

DO WE NEED A DEFINITION OF CONSUMER "OVERINDEBTEDNESS"?

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1. Firstly, it must be pointed out that a global definition of consumer overindebtedness, valid for Economics sciences, Social and Psychological sciences and for Law policies, surely has no fruitful consequences. It may eventually result that a concept that fits Macroeconomics predictions or serves Sociological patterns, does not provide a useful milestone for legal regulation. The more outstanding decision for a Lawmaker is to determine the extent it should be optimal to link legal measures to a given situation of consumer indebtedness. The decision does not solely depend on the true description and framing of the economic or social situation of overindebtedness (even in case this can be achieved), but on the balance between sociological or economic consumers urgencies and the cost for the Law system to create specific consumer insolvency solutions. The outcome of M. Green's paper, so valuable as it might be, provides methodological conclusions for Economics, but do not touch the Legal concern.

2. This small paper attempts to offer a modest contribution to the legal problem of defining overindebtedness. In my opinion, there is neither necessity nor possibility to grasp and define an unique (legal) concept for overindebtedness, that may be useful in every context in Law where consumer indebtedness, and the measures to treat it, are at stake. Moreover, focusing on the real problems concerning the subject of consumer indebtedness, proposals to normalize a "canonical" and "definite" meaning and boundaries of overindebtedness should fail or become useless.

3. There is at least **four** legal/financial situations in which the problem of consumer overindebtedness arises. In every one of them, the applicable concept might or should be different, because of the different purposes which the consumer policy aims to fulfil.

- (a) When should **public consumer protection agencies** act in order to prevent the danger arising from families' financial difficulties? Facing this challenge, the question as whether the consumer unit has or has not breached its contractual duties should not be an issue, neither should be whether there is or not unsatisfied creditors. The actual or feared impossibility of paying the debts when they fall and mature is not necessarily the problem to face. Public agencies may use a quantitative test (a ratio between income and debts or between debts and assets, etc) or a subjective test (the personal consumer feeling or anxiety to be overburdened with debts, etc). Whether the consumer unit has or has not yet arrived to an "insolvency" position is not relevant in this context. **Administrative measures** may take several forms and attempt a wide range of policies: counselling, providing rational financial planning, help to restructure the set of debts, facilitating meetings between debtor and creditors, etc. In order to achieve these purposes, administrative bodies may resort to an objective-quantitative measure of overindebtedness, like the well known three-tests approach, proposed by the English Task Force on Tackling Overindebtedness, Second Report (2003), or they may encourage consumers to ask for help when they feel themselves at risk. These agencies may very well rely on both approaches simultaneously.

- (b) Which measures should be included in the Consumer Credit Directive in order to prevent situations of consumer overindebtedness? This is a well known problem, widely discussed during the current drafting of the Directive. To attain an adequate level of **preventive legal measures** (information requirements, cooling off periods, full disclosure, etc), we ought not to raise a specific concept of overindebtedness. The policy problem of framing better Law solutions may be very well achieved by managing a proximate or uncompromising definition of overindebtedness or adopting several and diverse approaches of overindebtedness. An intuition of the problem suffices, as well as an proximate or indefinite concept. The problem is how to act to help consumers avoid the risk embodied in large credit taking, without any need to define the threshold in which this risk becomes real overindebtedness. Because of this specific field, overindebtedness is something to be prevented, but not the *condition* to any legal provision.
- (c) When ought **contractual regulations of consumer credit contracts** provide solutions to prevent or to react to an overindebtedness problem? Also in this context, there is no pressure to face the necessity to offer an accurate definition of overindebtedness. For instance, in order to grant the consumer a delay when default occurs or to make void excessive guarantees. We know that these measures are issued to prevent overindebtedness problems, but we not need to know in advance, nor furnish, a precise definition as to what we understand for overindebtedness.
- (d) Assuming the legal system provides an **adjustment debt procedure for consumers in difficulties or a proxy-bankruptcy procedure for consumers in difficulties**, in which situations of overindebtedness should these procedures came into action? In such cases, the legal framework may require, for instance, an "insolvency (real or imminent) debtor's situation", or a plurality of concurring creditors, or a specific composition or origins of the debts. All these circumstances may be embodied in the concept of overindebtedness needed for this purpose, which on its own may differ from the concept used to other legal purposes. Only in these cases, "overindebtedness" is clearly a regulatory condition for a legal regimen to be applied. The reason is that only to these purposes we face the overindebtedness as the element of fact to which legal consequences may be linked. "Overindebtedness" is not in this situation a mere policy or a single fear o public concern, but the definition of an state of fact to whom the Law endorse legal effects.

4. In order for "debts" to exist, there ought to be contractual claims due and payable in the future. Without future obligations to be paid, there is no "indebtedness". However, it might very well exist "overexpenses", where, for instance, the family pays in cash their larger and unreasonable costs and expenses, without resorting to credit, or without using credit cards. Plainly speaking, we may also refer to this situation as "overindebtedness". Of course, it is clear that there should be legal policy issues in which this non-technical concept may be fruitful, and be also considered by the Law as an "overindebtedness" situation. The family reduced dangerously its economic standing because of the increased and unnecessary expenses incurred in, perhaps encouraged by the irrepressible pull of commercial advertising, or perhaps because of an irresistible compulsion to gamble, etc. Of course, such case would be a serious social and psychological problem, and the Law System may have solid reasons to consider these situations as "overindebtedness situations" for certain purposes.

5. We focus now on the problem of **proxy-bankruptcy procedures**, and let aside the other above mentioned situations. Lets suppose our legal system provides

(which is not the Spanish case) a specific consumer related insolvency proceeding, whose intended outcomes may be, let's say, to create conditions for the future financial recovery of the consumer unit, to make possible a fresh start, to adjust the time of maturing of future debts, etc. Even in this narrow field of Law, we are not entitled to build a specific and unique concept of consumer overindebtedness. It is at least obvious that:

- (a) Like general (corporate) Insolvency Law in most European countries, the overburdened consumer debtor should be allowed to file for insolvency proceedings before any debt has been yet unpaid, if such debtor *feels* that continuation of the current financial situation, and the perspective of future maturing of debts, should be unbearable to him. Like general Insolvency Law, at present a **subjective** concept for overindebtedness *prima facie* suffices. And this concept corresponds to the classical concept of "feared insolvency", used in Spanish Bankruptcy Act 2004 (article 2.3). Hereupon, we need only to settle when a consumer is "insolvent" and to enumerate the elements that make the definition of consumer insolvency different from that of commercial insolvency. But strictly speaking, we do not require a particular "overindebtedness" concept that differs from the "insolvency" legal term.
- (b) To the contrary, creditors have no right to resort to filing for insolvency (consumer) proceedings, before their matured and due claims are unperformed. There is no place for fear of insolvency. The objective-quantitative overindebtedness situation (ratio between income and debts) is also of no moment, if the accrued debts are not yet unpaid. **According to our prospective legal model**, and supposing we would enable creditors to file for this proceedings, we ought to grant unsatisfied creditors with the right to rely on the specific legal insolvency proceedings regardless of whether there is or not real chances for the consumer's future disposable income to improve. Present insolvency, not chances for future improvement, is what counts in this context. Besides, creditors cannot file for insolvency only proving that the future probable income will not be sufficient to cover the future flow of debts, when at present, there is no default. In conclusion, here we also have a specific subject matter related concept of overindebtedness: not only an objective approach, but also an approach based on the effective default of due debts. Hereupon, we do not need any special consumer bankruptcy definition. Again it suffices with the general pattern of insolvency situation, as the financial situation in which the debtor is no longer able to comply with its contractual obligations, when they fall due (article 2.2 Bankruptcy Act 2004). In these cases, I do not like the manner in which the meaning of consumer default may differ from commercial default. Of course, we can construct the legal model to provide debt adjustment or "fresh start" measures specific for consumer indebtedness. But this option has nothing to do with the problem of definition, but with the options of substantive regulation.
- (c) Of course, neither in fall (a) suffices with the fear of insolvency or breakdown of family economy, nor in fall (b) suffices with the breach of contractual duties, for our legal theoretical model to be applied. Subjective feeling and no-performance, in each case, are central and necessary parts of the definition of overindebtedness, but perhaps these are not per se able nor sufficient to trigger the **specific legal consequences of our theoretical and prospective regulatory model**. In other words, our legal model may require not only that consumer is overindebted, but may oblige additional requirements for specific insolvency procedures to be opened. There is at least to decide:

- Which is the maximum renunciation threshold required to the consumer in order to “favour” him with access to the theoretical procedures? Which commodities, living facilities should the consumer unit give up if it wants to enjoy favourable treatment of specific procedures?
- Should the Law open the regulatory model to indebted consumers whose debts surpass a specific ratio of its income but lies below a specific ratio of its assets?
- Should the Law open the regulatory model to indebted consumers who incur this situation by mismanagement or irresponsible lending or luxurious purchasing?
- Should the imbalance between income and debts be “structure based” imbalance or suffices a contingent imbalance?
- Which future risks should be taken into consideration in order to decide whether future income would cover the future stock of debts?

All these points may be fine tuned and discussed upon, without “compromising” the definition of overindebtedness we may have chosen in advance. A definition that asserts that “overindebtedness” amounts and corresponds to “insolvency” in Bankruptcy Law. In this field of Law, a consumer is in overindebtedness when it is insolvent, and, like a commercial or professional debtor, the consumer is overindebted when he is in no condition to face payment of his debts when they fall due. Certainly, other approaches and definitions of overindebtedness may be useful in other contexts and with other purposes. But facing the overindebtedness problem as an adjustment/bankruptcy consumer related insolvency procedure – which, we repeat, is neither the only nor, perhaps, the most prominent approach- “overindebtedness” amounts to “insolvency”. And we need no further details, as we do not need further details to deal with the “insolvency” definition in commercial Insolvency Law.

6. In any case, for a definition of consumer overindebtedness to be useful for Law policies, two conditions should be met. First, the definition should have clear boundaries. Indeterminate sociological or economic descriptions are out of service for legal matters. Secondly, the definition must be proportionate to intended the legal consequences. Many nuances incorporated into the several definitions of consumer overindebtedness laid down in current literature are legally unimportant, not because of meaningless, but because of the impossibility for legal techniques to provide for a correct translation of those nuances. The “stressed feelings” of the overindebtedness household, the “unsustainability” of the debt burden, as part of the definition, are legally without significance.