforcement (Northern Ireland) Order 1981*.

⁴⁷⁵ Capper *The Enforcement of Judgments in Northern Ireland* (SLS Legal Publications (NI) 2004) at 86.

⁴⁷⁶ See *Enforcement of Civil Obligations in Scotland – A Consultation Document* (The Scottish Executive 2002) at 99.

⁴⁷⁷ *Ibid* at paragraph 5.146.

⁴⁷⁸ [2009] IEHC 276 at 81. See paragraph 6.349 below.

⁴⁷⁹ See paragraphs 6.180 to 6.186 above.

debtor.⁴⁸⁰ The procedure under the *Family Law (Maintenance of Spouses and Children) Act 1976* was criticised. This is because it permits an attachment of earnings order to be made at the same time as maintenance payments are first ordered, with the onus on the maintenance debtor to show that he or she is likely to make the payments without the need for an attachment of earnings order. The report argued that a judgment debtor should firstly be provided with the opportunity to pay a judgment debt through an instalment order before an attachment of earnings order is made. This would mean that the debtor's employer would not be informed of the attachment order until the debtor had defaulted under an instalment order. FLAC also argued that even if the debtor has defaulted in paying an instalment order, he or she should be given a final chance to repay before an attachment of earnings order is made, and the debtor's employer is informed.⁴⁸¹ It was recommended that, as in England and Wales, a system of suspended attachment of earnings orders should be introduced. This would provide the debtor with a final chance to comply with the judgment, with the suspended order then automatically coming into effect if a further default occurs.⁴⁸²

6.305 In Northern Ireland, various safeguards exist to restrict the use of attachment of earnings orders.⁴⁸³ First, unlike in the case of other enforcement mechanisms, the Northern Irish Enforcement of Judgments Office has no power to make an attachment of earnings order without a prior application from the creditor.⁴⁸⁴ Secondly, before an attachment of earnings order becomes effective, a provisional order must be served on the debtor, who is given the opportunity to specify grounds under which the debtor objects to the making of a final order.⁴⁸⁵ If the debtor objects, a hearing may take place before the Master of the EJO. As noted by the "Hunter" review of enforcement in Northern Ireland, a frequent ground of objection is that the debtor does not want his or her employer to become aware of the putative attachment of earnings order. The Hunter report also noted that when this happened the EJO usually made a suspended order, and the debtor's employer was not notified of the order unless the debtor defaulted in making repayments.⁴⁸⁶ The suspended order would then immediately come into operation in the event of a default. The Hunter report found this practice to be operating successfully and recommended that it replace the provisional attachment of earnings order procedure, so that the debtor would no longer be required to formally object to the making of an attachment of earnings order, but instead be automatically provided with a suspension of the order so long as repayments were made.⁴⁸⁷ It appears that this recommendation has not been implemented however.

6.306 Similarly, in England and Wales, section 3(3) of the *Attachment of Earnings Act 1971* provides that an attachment of earnings order may only be made where the debtor has first failed to comply with one or more payments ordered under the court adjudication being enforced.⁴⁸⁸ Also, the judgment debtor, when providing the court with a statement of means as part of the attachment of earnings procedure, may request a suspended attachment of earnings order.⁴⁸⁹ The recent review of enforcement in England and Wales noted that this procedure is an important device for debtors who do not wish their

⁴⁸⁰ Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 52.

⁴⁸¹ *Ibid* at 118.

⁴⁸² Joyce *op cit.* at 119.

⁴⁸³ See Capper *The Enforcement of Judgments in Northern Ireland* (SLS Legal Publications (NI) 2004) at 81.

⁴⁸⁴ Article 73(1) *Judgments Enforcement (Northern Ireland) Order 1981*.

⁴⁸⁵ Rule 49 *Judgments Enforcement Rules (Northern Ireland) 1981* (SR 1981/147) (NI).

⁴⁸⁶ *Report of the Enforcement of Judgments Review Committee (Northern Ireland)* (1987) at paragraph 14.13.

⁴⁸⁷ *Ibid* at paragraphs 14.15-14.16.

⁴⁸⁸ This restriction does not however family maintenance payment orders: section 3A *Attachment of Earnings Act 1971*.

⁴⁸⁹ See Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 74; Lord Chancellor's Department *Effective Enforcement – Improved Methods for Recovery for Civil Court Debt and Commercial Rent and a Single Regulatory Regime for Warrant Enforcement Agents* (Cm5744 2003) at 77.

employers to know about their judgment debt.⁴⁹⁰ Also, suspended orders prevent the employer from being burdened with administering an attachment order where it is not necessary, and also may result in the repayment of the debt more quickly than under an attachment order, as the costs of administration need not add to the debt.⁴⁹¹ This review found that approximately 28% of suspended orders lead to final attachment orders being made, with one reason for this being the tendency of some debtors to make unrealistically high offers of repayment. Several recommendations were therefore made to promote suspended orders and to make them more successful. First, it was proposed that suspended orders should remain available and should be automatically granted when first requested by a debtor. Secondly, it was recommended that efforts be made to make debtors more aware of the benefits of suspended orders and to make such orders easier to comply with. For example, creditors would be encouraged to facilitate repayment through mechanisms such as standing orders.⁴⁹²

6.307 It can thus be seen that other jurisdictions place restrictions on the availability of the remedy of attachment of earnings due to the recognition that this enforcement mechanism may significantly restrict the rights of the debtor. In accordance with the principle of proportionate enforcement, the Commission believes that attempts should be made to allow the debtor to repay the debt through an instalment order before a coercive attachment of earnings order may be made. In this manner the attachment of earnings order may be seen as a substitute for the committal procedure where default occurs under an instalment order, rather than as an enforcement remedy of first resort. The Commission therefore provisionally recommends that an attachment of earnings order may only be made where remedies which are less restrictive of the debtor's rights are unavailable.

6.308 *The Commission provisionally recommends that an attachment of earnings order should only be available where less restrictive enforcement mechanisms are unavailable or are ineffective; and that an attachment of earnings order should be used only where the debtor has been provided with an opportunity to repay the judgment debt (by instalment order) and has defaulted. The Commission also provisionally recommends that suspended attachment of earnings orders should be made in conjunction with instalment orders so that an attachment of earnings order automatically comes into effect in the event of default.*

(vii) Suspensions/variations of attachment

6.309 As attachment of earnings orders remain in force over a long period of time, the circumstances of the debtor may change during the order's existence. Therefore facilities must exist to allow the order to respond to these changes. Debtors may require an increase in the protected earnings rate due to, for example, the birth of child. Similarly, if the debtor's income is reduced, the deduction rate must be lowered to take account of this. This is the case under the current law on instalment orders, which may be varied where the debtor's circumstances change. Similar rules would be necessary to vary attachment of earnings orders.

6.310 In Northern Ireland, legislation provides for the variation, discharge, lapse and termination of attachment of earnings orders.⁴⁹³ An application to vary the order may be made by the creditor - for example if the debtor's income has increased⁴⁹⁴ - or by the debtor.⁴⁹⁵ The Hunter review of enforcement in Northern Ireland recommended that the Enforcement of Judgments Office (EJO) should review the need to vary attachment of earnings orders itself as part of its periodic reviews of the operation of all enforcements.⁴⁹⁶ If the EJO observed from the nature of the debtor's employment or information provided by the creditor that the debtor's income may have increased, it could issue directions to the debtor and/or

⁴⁹⁰ *Effective Enforcement op cit.* at 77.

⁴⁹¹ *Ibid.*

⁴⁹² *Effective Enforcement op cit.* at 77.

⁴⁹³ Capper *The Enforcement of Judgments in Northern Ireland* (SLS Legal Publications (NI) 2004) at 86.

⁴⁹⁴ Under rule 51 of the *Judgments Enforcement Rules (Northern Ireland) 1981* (SR 1981/147) (NI).

⁴⁹⁵ Under rule 59 of the 1981 Rules.

⁴⁹⁶ *Report of the Enforcement of Judgments Review Committee (Northern Ireland)* (1987) at paragraph 14.20.

employer and increase the deduction rate where the debtor's income justified this. This recommendation was not adopted however, and attachment of earnings orders are only reviewed on request.⁴⁹⁷ If the debtor loses his or her job, he or she may apply for a discharge of the attachment order.⁴⁹⁸ The EJO may also discharge or vary an existing order where another attachment of earnings order is made against a debtor by the EJO or by a court, having regard to the rules for the priority of orders.⁴⁹⁹ An attachment of earnings order is terminated on the repayment of the total amount owed under the judgment debt, at which point the EJO must notify the employer that no further compliance with the order is required.⁵⁰⁰

6.311 Similar provisions exist under English law to allow for the variation of attachment of earnings orders. Section 9 of the *Attachment of Earnings Act 1971* provides that the court may make an order discharging or varying an attachment of earnings order, and rules of court have now specified the circumstances under which a court may make such an order of its own motion.⁵⁰¹ These circumstances include where the court is notified of another attachment order of higher ranking priority than the original attachment order, where an administration order is made by the court, where a consolidated attachment of earnings order is made or where the debtor becomes subject to a bankruptcy order. An attachment of earnings order lapses where the employer to whom it was addressed ceases to have the debtor in his or her employment,⁵⁰² and the order terminates on the repayment of all the sums owed.⁵⁰³

6.312 Interesting provisions for variations in repayments under attachment of earnings orders exist in Finland.⁵⁰⁴ "Leniency" provisions allow the illness, unemployment of the debtor or a similar factor to be taken into account in certain cases. If the debtor is unemployed for a long period of time, the attachment of earnings may be postponed for up to four months, unless this seriously endangers creditors' possibilities of receiving payment. Once the attachment has been in effect for a year without default, the debtor may apply for "holiday months", during which the attachment deductions will not be made from his or her salary. Holiday months will be awarded where certain conditions are met, including a requirement that the debtor's necessary living costs are high in relation to the amount left to him or her after the attachment; and a requirement that another special reason exists for the holiday, such as the purchase of necessary household equipment. Depending on the category of attachment involved, the debtor may be awarded two or three holiday months per year. A holiday month and a reduction in the attached amount may not however be granted on the same ground.

6.313 The FLAC report argued that there is a need to ensure flexibility exists in the attachment of earnings procedure so that changes in the debtor's income may be taken into account.⁵⁰⁵ The debtor should be provided with clear documentation at the time an attachment of earnings order is made, informing him or her of the procedure for applying for a variation. The report also argued that in certain circumstances, such as where the debtor's income is temporarily reduced, the order should be suspended rather than merely varied. The order could then resume when the debtor's circumstances improve.

6.314 Any attachment of earnings regime would be required to take account of changes in the circumstances of the debtor and be capable of reacting to such changes. Therefore provisions must be included to allow the variation of the attachment of earnings order where reasons exist to necessitate such a change. Debtors and creditors should be informed of their rights to apply for such a variation.

⁴⁹⁷ Capper *The Enforcement of Judgments in Northern Ireland (SLS Legal Publications (NI) 2004)* at 87.

⁴⁹⁸ Under rule 59 of the *Judgments Enforcement Rules (Northern Ireland) 1981* (SR 1981/147) (NI).

⁴⁹⁹ Rule 54(4) of the 1981 Rules.

⁵⁰⁰ Under article 76(8) *Judgments Enforcement (Northern Ireland) Order 1981*.

⁵⁰¹ Under *Civil Procedure Rules* Schedule 2 County Court Rules Order 27 Rule 13(1).

⁵⁰² Section 9(4) *Attachment of Earnings Act 1971* (Eng).

⁵⁰³ Section 12 *Attachment of Earnings Act 1971* (Eng).

⁵⁰⁴ See the description of the attachment of earnings system on the Finnish Judicial System website, available at: <http://www.oikeus.fi/19893.htm>.

⁵⁰⁵ Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 122.

The possibility of suspending the attachment order in certain circumstances should also be considered, and the Commission invites submissions as to the desirability of introducing a power to suspend the order. The question of whether, and under what circumstances, an attachment of earnings order could be discharged should also be considered.

6.315 *The Commission provisionally recommends that a power to apply to vary (and possibly to suspend) attachment of earnings orders would be an essential element of an attachment of earnings regime. The Commission provisionally recommends that information about this power should be made readily available to debtors and creditors on the making of an attachment of earnings order. The Commission invites submissions on the desirability of introducing a power to apply for a suspension or discharge of an attachment of earnings order, and invites submissions as to the circumstances in which such a power should be available.*

(viii) Difficulties in tracing debtors to new jobs

6.316 A common problem identified in relation to attachment of earnings in many countries is the difficulty in operating an attachment where the debtor leaves or changes his or her employment. Under the attachment of earnings procedure of the *Family Law (Maintenance of Spouses and Children) Act 1976*, a debtor who leaves employment, becomes employed or changes employer is obliged to notify the court within ten days of this fact.⁵⁰⁶ The debtor must also provide details of his or her earnings in the relevant employment.⁵⁰⁷ In addition, a debtor's new employer must notify the court that he or she is the debtor's employer if he or she knows that an attachment of earnings order exists against the debtor.⁵⁰⁸ Where the debtor leaves an employment, the attachment order lapses in respect of the relevant employer,⁵⁰⁹ but remains in force for other purposes.

6.317 Despite similar obligations existing for debtors and employers under legislation in England and Wales, the enforcement review in that jurisdiction found that creditors find it difficult to track debtors who change employment while an attachment of earnings order is in place.⁵¹⁰ The reliance of the existing system on debtors to provide employment details was described as being a weakness, as a number of reasons may exist why a debtor is not forthcoming with this information. It was noted that creditors are often left to seek out the debtor's employment details themselves, which is often expensive, time-consuming or impossible.⁵¹¹ Such private inquiries may also intrude on debtors' privacy, as they are not supervised by the court. The enforcement review concluded that the employee records of the UK Inland Revenue are the most reliable source of information to enable tracking, and it was recommended that an information-sharing procedure should be introduced to allow this information to be accessed for the purpose of facilitating attachment of earnings orders.⁵¹² It was recommended that the procedure should only be available where the debtor has failed to comply with a request to voluntarily provide the relevant information, and where the creditor does not hold information as to the debtor's employment. The costs of the procedure should be borne by the debtor, with the debtor being informed of his or her responsibility at every stage of the procedure so that he or she may avoid these costs.

6.318 These recommendations have been implemented in section 92 of the *Tribunals, Courts and Enforcement Act 2007* (Eng), which amended the *Attachment of Earnings Act 1971* (Eng)⁵¹³ to provide the English High Court, county courts, magistrates' courts and fines officers with the power to request UK

⁵⁰⁶ Section 14(a) *Family Law (Maintenance of Spouses and Children) Act 1976* (Irl.).

⁵⁰⁷ Section 14(b) of the 1976 Act.

⁵⁰⁸ Section 14(c) of the 1976 Act.

⁵⁰⁹ Section 17(3) of the 1976 Act.

⁵¹⁰ Lord Chancellor's Department *Effective Enforcement – Improved Methods for Recovery for Civil Court Debt and Commercial Rent and a Single Regulatory Regime for Warrant Enforcement Agents* (Cm5744 2003) at 79.

⁵¹¹ *Ibid* at 80.

⁵¹² *Effective Enforcement op cit.* at 80.

⁵¹³ This provision inserts new sections 15A to 15D into the *Attachment of Earnings Act 1971*.

revenue authorities to provide the name and address of the debtor's current employer for the purposes of re-directing a lapsed attachment of earnings order. The use of this procedure is, however, dependent on the introduction of regulations governing the use and supply of debtor information. The disclosure of information is restricted to purposes connected with enforcement of the relevant attachment of earnings order, and the disclosure of the information for another purpose constitutes an offence.

6.319 This reform should introduce a powerful method of obtaining information relating to a debtor's employment. It is however an expensive reform, with the report of the enforcement review in 2003 estimating the cost of introducing the necessary data-sharing gateway at £500,000. The procedure also involves considerable interference with the privacy rights of the debtor and raises issues of data protection law. A less radical proposal for addressing the problem of tracking debtors through changes of employment had been recommended by the "Payne Committee" report in England and Wales. This report suggested that the debtor's P45 form, which the debtor must present to his or her employer on commencing employment, should indicate if an outstanding attachment of earnings order exists in respect of the employee.⁵¹⁴

6.320 The Commission invites submissions from interested parties on the subject of tracking debtors through changes in employment. The Commission invites submissions as to whether it is foreseeable that this will pose difficulties if an attachment of earnings regime is introduced, and as to the best means of overcoming these difficulties.

6.321 *The Commission invites submissions as to whether measures should be introduced to enable information to be obtained independently of the debtor on changes in the debtor's employment, and as to the best means of obtaining this information.*

(ix) Multiple attachment orders

6.322 A further subject for consideration identified by the FLAC report was the question of how to deal with a situation where multiple attachment of earnings orders are made against a single debtor.⁵¹⁵ The report notes that measures must be put in place to prevent multiple attachments of earnings reducing the debtor's income to below what is required to provide a reasonable standard of living for the debtor and his or her dependents. A comparison was made with the current inadequacies of the instalment order system, which frequently results in multiple instalment orders being made against a debtor who may not be able to satisfy even one order.

6.323 In this regard the FLAC report refers to the system of consolidated attachment of earnings orders in England and Wales under section 17 of the *Attachment of Earnings Act 1971*.⁵¹⁶ Under this procedure, a court can consolidate a number of attachment of earnings orders into a single order. The application for such an order may be made by the debtor or by any creditor who has obtained, or is entitled to, an attachment of earnings order. When a consolidated order, which is only available in relating to judgment debts rather than maintenance or local authority debts, involves the *pro rata* distribution of the attached money amongst the creditors according to the amount of the respective judgment debts. Creditors for this reason are provided with a power to object to the making of a consolidated order, and a hearing on the issue may take place if such an objection is made.

6.324 The FLAC report notes that the advantages of this mechanism include the saving of court time and administrative workload for the debtor's employer. This is in addition to the saving of the distress for the debtor.⁵¹⁷ The report also notes that the system of the *pro rata* distribution of the proceeds of attachment is fairer than allowing the creditor who is first to court (and who may have not followed best practices in responsible lending and arrears management) to attach all available income.⁵¹⁸ The report did however note disadvantages of the procedure, most notably the fact that it would take a very long

⁵¹⁴ *Report of the Committee on the Enforcement of Judgment Debts* (Cmnd. 3909 1969) at paragraphs 622-625.

⁵¹⁵ *Joyce An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 121.

⁵¹⁶ See *Joyce An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 78, 121.

⁵¹⁷ *Joyce op cit.* at 78.

⁵¹⁸ *Joyce op cit.* at 121.

time to repay all of the debts owed under a consolidated attachment of earnings order. In this regard it was noted that consolidated attachment of earnings orders are no substitute for formal debt settlement.⁵¹⁹

6.325 In considering whether to recommend the consolidation of attachment of earnings orders, the Commission first notes that an advantage of the proposed enforcement office is that the single office could have an overview of all the enforcement proceedings commenced against a debtor, and so should be in a better position than individual courts to take account of the debtor's overall circumstances. This should prevent multiple incompatible enforcement orders from being made against the debtor. Secondly, it should also be considered that where a debtor is in default in relation to multiple obligations, the proposed debt settlement procedure may be the most appropriate option both for the debtor and his or her creditors. The enforcement office would again be in a much better position to assess the appropriateness of debt settlement in the debtor's circumstances than an individual court which may lack key information. Nonetheless, if the debtor possesses sufficient means to allow enforcement to continue, mechanisms must be created to allow multiple debts to be enforced simultaneously. In this context, a mechanism for consolidating attachment of earnings orders should be considered. The Commission therefore invites submissions as to whether a consolidated attachment of earnings order should be introduced.

6.326 *The Commission invites submissions as to whether a consolidated attachment of earnings order should be introduced as part of a system of attachment of earnings.*

(x) Rules of priority as between attachment orders

6.327 A further issue which should be considered in introducing an attachment of earnings system for the enforcement of civil debt is the question of how this system would interact with the current system of attachment of earnings for the purposes of enforcing maintenance orders under the *Family Law (Maintenance of Spouses and Children) Act 1976*. This raises an issue of the respective priority of attachment orders, and in this regard is similar to the question of non-dischargeable debts under debt settlement, as discussed above.⁵²⁰ In most European countries, attachments for the purposes of enforcing maintenance payments are given higher priority than attachments for the enforcement of other civil debts.⁵²¹ The rationale for this rule has been said to be that a person's domestic and family obligations should be given precedence over obligations owed to other creditors. In the related context of prohibitions on the discharge of maintenance obligations in bankruptcy, it is argued that such obligations should be afforded special status "not only because of the social primacy of family welfare but also because the claimants are unable effectively to pass on the loss."⁵²² The privileged status of claims for maintenance payments has been said to represent "the state's protection of special values".⁵²³

6.328 Recent reform proposals in Scotland have followed this policy by recommending that the existing policy of affording ordinary attachments priority over family maintenance attachments should be reversed.⁵²⁴ This report of the Scottish Executive noted that four rationales had been advanced previously for affording lower priority to maintenance attachments. These were that the general rule is that a maintenance creditor must follow the debtor's fortunes; that a priority rule would put dependents not living with the debtor in a better position than debtors living with the debtor; the maintenance creditor possessed a power under Scottish law to vary the amount of the attachment which ordinary creditors did not; and in many cases the maintenance creditor could rely on supplementary benefit payments if maintenance fails. These policy considerations were rejected by the Scottish Executive due to the view

⁵¹⁹ Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 121.

⁵²⁰ See paragraphs 5.117 to 5.119 above.

⁵²¹ See Joyce *op cit.* at 121.

⁵²² *Report of the Commission on the Bankruptcy Laws of the United States* H.R. Doc. No. 137, 93d Cong., 1st Sess., pt. I at 79.

⁵²³ *Report of the Commission on the Bankruptcy Laws of the United States* H.R. Doc. No. 137, 93d Cong., 1st Sess., pt. I at 79.

⁵²⁴ *Enforcement of Civil Obligations in Scotland – A Consultation Document* (The Scottish Executive 2002) at 96-97.

that social attitudes and government policy had changed and made these considerations less persuasive.⁵²⁵ Reforms similar to those made in Ireland⁵²⁶ aimed at making attachments for the purposes of maintenance payments more effective demonstrated a policy of promoting the importance of maintenance payments. For these reasons the Scottish Executive considered it appropriate to bring attachment of earnings policy in line with current policy for affording priority to maintenance of children. The Scottish Executive proposed that maintenance attachments should be given priority over, or should at least rank equally, with other attachments, and invited submissions as to which of these options would be preferable.⁵²⁷ Ultimately in 2007 legislative reforms were made which gave equal priority to maintenance attachments and other attachments.⁵²⁸

6.329 It can be seen that strong policy arguments exist for affording family maintenance attachments priority over other attachments of earnings. Therefore if a general system of attachment of earnings for the enforcement of judgment debts is introduced, consideration may be given to including a rule in the relevant legislation affording priority to maintenance payments. The Commission invites submissions on this subject. If subsequent parallel attachment of earnings mechanisms are introduced, for example for the enforcement of revenue debts or criminal fines, consideration should also be given to the question of whether these attachments should also be afforded a position of priority, as is recommended in the FLAC report.⁵²⁹

6.330 *The Commission invites submissions as to whether family maintenance attachments of earnings orders should be given priority over attachment orders for the enforcement of judgment debts.*

(5) Execution against Goods

(a) A system in need of reform

6.331 As noted in Chapter 3 above, the current system of execution against goods is generally regarded as ineffective.⁵³⁰ The system produces very low returns for creditors and causes considerable hardship to debtors. Recent empirical research has highlighted the ineffectiveness of this method of enforcement.⁵³¹ During 2007, 7,535 execution orders were lodged or already held in County Registrars' offices throughout the country. Approximately only 30% of these orders were enforced, while the average number of orders returned marked "no goods" amounted to 35%. In addition to the general ineffectiveness of execution, it is significant that the operation of this remedy varies considerably throughout the country. While three County Registrars' offices produced an enforcement rate in excess of 50% in 2007, three other County Registrars presented an enforcement rate of less than 10% for that year. Similar trends can be observed for the year 2008. Of the 9,516 execution orders lodged or already held in County Registrar offices in 2008, only 2085 were enforced. 3,221 were returned marked "no goods", with only 12 seizures and 32 sales taking place throughout the country. 4,064 execution orders remained unenforced at the end of the year. This study did however caution that these statistics may not convey the success of the threat of seizure as a means of inducing payment. No statistics were provided in relation to the success rates of execution by sheriffs in Cork and Dublin, and so it is difficult to judge whether execution by the Sheriff is more effective. The Commission however understands it is reasonably widely accepted that more satisfactory results are achieved by the Sheriffs.

⁵²⁵ *Enforcement of Civil Obligations in Scotland op cit.* at 97.

⁵²⁶ See e.g. the *Judicial Separation and Family Law Reform Act 1989*; the *Family Law Act 1995*; the *Family Law (Divorce) Act 1996*.

⁵²⁷ *Enforcement of Civil Obligations in Scotland op cit.* at 98.

⁵²⁸ See Part 9 of the *Bankruptcy and Diligence etc. (Scotland) Act 2007* (2007 asp 3), amending the *Debtors (Scotland) Act 1987*.

⁵²⁹ *Joyce An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 121.

⁵³⁰ See paragraphs 3.342 to 3.359.

⁵³¹ Keating and Donnelly "The Sheriff's Office: An Effective Model for Debt Enforcement?" [2009] 16(7) *Commercial Law Practitioner* 135 at 139-141. See the full table of statistics provided at paragraph 3.343 above.

6.332 It is clear from the above and from the criticisms of the current system described in Chapter 3 that the mechanism for execution against goods is not operating effectively and is in need of reform.

(b) ***Reduction in reliance on execution against goods as the primary method of enforcement***

6.333 The first issue to be addressed in relation to the mechanism of execution against goods is whether steps should be taken to change the current status of this mechanism as the most commonly used method of enforcement. The position in other countries is now discussed, to illustrate a general trend of the declining importance of this method of enforcement.

(i) ***Scotland***

6.334 In the early years of the 21st Century a series of policy documents were produced examining the law on the enforcement of judgments in Scotland.⁵³² These studies identified several concerns about the operation of the system of poinding and warrant sale, which largely corresponded to the system for execution against goods in Ireland. A report of the Scottish Executive noted that particular concerns included the forced entry to the debtor's home and consequent distress to the debtor, and the fact that little benefit was provided to creditors due to the small proceeds of sale usually obtained.⁵³³ It was noted that, as is currently the case in Ireland, the mechanism of execution against goods was widely used because creditors did not possess sufficient information about the means of the debtor to attempt enforcement by other means.⁵³⁴ An additional criticism is that the sale of goods seized may only cover the expenses and so not reduce the debt owed at all, and the Scottish Executive indicated that such a result must be avoided.⁵³⁵ This view was also expressed in an independent review of bailiff law in England and Wales, which argued that the seizure and sale of goods which realised less than the costs involved, would be vulnerable to challenge under Article 8 ECHR as a disproportionate interference with the private life of a debtor.⁵³⁶ The report however recognised that creditors argue that the threat of seizure is an effective means of inducing payment. It was also noted that the actual sale of debtors' goods rarely occurred.⁵³⁷

6.335 Despite these failings of the system, it was decided that a mechanism for the seizure of debtors' movable goods should be retained, albeit in a much-reformed system.⁵³⁸ This view was supported by the fact that all other countries in the developed world provide for procedures to realise the movable physical assets of debtors.⁵³⁹ A greatly reformed system for execution against goods was thus

⁵³² See *Striking the Balance: A New Approach to Debt Management* (The Scottish Executive 2001); *Striking the Balance: A New Approach to Debt Management – Summary Analysis of Written Responses to Consultation* (The Scottish Executive 2001); *Enforcement of Civil Obligations in Scotland – A Consultation Document* (The Scottish Executive 2002); Blake Stevenson Ltd *Enforcement of Civil Obligations in Scotland: Analysis of Consultation Responses* (The Scottish Executive Social Research 2002); The Scottish Law Commission *Poinding and Sale: Effective Enforcement and Debtor Protection* (Discussion Paper No 110 1999); The Scottish Law Commission *Report on Poinding and Warrant Sale* (Scot Law Com No 177, 2000).

⁵³³ *Striking the Balance: A New Approach to Debt Management* (The Scottish Executive 2001) at 8.

⁵³⁴ *Striking the Balance op cit.* at 11.

⁵³⁵ This point had been previously recognised by the Scottish Law Commission, who recommended that the seizure of goods should always be prohibited unless there are seizable goods of sufficient value to reduce the debt itself: The Scottish Law Commission *Report on Poinding and Warrant Sale* (Scot Law Com No 177, 2000) at 10.

⁵³⁶ Beatson *Report of the Independent Review of Bailiff Law* (The University of Cambridge Centre for Public Law 2000) at paragraphs 1.8 and 2.17-2.27.

⁵³⁷ The Scottish Law Commission *Report on Poinding and Warrant Sale* (Scot Law Com No 177, 2000) at 10.

⁵³⁸ *Ibid* at 14-16.

⁵³⁹ Scottish Law Commission *op cit.* at 14.

recommended, and this system was in turn introduced by the *Debt Arrangement and Attachment (Scotland) Act 2002*.⁵⁴⁰

6.336 First, the procedure of poinding and warrant sale was replaced as two new procedures called “attachment” and “exceptional attachment” were introduced. The fundamental difference between these two procedures is that attachment is available against commercial debtors,⁵⁴¹ while exceptional attachment is the procedure used to seize and sell assets in the debtor’s home.⁵⁴²

6.337 The review which led to the 2002 Act noted that the main criticisms of the old poinding and warrant system arose in relation to domestic cases and that as a result there was a compelling case for the introduction of two different procedures for domestic and commercial cases.⁵⁴³ This reflected a policy that seizure should be used only as a genuine last resort in domestic cases. The 2002 Act seeks to promote the non-judicial settlement of debt disputes before resorting to enforcement by introducing a National Debt Arrangement Scheme similar to the debt settlement schemes discussed above.⁵⁴⁴ This policy is continued in relation to attachment by requiring a debt advice and information package to be provided to the debtor by the creditor before the creditor may attempt attachment, as described above.⁵⁴⁵ After this has been carried out, a creditor may apply to court for an exceptional attachment order and the court may grant it only where he or she is satisfied that are exceptional circumstances.⁵⁴⁶ These exceptional circumstances include where the creditor has taken reasonable steps to negotiate a settlement of the debt; where the creditor has attempted to enforce the debt using other methods such as attachment of earnings; and where there is a reasonable prospect that the sum raised by seizing and selling the debtor’s assets will be at least equal to the costs incurred plus €100.⁵⁴⁷ The Act provides that the debtor may be represented at these court proceedings by a non-lawyer,⁵⁴⁸ a provision which is designed to allow money advisors to assist the debtor. In considering whether to grant the order, the judge must take into account certain specified considerations, including the nature of the debt; whether the dwellinghouse is the debtor’s home; whether money advice has been given; whether the debtor possesses any non-essential assets, and whether or not a settlement has been attempted between the debtor and creditor.⁵⁴⁹ An exceptional attachment order must be limited to non-essential assets.⁵⁵⁰

6.338 The result of these provisions is that the seizure of goods is only used in appropriate cases. The Scottish reforms have thus succeeded in altering the situation whereby enforcement by the seizure of goods proceeded almost automatically as the first method of enforcement for creditors.

(ii) Northern Ireland

6.339 It was noted above that a major factor in the development of a radical new system of enforcement in Northern Ireland was the criticism that the old system relied too heavily on the ineffective procedure of execution against goods.⁵⁵¹ It was also stated that a success of the new centralised system

⁵⁴⁰ See McKenzie “The Debt Arrangement and Attachment (Scotland) Act 2002” [2003] *Scots Law Times* 205.

⁵⁴¹ See section 10 of the 2002 Act.

⁵⁴² See sections 46 and 47 of the 2002 Act.

⁵⁴³ The Scottish Law Commission *Report on Poinding and Warrant Sale* (Scot Law Com No 177, 2000) at 21.

⁵⁴⁴ See sections 1-9 *Debt Arrangement and Attachment (Scotland) Act 2002*.

⁵⁴⁵ See sections 10(3)(b) and 10(5) of the 2002 Act.

⁵⁴⁶ Section 47 of the 2002 Act.

⁵⁴⁷ Section 48 of the 2002 Act.

⁵⁴⁸ Section 43 of the 2002 Act.

⁵⁴⁹ Section 47(4) of the 2002 Act.

⁵⁵⁰ Section 45 and Schedule 2.

⁵⁵¹ See paragraph 6.08 above.

under the Enforcement of Judgments Office has been the fact that this procedure has lost its status as the most widely used enforcement mechanism and is now ranked fourth in the list of mechanisms.⁵⁵²

6.340 Despite these criticisms, a similar conclusion was adopted in Northern Ireland to that reached in Scotland that the seizure of a debtor's goods retained a useful function in compelling "won't pay" debtors to pay.⁵⁵³ The view was also expressed that if seizure orders were only made where examinations of debtors' means showed assets available for seizure, they would be more effective than the old mechanism of execution.⁵⁵⁴ For these reasons the procedure was retained, but in an amended form. Now a seizure order may only be made when the Enforcement of Judgments Office has determined that the debtor has property which is liable to seizure.⁵⁵⁵ In addition to this condition, the Hunter Committee recommended two additional prerequisites which now must be met as part of EJO practice before a seizure order will be granted.⁵⁵⁶ First, as in the new Scottish legislation, no seizure order should be made where the costs involved appeared likely to exceed any proceeds of sale or where other enforcement methods would probably clear the debt within eight months.⁵⁵⁷ Also, it was recommended that the Chief Enforcement Officer should have the power to postpone the making of an order of seizure where an instalment order or attachment of earnings order could discharge the debt within a reasonable time. These two recommendations are followed in practice but have not been established in legislation. It was also recommended that when a seizure order has been made, the debtor should have the right to apply to the Master of the EJO for a discharge or variation of the order on the ground that the assets to be seized are exempt or that seizure would cause hardship or not be in the best interests of creditors.⁵⁵⁸ A debtor may do this under the procedural rules of the EJO.⁵⁵⁹ Thus, as in Scotland, it can be seen that reforms in Northern Ireland have been designed to take into account the hardship which execution against goods causes to debtors, and the low levels of returns it provides to creditors, and so seek to limit the use of this procedure to cases where it will be effective and where other methods of enforcement are not appropriate.

(iii) England and Wales

6.341 Recent reforms in England and Wales have aimed to introduce widespread changes to the mechanism of execution against goods. These reforms are contained in the *Tribunals, Courts and Enforcement Act 2007*. Prior to the introduction of this Act, the law on execution against goods was very complex and unclear and was contained in a variety of legislative measures and common law rules which had developed over 800 years.⁵⁶⁰ Various types of execution procedure applied under these different legislative⁵⁶¹ and common law regimes,⁵⁶² and several different categories of actors carried out the actual

⁵⁵² See paragraph 6.09 above.

⁵⁵³ See e.g. the "Hunter Report": *Report of the Joint Working Party on the Enforcement of Judgments, Orders and Decrees of the Courts in Northern Ireland* (1987) at paragraph 15.9.

⁵⁵⁴ This was the view expressed by the "Anderson Committee": *Report of the Joint Working Party on the Enforcement of Judgments, Orders and Decrees of the Courts in Northern Ireland* (1965) at paragraph 94.

⁵⁵⁵ Rule 30(1) *Judgments Enforcement Rules (Northern Ireland) 1981*.

⁵⁵⁶ Capper *The Enforcement of Judgments in Northern Ireland* (SLS Legal Publications (NI) 2004) at 92.

⁵⁵⁷ This recommendation of the Hunter Committee can be found at *Report of the Joint Working Party on the Enforcement of Judgments, Orders and Decrees of the Courts in Northern Ireland* (1987) at paragraph 15.61.

⁵⁵⁸ *Report of the Joint Working Party on the Enforcement of Judgments, Orders and Decrees of the Courts in Northern Ireland* (1987) at paragraphs 15.6-16, 15.60-62.

⁵⁵⁹ Rule 59 *Judgments Enforcement Rules (Northern Ireland) 1981* (NI).

⁵⁶⁰ See Kruse "Enforcement law reform and the common law" [2008] *CJQ* 494.

⁵⁶¹ See Schedule 13 of the 2007 Act for a list of the relevant legislative provisions which have now been amended.

⁵⁶² See section 65 of the 2007 Act, which "replaces the common law rules about the exercise of the powers which under it become powers to use the procedure in Schedule 12".

task of seizure and sale.⁵⁶³ These rules are to be replaced by a single process named “taking control of goods”.⁵⁶⁴ This new process unifies the rules for taking control of goods for the recovery of local taxes, fines, civil court judgments, road traffic penalties, maintenance, national insurance contributions, income taxes and VAT.⁵⁶⁵ Schedule 12 of the 2007 Act contains a statutory code for the mechanism of taking control of goods. The entire process to be followed by enforcement agents when taking control of and selling goods is prescribed in this Schedule, or will be prescribed by regulations made under the Schedule.⁵⁶⁶

6.342 Unlike the Scottish and Northern Irish reforms, the 2007 Act does not directly impose limitations on when the mechanism of taking control of goods may be applied. It has been argued that certain provisions of the Act will indirectly reduce the use of this mechanism however.⁵⁶⁷ First, where goods have been seized but left on a debtor’s premises, bailiffs must now apply to court for a warrant permitting forced re-entry to the premises. Secondly, goods seized must now be valued before sale, a practice which was not mandatory under the old rules. Thirdly, if goods seized and sold are jointly owned, the bailiff must account for 50% of the proceeds of sale to the co-owner before the debt and costs are discharged, which had not been the practice under the old regime. Finally, if a sale is held but not all goods are sold, the remaining goods are deemed to have been abandoned by the bailiff and must be returned to the debtor. It has been argued that these new steps will make the process of seizure and sale so complicated and expensive that bailiffs may cease to pursue enforcement to the point of actually selling the goods.⁵⁶⁸ This again illustrates how reforms can reduce the use of execution against goods, albeit in an indirect manner in this case.

(iv) France

6.343 An overview of the system of enforcement in France has been provided above.⁵⁶⁹ The general principle under French enforcement law is that all of the debtor’s assets are liable to execution to discharge any debt owed to his or her creditors.⁵⁷⁰ The choices of enforcement mechanism and of the assets against which enforcement should be made belong solely to the creditor.⁵⁷¹ The creditor may however face sanctions where the commencement of enforcement has been abusive.⁵⁷² The attachment of movable property includes the seizure and sale of the debtor’s physical property (including specific provisions for the sale of motor vehicles), the attachment of earnings and a garnishee mechanism. Execution against goods serves to freeze the debtor’s assets for a period of one month, after which the

⁵⁶³ Andenas “England and Wales” in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 131ff.

⁵⁶⁴ Schedule 12 of the 2007 Act.

⁵⁶⁵ See Kruse “Enforcement law reform and the common law” [2008] *CJQ* 494 at 494. It should be noted that section 71 of the Act abolishes the common law remedy of distress for rent which had allowed landlords to seize a tenant’s goods in order to recover rent arrears. In its place a new procedure entitled “commercial rent arrears recovery” is introduced in relation to commercial leases by section 72, while the remedy of distress is abolished without replacement in the case of domestic premises.

⁵⁶⁶ A discussion of the detailed procedural rules contained in this schedule falls outside the scope of this Consultation Paper.

⁵⁶⁷ Kruse “Enforcement law reform and the common law” [2008] *CJQ* 494 at 504.

⁵⁶⁸ *Ibid.*

⁵⁶⁹ See paragraphs 6.29 to 6.32.

⁵⁷⁰ Andenas and Nazzini “Market Integration, the Harmonization Process, and Enforcement Practices in the EU Member States” in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 72.

⁵⁷¹ Article L.22-1 of the law of 9 July 1991. See Niboyet and Lacassagne “France” in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 159.

⁵⁷² Niboyet and Lacassagne *op cit.* at 157.

assets may be sold at a public auction. The debtor retains possession of the goods during this period. For debts of no more than €525, execution against goods may only be used after the creditor has first asked the debtor for the name and address or his or her employer and/or bank account so that an attachment of earnings or garnishment of the debtor's bank account may first be attempted. If the debtor does not respond, however, it is possible to obtain authorisation from the enforcement court for the judicial sale of the debtor's goods. Certain non-attachable assets such as basic household equipment necessary for the performance of the debtor's profession or items vital for the care of a disabled or ill person are exempt from seizure.

(v) Austria

6.344 An overview of the system of enforcement in Austria has been provided above. This system is largely court-based, with enforcement orders all made by local courts on the application of the creditor. Although the creditor possesses a choice as to the enforcement procedure to be used in a given case, certain legislative rules have been introduced which seek to limit this choice. Primarily these rules follow a policy of seeking to prevent execution against goods where other enforcement mechanisms are available.

6.345 First, the warrant of execution can be restricted to certain methods of enforcement if the application for enforcement clearly shows that one or more of the methods will suffice to satisfy the creditor.⁵⁷³ A number of provisions seek to reduce reliance on execution against goods in favour of other means of enforcement, in particular attachment of earnings. This is because other methods are considered to be less intrusive to debtors than the seizure of goods, and also provide greater returns for creditors. Thus if the creditor seeks execution against goods and other methods of enforcement simultaneously, the sale of seized goods is suspended if it appears that the debt can be recovered through the other methods of enforcement within one year.⁵⁷⁴ Also, if enforcement by attachment of earnings has been attempted, a warrant for execution against goods will only be granted if attachment of earnings has failed due to the inability to identify the debtor's employer or due to the employer's refusal to acknowledge the debt as justified or to give a declaration.⁵⁷⁵

6.346 The success of these Austrian provisions and the rationale against execution against goods has been questioned. First, it appears that execution against goods has not been curbed to the extent intended by the legislature. Secondly, it may be doubted whether attachment of earnings is less intrusive to the debtor than execution against goods, seeing as how it involves substantial interference with the employer/employee relationship and may even affect a debtor's job security.⁵⁷⁶

(vi) Provisional Recommendations

6.347 It has been already described above that the mechanism of enforcement through seizure of goods is widely regarded as unsatisfactory. It would appear that execution against goods remains the most widely used remedy, even though it is largely regarded as ineffective. The Commission believes that the availability of more information about a debtor's means will help to address this problem. The Commission understands that creditors and practitioners find garnishee orders and equitable execution to be useful and effective methods of enforcement when the necessary information is available. Execution of goods is however widely used due to lack of information among creditors of the assets of debtors. The introduction of a general attachment of earnings mechanism would also provide an alternative to this procedure.

⁵⁷³ §14(1) of the Austrian Execution Code. The law also restricts enforcement through the sale of the debtor's real property, by suspending the sale of real property and ordering that a receiver be appointed instead: §201 Execution Code.

⁵⁷⁴ §264 of the Austrian Execution Code.

⁵⁷⁵ §14(2) of the Austrian Execution Code.

⁵⁷⁶ See Oberhammer "Austria" in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 125.

6.348 The position of execution against goods as the primary method of enforcement may also be attributed to historical factors, where people's wealth was generally held in physical goods. This is no longer the case, and now the primary assets of people can often be found in bank account savings, and future income. It was recognised as long ago as 1972 that it is a comparatively rare occurrence to find goods against which one can execute under an order of *fiери facias*.⁵⁷⁷ This is due in part to the large number of goods which are purchased on hire purchase agreements which are subject to retention of title clauses. In addition, the resale value of goods seized is notoriously low. While the procedures for execution against goods could be made more efficient, most notably through the availability of more information about the assets of debtors, certain problems are inherent to the procedure and cannot be remedied. This has been recognised in both Scotland and Northern Ireland, where recognition of the hardship caused to debtors by execution against goods and the very limited benefits to creditors obtained in return have resulted in much reduced recourse to this procedure in those countries.

6.349 For this reason the Commission believes that enforcement should move away from the current reliance on execution against goods, and that the principle of selecting the most appropriate, least restrictive and most proportionate enforcement method requires greater use of other procedures such as the attachment of bank accounts and of earnings. This reasoning is supported by the approach adopted by Laffoy J in the decision in *McCann v Judge of Monaghan District Court and Ors*⁵⁷⁸ when assessing whether enforcement procedures involved a proportionate interference with debtors' rights. While the existence of an effective statutory scheme for the enforcement of debts was described as being unquestionably a reasonable and legitimate objective in the interests of the common good, it was held that such a scheme must not disproportionately interfere with the debtor's constitutional rights.⁵⁷⁹ This means that the enforcement mechanism must be rationally connected to the objective, must restrict the rights involved as little as possible, and must be proportionate to the objective to be achieved. If a debtor has no goods capable of seizure, or if the amount raised by sale and seizure does not discharge a significant portion of the debt (or even does not cover the costs of execution) then the execution may not be rationally connected to the objective of discharging the debt. Similarly, if the debtor could satisfy the debt through payment by instalments or other less intrusive forms of enforcement, execution against goods will not be the least restrictive method of achieving the objective. If a debtor's assets are not contained in physical goods but in other forms of wealth, the appropriate forms of enforcement necessary to access this wealth should be available.⁵⁸⁰ Also, if the cost of replacing goods sold results in an absolute loss for the debtor or does not discharge a significant portion of the debt, this enforcement mechanism will involve an interference with the debtor's rights which is disproportionate to the objective which it seeks to achieve. In addition, this mechanism of enforcement is expensive and leads to cost to creditors, debtors and the State. Therefore it is clear that the use of execution against goods will in certain cases breach the principle of proportionality.

6.350 For these reasons, the Commission believes that enforcement through execution against goods should be removed from its current position as the primary method of enforcement. If the choice of enforcement method is to be made by the proposed enforcement office, execution against goods should be used only where an examination of the debtor's means has shown this mechanism to be the most appropriate and proportionate method of enforcement. This could include where it can be shown that the debtor has sufficient goods available for seizure to at least cover the costs of execution and reduce the debt by a significant amount. If the choice of enforcement method is to remain with creditors, an execution warrant should no longer automatically issue on the creditor's application, and a creditor should only be permitted to apply for such a warrant where if it is appropriate and proportionate in a given case.

⁵⁷⁷ The Committee on Court Practice and Procedure *Eighteenth Interim Report: Execution of Money Judgments, Orders and Decrees* (The Stationary Office Dublin 1972) at 13.

⁵⁷⁸ [2009] IEHC 276.

⁵⁷⁹ [2009] IEHC 276 at 81.

⁵⁸⁰ This reasoning led the Alberta Law Reform Institute to advocate a fundamental principle of "universal exigibility", whereby the law must provide mechanisms for the enforcement of judgments against any available assets of the debtor, excluding certain "just exemptions". See *Enforcement of Money Judgments Volume 1* (Alberta Law Reform Institute Report No. 61, 1991)

Statutory criteria such as those specified in the Scottish legislation discussed above⁵⁸¹ should be established to indicate when execution against goods will be appropriate and proportionate.⁵⁸²

6.351 *As part of the policy of promoting appropriate and proportionate enforcement, the Commission provisionally recommends that the current position of over-reliance on enforcement by execution against goods should be removed, and that this mechanism should only be available where it is necessary, proportionate and not overly restrictive.*

6.352 Many of the objections to execution against goods are related to the operation of the mechanism in cases where goods are contained in the debtor's home. It is in these cases that the mechanism may involve a disproportionate interference with the debtor's privacy and the inviolability of the dwelling.⁵⁸³ Also, while household goods are likely to have little resale value, the same cannot be said of seizable commercial property. Therefore an argument may be presented for the wider use of the procedure of execution against goods in commercial settings, and for a two-tier system of execution similar to that operating in Scotland. The Commission invites submissions as to desirability of introducing such a two-tier system to allow a wider use of execution against goods in commercial cases than in domestic cases.

6.353 *The Commission invites submissions as to whether a two-tier system of execution against goods, involving a distinction between domestic and commercial premises, should be introduced.*

(c) ***A Code of Practice for Enforcement Officers***

6.354 In 2005, the Revenue Commissioners and Sheriffs Association produced a Code of Practice operated by each Sheriff's Office in relation to dealings with taxpayers.⁵⁸⁴ This Code provides guidance on the Sheriff's conduct when enforcing revenue debts, and for example requires the Sheriff to treat the taxpayer with courtesy, explain the purpose of the visit of the Sheriff, and provide the taxpayer with an inventory of goods seized and a receipt for any monies paid. In addition, the Code provides that the taxpayer must pay liabilities to the Sheriff on demand, be prompt in his/her dealings with the Sheriff's Office and treat the Sheriff and his staff with courtesy. Importantly, the Code establishes a complaints procedure for aggrieved debtors, and outlines the steps which a debtor must take if he or she wishes to complain the way in which he or she has been treated.⁵⁸⁵

6.355 The Commission understands that the introduction of this Code of Practice has been a success. The Commission however notes that the Code only applies in relation to the enforcement of revenue debts. The Commission therefore recommends that a similar Code of Practice be established for the enforcement of civil debts. This code should outline the duties of the enforcement officer and of the debtor. The responsibilities of creditors should also be explained in the code. It should also put in place a disputes resolution procedure under which aggrieved debtors may make complaints. Enforcement officers and representatives of debtors and creditors should collaborate in the drafting of this Code. If the Commission's provisional recommendation for the establishment of an enforcement office is adopted, this office could adopt a supervisory role and could manage complaints arising in relation to enforcement officers. A separate complaints mechanism independent of the enforcement office could

⁵⁸¹ Sections 47 and 48 of the Scottish *Debt Arrangement and Attachment (Scotland) Act 2002*.

⁵⁸² These criteria are listed in paragraph 6.337 above.

⁵⁸³ See paragraphs 2.42 to 2.46 above.

⁵⁸⁴ Available at: www.revenue.ie/en/practitioner/sheriff.pdf

⁵⁸⁵ The debtor may first complain in writing to the Sheriff's Office, prompting the Sheriff to investigate the complaint and respond as promptly as possible. If the debtor remains aggrieved, he or she may refer the complaint to the Revenue Commissioners in writing. The Commissioners will examine the complaint and may request that the Sheriff undertake a review. If the dispute has not been resolved, the debtor may request that the claim should be referred to the Joint Standing Committee of the Revenue Commissioners and the Sheriffs Association. This Committee is composed of an equal number of representatives of the Revenue Commissioners and the Sheriffs Association, with a neutral chairperson. In addition to this complaints procedure, the debtor retains his or her common law and statutory rights.

also be introduced if necessary. Alternatively, if other options such as the privatisation of the procedure of execution against goods are adopted, a strict code would be necessary as part of the regulation of private enforcement agents.

6.356 Models for the proposed code of practice exist in other countries, such as the *National Standards for Enforcement Agents* introduced in England and Wales in 2002.⁵⁸⁶ While it must be acknowledged that the presence of private enforcement agents means that the situation in England and Wales is quite different to that in Ireland at present, these standards also apply to public enforcement agents in England and Wales and so are relevant to the current position in Ireland.

6.357 The Commission recognises that the views of stakeholders on this subject are essential to recommending reforms, and so invites submissions on how a Code of Practice in civil enforcement should be established.

6.358 *The Commission provisionally recommends that a Code of Practice be introduced to regulate the procedure of execution against goods in civil debt cases. The Commission invites submissions as to how this code should be drafted and as to the content of the code.*

(d) **Exempt Goods**

6.359 Current rules specifying the debtor's goods which are exempt from seizure are outdated and wholly inappropriate for ensuring that the debtor is afforded a reasonable standard of living.⁵⁸⁷ Section 7 of the *Enforcement of Court Orders Act 1926* makes certain limited goods exempt from seizure. Thus the "necessary wearing apparel and bedding" of the debtor and family and the "tools and implements of this trade" are not to be seized, provided that such necessities do not exceed a monetary value of £15. It is clear that this exemption needs to be expanded to reflect modern standards of living. The Commission is particularly concerned that domestic appliances and "white goods" of the debtor may begin to be seized as creditors become eager to recover any debts possible in current economic conditions. These goods have not traditionally been seized due to their low resale value and difficulties in storing them, but there is no legal obstacle to prevent them from being seized. Therefore the Commission believes that such goods should be expressly made exempt from seizure due to the fact that they are necessary to ensure a reasonable standard of living for the debtor and his or her dependents. The Commission invites submissions from interested parties as to what other assets should be exempt from seizure. In order to assist parties in making submissions in this area, the Commission now presents a brief description of the exemption rules in other legal systems.

6.360 In Northern Ireland, legislation sets out a comparatively generous list of exempted goods. Article 33 of the *Judgments Enforcement (Northern Ireland) Order 1981* provides that the following assets are exempt from seizure:

- i) such wearing apparel, furniture, bedding and household equipment of the debtor and his spouse or civil partner as appear to the Office to be essential for the domestic purposes of the debtor, his spouse or civil partner and his dependants residing with him, or any of them;
- ii) the tools and implements of the debtor's trade to the value of £200 or of such greater amount as may be fixed by rules;
- iii) any property which has, at the date when the order takes effect, been seized under any other statutory provision;
- iv) any property held by the debtor in trust for, or on behalf of, any other person or body;
- v) any property in the hands of a receiver appointed by a court, except with the leave of the court which appointed the receiver;
- vi) any property exempted from seizure by any other statutory provision.

⁵⁸⁶ *National Standards for Enforcement Agents* (Department of Constitutional Affairs, May 2002), available at: <http://www.dca.gov.uk/enforcement/agents02.htm>.

⁵⁸⁷ See paragraphs 3.356 to 3.359 above.

The Hunter review of enforcement in Northern Ireland rejected the introduction of a more precise statutory list of exemptions on the grounds that it would be impractical to operate. This review however suggested that a non-statutory list should be established to provide guidance to enforcement officers.⁵⁸⁸ It also recommended that medical aids or equipment reasonably required for use by the debtor or a member of his household should be added to the list of exemptions,⁵⁸⁹ although it appears that these items are not seized in practice.⁵⁹⁰ In practice most domestic goods are not seized by enforcement officers as the proceeds raised are very low compared to the cost of seizing and selling the goods.⁵⁹¹

6.361 The review of enforcement in England and Wales also recommended that the category of exempted goods should be expanded due to the need to protect the basic standard of living of the debtor. This decision was also due to the fact that the low resale value of these goods is disproportionate to the loss caused to the debtor by their seizure. This review identified the following principles to be taken into account when considering the goods which should be exempt:

- the range of exempt goods should not be so great as to find that there are no seizable goods in a debtor's home;
- the sale of the goods should not inflict greater hardship on the debtor than it would benefit the creditor; and
- the exemptions must be workable.⁵⁹²

The review concluded that the exemptions should be set by secondary legislation and should include:

- "such tools, books, vehicles and other items of equipment as are necessary to the debtor for use personally by him in his employment, business or vocation not exceeding in aggregate value an amount as may be prescribed by [Regulations]; and
- such clothing, bedding, furniture, household equipment and provisions as are necessary for satisfying [his or her] basic domestic needs and those of [his or her] family."⁵⁹³

It was intended that the important points to be considered when drafting the ultimate list of exempted goods would be that the goods are used personally and that very expensive or luxury items, even if these are tools of the trade, may be taken and replaced with less expensive goods.⁵⁹⁴ It was also envisaged that the authority responsible for regulating enforcement agents would issue guidance to agents on how to interpret the legislative list of exempted goods.⁵⁹⁵ It appears that the secondary legislation required to identify exempted goods has not yet been passed.

6.362 The English enforcement review was influenced by the provisions on exempted goods contained in the *Debtors (Scotland) Act 1987*.⁵⁹⁶ These have now been repealed and replaced by the

⁵⁸⁸ *Report of the Enforcement of Judgments Review Committee (Northern Ireland)* (1987) at paragraph 15.29.

⁵⁸⁹ *Report of the Enforcement of Judgments Review Committee (Northern Ireland)* (1987) at paragraph 15.35.

⁵⁹⁰ Capper *The Enforcement of Judgments in Northern Ireland* (SLS Legal Publications (NI) 2004) at 97.

⁵⁹¹ Capper *op cit.* at 98. Even the threat to seize such domestic goods is often futile, as debtors often know that officers will not trouble with domestic goods. It appears that the large majority of domestic goods seized by enforcement authorities are motor vehicles.

⁵⁹² Lord Chancellor's Department *A Single Piece of Bailiff Law and a Regulatory Structure for Enforcement* (Green Paper 2001) at paragraph 4.28. See also Beatson *Report of the Independent Review of Bailiff Law* (University of Cambridge Centre for Public Law 2000) at paragraph 7.5.

⁵⁹³ Lord Chancellor's Department *Effective Enforcement – Improved Methods for Recovery for Civil Court Debt and Commercial Rent and a Single Regulatory Regime for Warrant Enforcement Agents* (White Paper 2003) at paragraph 169.

⁵⁹⁴ *Ibid* at paragraph 171.

⁵⁹⁵ *Effective Enforcement op cit.* at paragraph 170.

⁵⁹⁶ 1987 c. 18.

Debt Arrangement and Attachment (Scotland) Act 2002.⁵⁹⁷ Section 11(1) of the 2002 Act now provides for generous exemptions from seizure, including:

- i) any implements, tools of trade, books or other equipment reasonably required for the use of the debtor in the practice of the debtor's profession, trade or business and not exceeding in aggregate value £1,000 or such amount as may be prescribed in regulations made by the Scottish Ministers;
- ii) any vehicle, the use of which is so reasonably required by the debtor, not exceeding in value £1,000 or such amount as may be prescribed in regulations made by the Scottish Ministers;
- iii) a mobile home which is the debtor's only or principal residence;
- iv) any tools or other equipment reasonably required for the purpose of keeping in good order and condition any garden or yard adjacent to, or associated with, a dwellinghouse in which the debtor resides.

These categories of exempted goods can be modified by ministerial order if necessary.⁵⁹⁸ In addition to these provisions, the 2002 Act also provides for exemptions in relation to assets of sentimental value to the debtor. Section 52 of the Act provides that an officer may not seize articles which he or she considers likely to be of sentimental value to the debtor, but only where the value of such articles does not exceed €150.

6.363 It can be seen from the above comparative analysis that section 7 of the *Enforcement of Court Orders Act 1926* is considerably outdated and does not reflect modern standards of living in Ireland and abroad. This provision thus should be changed to take account of what is now necessary to ensure a reasonable standard of living for the debtor and his or her dependents. The Commission believes that the reforms in Northern Ireland, Scotland and England and Wales provide examples of the approach which could be taken to this issue in Ireland. The Commission invites submissions as to the categories of goods which should be exempt from seizure and as to how the list of exempted goods may be updated.

6.364 *The Commission invites submissions as to the categories of debtors' assets which should be exempt from seizure.*

6.365 Of particular relevance is the question of whether a motor vehicle of the debtor should be available for seizure. As seen above, the seizure of such an item is possible in Northern Ireland and England, except where it is necessary for the debtor's work. In Scotland, however, the debtor may retain such a vehicle if its use is reasonably necessary for the debtor and if its value falls below a certain threshold. The Commission understands that in practice cars are not seized in Ireland due to the current state of the market and the fact that Sheriffs and County Registrars cannot provide a warranty as to the roadworthiness of cars seized and sold. The legal position however is that such cars could be sold and the current practice may change if market conditions improve. If so, this could seriously impact on the standard of living of debtors, particularly where the debtor lives in a rural area or where a vehicle is necessary due to the needs of a disabled family member, for example. The Commission thus invites submissions as to whether a debtor's car or other vehicle should be exempt from seizure. Of course, often a car will be purchased under a financing arrangement which means that it remains the property of the lender and so cannot be seized in any case.

6.366 *The Commission invites submissions as to whether, and under what circumstances, a debtor's car or other vehicle should be exempt from seizure.*

(e) **Terminology.**

6.367 The terminology involved in the procedure of execution against goods is largely outdated. The procedure itself is known by several names, such as "execution against goods", "seizure", "distrain", or simply "execution by the Sheriff". Section 2 of the *Enforcement of Court Orders Act 1926* describes an

⁵⁹⁷ Section 58(2)(a) *Debt Arrangement and Attachment (Scotland) Act 2002* (asp 17), repealing Part II *Debtors (Scotland) Act 1987*.

⁵⁹⁸ Section 11(2) of the 2002 Act.

order providing for the seizure and sale of a debtor's goods as an "execution order". This section states that

"the expression "execution order" means and includes any writ, decree, warrant, or other document by whatever name called issued by a court in a civil matter directing or authorising the execution of an order of the court by the seizure and sale of a person's property or by putting a person in possession of lands or premises or delivering to him specific property."

The Act then refers to the actual procedure of seizing and selling the debtor's goods as the "execution of execution orders".⁵⁹⁹ This language is quite confusing and does little to promote the goals of making the law accessible and using plain language in the law.

6.368 The term "Sheriff" itself is of great antiquity, existing since before Norman times, and bears little resemblance to the actual functions of the Sheriff today.⁶⁰⁰ The term "*feri facias*"⁶⁰¹ is similarly outdated and is incomprehensible to the average person. Similarly, the term "*nulla bonna*" is an unnecessarily complicated term for the idea it expresses. Also, the term "bailiwick", used to describe the territory in which the Sheriff or County Registrar operates, is outdated and should be reformed.

6.369 Following the Commission's policy of promoting the use of plain language in the law,⁶⁰² the Commission recommends that the terminology in relation to this process should be updated and simplified. Reforms to this terminology in other countries are now discussed.

6.370 The *Tribunals, Courts and Enforcement Act 2007* has introduced considerable changes to the terminology used in this area in England and Wales. Part 3 of this Act contains rules establishing a new procedure for the seizure and sale of debtors' goods called "enforcement by taking control of goods".⁶⁰³ This new procedure replaces almost all previous procedures of execution against goods. The terminology contained in the various pieces of legislation which had provided for a power of execution against goods has been amended.⁶⁰⁴ In addition, the following warrants and writs are renamed by the Act:

- i) writs of *feri facias*⁶⁰⁵ are renamed writs of control;
- ii) warrants of execution⁶⁰⁶ are renamed warrants of control;
- iii) warrants of distress, unless the power they confer is exercisable only against specific goods, are renamed warrants of control.

6.371 When the Northern Irish system of enforcement was radically reformed in 1969, the old systems of county court execution warrants and writs of *feri facias* were replaced by a single procedure

⁵⁹⁹ Section 3 *Enforcement of Court Orders Act 1926*.

⁶⁰⁰ See Law Reform Commission *Report On Debt Collection: (1) The Law Relating to Sheriffs* (LRC 27-1988) at 7.

⁶⁰¹ Literally meaning "cause to be made": Murdoch *Murdoch's Dictionary of Irish Law* (3rd ed. Topaz Publications 2000) at 327.

⁶⁰² See Law Reform Commission *Report on Statutory Drafting and Interpretation: Plain Language and the Law* (LRC 61-2000).

⁶⁰³ Section 62 of the 2007 Act.

⁶⁰⁴ See Schedule 13 of the 2007 Act.

⁶⁰⁵ This writ empowers the sheriff or enforcement officer to seize and sell debtors' goods for the enforcement of a *High Court* judgment. It should be noted that writs of *feri facias de bonis ecclesiasticis* are not renamed under this provision.

⁶⁰⁶ This is a warrant empowering a district judge to seize and sell debtors' goods for the enforcement of a *County Court* judgment.

for the seizure and sale of goods which no longer depends on the level of court in which the original judgment was obtained. This new mechanism is known as a “seizure order”.⁶⁰⁷

6.372 As noted above, Scotland also engaged in a wide ranging reform of its system of execution against goods under the *Debtors (Scotland) Act 1987* and the *Debt Arrangement and Attachment (Scotland) Act 2002*. Changes in terminology were introduced as part of these reforms. Therefore the traditional procedure of “pounding and warrant sale” or execution against goods was replaced by a new procedure under the new name of “attachment”.⁶⁰⁸

6.373 Reports of law reform bodies in Canada also included reforms of terminology as part of recommending that a single order should cover all forms of enforcement, including those other than execution against goods.⁶⁰⁹ These reports therefore recommended that a single order called a “writ of enforcement” should replace the various writs of *feri facias*, garnishee orders etc.

6.374 It can therefore be seen from the above analysis that the ancient terminology used in this area of the law has been reformed in many different countries in recent years. The Commission recommends that this should also form part of reforms in Ireland, and that updating and simplifying terminology will facilitate access to justice and reduce the intimidation caused to debtors by enforcement proceedings. The Commission therefore provisionally recommends that the terms “execution against goods”, “execution order” and “order of *feri facias*” should be substituted with simpler and more modern terms. A single order should be issued for the execution of judgments of the District, Circuit and High Courts, and the distinction between execution orders and orders of *feri facias* should be abolished. The Commission invites submissions as to appropriate new terms which could be used in place of these old terms, considering the reforms in other countries.

6.375 *The Commission provisionally recommends that the terms “execution against goods”, “execution order” and “order of fieri facias” should be replaced by clearer terms. The Commission invites submissions as to appropriate new terms which could be adopted.*

(f) **A Code for Execution against Goods**

6.376 As described in Chapter 3 above,⁶¹⁰ the *Enforcement of Court Orders Act 1926* contains a statutory list of many of the rules regulating execution against goods. Certain powers and duties of the Sheriff and County Registrar are specified in this Act, which to this extent codifies the common law rules in this area. Despite this, it is clear from the discussion of the current law in Chapter 3 that many common law rules still govern the mechanism of execution against goods. Important issues such as the liability of the Sheriff and the judgment creditor in the case of wrongful seizure are regulated by the common law and not by statute.⁶¹¹ Similarly, some duties of the Sheriff, such as the obligation to execute an execution order as soon as is reasonably practicable, are contained in common law decisions of the courts rather than in legislation.⁶¹² There is no single statutory list of the types of goods which may be seized, with some rules relating to the seizure of money and securities for money (cheques, bills of exchange etc) contained in section 81 of the *Common Law Procedure (Ireland) Act 1853*. Insurance policies effected by the debtor on his or her own life do not appear to fall under the statutory provisions concerning money securities,⁶¹³ and case law is not consistent as to whether such a policy is capable of

⁶⁰⁷ See Capper *The Enforcement of Judgments in Northern Ireland* (SLS Legal Publications (NI) 2004) at 91-108.

⁶⁰⁸ Section 10 *Debt Arrangement and Attachment (Scotland) Act 2002*.

⁶⁰⁹ Ontario Law Reform Commission *Report on the Enforcement of Judgment Debts and Related Matters* (Part 2, 1981) at 12ff; Alberta Law Reform Institute *Enforcement of Money Judgments Volume 1* (Report No. 61, 1991) at 36ff.

⁶¹⁰ See paragraphs 3.247 to 3.257 above.

⁶¹¹ See paragraph 3.249 above.

⁶¹² See paragraph 3.247 above.

⁶¹³ Section 131 *Common Law Procedure Act 1853* and section 20 *Debtors (Ireland) Act 1840*. The position appears to be that while an insurance policy under which premiums are payable may constitute a security for money, it does not appear to fall under the wording of the Acts as no provision is made for continued payment

seizure⁶¹⁴ Similarly, various rules such as those relating to the powers of the court to fine sheriffs for breaches of their duties⁶¹⁵ are contained in various statutory provisions. The rules on wrongful seizure of goods by the sheriff

6.377 As part of the principle of streamlining and clarifying the law on enforcement,⁶¹⁶ the Commission believes that all of the rules relating to the procedure of execution against goods should be presented in a single piece of legislation. This should be done as part of legislation introducing the proposed new overall system of enforcement. As has been described above, a similar approach has been adopted in Northern Ireland, Scotland and England and Wales, where the rules relating to execution against goods have been comprehensively specified in a legislative code. The Commission believes that a similar approach should be adopted in Irish law, and will consider the drafting of a code of rules in this area as part the Commission's proposed final Report.

(g) **Substantive Law Reforms**

6.378 Having proposed reforms of the overall system of execution against goods, the terminology used in the area and recommended that the existing law be codified in statutory form; the Commission now presents some recommendations as to substantive reforms of the law governing the mechanism of execution against goods.

(i) **Binding of debtor's property.**

6.379 At common law the delivery of a writ of *fiery facias* to a sheriff had the effect of "binding" the property in the goods of the judgment debtor. This "binding" effect of the writ means that the debtor's goods become liable to seizure by the sheriff, and that the title to the debtor's goods is subject to this liability to seizure.⁶¹⁷ This position was codified and slightly amended by legislation in 1893, which confirmed the binding effect of the writ, but stated that a purchaser of the debtor's goods who acted in good faith would not find his or her title to the goods to be prejudiced by the writ.⁶¹⁸

6.380 The rules in this area would need reform if the Commission's provisional recommendations are to be adopted. Writs of *fiery facias* are to be abolished as a single procedure is to be introduced for applying for the various mechanisms for enforcing judgments. The Commission takes the view that once an application for enforcement has been made, the debtor's property should be "bound" to prevent the debtor dealing with the property, pending the examination of the debtor's means and the making of an enforcement order. In Northern Ireland, once an application for enforcement has been made the Enforcement of Judgments Office issues a "custody warrant" which deems specific goods of the debtor to be in the possession and control of the office.⁶¹⁹ This warrant effectively has the same effect as "walking possession" arrangements discussed below, which also prevent a debtor from dealing with assets which are deemed to be in the possession of the sheriff.

6.381 The Commission recognises that a similar provision may have to be introduced to allow the proposed enforcement office to restrain debtors from dealing with certain assets pending the resolution of the enforcement process. Questions also arise as to whether only the debtor's physical assets should be bound, or whether other assets such as the debtor's bank account should be subject to some restrictions. Any goods which are exempt from seizure and debts or bank account amounts exempt from attachment

by the sheriff of the premiums: see Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 66.

⁶¹⁴ *Re Sargent's Policy* (1881) 7 LR Ir. 66 suggests that an insurance policy due and payable immediately may be capable of seizure, doubting the decision of *Stokoe v Cowan* 29 Beav. 637.

⁶¹⁵ Section 8 *Sheriffs (Ireland) Act 1920* (10 & 11 Geo. 5.) c.26.

⁶¹⁶ See paragraphs 2.121 to 2.124 above.

⁶¹⁷ For a discussion of the binding effect of the delivery of a writ to the sheriff, see Alberta Law Reform Institute *Enforcement of Money Judgments Volume 1* (Report No. 61, 1991) at 32-33.

⁶¹⁸ Section 26 of the *Sale of Goods Acts 1893*.

⁶¹⁹ See Capper *The Enforcement of Judgments in Northern Ireland* (SLS Legal Publications (NI) 2004) at 52-3.

would also be exempt from the binding effect of any such order, and could be dealt with by debtors in the normal manner. The Commission will return to this issue when making final recommendations for reform in its Report.

(ii) Walking possession

6.382 The previous Report of the Commission on the law relating to Sheriffs recommended that the position of the law relating to “walking possession” agreements should be clarified.⁶²⁰ It can be recalled that seizure does not require any physical contact with the goods seized, and that an entry upon the premises on which the goods are situate, combined with a demonstration of an intention to seize the goods, is sufficient to establish a seizure of the goods.⁶²¹ “Walking possession” agreements involve an arrangement between the debtor and the Sheriff/County Registrar under which the debtor agrees to hold the goods for the Sheriff/County Registrar and return them to the Sheriff/County Registrar when required.⁶²² If no such agreement exists, the Sheriff who leaves the seized goods with the debtor is deemed to have abandoned them.⁶²³ The Commission previously expressed doubts as to whether “walking possession” agreements were valid in Irish law, or alternatively whether a Sheriff leaving seized goods with the judgment debtor in law abandons them.⁶²⁴

6.383 The Commission believed that such arrangements were “clearly desirable” for the reasons that the Sheriff may need an interval of time after ascertaining the assets of the debtor during which he or she can decide on how best to proceed; and that such an interval may provide the debtor with the opportunity of settling the claim.⁶²⁵ The Commission therefore recommended that a provision should be enacted to the effect that the Sheriff shall not be deemed to have abandoned possession of the seized goods if he or she permits them to remain in the possession of any person, including a judgment debtor. The judgment debtor or other person must acknowledge that the goods have been seized and agree to hold them for the Sheriff until they are demanded by him or her.⁶²⁶

6.384 The reforms to execution law of 2007 introduced a new general statutory procedure for walking possession arrangements in England and Wales. Under the new procedure of “enforcement by taking control of goods”, one of the ways in which an enforcement agent may take control of goods is by entering into a “controlled goods agreement” with the debtor.⁶²⁷ A controlled goods agreement is defined as an agreement under which the debtor

- Is permitted to retain custody of the goods,
- Acknowledges that the enforcement agent is taking control of them, and
- Agrees not to remove or dispose of them, nor to permit anyone else to, before the debt is paid.⁶²⁸

⁶²⁰ Law Reform Commission *Report On Debt Collection: (1) The Law Relating to Sheriffs* (LRC 27–1988) at 41.

⁶²¹ Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 64.

⁶²² Law Reform Commission *Report On Debt Collection: (1) The Law Relating to Sheriffs* (LRC 27–1988) at 40.

⁶²³ *Bales v Arundale* (1813) 1 M & S 77.

⁶²⁴ Section 11 of the *Enforcement of Court Orders Act 1926* possibly suggests that such walking possession agreements could be valid, as it states that: “The power and authority of an under-sheriff to sell any goods, animals or other chattels taken in execution by him shall not be prejudiced or affected by reason of such goods, animals or chattels having been out of the custody of the under-sheriff or his custody thereof having been by any means interrupted at any time or times between the time of the seizure and the time of the actual sale of such goods, animals, or chattels.”

⁶²⁵ Law Reform Commission *Report On Debt Collection: (1) The Law Relating to Sheriffs* (LRC 27–1988) at 40-41.

⁶²⁶ *Ibid* at 41.

⁶²⁷ Schedule 12, section 13(1)(d) of the *Tribunals, Courts and Enforcement Act 2007*.

⁶²⁸ Schedule 12, section 13(4) of the 2007 Act.

It should however be noted that this legislation expressly requires the walking possession agreement to be entered into by the debtor, while previous case law had permitted any “responsible” person in the household to sign a walking possession agreement.⁶²⁹

6.385 Similar reforms have taken place in Northern Ireland. As part of the creation of the new seizure order mechanism, a provision was created which placed walking possession arrangements on a statutory basis.⁶³⁰ It appears that the practice of walking possession is not as well established in Northern Ireland as in England and Wales, and this provision has been described as “curious”.⁶³¹ The Hunter Committee report recommended that the provision be repealed on the grounds that it gave too much discretion to enforcement officers and that the provision did not appear to have been used in practice.⁶³²

6.386 It can be seen from the above that legal systems similar to Ireland’s have provided a statutory basis for walking possession agreements, and that the Commission previously recommended that Irish law should do likewise. The Commission invites submissions from interested parties as to whether such agreements should be given statutory validity in Ireland.

6.387 *The Commission invites submissions as to whether legislation should provide for “walking possession” arrangements (under which the Sheriff and debtor agree that the debtor’s goods have been seized but that they should remain in the custody of the debtor and not be sold until the debt has been paid).*

(iii) The provision of notice to the debtor in advance of seizure

6.388 It has been noted above that under the common law that the Sheriff is under no duty to provide notice to the debtor of his or her intention to levy execution before seizing the debtor’s goods.⁶³³ The law takes the view that since the debtor has been notified of the judgment awarded against him or her, he or she should expect execution to be levied against his or her goods.⁶³⁴ Recent empirical research conducted by the Free Legal Advice Centres (FLAC) has however demonstrated that this is not always the case.⁶³⁵ This report noted that at present there does not appear to be any formal requirement in the District Court rules for the debtor to be served with a copy of the District Court judgment or decree. While most creditors will provide debtors with a letter notifying them of the judgment, it appears that not all creditors do so.⁶³⁶ As a consequence one third of debtors surveyed in this study reported that they did not receive any letter notifying them of the fact that the creditor had obtained a judgment against them.⁶³⁷

⁶²⁹ *National Commercial Bank of Scotland v Arcam Demolition and Construction Ltd* [1966] 2 QB 593. It has been argued that this added difficulty in entering a walking possession agreement may induce enforcement agents to remove goods from the debtor’s premises on the first visit, a result which would be against the debtor’s interests: Kruse “Enforcement law reform and the common law” [2008] CJK 494 at 505.

⁶³⁰ Article 35 of the *Judgments Enforcement (Northern Ireland) Order 1981* provides that

An enforcement officer executing an order of seizure may label or otherwise identify any property seized in pursuance of the order and may defer the removal of the property upon his receiving in writing—

(a) an admission by the debtor that the property in question is in his possession, and

(b) an undertaking by the debtor to pay the amount recoverable on foot of the judgment, or a substantial part of it, by a date specified in the undertaking.

⁶³¹ Capper *The Enforcement of Judgments in Northern Ireland* (SLS Legal Publications (NI) 2004) at 101.

⁶³² *Report of the Enforcement of Judgments Review Committee (Northern Ireland)* (1987) at paragraph 15.72.

⁶³³ See paragraph 3.247 above

⁶³⁴ *Wymes v Tehan* [1988] IR 717.

⁶³⁵ Free Legal Advice Centres (FLAC) *To No One’s Credit: The Debtor’s Experience of Instalment and Committal Orders in the Irish Legal System* (FLAC 2009) at 62ff.

⁶³⁶ *Ibid* at 63.

⁶³⁷ *To No One’s Credit: The Debtor’s Experience of Instalment and Committal Orders in the Irish Legal System op cit.* at 62.

Of those who did receive such a letter, the majority did not understand the letter or did not understand the options available to them on receiving the letter. This is clearly a cause for concern, as execution against goods should not occur unexpectedly in this manner. While the Commission has recommended above that creditors should be obliged to notify debtors of the fact that a judgment has been obtained against them,⁶³⁸ the Commission also considers that additional notice should be provided to debtors in advance of enforcement, and most particularly in advance of the seizure and sale of debtors' goods. While the Commission understands that it is the practice of Sheriffs to send a demand letter to the debtor before visiting the debtor's premises, it may nonetheless be desirable to introduce legislation making this practice a legal requirement. The approaches to this issue in other jurisdictions are now discussed.

6.389 Professor Beatson's 2000 report on bailiff law in England and Wales recommended that legislation should introduce a requirement to give notice informing the debtor that a judgment has been obtained against him or her.⁶³⁹ It was recommended that the notice should include a warning that enforcement may follow, and an indication of the forms of enforcement which may be used against the debtor. It should also indicate the consequences of an enforcement agent calling to the debtor's premises, the costs involved, and the relevant complaints procedures. It was envisaged that this notice period should last for seven days, during which the debtor could seek money advice and if possible arrange to repay the debt by instalments so as to avoid the costs of enforcement. The giving of notice could be avoided however where the creditor has reasonable grounds for believing that if notice is given the debtor will dispose of assets. The report also recommended that consideration should be given to whether commercial debtors should be treated differently from residential debtors in regard to the notice requirements. This requirement of notice has been given legislative force in the *Tribunals, Courts and Enforcement Act 2007*, which provides that an enforcement agent may not take control of goods unless the debtor has been given notice.⁶⁴⁰ The details of this notice requirement are to be specified by ministerial regulations. It is expected that the notice period will not be less than seven days.⁶⁴¹ The legislation provides that if regulations so authorise, the court may order in prescribed circumstances that the notice given may be less than the minimum period.⁶⁴²

6.390 In Scotland, extensive notice requirements were introduced under the *Debt Arrangement and Attachment (Scotland) Act 2002*. Under section 10(3)(b) of the Act, execution against goods may only take place where the creditor has provided the debtor with a debt advice and information package. The contents of this package are to be specified by ministerial order.⁶⁴³ In addition to this requirement, further steps must be followed when carrying out execution in a debtor's "dwellinghouse" under the "exceptional attachment order" procedure. In such a case the creditor must apply to court for an exceptional attachment order, and the debtor is to be given an opportunity to make a voluntary declaration about his or her financial circumstances, ability to pay and information relating to any non-essential assets held, including their value.⁶⁴⁴ The court may also order that the debtor be visited by a money advisor before making the attachment order.⁶⁴⁵

6.391 In Northern Ireland, the central role of the examination of debtors' means has as a consequence the fact that notice of impending enforcement is not as significant an issue as in other systems such as Ireland where debtors generally do not participate in enforcement proceedings. As

⁶³⁸ See paragraphs 6.174 to 6.175.

⁶³⁹ Beatson *Independent Review of Bailiff Law* (University of Cambridge Centre for Public Law 2000) at 19-21.

⁶⁴⁰ Schedule 12 section 7(1) of the *Tribunals, Courts and Enforcement Act 2007*.

⁶⁴¹ Lord Chancellor's Department *Effective Enforcement – Improved Methods for Recovery for Civil Court Debt and Commercial Rent and a Single Regulatory Regime for Warrant Enforcement Agents* (Cm5744 2003) at 38.

⁶⁴² Schedule 12 section 7(1) of the 2007 Act.

⁶⁴³ Section 10(5) of the *Debt Arrangement and Attachment (Scotland) Act 2002*.

⁶⁴⁴ Section 47(4) of the 2002 Act.

⁶⁴⁵ Section 47(5)(a) of the 2002 Act.

described above, under the Northern Irish system, all enforcement proceedings begin with a mandatory examination of the debtor's means. Once this has been completed, the Enforcement of Judgments Office makes a preliminary decision and the parties are notified of this decision and are given time to make objections.⁶⁴⁶ In addition to this notice requirement, additional notice must be provided if the debtor is found to have assets available for seizure and a seizure order is made. In this case the seizure order must be served personally on the debtor along with a notice warning the debtor that goods seized may be sold after an interval of eight days from their being advertised for sale, unless the debtor pays the amount owed.⁶⁴⁷

6.392 It can therefore be seen that Irish law does not compare favourably with the law in similar legal systems as regards the provision of notice to debtors in advance of execution against their goods. While debtor awareness of impending enforcement will be increased if the Commission's suggestion of introducing mandatory examinations of means as in Northern Ireland is adopted, the Commission provisionally recommends that in any case additional notice should be provided to debtors before enforcement officers arrive at their premises to seize goods. This notice should allow the debtor adequate time to seek money advice or to arrange payment by instalments if possible. The Commission invites submissions as to the details which should be included in the notice provided to debtors.

6.393 *The Commission provisionally recommends that adequate notice should be provided to debtors before enforcement officers visit their premises for the purpose of seizing and selling debtors' goods.*

(iv) Third party property

6.394 The rules relating to the seizure of goods belonging to a party other than the debtor are described in Chapter 3.⁶⁴⁸ First, the primary rule is that at common law the goods of third parties, including those of the debtor's spouse, cannot be seized.⁶⁴⁹ The sheriff will be liable to third parties for the wrongful seizure of their goods.⁶⁵⁰ In relation to goods jointly owned by the debtor with a third party, the goods may be seized and sold, but the joint owner must be paid for his or her share out of the proceeds.⁶⁵¹

6.395 Section 13 of the *Enforcement of Court Orders Act 1926* allows the Sheriff to seize goods belonging to the debtor's spouse or children, and holds that the Sheriff will not be liable to these family members for any loss suffered. Instead, the owner of such seized property will "be entitled to recover from the debtor by action the value of such goods, animals, and other chattels, together with such damages as such person shall have suffered by reason of such goods, animals, or other chattels having been so taken in execution."⁶⁵² The exemption of the Sheriff from liability applies in all cases where the

⁶⁴⁶ Service is by ordinary first class post to the usual or last known place of abode or business in Northern Ireland of the person to be served: rule 76 *Judgments Enforcement Rules (Northern Ireland) 1981*. Service is deemed to take place on the third day after the notice is sent, or on the second day where sent to a Belfast postal address. The parties are then given at least eight days from the time the notice is deemed to be served: rule 28 of the 1981 Rules.

⁶⁴⁷ Rule 75(1) of the *Judgments Enforcement Rules (Northern Ireland) 1981*. If the debtor is not present at the time of seizure an order for substituted service must be made, although the enforcement officer can nonetheless enter forcibly in the debtor's absence (article 38 *Judgments Enforcement (Northern Ireland) Order 1981*), making this requirement appear unnecessary: See Capper *The Enforcement of Judgments in Northern Ireland* (SLS Legal Publications (NI) 2004) at 98.

⁶⁴⁸ See paragraph 3.250 above.

⁶⁴⁹ *Rondeau Le Grand & Co. v Marks* [1918] 1 KB 75. See Beatson *Independent Review of Bailiff Law* (University of Cambridge Centre for Public Law 2000) at 49.

⁶⁵⁰ *Jones v Woodhouse* [1922] 2 KB 117.

⁶⁵¹ *Farrar v Beswick* (1836) 1 M&W 682; *Mayhew v Herrick* (1849) 7 CB 229.

⁶⁵² Section 13(1) of the 1926 Act.

seized goods are claimed or alleged to be the property of the debtor's spouse or children, whether this claim turns out to be well-founded or not.

6.396 As noted above, this provision has been criticised as being unjustifiable in principle and possibly being in breach of the constitutional protection of property rights under Articles 40.3.2^o and 43 of the Constitution of Ireland.⁶⁵³ The goods of members of the debtor's family may be seized to enforce a judgment obtained against the debtor, and the debtor's family members are then left with what will often be a worthless cause of action against a debtor who has already failed to comply with previous court judgments. The injustice and interference with rights which this provision can cause are thus clear. It also dates from a time when social conditions regarding the ownership of property within families were quite different to those existing in today's society. The Commission understands that as a consequence the present practice of Sheriffs is to refrain from seizing goods claimed to be owned by a family member of the debtor where that person can produce receipts as proof of ownership.

6.397 On the other hand, it has been noted that the power provides a valuable protection for Sheriffs and assists in providing proceeds for creditors. The compatibility of similar legislation with the European Convention on Human Rights' guarantee of property rights has been upheld, albeit in the context of the enforcement of tax debts.⁶⁵⁴ It should however be noted that a similar provision of Northern Irish law has fallen into disuse due to a Practice Direction stating that it infringes the rights of the debtor's family members to a fair determination of their rights under Article 6 ECHR.⁶⁵⁵ This provision was introduced to respond to the perceived problem of execution being defeated by spurious claims of ownership by debtors' spouses.⁶⁵⁶ The "Hunter Committee" recommended the repeal of this provision and stated that instead the spouse's claim to ownership should be carefully investigated and if goods were found to be jointly owned by the debtor and another, the debtor's interest could be seized. In addition, it was recommended that a legal presumption should be introduced whereby any assets in the sole or joint possession of the debtor should be presumed to be seizable unless the EJO knows or ought to know that it is not, a recommendation which is now followed in practice by the Enforcement of Judgments Office.⁶⁵⁷

6.398 Under the reforms introduced in England and Wales by the *Tribunals, Courts and Enforcement Act 2007*, an enforcement agent may take control of goods only if they are goods of the debtor.⁶⁵⁸ The enforcement agent is however immune from liability for the sale of seized goods which belonged to a third party unless the agent had notice⁶⁵⁹ that the goods were not the debtor's, or that they did not belong solely to the debtor.⁶⁶⁰ It appears that these provisions do not distinguish family members from other third party owners. A procedure exists under which a third party may apply to court claiming that goods seized

⁶⁵³ See paragraph 3.353 above.

⁶⁵⁴ See *Gasus Dosier und Fördertechnik GmbH v The Netherlands*, Application No. 15375/89 ECtHR.

⁶⁵⁵ The Northern Ireland 1981 Rules state that the goods which may be seized include:

(d) goods of the debtor's spouse [or civil partner], where it appears to the Office that the judgment debt relates to—

(i) goods obtained or services rendered; or

(ii) the rent of, or rates due in respect of the occupation of, premises;

for the general use or enjoyment of the debtor, his spouse [or civil partner] and his dependants residing with him.

⁶⁵⁶ *Report of the Joint Working Party on the Enforcement of Judgments, Orders and Decrees of the Courts in Northern Ireland* (1965) at paragraph 93.

⁶⁵⁷ *Report of the Joint Working Party on the Enforcement of Judgments, Orders and Decrees of the Courts in Northern Ireland* (1987) at paragraph 15.57. See Capper *op cit.* at 96.

⁶⁵⁸ Schedule 12, paragraph 10 *Tribunals, Courts and Enforcement Act 2007*.

⁶⁵⁹ Schedule 12, paragraph 65(3) of the 2007 Act provides that "the enforcement agent... has notice of something if he would have found it out if he had made reasonable enquiries."

⁶⁶⁰ Schedule 12, paragraphs 63(1) and (2) of the 2007 Act.

are his or hers and not the debtor's, in which case the enforcement agent may not sell the goods until their ownership has been determined.⁶⁶¹ In respect of goods jointly owned by the debtor with a co-owner,⁶⁶² the enforcement agent must after the sale of the goods first pay the co-owner a share of the proceeds proportionate to his or her interest in the goods before paying the debt or the costs of enforcement.⁶⁶³ The narrow definition of "co-owner" under the 2007 Act provides for a form of presumption of sole ownership.

6.399 The reforms introduced in Scotland under the *Debt Arrangement and Attachment (Scotland) Act 2002* follow the approach recommended by the "Hunter Committee" in Northern Ireland and introduce a presumption of ownership in relation to goods in the possession of the debtor. Section 13(1) of the 2002 Act provides that an officer may proceed on the assumption that the debtor owns, solely or in common with a third party, any article which is in the possession of the debtor. The section continues to state that the enforcing officer must make enquiries of any person present at the place at which the article is situated as to the ownership of the article.⁶⁶⁴ In particular the officer must enquire as to whether the article in question is jointly owned by a third party. Section 13(3) provides that an officer may not proceed with this assumption of ownership where he or she knows or ought to know that the asset is not owned by the debtor jointly or solely. Finally, section 13(4) states that the officer may rely on the presumption even if the goods are of a type commonly held under a hire-purchase agreement and if an assertion has been made that the debtor does not own the article. A procedure exists under section 34 of the 2002 Act through which a third party claiming ownership of the seized goods may apply for the recovery of the goods. Similarly, section 35 of the 2002 Act provides for rules relating to goods owned jointly by the debtor and a third party. Under this section the third party can take sole ownership of the asset by paying to the enforcement officer a sum equal to the value of the debtor's interest in the asset.⁶⁶⁵ Also, if the court is satisfied that the sale of the asset jointly owned by a debtor and a third party would be unduly harsh to the third party, the court may order that the seizure of the asset ceases to have effect.⁶⁶⁶ If a third party claims joint ownership of a seized asset before sale and the asset is subsequently sold, the creditor must pay to the third party a portion of the proceeds of sale corresponding to the third party's interest in the asset.⁶⁶⁷

6.400 It can be seen in this way that the Scottish provisions seek to balance the legitimate interests of creditors with the equally legitimate interests of third parties. This is achieved by providing the enforcement officer with strong presumptions in order to facilitate effective enforcement; while also protecting third parties by providing them with powers to prevent the sale of their goods, to buy out the debtor's interest in the goods, or to be compensated by the creditor from the sale of the goods. It should be noted that similar presumptions of ownership apply in Sweden, and have been praised for aiding the efficiency of this method of enforcement there.⁶⁶⁸ Thus where the National Enforcement Authority is seizing a debtor's goods, it is aided by a legal presumption that all goods in the debtor's possession are owned by the debtor. Similarly, if goods are registered on a public register they are presumed to be owned by the registered owner.

⁶⁶¹ Schedule 12 paragraph 60 of the 2007 Act.

⁶⁶² A co-owner is defined narrowly as "a person other than the debtor who has an interest in the goods, but only if the enforcement agent (a) knows that the person has an interest in the particular goods; or (b) would have known, if he made reasonable enquiries: schedule 12, paragraph 3(1) of the 2007 Act.

⁶⁶³ Schedule 12, paragraph 50(6) of the 2007 Act.

⁶⁶⁴ Section 13(2) of the *Debt Arrangement and Attachment (Scotland) Act 2002*.

⁶⁶⁵ Section 35(2) of the 2002 Act.

⁶⁶⁶ Section 35(3) of the 2002 Act.

⁶⁶⁷ Section 36(2) of the 2002 Act.

⁶⁶⁸ See Andenas and Nazzini "Market Integration, the Harmonization Process, and Enforcement Practices in the EU Member States" in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 95.

6.401 The approaches in Scotland and England and Wales, in addition to the disuse of the relevant provision of Northern Irish law, highlight that section 13 of the *Enforcement of Court Orders Act 1926* does not compare favourably with comparative standards. The legitimate interests of the debtor's spouse and children are not as well respected under the Irish provision as they are in other jurisdictions. The Commission thus recommends that the rule under section 13 of the *Enforcement of Court Orders Act 1926* should be amended, and that members of the debtors family should be treated in the same way as other third party owners of seized goods.

6.402 In relation to goods in which third parties have an interest, it should be noted that a previous Commission report recommended that:

"It is recommended that provision be made that goods may be seized and the interest of the judgment debtor in them sold if he has a right to possession and a right to transfer his interest in them. It should also be provided that where the judgment debtor has a right to the possession of the goods and will be entitled to sell those goods or an interest therein upon making a payment to a third party, then, if the judgment creditor pays that amount to the sheriff, the sheriff should be entitled to seize those goods under an execution order."⁶⁶⁹

6.403 The Commission believes that the current rules on the seizure of goods owned by third parties should be codified. The general rule should remain that only the goods of the debtor should be capable of being seized. Joint property should be capable of being seized and sold provided that the interests of joint owners are respected by either ensuring that they are paid for their shares in priority to the repayment of the debt and costs (as under the 2007 Act in England and Wales) or after the creditor has been paid (as in Scotland under the 2002 Act). The Commission invites submissions as to which of these approaches is to be preferred. Also, the possibility of providing third parties with the ability to prevent the sale of the seized assets by either buying out the debtor's share or by showing that the sale of the assets would be unduly harsh should be considered. The Commission invites submissions as to the desirability of introducing this additional protection for third parties. Consideration should also be given to the previous recommendation of the Commission that where a judgment debtor has a right to sell goods upon making a payment to a third party, the Sheriff should be permitted to sell those goods where the judgment creditor pays this sum to the third party.

6.404 *The Commission provisionally recommends that the current rules on the seizure of goods owned by third parties should be codified. The Commission provisionally recommends that the primary rule should be that only the goods of the debtor should be capable of being seized. The Commission however provisionally recommends that jointly-owned property should be capable of being seized subject to the protection of the interests of joint owners. In this regard the Commission invites submissions as to how third party interests should be protected, in particular with regard to the following options:*

- *Whether third parties should be compensated for their interest in seized and sold goods by the enforcement official in priority to the payment of the debt to the creditor and the payment of the costs of seizure and sale?*
- *Whether third parties should be paid for their interests by the judgment creditor after the proceeds of sale have been paid to the judgment creditor?*
- *Whether third parties should be entitled to prevent the sale of jointly owned goods or goods in which they have an interest by buying out the debtor's interest in the seized goods or by demonstrating that it would be unduly harsh on their interests to allow the sale to continue?*
- *Where a debtor has a right to sell goods upon making a payment to a third party, whether the Sheriff should be entitled to sell those goods provided that the judgment creditor pays this sum to the third party?*

6.405 The presumptions of ownership existing in Scotland and Sweden appear to assist the efficiency of the execution of judgments and also appear to provide a more balanced approach than the current rule under section 13 of the *Enforcement of Court Orders Act 1926*. Such presumptions could therefore be an appropriate means of preserving the rationale of the rule in section 13 of the 1926 Act in a

⁶⁶⁹ Law Reform Commission Report On Debt Collection: (1) *The Law Relating to Sheriffs* (LRC 27–1988) at 32.

more proportionate manner, and the Commission invites submissions as to the desirability of introducing a presumption of ownership in relation to goods in the possession of the debtor, or goods found on the premises of the debtor.

6.406 *The Commission invites submissions as to the desirability of introducing a presumption of ownership in relation to goods found (a) within the possession of the debtor and/or (b) on the premises of the debtor.*

6.407 A complicated issue arises in relation to goods which are subject to leasing, hiring or retention of title agreements. Under the common law, hired goods may be seized by the sheriff if the debtor has a saleable interest in them and has a right to possession of them.⁶⁷⁰ The third party (e.g. the hirer) must be paid for his or her share in the goods out of the proceeds of sale.⁶⁷¹ The debtor however will have no interest in hired goods or goods purchased on hire purchase terms until all or nearly all of the instalments have been paid.⁶⁷² For this reason the report of Professor Beatson on bailiff law in England and Wales recommended that hired goods should not be capable of being seized.⁶⁷³ This report also recommended that goods purchased on hire purchase terms should not be liable to seizure unless the debtor has acquired title at the time of the seizure. In the Commission's previous report on this area of the law, it was recommended that Sheriffs should be given the option of paying up the balance owing in respect of goods held under a leasing or hiring agreement, so that the Sheriff would obtain a clear title to the goods in question in advance of their sale.⁶⁷⁴ This would obviously result in the expenditure of resources by the Sheriff or County Registrar, which may lead to increased costs to the State under the current system of financing execution activities. Under a privatised system as discussed above,⁶⁷⁵ these costs would be incurred by the private enforcement agent pending a sale of the goods.

6.408 The Commission in that report also recognised the problems caused by retention of title clauses, whereby the goods in the possession of the debtor are not owned by him or her. It was noted that it was not appropriate to deal with this much wider topic in the context of a study of the law solely relating to the Sheriff.

6.409 The Commission recognises that the questions raised by the seizure of goods held under hire purchase, lease or retention of title agreements are complicated issues which impact on the law outside the scope of this Consultation Paper. The Commission is therefore cautious in making recommendations on these issues. The Commission invites submissions as to the desirability of implementing the Commission's previous recommendation that Sheriffs should be capable of paying up the balance owed under hire or leasing agreements so as to obtain a clear title to the goods held under the agreement.

6.410 *The Commission invites submissions as to whether Sheriffs should be given the power to pay the balance owed under hire or leasing agreements in order to obtain a clear title to the goods held under such an agreement in advance of sale. The Commission particularly invites submissions as to whether the additional costs involved for Sheriffs and County Registrars would be justified.*

6.411 In the event that a third party claims goods seized by the Sheriff, the remedy available is that contained in the "interpleader" procedure under section 22 of the *Enforcement of Court Orders Act 1926* and various provisions of the rules of each court.⁶⁷⁶ This procedure is described in more detail above.⁶⁷⁷ The procedure was criticised by the Commission in a previous report, and the Commission recommended that the requirement of the Sheriff to institute new proceedings in order to begin the interpleader

⁶⁷⁰ *Leggs v Evans* 6 M & W 36, 42.

⁶⁷¹ *Jones Bros. (Holloway) Ltd. v Woodhouse* [1923] 2 KB 117.

⁶⁷² Beatson *Independent Review of Bailiff Law* (University of Cambridge Centre for Public Law 2000) at 50.

⁶⁷³ *Ibid.*

⁶⁷⁴ Law Reform Commission *Report On Debt Collection: (1) The Law Relating to Sheriffs* (LRC 27–1988) at 31.

⁶⁷⁵ See paragraphs 6.59 to 6.66 above.

⁶⁷⁶ Order 57 RSC; Order 40 CCR; Order 49 DCR.

⁶⁷⁷ See paragraph 3.251 above.

procedure should be removed.⁶⁷⁸ The Commission further criticised the provision that a mere claim in writing to the goods seized by the creditor was all that was required to require the Sheriff to begin the interpleader procedure, and recommended that third parties claiming an interest in the goods seized should be required to swear an affidavit to this effect.⁶⁷⁹ In addition, it was recommended that an action for damages should lie against any person who makes a fraudulent or vexatious claim to goods which are, or which, but for the claim, would have been seized in execution of the judgment, and that such conduct should also be made a criminal offence.⁶⁸⁰ The Commission further recommended that any claim to the goods by a third party must be made within 72 hours from the time of seizure rather than the 48 hour time limit which currently exists.⁶⁸¹

6.412 The Commission understands that the interpleader procedure is used very rarely in practice, and that the usual practice of Sheriffs where claims are made to goods seized is to simply deliver up the goods to the third party claimant on production of receipts or other proof of ownership. In addition, opposition has been expressed among some Sheriffs as to the desirability of reforming the interpleader procedure to make it more frequently used, as this could lead to excessive litigation and legal costs for Sheriffs.⁶⁸²

6.413 The Commission therefore invites submissions from interested parties as to how the interpleader procedure could be made more effective.

6.414 *The Commission invites submissions as to how the interpleader procedure could be made more effective for the parties involved.*

(v) Right of entry on premises

6.415 As noted above, the sheriff may enter a debtor's premises for the purpose of seizing his goods in execution and may do so forcibly, provided that he or she has first made reasonable efforts to enter "peaceably and without violence."⁶⁸³ A sheriff may also use force to enter the premises of a third party, provided that he or she has good grounds for believing that goods of the debtor are on the premises. In its 1988 Report, the Commission noted that these provisions have been criticised, most notably on the grounds that they threatened the constitutional guarantee of the inviolability of the dwelling.⁶⁸⁴ It had been argued on this ground that a sheriff should be required by law to obtain a search warrant authorising the forcible entry to a premises. The Commission ultimately rejected these criticisms, deciding that since the sheriff's powers of entry were specified in law and were only exercisable under an execution order of a court, the violation of the dwelling involved was in accordance with law.⁶⁸⁵

6.416 In this regard the Commission notes that enforcement agents are provided with powers of forcible entry in many countries. For example, in Northern Ireland enforcement officers are provided by legislation with the power to enter the premises of the debtor, of the debtor's spouse or civil partner, and of any of the debtor's dependants by force if necessary.⁶⁸⁶ The enforcement officer may also enter by force the premises of any other person where notice of an enforcement order has been given to that person. The officer must be prepared to produce his or her identification credentials when entering a premises under this legislation. Under the new system of taking control of goods in England and Wales,

⁶⁷⁸ Law Reform Commission *Report On Debt Collection: (1) The Law Relating to Sheriffs* (LRC 27–1988) at 47-8.

⁶⁷⁹ *Ibid* at 48.

⁶⁸⁰ Law Reform Commission *Report On Debt Collection: (1) The Law Relating to Sheriffs* (LRC 27–1988) at 49.

⁶⁸¹ Law Reform Commission *Report On Debt Collection: (1) The Law Relating to Sheriffs* (LRC 27–1988) at 48.

⁶⁸² Keating and Donnelly "Reforming the Law on Debt Enforcement and the Role of the Sheriff" [2009] *Commercial Law Practitioner* (forthcoming).

⁶⁸³ Section 12 of the *Enforcement of Court Orders Act 1926*.

⁶⁸⁴ Law Reform Commission *Report On Debt Collection: (1) The Law Relating to Sheriffs* (LRC 27–1988) at 43-45.

⁶⁸⁵ *Ibid*.

⁶⁸⁶ Article 38 of the *Judgments Enforcement (Northern Ireland) Order 1981*.

a power of forcible entry is also provided to enforcement agents, although this power is subject to detailed statutory provisions and may be restricted by regulations.⁶⁸⁷

6.417 The issue of the power of forcible entry is one to which the Commission will return in its final Report. The Commission understands that the power is not often used in practice. The Commission nonetheless invites submissions as to whether this power should be more strictly regulated to protect the inviolability of the dwelling of the debtor and third parties.

6.418 Another issue which has been in relation to the power of entry of sheriffs is the problem posed by the inability of sheriffs to obtain access to multi-unit developments where the debtor is resident in one of the units contained therein. The possibility of creating a statutory duty for the management companies of multi-unit developments to assist enforcement officers in carrying out their lawful duties should be considered in this regard.

6.419 *The Commission invites submissions as to the desirability of requiring further procedural safeguards to be introduced limiting the power of a sheriff to forcibly enter a premises. The Commission also invites submissions on whether assistance should be provided by law to sheriffs to facilitate access to multi-unit developments.*

(vi) Reports to creditors.

6.420 A further problem identified by the previous report of the Commission is that the Sheriff is not obliged to make a return to the judgment creditor accounting for the goods, if any, seized in execution.⁶⁸⁸ While the sheriff is obliged to make a return to the court, the creditor is not entitled by law to information on the progress of the execution process. The judgment creditor does have the right to ask the court to obtain a return from the Sheriff however. In practice, it appears that sheriffs make payments directly to the judgment creditor and present the judgment creditor with the order with the result endorsed on it for filing in court. The previous Commission report however noted that this practice appears to have no legal basis. It noted that the lack of information available to judgment creditors as to the progress of execution was a legitimate cause of complaint and recommended that there should be an express obligation on the Sheriff to report to both the court and judgment creditor within a prescribed time.

6.421 Against these considerations, arguments have been made that such a right to information should not be given to creditors. Recent research based on interviews with Sheriffs and County Registrars noted that this right could increase the costs of enforcement and that it also could place increased pressures on sheriffs to return judgments marked “no goods” rather than coming to arrangements with debtors to allow them to pay the debt by instalments.⁶⁸⁹ The Commission believes that the making of such repayments by instalments could be facilitated by law and that providing creditors with information on the progress of execution would not hamper the making of such arrangements. Creditors may on the contrary be satisfied to obtain information on the Sheriff’s negotiation of a repayment arrangement.

6.422 The Commission supports the view that judgment creditors should be entitled to obtain information on the progress of execution. The Commission understands that transparency and accountability are key reasons for the satisfaction existing in relation to the work of Revenue Sheriffs.⁶⁹⁰ The Revenue Commissioners communicate with the Sheriffs and obtain progress updates during the course of a case. The Commissioners also monitor closely the outcomes of executions and compile efficiency reports in this regard. This situation contrasts sharply with the situation in relation to Sheriffs and County Registrars in the enforcement of judgment debts, where often a judgment creditor will be notified of a return of “no goods” without receiving any information on the steps taken during the

⁶⁸⁷ Schedule 12, paragraphs 15-30 of the *Tribunals, Courts and Enforcement Act 2007*.

⁶⁸⁸ Law Reform Commission *Report On Debt Collection: (1) The Law Relating to Sheriffs* (LRC 27–1988) at 13.

⁶⁸⁹ Keating and Donnelly “Reforming the Law on Debt Enforcement and the Role of the Sheriff” [2009] *Commercial Law Practitioner* (forthcoming)

⁶⁹⁰ See the discussion of the operations of the Revenue Sheriffs’ enforcement activities at paragraphs 6.54 to 6.57.

execution process. As judgment creditors must pay fees to the Sheriffs and County Registrars for their services, the Commission believes that it is just that the actions taken to justify that fee should be made known to the creditors so that principles of accountability and value for money can be promoted.

6.423 Judgment creditors should therefore be given the right to obtain progress reports from enforcement agents. The content of these reports and the time at which they must be made available should be specified in legislation. The reports could for example include an inventory of items seized. With due regard to the privacy of the judgment debtor, an account of the exempt assets owned by the debtor could possibly also be given to provide evidence of the lack of available assets for seizure.

6.424 *The Commission provisionally recommends that judgment creditors should be entitled to obtain a progress report from an enforcement agent/officer detailing steps taken to attempt to execute a judgment debt. The Commission invites submissions as to the information which should be contained in such a report and as to the time after the issue of an execution order at which such a report should become available.*

(6) A Continued Role for Imprisonment as a Last Resort for “Won’t Pay” Debtors?

6.425 The Commission now turns to the question of whether any role should be retained for imprisonment under a system for the enforcement of judgment debts. Chapter 3 discusses the arguments for and against retaining any role for imprisonment.⁶⁹¹ In considering these arguments, some important points made by Laffoy J in the 2009 High Court decision of *McCann v Judge of Monaghan District Court and Ors*⁶⁹² should be recalled. First, the following statement of the judge shows that the reasonable and legitimate public objective of having an effective system for the enforcement of contractual obligations could permit a role for imprisonment to be retained, provided the procedure for imprisonment is not disproportionate:

“Having in place an effective statutory scheme for enforcement of contractual obligations, including the payment of debt, is unquestionably a reasonable and legitimate objective in the interests of the common good in a democratic society. The means by which effectiveness is achieved may reasonably necessitate affording a creditor a remedy which entitles him or her to seek to have a debtor imprisoned, but such means will constitute an infringement of the debtor’s right to personal liberty guaranteed by Article 40.4.1^o [of the Constitution of Ireland] unless they pass the proportionality test.”⁶⁹³

6.426 Secondly, in order for a procedure for the imprisonment of a debtor to be constitutionally permissible, it must only be capable of being used as an absolute last resort against “won’t pay” debtors where other enforcement mechanisms have been found to be ineffective. This can be seen from the following statement of Laffoy J:

“The rationale of the [European Court of Human Rights] in the *Saadi* case,⁶⁹⁴ that the detention of an individual is such a serious measure that it is justified only as a last resort where less severe measures have been considered and found to be insufficient to safeguard the individual or public interest, is equally applicable in considering the right to liberty guaranteed by the Constitution.”⁶⁹⁵

6.427 The FLAC reports discussed above in relation to instalment orders have argued that imprisonment for debt should be replaced by an alternative enforcement method such as attachment of earnings.⁶⁹⁶ The reports also recommended that legislation should ensure that an order for arrest and

⁶⁹¹ See paragraphs 3.339 to 3.341

⁶⁹² [2009] IEHC 276

⁶⁹³ [2009] IEHC 276 at 81.

⁶⁹⁴ ECtHR Grand Chamber, Unreported, 29th January 2008.

⁶⁹⁵ [2009] IEHC 276 at 82-83.

⁶⁹⁶ Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 115; *To No One’s Credit: The Debtor’s Experience of Instalment and Committal Orders in the Irish Legal System* (FLAC 2009) at 156.

imprisonment could only be made where the debtor appears at the imprisonment hearing. The 2009 High Court decision of *McCann v Judge of Monaghan District Court and Ors*⁶⁹⁷ and the subsequent *Enforcement of Court Orders (Amendment) Act 2009* should reduce greatly the use of imprisonment in debt enforcement proceedings, and it will no longer be possible to make an order for arrest and imprisonment in the absence of a debtor.⁶⁹⁸ These reforms should ensure that imprisonment for debt, as prohibited by the European Convention on Human Rights and the UN International Convention on Civil and Political Rights, is abolished, and that imprisonment of debtors is reserved for situations where individuals wilfully refuse or culpably neglect to obey court orders. While imprisonment has therefore not been removed from the debt enforcement system entirely, in future it should be limited to situations where an individual has wilfully refused or culpably neglected to obey a court order, and where other means of enforcing that court order have first been attempted.⁶⁹⁹ The question remains as to whether imprisonment should be entirely removed from the debt enforcement system, or whether it should be retained as a last resort for those “won’t pay” debtors who have persistently and deliberately sought to evade their obligations. The Commission invites submissions on this issue.

6.428 *The Commission invites submissions as to whether imprisonment should be retained as a last resort in debt enforcement proceedings after all other enforcement methods have been found to be ineffective, and where a debtor has wilfully refused or culpably neglected to obey a court order.*

6.429 The Commission has noted in Chapter 3 that two parallel procedures for the arrest and imprisonment of debtors exist, under the *Enforcement of Court Orders Acts 1926 to 2009* and sections 6 and 7 of the *Debtors (Ireland) Act 1972*.⁷⁰⁰ The interaction between these two procedures is not always clear, and the procedure under the 1926-2009 Acts is more commonly used than that of the 1872 Act. The 1872 Act also provides for imprisonment procedures in the Circuit Court and High Court as well as the District Court, while the 1926-2009 Acts are limited to a District Court procedure.

6.430 The Commission believes that this procedure under the 1872 Act should be abolished as part of a comprehensively reformed system of debt enforcement. In addition, the procedure of imprisonment under the *Enforcement of Court Orders Acts 1926-2009* should be abolished. If a role is to continue to exist for imprisonment as a last resort for won’t pay debtors, a new single procedure should be introduced. It will obviously be necessary to ensure that any such procedure is compatible with the requirements of the constitution as interpreted in the High Court decision of *McCann v Judge of Monaghan District Court and Ors*.⁷⁰¹

6.431 *The Commission provisionally recommends that the procedures for the imprisonment of debtors under the Debtors (Ireland) Act 1872 and the Enforcement of Court Orders Acts 1926 to 2009 should be repealed in the context of a reformed system of court-based enforcement. If imprisonment is to be retained as a remedy of last resort against “won’t pay” debtors, a single new procedure should be enacted.*

6.432 If imprisonment is retained as part of the debt enforcement system, it is clear that proceedings for the arrest and imprisonment of a debtor must take place before a court, and could not take place before the proposed enforcement office. Article 34 of the Constitution of Ireland provides that justice shall be administered by courts, and proceedings involving the possible arrest and imprisonment of an individual would almost certainly be categorised as the administration of justice. Furthermore, the

⁶⁹⁷ [2009] IEHC 276.

⁶⁹⁸ See sections 6(3) to 6(8) of the *Enforcement of Court Orders Act 1940*, as inserted by section 2 *Enforcement of Court Orders (Amendment) Act 2009*.

⁶⁹⁹ Section 6(8)(b) of the 2009 Act provides that attempts must be made to seize and sell the debtor’s goods in advance of seeking an order for the debtor’s arrest and imprisonment. Also, the Commission’s proposal to introduce a requirement to attempt enforcement by attachment of earnings in advance of the mechanism of arrest and imprisonment becoming available should introduce another alternative means of obtaining obedience of an instalment order and so further limit the use of imprisonment.

⁷⁰⁰ See paragraphs 3.296 to 3.297.

⁷⁰¹ [2009] IEHC 276 at 6.

exception of Article 37 which allows limited functions and powers of a judicial nature to be exercised by a body other than a court applies only in matters other than criminal matters, and it is likely that proceedings deciding the issue of whether or not to order the imprisonment of a debtor may constitute criminal matters for the purposes of this article.⁷⁰² The Commission therefore recommends that if imprisonment remains part of the enforcement system, any orders for imprisonment must be made by a court, and not by the proposed enforcement office.

6.433 *The Commission provisionally recommends that if imprisonment is retained as part of the debt enforcement system, orders for imprisonment must continue to be made by a court, and not by the proposed enforcement office.*

(7) Other Enforcement Mechanisms

(a) The appointment of a receiver by way of equitable execution

(i) Access to information

6.434 The appointment of a receiver by way of equitable execution was described in Chapter 3 as being a relatively effective enforcement mechanism. A major limitation of the remedy however is that for it to be used, the creditor must possess sufficient information relating to the assets of a debtor to identify income over which a receiver may be appointed. It is hoped that the general reforms to the methods of obtaining information on the assets of a debtor discussed above will reduce this limitation on the use of this enforcement mechanism.⁷⁰³

(ii) Equitable execution only available where legal execution is unavailable

6.435 A second major limitation of this enforcement mechanism is that it may only be used where legal execution is shown to be ineffective. In practice it appears that a judgment creditor will usually obtain a Sheriff's return marked "no goods" to satisfy this criterion. Nonetheless, unlike the situation in relation to garnishee orders, case law appears to have confirmed that this is not an absolute requirement, and the judgment creditor is not required to attempt execution against the debtor's goods before applying for equitable execution if it can be shown that such execution against goods would not be effective.⁷⁰⁴

6.436 This position partly reflects the Committee on Court Practice and Procedure, which recommended that no requirement to attempt execution against goods before applying for equitable execution should exist.⁷⁰⁵ The Committee appeared to go further than the case law, however, by recommending that the creditor should not have to consider at all whether legal execution was possible before attempting equitable execution. This is not the position under the current law, which continues to state that it must be shown that legal execution would be ineffective before a receiver may be appointed. The question then arises as to whether this situation should remain, or whether the appointment of a receiver by way of equitable execution should be available in all appropriate cases without first considering whether legal execution is possible.

6.437 The enforcement review in England and Wales considered this issue and concluded that equitable execution should remain as a last resort.⁷⁰⁶ This view was based on the fact that the appointment of a receiver is an expensive option, and no guarantee exists that the procedure will realise

⁷⁰² In the *McCann* decision, Laffoy J stated that "[i]t is difficult to identify any rational basis for treating a person facing the possibility of imprisonment for three months for non-payment of debt at the suit of a creditor differently from a person facing a criminal charge and the possibility of the imposition of a criminal sanction. In my view, there is none." See *McCann v Judge of Monaghan District Court and Ors* [2009] IEHC 276 at 71.

⁷⁰³ See paragraphs 6.92 to 6.97.

⁷⁰⁴ See e.g. *Manchester and Liverpool District Banking Co. Ltd v Parkinson* (1889) 22 QBD 173; *O'Connell v An Bord Pleanála* [2007] IEHC 79.

⁷⁰⁵ The Committee on Court Practice and Procedure *Eighteenth Interim Report: Execution of Money Judgments, Orders and Decrees* (The Stationary Office Dublin 1972) at 13.

⁷⁰⁶ *Enforcement Review: Report of the First Phase of the Enforcement Review* (Lord Chancellor's Department 2000) at paragraphs 56-57.

sufficient assets to pay for the costs involved. The expense of employing a receiver was held to be sufficient to justify restricting access to situations where other enforcement methods would be ineffective.

6.438 In Northern Ireland the traditional limitations on the use of equitable execution were continued under the new enforcement system, including the rule that equitable execution is unavailable where legal execution is possible.⁷⁰⁷ This position was criticised by the “Hunter” review of enforcement in Northern Ireland, which recommended that the power to appoint a receiver should operate on all kinds of assets, income and property of a judgment debtor, whether legal or equitable, and whether present, contingent or future.⁷⁰⁸

6.439 The Commission recognises that there are strong arguments both in favour of and against the expansion of the availability of the appointment of a receiver, and invites submissions from stakeholders as to whether this expansion is desirable.

6.440 *The Commission invites submissions as to whether the appointment of a receiver should be available without first considering whether enforcement by other means is possible.*

(iii) Codification of the rules.

6.441 As can be seen from the previous chapter, the majority of the principles and rules relating to the appointment of a receiver are contained in case law developed in the courts over many decades. If the power to appoint a receiver is to be transferred to the proposed enforcement office, it would be desirable to codify the majority of these rules as part of the process. This would increase transparency and reduce uncertainty as to when this remedy is available. Also, as equitable execution has been a discretionary remedy of the courts, codification of the rules in the area may be desirable to limit the discretion involved. This is because it may not be appropriate to allocate overly wide discretion to an administrative body such as the proposed enforcement office. The Commission will return to the question of codifying the common law rules relating to the appointment of receivers by way of equitable execution in its final report.

(b) Charging orders and stop orders

6.442 Charging orders and stop orders are other methods of enforcing judgments which are rarely used in practice. Under a charging order, a court may order that stocks or shares belonging to a judgment debtor be charged and may ultimately order that such stocks or shares or any interest in them be transferred to the Sheriff. Similarly, a stop order prevents funds in court in which the judgment debtor has an interest from being paid out without the judgment creditor first being notified. The legislation governing this power in the High Court is very old, and is found under sections 23-24 & 27 of the *Debtors (Ireland) Act 1840*, and under sections 132-135 *Common Law Procedure (Ireland) Act 1853*. The Circuit Court may also make such an order, with jurisdiction to do so conferred by *Courts (Supplemental Provisions) Act 1961*, section 51 of the *Courts of Justice Act 1924* and section 34 of the *County Officers and Courts (Ireland) Act 1877*.⁷⁰⁹ It appears that no such jurisdiction exists in relation to the District Court.

6.443 An example of how this procedure may be used by creditors to enforce a judgment debt may be seen in *M.I.B.I. v Linehan*⁷¹⁰ where a creditor who had obtained judgment in the Circuit Court obtained a stop order against money which the judgment debtor had paid into the High Court by way of lodgement in another action in which he was ultimately successful. O’Hanlon J in the High Court thus required the Circuit Court-appointed receiver to pay out the balance of the money to satisfy the outstanding claim.

6.444 The Commission understands that charging orders against stocks and shares and stop orders are very rarely used in practice. Very little evidence is therefore available as to how these orders and procedures could be reformed, and whether such reforms would be worthwhile. The Commission invites

⁷⁰⁷ See Capper *The Enforcement of Judgments in Northern Ireland* (SLS Legal Publications (NI) 2004) at 131.

⁷⁰⁸ *Report of the Enforcement of Judgments Review Committee (Northern Ireland)* (1987) at paragraph 20.6.

⁷⁰⁹ See The Committee on Court Practice and Procedure *Eighteenth Interim Report: Execution of Money Judgments, Orders and Decrees* (The Stationary Office Dublin 1972) at 14.

⁷¹⁰ High Court (O’Hanlon J) 23 November 1994.

submissions as to the extent to which these orders are used. Having received such submissions, the Commission will return to the subject of these orders in its final Report.

6.445 *The Commission invites submissions as to the extent to which charging orders against stocks and shares and stop orders are used in practice.*

CHAPTER 7 SUMMARY OF PROVISIONAL RECOMMENDATIONS AND SUGGESTIONS

7.01 This chapter contains a summary of the *suggestions for consideration* made in the Consultation Paper (primarily those matters which would most likely be dealt with by bodies other than the Commission) and a summary of the *provisional recommendations* (those matters which the Commission will deal with in the Report which will follow from this Consultation Paper). To distinguish between these two categories, *suggestions for consideration* are marked with an asterisk throughout this chapter, while the Commission's provisional recommendations are unmarked.

7.02 The Commission provisionally recommends that the law on debt enforcement should be drafted to take account of the different circumstances in which over-indebtedness arises. [Paragraph 1.60]

7.03 The Commission provisionally recommends that the law should reflect and support the holistic approach to debt management and debt enforcement, namely, that legal debt enforcement proceedings should be seen as a last resort to be used when other measures have failed or can be shown to be inappropriate. [Paragraph 1.95]

7.04 The Commission provisionally recommends that the law on debt enforcement should adequately respect creditors' rights to have access to a court and to be able to enforce any court judgments. [Paragraph 2.15]

7.05 The Commission provisionally recommends that any reform of the law on debt enforcement must produce an efficient system of enforcement so as to vindicate the property rights of creditors. The Commission also recognises that the property rights of creditors may be subject to limited interferences if justified by the interests of the common good. [Paragraph 2.23]

7.06 The Commission provisionally recommends that the informational privacy rights of debtors must be respected by the law on debt enforcement. [Paragraph 2.41]

7.07 The Commission provisionally recommends that the law on debt enforcement should respect the territorial privacy of debtors and that such rights should only be subject to proportionate interference where necessary to achieve an important objective. [Paragraph 2.46]

7.08 The Commission provisionally recommends that the law on debt enforcement must at all times have regard to the need to protect the basic human dignity of debtors and their families. [Paragraph 2.49]

7.09 The Commission provisionally recommends that the property rights of debtors, including the right to earn a livelihood, must be respected by the law on debt enforcement. [Paragraph 2.62]

7.10 The Commission provisionally recommends that a guiding principle of the law on debt management and debt enforcement should be the need to reach a fair balance between the rights of creditors and debtors. [Paragraph 2.92]

7.11 The Commission provisionally recommends that the principle of proportionate enforcement should be a guiding principle of the law on debt enforcement. [Paragraph 2.101]

7.12 The Commission provisionally recommends that the recognition of the need to prevent and remedy personal over-indebtedness should form a guiding principle of the law on debt enforcement and debt management. [Paragraph 2.108]

7.13 The Commission provisionally recommends that the law on debt enforcement should distinguish between debtors who cannot pay and debtors who refuse to pay. This will involve an individualised approach to debt enforcement, requiring increased access to accurate information on the circumstances of each debtor. [Paragraph 2.111]

7.14 The Commission provisionally recommends that the need to obtain accurate information relating to a debtor's financial circumstances should be a guiding principle of the law on debt management and debt enforcement. [Paragraph 2.116]

7.15 The Commission provisionally recommends that the promotion of the non-judicial resolution of debt disputes should be a guiding principle of the law on debt management and debt enforcement. [Paragraph 2.120]

7.16 The Commission provisionally recommends that the need to consolidate, clarify and simplify the law should be a guiding principle of the reform of debt management and debt enforcement law. [Paragraph 2.125]

7.17 The Commission provisionally recommends that a complete collection of all of the rights of consumers under the various consumer credit law instruments should be made available to consumers in a consolidated and reduced form, written in plain language. [Paragraph 4.24]

7.18 The Commission suggests that the issue of introducing a more comprehensive system of credit reporting in Ireland should be considered as part of a review of financial services legislation.* [Paragraph 4.97]

7.19 The Commission suggests that the issue of whether a "responsible lending" test should be introduced as part of the licensing process for credit institutions should be considered as part of a review of financial services legislation.* [Paragraph 4.110]

7.20 The Commission suggests that, as part of a review of financial services legislation, consideration should be given to the question of whether it would be desirable to introduce a levy on consumer lenders, calculated on the basis of the proportion of their defaulting consumer loans, as a means of preventing irresponsible lending practices. Such a fund could be used to contribute to the cost of debt counselling services, financial education programmes and the introduction of a statutory debt settlement system.* [Paragraph 4.116]

7.21 The Commission suggests that the question of whether a private law remedy against irresponsible lending should be introduced should be considered as part of a review of financial services and consumer credit legislation. Such a remedy could for example allow a court to re-open a credit agreement in the event of irresponsible or unfair lending practices.* [Paragraph 4.145]

7.22 The Commission suggests that to complement the introduction of legal measures to prevent irresponsible lending, research should be undertaken on the impact of such measures on the issue of financial exclusion.* [Paragraph 4.173]

7.23 The Commission suggests that amendments to the Code of Conduct on Mortgage Arrears should be considered to extend it to cover a situation where a debtor who is about to default but has not yet fallen into arrears approaches a creditor to discuss alternative repayment arrangements.* [Paragraph 4.178]

7.24 The Commission suggests that consideration should be given to the question of whether the Code of Conduct on Mortgage Arrears should be capable of being taken into account in possession order proceedings.* [Paragraph 4.181]

7.25 The Commission suggests that the introduction of obligations on mortgage lenders to refer debtors in arrears to money advice and/or free legal aid services should be considered when reviewing the Code of Conduct on Mortgage Arrears.* [Paragraph 4.185]

7.26 The Commission suggests that consideration should be given to how the law may seek to ensure that responsible arrears management standards, as currently exist in respect of cases of mortgage arrears, are observed in all personal debt cases.* [Paragraph 4.189]

7.27 The Commission suggests that consideration should be given to the desirability of introducing legislation specifying certain basic principles of arrears management which must be followed in all personal debt cases.* [Paragraph 4.195]

7.28 The Commission provisionally recommends that a licensing system should be introduced for the debt collection industry. Subject to specified exceptions, all debt collectors and debt collection

agencies should be obliged to hold a licence before operating a debt collection business. [Paragraph 4.225]

7.29 The Commission provisionally recommends that the Irish Financial Services Regulatory Authority or another body such as the Irish Private Security Authority should be responsible for supervising the proposed licensing system for debt collection agencies. [Paragraph 4.228].

7.30 The Commission provisionally recommends that creditors collecting debts on their own behalf should be exempt from the proposed licensing system. The Commission invites submissions as to whether this exemption should be extended to those who have been assigned a debt, and as to whether exemptions should be given to other groups. [Paragraph 4.230]

7.31 The Commission invites submissions as to the criteria which should be taken into account in assessing whether an applicant is fit to hold a debt collection licence. [Paragraph 4.232]

7.32 The Commission provisionally recommends that in addition to carrying out licensing assessments the relevant regulatory authority should issue a binding code of practice for debt collection agencies. Such a code could be drawn up in cooperation with representatives of the debt collection industry. [Paragraph 4.234].

7.33 The Commission provisionally recommends that commercial debt management and debt advice companies should be subject to a licensing regime. [Paragraph 4.248]

7.34 The Commission provisionally recommends that the proposed licensing regime for debt advice and debt management companies should be supervised by the Irish Financial Services Regulatory Authority. The Commission provisionally recommends that IFSRA should be given statutory powers to issue binding codes of conduct in respect of such companies. [Paragraph 4.250]

7.35 The Commission suggests that standards should be established relating to the quality of advice provided by debt advice and debt management companies. Minimum levels of training and skills for debt advisors should be established.* [Paragraph 4.252]

7.36 The Commission invites submissions as to whether the proposed licensing regime for debt advice and debt management companies should be extended to non-profit, non-fee-charging organisations. [Paragraph 4.254].

7.37 The Commission provisionally recommends that the Bankruptcy Act 1988 be replaced because it does not provide an adequate and effective system of personal insolvency law. The Commission provisionally recommends that a thorough review of the 1988 Act should be undertaken with a view to introducing a new Bankruptcy Act [Paragraph 5.69]

7.38 The Commission provisionally recommends that a non-judicial debt settlement system should be introduced into Irish law. [Paragraph 5.71]

7.39 The Commission provisionally recommends that Irish law should favour non-judicial debt settlement over court-based personal insolvency proceedings. [Paragraph 5.78]

7.40 The Commission provisionally recommends that the creation of a consumer insolvency system should involve both non-judicial debt settlement and judicial insolvency procedures. The Commission provisionally recommends that this should involve the creation of a non-judicial debt settlement system and the amendment of the Bankruptcy Act 1988. [Paragraph 5.83]

7.41 The Commission invites submissions on the appropriate means of encouraging (or compelling) the use of non-judicial debt settlement procedures over judicial bankruptcy procedures. [Paragraph 5.89]

7.42 The Commission provisionally recommends that the law should provide a means of giving binding effect to debt settlements which have been accepted by a majority of creditors and to which some creditors have unreasonably objected. [Paragraph 5.91]

7.43 The Commission provisionally recommends that non-judicial debt settlement procedures should take place under conditions specified in legislation and should not be entirely voluntary in nature. [Paragraph 5.97]

- 7.44 The Commission provisionally recommends that the role of mediator in the proposed statutory debt settlement scheme should be carried out by a money advisor. [Paragraph 5.101]
- 7.45 The Commission provisionally recommends that only licensed agencies and money advisors should be permitted to act as mediators under the proposed debt settlement scheme. [Paragraph 5.103]
- 7.46 The Commission invites submissions as to the desirability of a money advisor operating as both mediator and settlement administrator under the debt settlement scheme. The Commission alternatively invites submissions on whether the role of a money advisor should be restricted to mediating a settlement, with another administrative body responsible for supervising and administering the settlement. [Paragraph 5.105]
- 7.47 The Commission invites submissions as to the structure which a proposed debt settlement system should take. The Commission invites submissions in particular on the respective roles of money advisors and the proposed enforcement office in the debt settlement procedure. [Paragraph 5.108]
- 7.48 The Commission provisionally recommends that a key principle of the personal insolvency regime should be that of an “earned start”. Debt discharge should be conditional on the completion of a repayment plan by debtors. [Paragraph 5.112]
- 7.49 The Commission invites submissions as to whether other obligations in addition to the making of repayments should be imposed on debtors during the pre-discharge period. [Paragraph 5.116]
- 7.50 The Commission invites submissions as to whether certain debts should be excluded from discharge and which debts should be included in this non-dischargeable category. [Paragraph 5.119]
- 7.51 The Commission provisionally recommends that the “insolvency” condition for accessing debt settlement procedures should consist of a test as to whether the debtor is unable to meet his or her obligations, with this inability continuing over a significant period of time. The Commission invites submissions as to whether any other considerations should be taken into account in formulating this condition. [Paragraph 5.126]
- 7.52 The Commission invites submissions as to the appropriate content of the “good faith” condition for accessing debt settlement procedures.[Paragraph 5.133]
- 7.53 The Commission provisionally recommends that a fundamental principle of any debt settlement scheme is that debtors must not be excluded from obtaining relief due to the costs of procedures. [Paragraph 5.135]
- 7.54 The Commission invites submissions as to whether a debt settlement scheme should be limited to consumer debtors, or whether small business debtors should also be included. The Commission also invites submissions as to whether, alternatively, limits on access should be based on the amount of over-indebtedness of an individual rather than on an individual’s legal status. [Paragraph 5.142]
- 7.55 The Commission invites submissions as to the restrictions which should be placed on the use of the proposed debt settlement scheme by individuals who have already availed of debt discharge under the scheme. [Paragraph 5.145]
- 7.56 The Commission provisionally recommends that debtor participation in the proposed debt settlement scheme should be promoted, and that the scheme should avoid stigmatisation of the debtor in its terminology and in its procedures. The Commission also provisionally recommends that measures should be put in place to inform debtors of the existence of the new procedure. The Commission provisionally recommends that a programme of public awareness should be launched if the debt settlement scheme is introduced. [Paragraph 5.150]
- 7.57 The Commission invites submissions as to the assets which should be exempted from distribution to creditors under formal bankruptcy procedures. [Paragraph 5.158]
- 7.58 The Commission invites submissions as to the approach the proposed debt settlement system should take to the debtor’s home. The Commission in particular invites views as to the circumstances in which the debtor’s home should be protected from sale, and the circumstances in which the debtor may be required to sell his or her home. [Paragraph 5.164]

7.59 The Commission provisionally recommends that repayment plans must protect a level of the debtor's income sufficient to provide a reasonable standard of living for the debtor and his or her family. The Commission also provisionally recommends that the repayment plan should be structured in a manner which encourages debtor compliance with the plan. [Paragraph 5.166]

7.60 The Commission invites submissions on the most appropriate method of specifying the level of income which debtors should be permitted to retain under a statutory payment plan. [Paragraph 5.168]

7.61 The Commission provisionally recommends that debt settlement and bankruptcy procedures should not be unavailable to debtors merely because such debtors cannot afford to make any repayment to creditors. The Commission thus provisionally recommends that "zero-payment" plans should be available in the case of a debtor who has no available income above that required for maintaining a reasonable standard of living. [Paragraph 5.170]

7.62 The Commission provisionally recommends that the duration of the repayment period under the debt settlement scheme should be three to five years. The Commission also invites submissions as to the appropriate length of this repayment period. [Paragraph 5.177]

7.63 The Commission invites submissions as to how the impact of participation in a debt settlement scheme on a debtor's credit history can be reconciled with the principle of non-discrimination. [Paragraph 5.179]

7.64 The Commission provisionally recommends that a centralised enforcement system under the control of a dedicated enforcement office should be introduced in Ireland. [Paragraph 6.45]

7.65 The Commission invites submissions as to desirability of continuing to assign execution functions to County Registrars. If the responsibility for executing judgments is to be removed from County Registrars, the Commission invites submissions as to how this best should be achieved, and to whom these functions should be assigned. The Commission invites submissions particularly as to the desirability of transferring the enforcement functions currently carried out by County Registrars to either Revenue Sheriffs or to private agents. [Paragraph 6.68]

7.66 The Commission invites submissions as to the appropriate organisational structure of the proposed enforcement office, and how the roles of existing enforcement officers should be allocated under the proposed new system. [Paragraph 6.70]

7.67 The Commission provisionally recommends that a fundamental aim of the reform of debt enforcement procedures should be to make available more information on the means of the debtor. [6.73]

7.68 The Commission invites submissions concerning the most appropriate methods of obtaining information about a debtor's means in enforcement proceedings. [Paragraph 6.97]

7.69 The Commission provisionally recommends that the existence of an enforceable court judgment must be a necessary precondition for an application to the enforcement office in all cases [6.109].

7.70 The Commission invites submissions as to the desirability of introducing the following reforms of the procedure for obtaining judgment in personal debt claims. These proposed reforms include:

- A single procedure for commencing debt claim proceedings in District, Circuit and High Courts.
- A harmonisation of the documents needed to make a debt claim in these three courts.
- A reduction in the documents needed to prove a debt claim: for example, an affidavit of debt could possibly suffice instead of also requiring a solicitor's certificate to be presented.

The Commission also invites submissions as to further options which could be explored in improving the efficiency of current procedures. [Paragraph 6.126]

7.71 The Commission invites submissions as to the desirability of introducing online claim applications and bulk claim processing procedures. [Paragraph 6.128]

7.72 The Commission provisionally recommends that in personal debt enforcement proceedings, attempts at negotiating a voluntary debt rescheduling arrangement or a statutory debt settlement should be mandatory preconditions for enforcement. [Paragraph 6.132]

- 7.73 The Commission invites submissions as to the appropriate method of encouraging non-judicial debt settlement prior to court-based enforcement. [Paragraph 6.142]
- 7.74 The Commission provisionally recommends that before legal proceedings are commenced, creditors should be obliged to send debtors a pre-litigation notice providing the debtor with certain specified information, expressed in plain language. [Paragraphs 6.165]
- 7.75 The Commission invites submissions as to the contents of the information provided to debtors in the proposed pre-litigation notice. [Paragraph 6.167]
- 7.76 The Commission invites submissions as to whether the contents of the information provided should be prescribed by law. [Paragraph 6.169]
- 7.77 The Commission provisionally recommends that creditors should be obliged to indicate compliance with the requirement of a pre-litigation notice before legal proceedings may be commenced [Paragraph 6.171]
- 7.78 The Commission provisionally recommends that the current practice by creditors of sending draft summonses to debtors should be replaced by the issuing of the proposed Pre-Litigation Notice. [Paragraph 6.173]
- 7.79 The Commission provisionally recommends that a requirement that a judgment creditor serves notice of the judgment given against a judgment debtor should be expressly included in rules of court. [Paragraph 6.175]
- 7.80 The Commission invites submissions as to how an examination of a debtor's means could be conducted otherwise than in public, in order to encourage debtors to be forthcoming in providing this information. [Paragraph 6.178]
- 7.81 The Commission invites submissions as to whether the choice of the enforcement method to be applied in a given case should remain with the creditor or whether this choice should be the responsibility of the proposed enforcement office. [Paragraph 6.186]
- 7.82 The Commission provisionally recommends that a comprehensive register of judgment debts should be introduced. The Commission invites submissions as to how access to this register should be controlled. [Paragraph 6.193]
- 7.83 The Commission provisionally recommends that enforcement proceedings should be commenced by a single application procedure, irrespective of the method of enforcement which is ultimately chosen. [Paragraph 6.199]
- 7.84 The Commission provisionally recommends that, subject to appropriate exceptions, enforcement through an instalment order must first be attempted, or at least considered, before other enforcement mechanisms may be used. The Commission provisionally recommends that an exception to this rule should exist where enforcement by instalment order is inappropriate, and the Commission invites submissions as to the circumstances in which this exception should apply. The Commission also recommends that suspended execution orders against goods, garnishee orders and attachment of earnings orders should be capable of being used in conjunction with instalment orders; and that these suspended orders could come into effect automatically in the case of a failure to comply with an instalment order. [Paragraph 6.203]
- 7.85 The Commission provisionally recommends the introduction of a reformed procedure to enable debtors to make offers of payment by instalments on receipt of a summons for debt proceedings. The Commission invites submissions as to the detailed form this procedure should take. [Paragraph 6.210]
- 7.86 The Commission provisionally recommends that an instalment order should not be made in the absence of accurate information about the debtor's means and ability to pay. [Paragraph 6.212]
- 7.87 The Commission invites submissions as to whether a consolidated instalment order mechanism should be introduced to allow multiple instalment orders to be paid through a series of single payments where appropriate. [Paragraph 6.214]

7.88 The Commission provisionally recommends that debtors should be provided with clear and readily understandable information on their right to seek a variation of the instalment order where their ability to comply with the order changes. [Paragraph 6.216]

7.89 The Commission provisionally recommends that creditors should be entitled to apply for a garnishee order without first attempting enforcement through execution against goods. [Paragraph 6.227]

7.90 The Commission provisionally recommends that legislation should ensure that garnishee orders do not deprive debtors of the funds necessary to maintain a minimum standard of living for themselves and their dependents. The Commission invites submissions as to the best approach to ensure this aim, while also vindicating the rights of creditors to have access to funds owed to the debtor. [Paragraph 6.233]

7.91 The Commission invites submissions as to whether joint bank accounts should be capable of being attached to satisfy a judgment debt. [Paragraph 6.243]

7.92 The Commission provisionally recommends that legislation and rules of court relating to garnishee orders should be repealed and replaced as part of legislation introducing a new system for the enforcement of judgments. The Commission provisionally recommends that the respective scopes of attachment of earnings orders and garnishee orders should be clarified in legislation. [Paragraph 6.246]

7.93 The Commission provisionally recommends that the term “garnishee order” should be replaced with a term which more clearly describes the process involved. The Commission invites submissions as to the most appropriate new term, such as “attachment of debt order” or “third party debt order”. [Paragraph 6.250]

7.94 The Commission invites submissions as to the desirability of introducing an attachment of earnings mechanism for the enforcement of all judgment debts against individuals receiving regular income. [Paragraph 6.272]

7.95 The Commission invites submissions as to how the level of protected income which cannot be made subject to an attachment of earnings order should be calculated. The Commission in particular invites submissions as to whether this level should be set in statute, or whether it should be decided by the enforcement officer in each individual case. [Paragraph 6.282]

7.96 The Commission invites submissions as to whether social welfare payments should be subject to attachment under attachment of earnings orders. [Paragraph 6.286]

7.97 The Commission provisionally recommends that the link between exemptions from attachment of earnings and exemptions from the garnishment of bank accounts should be recognised, and that a consistent approach should be adopted to these two exemption levels. The Commission also provisionally recommends that the status of deposited earnings should be expressly addressed in legislation to extend the protection of exempted unpaid income to paid and deposited income. The Commission invites submissions as to how the exempt level of funds should best be calculated. [Paragraph 6.290]

7.98 The Commission invites submissions as to the best means of ensuring that a debtor who is subject to an attachment of earnings order is protected from being subject to dismissal or discrimination on the grounds of being subject to such an order. The Commission invites submissions in particular on whether a prohibition on the dismissal of an employee on the grounds of being subject to an order would provide sufficient protection, or whether a wider prohibition on discrimination on the grounds of such an order would be preferable. [Paragraph 6.296]

7.99 The Commission provisionally recommends that employers should not be burdened with excessive administrative costs through their obligations to comply with attachment of earnings orders. The Commission invites submissions as to how employers can be compensated for the tasks they perform in administering attachment of earnings orders. [Paragraph 6.302]

7.100 The Commission provisionally recommends that an attachment of earnings order should only be available where less restrictive enforcement mechanisms are unavailable or are ineffective; and that an attachment of earnings order should be used only where the debtor has been provided with an opportunity to repay the judgment debt (by instalment order) and has defaulted. The Commission also

provisionally recommends that suspended attachment of earnings orders should be made in conjunction with instalment orders so that an attachment of earnings order automatically comes into effect in the event of default. [Paragraph 6.308]

7.101 The Commission provisionally recommends that a power to apply to vary (and possibly to suspend) attachment of earnings orders would be an essential element of an attachment of earnings regime. The Commission provisionally recommends that information about this power should be made readily available to debtors and creditors on the making of an attachment of earnings order. The Commission invites submissions on the desirability of introducing a power to apply for a suspension or discharge of an attachment of earnings order, and invites submissions as to the circumstances in which such a power should be available. [Paragraph 6.315]

7.102 The Commission invites submissions as to whether measures should be introduced to enable information to be obtained independently of the debtor on changes in the debtor's employment, and as to the best means of obtaining this information. [Paragraph 6.321]

7.103 The Commission invites submissions as to whether a consolidated attachment of earnings order should be introduced as part of a system of attachment of earnings. [Paragraph 6.326]

7.104 The Commission invites submissions as to whether family maintenance attachments of earnings orders should be given priority over attachment orders for the enforcement of judgment debts. [Paragraph 6.330]

7.105 As part of the policy of promoting appropriate and proportionate enforcement, the Commission provisionally recommends that the current position of over-reliance on enforcement by execution against goods should be removed, and that this mechanism should only be available where it is necessary, proportionate and not overly restrictive. [Paragraph 6.351]

7.106 The Commission invites submissions as to whether a two-tier system of execution against goods, involving a distinction between domestic and commercial premises, should be introduced. [Paragraph 6.353]

7.107 The Commission provisionally recommends that a Code of Practice be introduced to regulate the procedure of execution against goods in civil debt cases. The Commission invites submissions as to how this code should be drafted and as to the content of the code. [Paragraph 6.358]

7.108 The Commission invites submissions as to the categories of debtors' assets which should be exempt from seizure. [Paragraph 6.364]

7.109 The Commission invites submissions as to whether, and under what circumstances, a debtor's car or other vehicle should be exempt from seizure. [Paragraph 6.366]

7.110 The Commission provisionally recommends that the terms "execution against goods", "execution order" and "order of fieri facias" should be replaced by clearer terms. The Commission invites submissions as to appropriate new terms which could be adopted. [Paragraph 6.375]

7.111 The Commission invites submissions as to whether legislation should provide for "walking possession" arrangements (under which the Sheriff and debtor agree that the debtor's goods have been seized but that they should remain in the custody of the debtor and not be sold until the debt has been paid). [Paragraph 6.387]

7.112 The Commission provisionally recommends that adequate notice should be provided to debtors before enforcement officers visit their premises for the purpose of seizing and selling debtors' goods. [Paragraph 6.393]

7.113 The Commission provisionally recommends that the current rules on the seizure of goods owned by third parties should be codified. The Commission provisionally recommends that the primary rule should be that only the goods of the debtor should be capable of being seized. The Commission however provisionally recommends that jointly-owned property should be capable of being seized subject to the protection of the interests of joint owners. In this regard the Commission invites submissions as to how third party interests should be protected, in particular with regard to the following options:

- Whether third parties should be compensated for their interest in seized and sold goods by the enforcement official in priority to the payment of the debt to the creditor and the payment of the costs of seizure and sale?
- Whether third parties should be paid for their interests by the judgment creditor after the proceeds of sale have been paid to the judgment creditor?
- Whether third parties should be entitled to prevent the sale of jointly owned goods or goods in which they have an interest by buying out the debtor's interest in the seized goods or by demonstrating that it would be unduly harsh on their interests to allow the sale to continue?
- Where a debtor has a right to sell goods upon making a payment to a third party, whether the Sheriff should be entitled to sell those goods provided that the judgment creditor pays this sum to the third party?

[Paragraph 6.404]

7.114 The Commission invites submissions as to the desirability of introducing a presumption of ownership in relation to goods found (a) within the possession of the debtor and/or (b) on the premises of the debtor. [Paragraph 6.406]

7.115 The Commission invites submissions as to whether Sheriffs should be given the power to pay the balance owed under hire or leasing agreements in order to obtain a clear title to the goods held under such an agreement in advance of sale. [Paragraph 6.410]

7.116 The Commission invites submissions as to how the interpleader procedure could be made more effective for the parties involved. [Paragraph 6.414]

7.117 The Commission invites submissions as to the desirability of requiring further procedural safeguards to be introduced limiting the power of a sheriff to forcibly enter a premises. The Commission also invites submissions on whether assistance should be provided by law to sheriffs to facilitate access to multi-unit developments. [Paragraph 6.419]

7.118 The Commission provisionally recommends that judgment creditors should be entitled to obtain a progress report from an enforcement agent/officer detailing steps taken to attempt to execute a judgment debt. The Commission invites submissions as to the information which should be contained in such a report and as to the time after the issue of an execution order at which such a report should become available. [Paragraph 6.424]

7.119 The Commission invites submissions as to whether imprisonment should be retained as a last resort in debt enforcement proceedings after all other enforcement methods have been found to be ineffective, and where a debtor has wilfully refused or culpably neglected to obey a court order. [Paragraph 6.428]

7.120 The Commission provisionally recommends that the procedures for the imprisonment of debtors under the Debtors (Ireland) Act 1872 and the Enforcement of Court Orders Acts 1926 to 2009 should be repealed in the context of a reformed system of court-based enforcement. If imprisonment is to be retained as a remedy of last resort against "won't pay" debtors, a single new procedure should be enacted. [Paragraph 6.431]

7.121 The Commission provisionally recommends that if imprisonment is retained as part of the debt enforcement system, orders for imprisonment must continue to be made by a court and not by the proposed enforcement office. [Paragraph 6.433]

7.122 The Commission invites submissions as to whether the appointment of a receiver should be available without first considering whether enforcement by other means is possible. [Paragraph 6.440]

7.123 The Commission invites submissions as to the extent to which charging orders against stocks and shares and stop orders are used in practice. [Paragraph 6.445].