CONTINUITY, CHANGE AND INNOVATION IN EMERGING CONSUMER BANKRUPTCY SYSTEMS: BELGIUM AND LUXEMBOURG

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It is a matter of duty for any evolved society to attack this scourge [of consumer overindebtedness].[1]

Consumer bankruptcy—it's not just for the heavily indebted any more! One is not surprised to find debt relief laws in a country like the United States, legendary for high levels of debt-financed consumer spending.[2] But what of Europe? The development of consumer insolvency law seemed inevitable in countries like Germany, for example, where total consumer debt more the doubled between the mid-1980s and the mid-1990s.[3] But in Belgium and Luxembourg, consumers largely escaped or ignored this invasion of liberalized lending. Consumers on average devoted roughly 20% of their disposable income to non-mortgage consumer debt in the 1990s in the U.S., and 17% in Germany, but only about 6.5% in Belgium.[4] In Luxembourg between 1994 and 2000, consumers on average dedicated only 11% of their monthly disposable income to servicing their *total* debt burden, both mortgage and non-mortgage.[5] Lawmakers in the United States just moved to *restrict* access to the bankruptcy system. Why would such mildly indebted countries as Belgium and Luxembourg move in the opposite direction and join the "consumer bankruptcy" movement in Europe?

This article explores the thought process behind the recent enactment of consumer debt relief law in Belgium and Luxembourg, two of the least indebted countries in Europe. It explores how legislators in these states overcame their reticence to adopt formal consumer debt relief procedures and how they ultimately chose to structure such relief. In so doing, this article discusses the extent to which the consumer debt relief systems in Belgium and Luxembourg reflect continuity,

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[1] Doc. parl. Chambre (1996-1997) no. 1073/11, p. 3, *available at* http://www.lachambre.be/FLWB/pdf/49/1073/49K1073011.pdf.

[2] Total outstanding consumer debt in the U.S. has exceeded $2 trillion since 2003—over one-third of which is "revolving" credit; *i.e.*, credit card debt. *See* Fed. Reserve Stat. Release, G.19 (Consumer Credit), *available at* http://www.federalreserve.gov/releases/g19/current/default.htm.

[3] *See* Jason Kilborn, *The Innovative German Approach to Consumer Debt Relief: Revolutionary Changes in German Law, and Surprising Lessons for the United States*, 24 NW. J. INT'L. L. & BUS. 257, 261 (2004).

[4] *See* NURIA DIEZ GUARDIA, EUROPEAN CREDIT RESEARCH INSTITUTE, CONSUMER CREDIT IN THE EUROPEAN UNION 53 tbl.A18 (2000), *available at* http://www.ecri.be/media/research_report/ECR1en.pdf.

[5] *See* ANNE REINSTADLER, L'ÉVOLUTION DE L'ENDETTEMENT DES MÉNAGES AU COURS DES ANNÉES 1994 À 2000, at 2 & tbl. T1, 11 (2003), *available at* http://www.statistiques.public.lu/fr/publications/thematiques/PopulationEmploi/PopulationEmploi/2003/03_03_endettement_menages/PDF_Population_et_Emploi_3_2003.pdf.

change, and innovation in terms of the existing systems in neighboring countries, especially France.

In addition, the development of consumer debt relief systems in Belgium and Luxembourg is a harbinger of what is likely to come as other countries with civil law systems, like Spain and Portugal—not to mention the entire South American continent—begin to grapple with the problem of rising consumer indebtedness.[6] These new laws offer alternatives to the highly maligned "debtor-friendly" model of Anglo-American consumer "bankruptcy." To the civilian mind, the Anglo-American common law tends to take a rather sterilely economic approach to analyzing contractual obligations, which contrasts sharply with the deep moral commitment to the sanctity of contracts in the civil law.[7] Recent experience in Belgium and Luxembourg shows that consumer debt relief laws need not undermine civilian dedication to the sanctity of contracts and can successfully integrate into a "French civil law" system. The path to enactment of these laws demonstrates that consumer debt relief can be appropriate and necessary well before debt levels reach those in the U.S. and Germany.

As more and more countries adopt and develop their own unique regimes of consumer debt relief, opportunities for cross-systemic learning are multiplying rapidly. This exchange can occur, however, only if policy makers have ready access to information about how these systems operate, both in theory and in reality. This Article continues the process that I began a few years ago[8] of breaking down barriers of language and legal culture to create a foundation of shared knowledge and experience—in English—from a wide array of new consumer bankruptcy systems. The story of consumer debt relief in Belgium and Luxembourg reflects a definite direction of shared development in responding to the challenges of the modern consumer credit economy. In particular, these systems offer a new and unique perspective on how best to assign responsibility among creditors and their distressed debtors.

Part I provides some context for the discussion to come by describing the French consumer debt relief system, which strongly influenced the laws in Belgium and Luxembourg. The French law has evolved over 15 years to support more

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[6] *See, e.g.*, CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE 85, 121 (Johanna Niemi-Kiesiläinen et al.. eds., Hart Publishing 2003) (highlighting contributions of José Reinaldo de Lima Lopes and Maria Manuel Leitão Marques and Catarina Frade on movement toward consumer "bankruptcy" legislation in Brazil and Portugal, respectively).

[7] *See, e.g.*, Vivian Grosswald Curran, *Cultural Immersion, Differences and Categories in U.S. Comparative Law*, 46 AM. J. COMP. L. 43, 81–82 & n.130 (1998) (collecting sources exploring the general contrast between European and U.S. views of contractual obligations); Johanna Niemi-Kiesiläinen, *Consumer Bankruptcy in Comparison: Do We Cure a Market Failure or a Social Problem?,* 37 OSGOODE HALL L. J. 473, 476–82 (1999).

[8] *See* Kilborn, *supra* note 3 (analyzing German system, effective since 1999); Jason Kilborn, *La Responsabilisation de l'Economie: What the United States Can Learn From the New French Law on Consumer Overindebtedness*, 26 MICH. J. INT'L L. 619 (2005) (analyzing French system, effective since 1990, but substantially amended several times since then).

consensual workouts, to demand less of average debtors, and to offer greater relief to the most needy. Part II analyzes in detail the adoption and first few years of development of the Belgian and Luxembourguish laws, tracking the extent to which the new laws maintain or alter elements of the "parent" system in France. The new laws in Belgium and Luxembourg seem to have picked up where the French law left off in the late 1990s, and all three systems now seem to be headed in largely the same direction in practice. Finally, Part III explores some innovative ways in which Belgium and Luxembourg have implemented special debt relief funds, which function in part to hold creditors accountable for their role in creating the need for these new recovery systems.

I. THE "PARENT" SYSTEM: CONSUMER BANKRUPTCY IN FRANCE, 1990-2004

Belgium and Luxembourg entered the battle against consumer overindebtedness quite late, a decade after the first consumer debt relief laws began to emerge on the European continent. Because they were not drafting on a clean slate, lawmakers in Belgium and Luxembourg learned from the experience of neighboring states. Given their cultural and linguistic ties to France, they understandably used the French system as a guide. The legislative history of the consumer debt relief laws in both Belgium and Luxembourg makes fleeting reference to existing and planned laws in Denmark and Germany, but it is peppered with references to the French system and its first few years of successes and challenges.[9] Indeed, although all legislative activity in Belgium is conducted in both French and Dutch, the consumer debt relief law was drafted in French—and the legislative history is replete with criticisms of the Dutch translation of the French original.[10] Lawmakers in Luxembourg were also heavily inspired by the French law and drew liberally—often verbatim—from the final Belgian law.[11]

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[9] *See, e.g.*, Doc. parl. Sénat (1997-1998) no. 929/5, pp. 13–15, *available at* http://www.senat.be/wwwcgi/get_pdf?16777529; Doc. parl. Chambre (1991-1992) no. 274/3, pp. 56–57, *available at* www3.dekamer.be/digidoc/DPS/K2331/K23310964/K23310964.pdf; Doc. parl. Chambre (1996-1997) no. 1073/1, pp. 16, 18, *available at* http://www.lachambre.be/FLWB/pdf/49/1073/49K1073001.pdf; Doc. parl. no. 3813, *available at* http://www.chd.lu/servlet/Merge?lot=J-1992-O-0454&lib=chdl (proposing a system for Luxembourg virtually identical to that in France); Doc. parl. no. 3813, Débat, *available at* http://www.chd.lu/servlet/Merge?lot=C-1993-O-005&lib=chdl (noting that this early proposal had been drawn virtually verbatim from the French law and observing the difficulties that the French law had encountered).

[10] *See, e.g.*, Doc. parl. Chambre no. 1073/1, *supra* note 10, at 78, 82; Doc. parl. Chambre no. 1073/11, *supra* note 1, at 30, 40; Doc. parl. Sénat (1997-1998) no. 929/3, pp. 1–2, *available at* http://www.senat.be/wwwcgi/get_pdf?16777527; Doc. parl. Sénat (1997-1998) no. 929/4, p. 2, *available at* http://www.senat.be/wwwcgi/get_pdf?16777528; Doc. parl. Chambre (2004-2005) no. 1309/002, p. 15, *available at* http://www.lachambre.be/FLWB/pdf/51/1309/51K1309002.pdf (suggesting that the entire text of the latest reform bill be submitted to a Dutch linguistic adviser for more accurate translation from the French).

[11] *See, e.g*, Doc. parl. no. 4409, p. 3, *available at* http://www.chd.lu/servlet/Merge?lot=J-1997-O-0259&lib=chdl; Doc. parl. no. 4409/07, pp. 3–4 (15 Feb. 2000), *available at*

Therefore, a brief overview of the French system of "individual overindebtedness" will enhance our appreciation of where the systems in Belgium and Luxembourg began. More importantly, it will focus attention on areas of continuity and change, where the French law was seen as "strong," and might therefore remain a model for future laws, or where the French model left something to be desired. Additionally, this brief overview will reveal changes that French legislators themselves made in their own system *after* Belgium and Luxembourg had modeled their laws on the prior version, which in turn reflects on perhaps "unfinished business" in the Belgian and Luxembourguish systems.

A. Stage One: Commission Proposes a Consensual, Negotiated Payment Plan

Effective in early 1990, the French "Loi Neiertz" was the second law of its kind on the European continent to provide specific relief to over-indebted consumers.[12] It added a series of sections to the Consumer Code on "Treatment of Situations of Overindebtedness," which progressed through several rounds of amendments over the next 14 years.

French consumers initiate "overindebtedness" cases by filing a petition for relief with one of the "commissions on individual overindebtedness" established in each of the 117 *départements* in France. Six voting members comprise each commission: The prefect, treasurer-general, and director of fiscal services in each department occupy three of the voting positions. To these are added two "partisans," one nominated by the credit sector and one by consumer associations. Finally, the departmental representative of the French central bank—the Banque de France—rounds out the voting membership of each commission. A lawyer and a social worker provide "consultation" to each commission, but they do not vote. The debtor might or might not be represented by a lawyer in this process, but these commissions—not the debtor or her lawyer—completely control the process after the filing of the debtor's petition. Specifically, the Banque de France is charged with collecting information from the debtor and third parties, preparing a payment plan, and negotiating its acceptance by the debtor and all creditors.

The great bulk of cases end at this stage. In the early years of the system, debtors and creditors were reconciled to consensual payment plans in just less than half of all cases. Over the last decade, between 60% and 70% of all cases have concluded at this first, "consensual plan" stage. Many have predicted that the earlier plans are likely to fail, however, as creditors rarely agree to forgive any amount of debt, even if the debtor is clearly unable to pay over time. The earliest plans often extended over as many as 15 years and left very little income to debtors.

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http://www.chd.lu/servlet/Merge?lot=J-1999-O-0660&lib=chdl; Doc. parl. no. 4409/11, pp. 9–10 (3 Oct. 2000), *available at* http://www.chd.lu/servlet/Merge?lot=J-1999-O-0668&lib=chdl.

[12] For a detailed description of the French system and its development, *see* Jason Kilborn, *La Responsabilisation de l'Economie: What the U.S. Can Learn From the New French Law on Consumer Overindebtedness*, 26 MICH. J. INT'L L. 619 (2005). All of the statements in this Part are drawn from the research described in this recent article on the French system.

As of 1999, all payment plans must leave to debtors at least whatever income the exemption laws shield from seizure, and as of 2003, the maximum length of any consensual plan is limited to 10 years (unless a longer period is necessary to cover mortgage debt).

B. Stage Two: Commission Recommendations to the Court

If any creditor rejects the commission's proposed plan, at the debtor's request, the commission forwards the case to a court with a recommendation that the court impose "ordinary" or "extraordinary" measures of relief. In most cases, the commission proposes that the court impose a payment plan with "ordinary" measures of relief. Such relief is limited to extensions or deferrals of time to pay, reductions in accruing interest, and discharge of a deficiency obligation remaining after the sale of an over-encumbered home. No other debt can be discharged at this stage. The maximum duration of a court-imposed plan was originally limited to 5 years, but that limit was extended to 8 years in 1999 and then again to 10 years in 2004. Imposed plans containing these "ordinary" measures of relief currently account for just over half of the remaining cases not treated at the consensual stage—about 15% of all administered cases.

For particularly overextended debtors whose meager income leaves them unable to repay any significant portion of their debts, the law since 1999 allows for "extraordinary" measures. The commission can recommend simply that the court impose a global deferral of all of the debtor's obligations for up to two years (reduced from three years in 2004). At the conclusion of this period, the commission reevaluates the debtor's situation. If the debtor's financial situation has improved, the commission must recommend a plan with "ordinary" relief measures. If the debtor remains unable to pay any significant portion of her debts, the commission must recommend a *partial* discharge of the debtor's remaining debts. Recently, the commissions have recommended partial discharge in only about 4% of all administered cases—up from less than 2% in the early 2000s. The percentage of debts to be discharged is left to the commission's discretion, but a *full* discharge of all debts is available only to a small subset of debtors.

C. Alternative Stage One: Anglo-American Style "Personal Recovery"

Finally, as of February 2004, the commissions can refer the most desperately and hopelessly overwhelmed debtors immediately to the court for a new procedure of "personal recovery." Much like the U.S. system of "chapter 7" liquidation bankruptcy, the personal recovery process requires only that the debtor give up her non-exempt property for liquidation and distribution to creditors (although very few debtors have any valuable non-exempt assets at this stage). Upon completion of this simple step, the court declares the case closed for "asset insufficiency," and most of the debtor's remaining obligations are "erased."

Unlike the U.S. system, the French personal recovery process is strictly reserved for those whose financial situation is "irremediably compromised." The commissions can refer cases out of the "normal" process only if it is "manisfestly impossible" to address the debtor's distress within the confines of the normal system of "ordinary" payment plans and "extraordinary" global deferrals and partial discharges. In the first ten months of availability of the new procedure, the commissions have referred just under 14% of all administered cases to the "personal recovery" procedure. This "alternative stage one" appears to be slowly replacing the "extraordinary" recommendation stage for debtors whose heightened level of distress is immediately apparent.

II. FOLLOWING THE LEARNING CURVE—CONTINUITY AND CHANGE

This Part traces the development of the new consumer debt relief legislation in Belgium and Luxembourg, focusing on those provisions that represent either a continuation or evolutionary change[13] from the French model on which these new systems are based. Part II.A explores the thought process that gave impetus to the new laws despite relatively low levels of aggregate debt. Parts II.B and II.C report that the strongest elements of continuity in Europe remain strong in Belgium and Luxembourg. The gateway to these newest systems remains an out-of-court attempt at a consensual arrangement with creditors (II.B), and relief is strictly conditioned on the fulfillment of a multi-year payment plan, even if "purely symbolic" (II.C). In practice, the new systems in Belgium and Luxembourg seem to be carrying forward the French system's evolution, moving away from theoretical antagonism toward undermining obligations and toward a more economic focus, moderating the demands on debtors and offering more decisive relief. Part II.D surveys the results of the first few years of these new systems.

A. Early Resistance Gives Way to Nuanced Acceptance of Consumer Debt Relief

Expanded availability of "easy" consumer credit inevitably leads to individual excesses—both intentional and unintentional. Even in moderately indebted Belgium and Luxembourg, individual instances of excessive consumer debt created serious and wide-spread social problems. The story of consumer debt relief in Belgium and Luxembourg shows how effective policy emerges from a skeptical and nuanced evaluation of aggregate statistics in light of localized evidence of real human distress.

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[13] For a discussion of revolutionary innovations, *see infra* Part III.

1. Moderate Debt Unevenly Distributed

Average rates of indebtedness in Belgium were among the most moderate in Europe in the 1990s—just behind the slightly elevated numbers in France. From the late 1980s to the late 1990s, total non-mortgage consumer credit consistently accounted for between 6% and 7% of aggregate disposable household income in Belgium and 8% in France, as compared to 16%-17% in Germany and 19%-20% in the U.S.[14] Even adding mortgage debt to the balance, total household credit in the 1990s on average absorbed only about 35% of disposable income in Belgium and 50% in France, well below the heavy burden of over 70% in Germany and over 90% in the U.S.[15] The relatively affluent population of Luxembourg shouldered an even lighter debt burden than their northern Belgian neighbors: Between 1994 and 2000, households in Luxembourg in the aggregate dedicated only about 11% of their monthly disposable income to monthly debt payments, both to mortgage creditors and to consumer financers.[16]

These aggregate statistics and averages, however, hide the painful truth about the uneven weight of the debt burden on individual debtors. The debt just described was not evenly distributed among households in Belgium and Luxembourg. Many families remained debt-free, while others carried a larger-than-average share, in many cases more than their future income could manage.[17] By lumping all households together, aggregate statistics create a misleading image based on the *national* population's financial health and propensity for borrowing.

More focused statistics painted quite a different picture of the debt burden weighing on many consumers in Belgium and Luxembourg in the 1990s. While residents of Luxembourg *on average* dedicated only about 11% of monthly disposable income to debt service, the *indebted* population paid about 20%, while the *most heavily indebted quartile* relinquished about 37% of their disposable income every month to their creditors.[18] The figures in the Belgian national consumer credit reporting database tell a similar story of rising and concentrated levels of distress. In 1995, the portion of Belgian consumer credit contracts *in default* rose to 13.74%.[19] Between 1993 and 2000, the number of Belgian consumers with registered credit defaults of one degree or another rose 28% from just over 300,000 to just over 385,000—just under 5% of the total adult population

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[14] *See* DIEZ GUARDIA, *supra* note 4, at 21, 53 tbl.A18
[15] *See id.* at 49 tbl.A14
[16] *See* REINSTADLER, *supra* note 5, at 2 & tbl.T1.
[17] *See, e.g.*, *id*. at 2 tbl.T1 & n.3 (noting that between 41% and 47% of households in Luxembourg carried *no* debt between 1994 and 2000).
[18] *See id.* at 5 & tbl.T2, 10 & tbl.T7.
[19] *See* Doc. parl. Sénat no. 929/5, *supra* note 9, at 3.

of Belgium in 2000.[20] These Belgian consumers were saddled with *arrearages* totaling over €1.2 billion in 1995, and over €1.75 billion in 2000.[21]

Individualized surveys of actual debtors buttressed these more focused statistics. A study commissioned by the EU Commission's Directorate General for Health and Consumer Protection reported that, in 1996, 64% of Belgian households and 29% of households in Luxembourg with non-mortgage loans were "overindebted."[22] Similarly, according to reports from socio-economic agencies within Luxembourg, between 1995 and 2000, a significant and consistent segment of that country's population—about 20%—indicated that their current income only allowed them to make do financially with significant difficulty.[23]

Whatever aggregate debt figures might have suggested about the low levels of indebtedness in Belgium and Luxembourg, a significant percentage of consumers in these countries were experiencing debt problems that legislators would feel compelled to address. As the Chamber of Civil Servants and Public Employees of Luxembourg observed, "one individual case [of overindebtedness] is already one too many."[24] Ultimately, legislators responded to real reports of human suffering rather than to comforting but misleading statistical averages.

2. Opposition and Support For Legislative Relief

In both Belgium and Luxembourg, legislators began pressing for legal relief for financially overburdened consumers in the early 1990s. Also in both states, a final law would emerge only after many years of discussion and debate—and, incidentally, after a change of monarchs in both states. Lawmakers filed the first Belgian proposal for combatting the ill effects of "overindebtedness" in the House of Representatives in March 1992,[25] under King Baudouin. It would take nearly seven years to achieve a final law under a new King, Baudouins' brother Albert II.

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[20] *See* GIANNI BETTI ET AL.., ORC MACRO, STUDY OF THE PROBLEM OF CONSUMER INDEBTEDNESS: STATISTICAL ASPECTS 43 & tbl.4.2 (2001), *available at* http://europa.eu.int/comm/consumers/cons_int/fina_serv/cons_directive/fina_serv06_sum_fr.pdf; Doc. parl. Chambre no. 1073/1, *supra* note 9, at 4.

[21] *See* BETTI ET AL.., *supra* note 20, at 43 & tbl.4.2.

[22] *See id.* at 2–3 & tbl.1.1.

[23] *See* REINSTADLER, *supra* note 5, at 4 & tbl.G3.

[24] Doc. parl. no. 4409/02, p. 2, *available at* http://www.chd.lu/servlet/Merge?lot=J-1997-O-0436&lib=chdl.

[25] *See* Doc. parl. Chambre (1991-1992) no. 274/1, *available at* http://www3.dekamer.be/digidoc/DPS/K2331/K23310950/K23310950.pdf. Similar proposals followed in May 1993, *see* Doc. parl. Chambre (1992-1993) no. 1047/1, *available at* http://www3.dekamer.be/digidoc/DPS/K2343/K23431784/K23431784.pdf, and February 1994, *see* Doc. parl. Chambre (1993-1994) no. 1324/1, *available at* http://www3.dekamer.be/digidoc/DPS/K2348/K23480615/K23480615.pdf. A House committee would ultimately rework and combine all of these proposals. *See* Doc. parl. Chambre no. 274/3, *supra* note 9, at 2–3. On the basis of this committee's report, the Belgian government introduced in 1996 the bill that became the final law on "collective debt arrangements." *See* Doc. parl. Chambre no. 1073/1, *supra* note 9.

In Luxembourg, a bill was introduced in July 1993, while Grand Duke Jean still reigned.[26] A final law would emerge only in December 2000, three months after Jean's son, Henri, ascended to power. Indeed, the new system in Luxembourg was finally implemented only in October 2001, as the regulatory framework was put in place. Discussion of consumer debt relief in Belgium and Luxembourg was marked by significant ambivalence in the early years. After years of debate and reflection, however, lawmakers in even these moderately indebted countries were convinced of the necessity of legislative relief for their overextended constituents.

In Belgium, opponents of consumer "bankruptcy" legislation continuously insisted that aggregate statistics showed that wild-eyed stories of a rising tide of indebtedness simply did not reflect reality, as Belgium remained among the least indebted countries in Europe.[27] And even if Belgians had begun to experience debt problems, opponents of the new bill argued, existing law adequately protected debtors and provided sufficient means of avoiding the "dehumanizing" effects of overly aggressive debt collection.[28] For example, the Belgian Civil Code allowed overextended debtors to petition a judge for "moderate" temporary payment delays and suspension of enforcement proceedings.[29] In addition, Belgian law shielded most household property, along with much of the debtor's income, from creditors.[30] Further restrictions on debt collection, opponents argued, might dissuade lenders from extending consumer credit.[31] In the final analysis, opponents of consumer debt relief argued that such a law should only apply to perhaps 10%-15% of consumer debtors in any event.[32] They urged lawmakers to be attentive to any potential use of such a law by those simply seeking to avoid moderate payment difficulties.

Consumer and creditor advocates alike countered that existing legislative responses were simply inadequate when debtors faced large claims from a variety of mutually antagonistic fronts (*e.g.*, consumer credit, utility bills, welfare and tax debts to the state, alimony and other family support debts).[33] Even the national representative of official (state-controlled) debt collectors argued that a compulsory and collective approach to consumer debt adjustment represented "the only realistic approach" to situations of consumer overindebtedness. He pointed out that the recalcitrance of aggressive creditors like the state all too often derailed the state

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[26] *See* Doc. parl. no. 3813, *supra* note 9.

[27] *See, e.g.,* Doc. parl. Sénat no. 929/5, *supra* note 9, at 7–10.

[28] *See, e.g.,* Doc. parl. Chambre no. 274/3, *supra* note 9, at 7–8, 36, 68. Similar arguments were made in Luxembourg by the Chamber of Commerce. *See* Doc. parl. no. 4409/05, p. 3, *available at* http://www.chd.lu/servlet/Merge?lot=J-1998-O-0068&lib=chdl.

[29] *See* C. CIV. BELG. art. 1244.

[30] *See* Doc. parl. Chambre no. 274/3, *supra* note 9, at 8. For a discussion of current Belgian exemptions law, see *infra* notes 106–12 and accompanying text.

[31] *See* Doc. parl. Chambre no. 274/3, *supra* note 9, at 8; Doc. parl. Chambre no. 1073/11, *supra* note 1, at 4 ("None would contest that credit is an indispensable element to any modern economic system.").

[32] *See* Doc. parl. Chambre no. 274/3, *supra* note 9, at 8, 16.

[33] *See id*. at 6, 36, 51; *see also* Doc. parl. Chambre no. 1073/1, *supra* note 9, at 6–8; Doc. parl. no. 4409/05, *supra* note 28, at 3 (same concession by Luxembourg Chamber of Commerce).

collectors' attempts to negotiate settlements between debtors and creditors,[34] leading to a needless accumulation of fees and expenses and a dead-weight loss of value.[35]

Ultimately, the specific observations of consumer counselors persuaded legislators that the time had come for formal relief from consumer overindebtedness.[36] The government and legislature in Luxembourg, for example, relied not on statistics, but on the on-the-ground experience of the National Service for the Fight Against Overindebtedness, an association chartered by the state in 1993 to unite several consumer debt counseling agencies.[37] Lawmakers in both Belgium and Luxembourg were moved by accounts from consumer counselors of the troubling reactions of many of their individual clients to the advances of debt collectors. Financially overwhelmed consumers faced social withdrawal and isolation. Many "buried their heads in the sand" to avoid confronting the fact that their credit problems had overtaken them.[38] Eventually, consumer advocates reported, credit problems had led to health problems, family tension, and other social ills, and ultimately to an increased welfare burden on the state.[39]

Legislators accepted that overindebtedness is not a system-wide problem to be measured in the aggregate, but rather the concentrated, case-by-case result of diverse factors, such as illness, accidents, divorce and separation, and most importantly unemployment.[40] To be sure, easier access to credit through credit cards and similar modern devices had laid the foundation for potentially irresponsible borrowing and spending. Indeed, the authors of the draft law in Luxembourg placed particular blame for overindebtedness on the "manipulation" of consumers by the "aggressive and omnipresent advertising of credit establishments."[41] But lawmakers acknowledged that, whatever the combination of causal factors, overindebtedness had become a widespread and serious problem that called for legislative intervention.

Moreover, on a pragmatic level, lawmakers stressed the senselessness of maintaining over a course of years "the illusion that the debt concerned might still be recovered."[42] The early observations of one Belgian legislator nicely sum up the legislative mindset:

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[34] A representative of the Belgian Justices of the Peace testified that official debt collectors had brokered settlements in hundreds of thousands of consumer debt cases. *See* Doc. parl. Chambre no. 274/3, *supra* note 9, at 31.

[35] *See id.* at 23.

[36] *See, e.g.,* Doc. parl. Sénat no. 929/5, *supra* note 9, at 2–3.

[37] *See infra* note 65; Doc. parl. no. 4409, *supra* note 11, at 2–3, 19–21; Doc. parl. no. 4409/11, *supra* note 11, at 4–6.

[38] *See* Doc. parl. Chambre no. 274/3, *supra* note 9, at 5; *see also* Doc. parl. no. 4409, *supra* note 10, at 3.

[39] *See* Doc. parl. Chambre no. 274/3, *supra* note 9, at 5; *see also Doc. parl.* Chambre no. 1073/11, *supra* note 1, at 3, 6; Doc. parl. Sénat no. 929/5, *supra* note 9, at 3.

[40] *See, e.g.,* Doc. parl. Chambre no. 274/3, *supra* note 9, at 5–6; Doc. parl. Chambre no. 1073/1, *supra* note 9, at 6; Doc. parl. no. 4409, *supra* note 11, at 2–3; Doc. parl. no. 4409/04, p. 3, *available at* http://www.chd.lu/servlet/Merge?lot=J-1997-O-0615&lib=chdl; Doc. parl. no. 4409/05, *supra* note 28, at 2.

[41] *See* Doc. parl. no. 4409, *supra* note 11, at 11–12.

[42] Doc. parl. Chambre no. 274/3, *supra* note 9, at 80.

> It is clear . . . that judicial and contractual security are essential in our society. Nonetheless, what is the significance of such security when the debtor is a person who is confronted with problems of such a gravity that she is virtually destitute in a material sense and from whom creditors will collect nothing more despite all their pursuits and legal actions? Doubtless, for judicial and contractual security, a long-term arrangement [payment plan] is preferable in such a case to the absence of any arrangement and the infinite multiplication of procedures before the courts.[43]

The new laws in both Belgium and Luxembourg thus expressly reject the theoretical formalism of insisting upon the sanctity of contract. Instead, these laws focus on practical considerations, defending consumer debt relief on two largely economic grounds: First, such relief is designed to "reinsert" the overburdened consumer into the economy and avoid the losses that "social exclusion" would otherwise occasion.[44] Belgian lawmakers emphasized repeatedly that "[t]he discharge of debts is the only means of reintegrating the overindebted person into the economic system. Otherwise, this person becomes marginalized, confines herself to the underground economy, and becomes a burden for society."[45] Lawmakers in Luxembourg likewise aimed explicitly to "reduce[e] the social cost resulting from social exclusion."[46] As a second and related justification for relief, the Belgian law borrowed from the U.S. the now virtually universal "slogan" of consumer bankruptcy: to offer overburdened consumers a "fresh start" (literally, "new start" in both French and Dutch, "*nouveau départ*" and "*nieuwe start*").[47] With these new laws, lawmakers in both Belgium and Luxembourg sought to deliver "dignity and hope"[48] and "offer perspectives for a better life" to overindebted persons.[49]

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[43] *Id.* at 62.

[44] *See, e.g.,* Doc. parl. Chambre no. 1073/11, *supra* note 1, at 11. Once again a European state has adopted the "open credit economy" justification articulated by Margaret Howard many years ago. *See* Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1048 (1987).

[45] Doc. parl. Chambre no. 1073/1, *supra* note 9, at 11, 17, 45; Doc. parl. Chambre no. 1073/11, *supra* note 1, at 6.

[46] Doc. parl. no. 4409, *supra* note 11, at 3; *see also id.* at 5 (adding as a general basis for the new law, "to resolve difficult financial situations susceptible of producing nefarious human consequences").

[47] *See* Doc. parl. Chambre no. 1073/1, *supra* note 9, at 12, 45; Doc. parl. Chambre no. 1073/11, *supra* note 1, at 7, 26.

[48] Doc. parl. Chambre no. 1073/11, *supra* note 1, at 7.

[49] Doc. parl. no. 4409/11, *supra* note 11, at 12 (noting that the new law affects civil and procedural law, but insisting on the goal of "reinforce[ing] our social legislation").

3. Enactment of the New Laws: How To Categorize Consumer Debt Relief?

The first contrast between the French "parent" model and the overindebtedness laws in Belgium and Luxembourg is the location of these new provisions within the body of the law. French law places "individual overindebtedness" under the rubric of consumer law, codifying its relief provisions in the Consumer Code. Belgian lawmakers, in contrast, viewed consumer debt relief as fundamentally procedural law, restricting creditors' rights to enforce their claims. Thus, "to realize the greatest correspondence possible with existing procedural rules,"[50] Belgian lawmakers placed their new consumer debt relief provisions in a newly created title in the "enforcement" section of the Judicial [Procedural] Code called simply "Collective Debt Arrangement."[51] In Luxembourg, consumer debt relief is apparently viewed as *sui generis* social welfare law. The new provisions comprise a free-standing law, called simply the law "on overindebtedness," overseen mainly by the Ministry of Families.[52]

B. Consensual Out-of-Court Payment Plans: Still the Gateway to Relief

As in all of the other current European systems, the process in both Belgium and Luxembourg begins with an extra-judicial attempt at brokering a consensual payment plan with creditors. The process in Belgium begins with the debtor's filing a petition for relief in a court of first instance,[53] but the court remains on the margins of the process initially. In Luxembourg, debtors proceed just like in France by filing their petitions with a non-judicial body.[54] In slight but important contrast with the French system, the new laws in Belgium and Luxembourg assign to consumer debt counseling professionals the initial required task of admitting new cases,[55] examining the debtor's situation, collecting information, and proposing a consensual arrangement among debtors and creditors.

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[50] Doc. parl. Chambre no. 1073/1, *supra* note 9, at 14; *cf.* Charles W. Mooney, Jr., *A Normative Theory of Bankruptcy Law: Bankruptcy As (Is) Civil Procedure*, 61 WASH. & LEE L. REV. 931 (2004).

[51] *See* CODE JUDICIAIRE/GERECHTELIJK WETBOEK [hereinafter CJ/GW] arts. 1675/2 to 1675/19.

[52] Law of 8 Dec. 2000, Mém. A, no. 136, 27 Dec. 2000, p. 2972, *available at* http://www.legilux.public.lu/leg/a/archives/2000/1362712/1362712.pdf?SID=eb751ea3b5ac87b8da29d777d2dfcddb#page=1.

[53] *See* CJ/GW arts. 1675/2, 1675/4.

[54] *See* Law of 8 Dec. 2000, art. 3.

[55] Unlike the French law, neither the Belgian nor the Luxembourguish law requires a showing of the debtor's "good faith" as a prerequisite to initiating a case. Lawmakers in both Belgium and Luxembourg explicitly rejected this requirement, in part because of the trouble that France had experienced with its application, particularly the wide differences in interpretation of the notion among districts. *See, e.g.,* Doc. parl. Chambre no. 1073/1, *supra* note 9, at 16. The only requirement is that the debtor cannot have "manifestly organized his insolvency." *See* CJ/GW art. 1675/2; Law of 8 Dec. 2000, art. 2. The legislative history explains that this does *not* mean that the debtor simply took on more debt that she might reasonably have foreseen being able to repay, but rather that she has acted fraudulently or criminally in subverting the advances of creditors. *See* Doc. parl. Chambre no. 1073/1, *supra* note 9, at 17–18; Doc. parl. Chambre no.

1. Belgium: The Debt-Mediator

In Belgium, the debtor's petition must nominate, and the court appoints, a "debt-mediator."[56] Designed to alleviate the potential burden on an already overworked judiciary, the debt-mediator was part of every consumer debt relief proposal from the outset.[57] The law allows the debtor and court to choose the debt-mediator from among lawyers, official debt collectors, and licensed public or private consumer counseling agencies.[58] Although the law requires the debt-mediator to be "independent and impartial,"[59] lawmakers suggested that this debt-mediator would probably be the person who had helped the debtor to assemble her petition. Some doubted the impartiality of the very person who had assisted the debtor in preparing her case, but such doubts were curtly brushed aside, in large part because lawmakers assumed that this person would be "in virtually every case" not a lawyer, but the state-licensed debt counseling service in the debtor's region.[60]

Much like the system of *Schuldnerberatungsstelle* in Germany, over 500 state-licensed consumer counseling services comprise a vast network spread across Belgium.[61] These centers are thus widely available to consumers, and they are more likely than lawyers to take on consumer debt cases for at least one other prominent reason: A Royal Order limits the allowable fees for debt-mediator services to a relatively low level—on average, about €500 to gather information and propose a

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1073/11, *supra* note 1, at 28–35 (drawing a parallel with the Criminal Code art. 490/2 definition of "organizing insolvency"); Doc. parl. Sénat no. 929/5, *supra* note 9, at 4. Note that the requirement that the debtor explain in the petition the reasons for her inability to pay her debt, *see* CJ/GW art. 1675/4 § 1(12), is designed simply to allow judge to gauge whether the debtor had "organized her insolvency"—this is *not* a general "worthiness" rule like one finds in the Scandinavian systems. *See* Doc. parl. Chambre no. 1073/1, *supra* note 9, at 27–28.

[56] *See* CJ/GW arts. 1675/4 § 1(5), 1675/6 § 2.

[57] *See* Doc. parl. Chambre no. 274/3, *supra* note 9, at 5 (describing the earliest Belgian proposals).

[58] *See* CJ/GW art. 1675/17 § 1.

[59] *See id.* art. 1675/17 § 2.

[60] *See, e.g.,* Doc. parl. Chambre no. 1073/1, *supra* note 9, at 29, 52; Doc. parl. Chambre no. 1073/11, *supra* note 1, at 39, 97, 101 (explaining away the apparent conflict of interest in part because the debt counselors—"public centers of social assistance," abbreviated "CPAS" in French, "OCMW" in Dutch—almost never recover any fees for pre-petition service, because they abandon fees in the interest of their state-supported mission of service). The legislative history suggests that each court would maintain a list of acceptable mediators. *See* Doc. parl. Chambre no. 1073/11, *supra* note 1, at 104. A website dedicated to helping consumer debtors with the new system reports that courts are maintaining lists of acceptable debt-mediators, but that some of these lists include only local lawyers, not the local debt counseling agencies. *See* http://www.dignitas.be/index.php. Note that the prominence of these public counseling centers is a significant contrast with U.S. practice—a contrast that should be borne in mind when considering a possible transplant of the Belgian experience to the U.S.

[61] These centers are distributed as follows: 177 in the southern, French area of Wallonia (*Wallonie*), 297 in the northern, Dutch area of Flanders (*Vlaams*), and 29 in the capital area of Brussels. *See* L'OBSERVATOIRE DU CRÉDIT ET DE L'ENDETTEMENT, 10 ANS D'OBSERVATOIRE 26 (2004), *available at* http://www.observatoire-credit.be/SiteOce/site.nsf/a9ee787768a96ef2c12569a7004bc215/56c2f0c718aa7806c1256f54002ade3b/$FILE/BrochureFR.pdf [hereinafter OCE REPORT].

plan, and €250-€300 per year to control the implementation of the plan if confirmed.[62]

2. Luxembourg: "Service" and "Commission"

In Luxembourg, debtors request relief by filing a petition with a state-funded "Service of information and counsel in matters of overindebtedness."[63] The Service then collects information and prepares a proposed payment plan.[64] The two[65] currently existing "Services" are the latest embodiment of an association of several non-profit agencies offering free debt counseling services since the early 1990s. In late 1993, these agencies entered into an agreement of cooperation with the Ministry of Families and began operating as one coordinated unit under the umbrella name "National Service for the Fight Against Overindebtedness."[66] The original mission of these agencies continues, as they still provide free counseling for consumers and consultation with government agencies about consumer debt policy. These "Services" now focus, however, on the preparation of payment plans under the new law "on overindebtedness."[67]

Thus, the Services are essentially analogous to the Belgian debt-mediators, except *only* free consumer counseling agencies may act as "mediators." In contrast with the Belgian debt-mediator, however, the Services' functions avoid the conflict

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[62] *See* Royal order of 18 Dec. 1998, M.B. 31 Dec. 1998, p. 41935–36. The fee is limited to (1) for collecting claims and preparing the plan, 15,000 Belgian francs (about €370) for cases with 5 or fewer creditors, increased by 1000 francs (about €25) for every creditor above 5; (2) if the mediator needs to engage judicial process to compel the production of information on the debtor in preparing the plan, 3000 francs (about €75) for each written declaration obtained; (3) for collecting payments owed to the debtor (e.g., wage payments), 250 francs (about €6) for every payment diverted from the debtor to the mediator during the course of the plan; (4) for follow-up in controlling the implementation of the plan, 6000 francs per year (just short of €150) for cases with 5 or fewer creditors, increased by 400 francs (just short of €10) for every creditor above 5; and (5) if the plan has to be revised or revoked, 5000 francs (just short of €125) for each such revision or revocation resulting in a judgment. *See id.* art. 2. In addition, the mediator received 2500 francs (about €60) for each required appearance at any court hearing. *See id.* art. 3. The mediators expenses are also limited by this same order. For example, telephone, email, and photocopying charges are limited to 3000 francs (about €75) per case. *See id.* art. 4. These amounts are indexed for inflation, with increases triggered with any 5% increase in the consumer price index. *See id.* art. 5.

[63] *See* Law of 8 Dec. 2000, art. 3; Grand-Ducal Order of 12 Oct. 2001, Mém. A, no. 134, 14 Nov. 2001, p. 2668, arts. 11-12, *available at* http://www.legilux.public.lu/leg/a/archives/2001/1341411/1341411.pdf?SID=be962d0991ea47fec6885ae2534a33bd#page=2.

[64] *See* Law of 8 Dec. 2000, art. 4.

[65] The two agencies currently operating a Service and their websites are Inter-Actions Faubourgs (www.inter-actions.lu) and the Luxembourguish League of Prevention and of Medico-Social Action (www.ligue.lu).

[66] *See* Doc. parl. no. 4409, *supra* note 11, at 3–4, 11, 19–21 (agreeing to cooperate with another agency in 1996). The law allows other non-profit agencies to apply to run a state-funded "Service" in the future, *see* Law of 8 Dec. 2000, art. 20; Grand-Ducal Order of 12 Oct. 2001, *supra* note 63, arts. 2–10, but none have done so thus far.

[67] *See* Law of 8 Dec. 2000, art. 19.

of interest inherent in the debtor's having chosen the mediator. The Services perform only the "intake" and "plan development" functions of the system. This allows them to act more like representatives—perhaps even advocates—for debtors, presenting their plans to the negotiating center of the system.[68]

Another public entity, the "Mediation Commission," takes charge of the plans submitted by the Services and negotiates them with creditors.[69] By majority vote of its six members (ties being broken by the president's vote), the Mediation Commission can accept a plan as proposed by the Services or modify it before presenting it to creditors.[70] Much like the French "commissions on individual overindebtedness," the Mediation Commission consists of six members with presumably evenly divided interests. Every three years, the Minster of Families reappoints the Commission, selecting two members from each of three groups: representatives of the state (one of whom serves as president), consumer lending professionals, and consumer debt counseling professionals.[71] Once again, the fact that the system in Luxembourg is placed largely in the hands of public debt counselors and the Families Ministry—as opposed to lawyers and the Ministry of Justice—testifies to legislators' view that the relief offered is primarily in the nature of "social work."

3. Debt-Mediator or Service/Commission Controls Stage One

Just like in France, the Belgian debt-mediator or the Luxembourguish Service and Mediation Commission—not the courts—occupy center stage in this first phase of the process. The mediator or Service—not the debtor or the debtor's lawyer—draws up a plan and presents it to the debtor and her creditors for approval.[72] At this stage, then, the debtor likely has no advocate or even advisor (although the Service may perform something like this function in Luxembourg). Perhaps this explains why so many debtors agree to plans, including some plans that experienced debt advisers might suggest are overly burdensome and unworkable.

By design,[73] the length and content of consensual plans are virtually unregulated. The *demands* made on the debtor are limited only by one overarching

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[68] *See* Grand-Ducal Order of 12 Oct. 2001, *supra* note 63, arts. 17–19. The Council of State recommended eliminating this division of labor between Service and Commission. *See* Doc. parl. no. 4409/07, *supra* note 11, at 6.

[69] *See* Law of 8 Dec. 2000, arts. 3, 5; Grand-Ducal Order of 12 Oct. 2001, *supra* note 63, art. 19.

[70] *See* Grand-Ducal Order of 17 July 2001, Mém. A no. 95, 13 Aug. 2001, p. 1898, arts. 2, 7, *available at* http://www.legilux.public.lu/leg/a/archives/2001/0951308/0951308.pdf?SID=a2bcc51445ae0291d6733bd8f9afdfbe#page=2.

[71] *See* Law of 8 Dec. 2000, art. 22; Grand-Ducal Order of 17 July 2001, *supra* note 70, at 4; Ministerial Order of 10 Sept. 2001, Mém. B, no. 57, 3 Oct. 2001, p. 1032, *available at* http://www.legilux.public.lu/adm/b/archives/2001/0570310/0570310.pdf#page=3 (naming the six current members).

[72] *See* CJ/GW art. 1675/10 §§ 2, 4.

[73] *See* Doc. parl. Chambre no. 1073/1, *supra* note 9, at 36 ("everything is possible").

requirement—identical in both Belgium and Luxembourg—that the plan allow the debtor to rehabilitate her financial situation while "guaranteeing [to the debtor and her family] that they will be able to lead a life in conformity with human dignity."[74] The *relief* offered to debtors is limited only by the requirement that creditors agree unanimously to the plan (or at least *not register a vote against* within the time allotted for voting).[75] This unanimity requirement led some in Belgium to doubt that consensual plans would be had in many cases, but the proponents insisted that the fear of a judicially imposed plan would force creditors to compromise.[76] As reported below,[77] the optimists appear to have been proven right.

C. Judicial Plans—Payment Plans For All, but To Discharge or Not To Discharge?

If the mediator or Commission is unable to bring debtor and creditors together on a consensual plan,[78] the case continues to the court for consideration of a judicially imposed payment plan—just like in the French system.[79] It is at this "judicial plan" stage that the "French-model" systems begin to diverge significantly, both from each other and from every version of the often-amended system in France.

In Belgium, the court can impose one of two types of plans. One allows the court to defer or delay payments and reduce interest rates for up to five years, and possibly to discharge penalty interest (but not accrued *remunerative* interest) and any other penalties and fees.[80] The other, which I will call a "capital-discharge" plan, allows the court to discharge even the principal claims against the debtor.[81] However, the principal of the debtor's debts can be discharged *only in part*, only after the proceeds of the liquidation of the debtor's non-exempt assets have been

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[74] CJ/GW arts. 1675/10 § 2, 1675/3; Law of 8 Dec. 2000, art. 1.

[75] *See* CJ/GW art. 1675/10 § 4. The German model of "presumed acceptance" was retained in Belgium to avoid "blockage" by uninterested creditors. *See Doc. parl.* Chambre no. 1073/1, *supra* note 9, at 37.

[76] *See* Doc. parl. Chambre no. 1073/11, *supra* note 1, at 57.

[77] *See infra* Part II.D. One judge reported in 2001 that in "innumerable" cases debtors were willing to accept plans for ten years or more, and every creditor (except the fisc) agreed, even offering partial remissions, as their payout in a judicial plan would be significantly less with the five-year limit on judicial plans. *See* Doc. parl. Chambre (2001-2002) no. 1285/006, p. 15, *available at* http://www.lachambre.be/FLWB/pdf/50/1285/50K1285006.pdf.

[78] The time limit for the consensual stage differs slightly in Belgium and Luxembourg, but neither system allows much time. In Belgium, the debt-mediator has only 4 months from her appointment, but she can abandon the process if it becomes clear before then that unanimity is unobtainable. *See* CJ/GW art. 1675/11 § 1. In Luxembourg, the Commission has only 6 months from filing of the petition. *See* Law of 8 Dec. 2000, art. 6.

[79] Note that the Belgian law directs the mediator to record her observations on the failed consensual process in the dossier—with the implicit suggestions that recalcitrant creditors will be punished by the court!

[80] *See* CJ/GW art. 1675/12.

[81] Except claims not subject to discharge, which are limited to *future* alimentary obligations, like child support and alimony (but not *present* accrued but unpaid obligations), and reparations orders arising from tortious injury caused by the debtor. *See* CJ/GW art. 1675/13 § 3.

applied to her unpaid debts, and only after the debtor has completed a three- to five-year payment plan.[82] Moreover, the court can consider a "capital-discharge" plan *only* if some kind of five-year payment plan without a capital discharge would not allow the debtor to pay off her debts in full.[83]

The legislative intent here clearly was that plans *not* offering capital discharge would be the norm. The first sentence of the bill introducing the capital discharge provision assured that "[t]he primary rule is the judicial debt arrangement without discharge of debt in principal." It goes on to explain, however, that the debtor can request a capital-discharge plan (such a plan may not be imposed on the debtor) in "extreme situations," where a partial discharge is necessary to permit the elaboration of a viable plan.[84] On the one hand, the Belgian law reflects a clear continuation of the French discomfort with discharging unpaid debt. On the other hand, it evidences a rapidly emerging European acceptance of economic reality: Debtors can be realistically expected to pay only so much, and creditors must be prepared to give a little, too.

In Luxembourg, the court is more restricted—the debtor is never required to sell her assets, and the court is never allowed to discharge any debt other than penalties and fees. The original bill had allowed the court to impose any relief in a judicial plan that the service could propose to creditors in a consensual plan, including full discharge of the capital of all unpaid debts.[85] The Chamber of Commerce opposed vigorously *any* discharge of debt without creditor consent.[86] The Council of State recommended adopting the approach of Belgian law, but its discussion of that law contained a striking omission. The Council explained that "[t]he Belgian law provides for four types of measures," it enumerated the measures for a non-capital-discharge plan (from section 1675/12 of the Belgian Judicial Code), and it recommended adoption of the substance of that provision of the Belgian law.[87] The Council did not even mention, however, that the *very next provision* (article 1675/13) of the Belgian law also provided for a *fifth* measure: a "capital-discharge" plan. The record contains no explanation for this oversight—if it was an

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[82] *See id*. art. 1675/13. In the original bill, the government admitted that, as in Germany, France, and the U.S., "the majority of overindebted persons have hardly any assets to distribute to their creditors." Doc. parl. Chambre no. 1073/1, *supra* note 9, at 12; Doc. parl. Chambre no. 1073/11, *supra* note 1, at 26.

[83] *See* CJ/GW arts. 1675/13 § 1, 1675/3.

[84] *See* Doc. parl. Chambre no. 1073/1, *supra* note 9, at 44.

[85] *See* Doc. parl. no. 4409, *supra* note 11, at 8–9 (proposed art. 24).

[86] *See* Doc. parl. no. 4409/05, *supra* note 28, at 8. The Justices of the Peace of Luxembourg joined this opposition. *See* Doc. parl. no. 4409/06, p. 3, *available at* http://www.chd.lu/servlet/Merge?lot=J-1998-O-0529&lib=chdl.

[87] I say "the substance" because the language is slightly different, but the Council's discussion clearly indicates that it proposed exactly what the Belgian law provided. *See* Doc. parl. no. 4409/07, *supra* note 11, at 13.

oversight—but the relevant committee[88] and ultimately the legislature adopted the Council's restrictive "compromise" position with no questions asked.

Though courts in Luxembourg cannot *impose* a discharge of debt, they can *recommend* that the state finance a sort of indirect "discharge" to certain debtors under a unique "creditor welfare"-like system, described below in Part III.A. Once again, the French distaste for imposed discharge is apparent on the law, but state-financed functional "discharges" have proved relatively common in recent practice.

1. The Big Question: How Long is Long Enough?

Like in France and other European states, a payment plan of considerable duration is an absolute prerequisite to court-imposed debt relief for consumers in both Belgium and Luxembourg. The mandated length of the plan differs in the two systems, however, although both systems limit plan duration much more so than does the French law. The legislative history of the Belgian law reveals a particularly sensitive and unique consideration of the minimum and maximum plan duration. A closer look at the history of the laws in Belgium and Luxembourg reveals just how arbitrary the decision about plan duration can ultimately be.

In Luxembourg, a judicial plan can require payments from the debtor for no longer than seven years. The law allows no exceptions (for mortgage debt, for example) and offers no indication of what the "average" plan length should be.[89] The government incorporated this seven-year term into its original bill, explaining that this limit was "absolutely indispensable" to "motivate the debtor to collaborate actively" in the plan process.[90] The government offered no explanation for why seven years, rather than some shorter period, as in the Belgian law, had been chosen. The legislative record contains no challenge to and virtually no discussion of this long time frame. The final committee report notes simply that the fixation of the maximum duration at seven years "results evidently from a political assessment" and that "[e]xperience will show whether this duration corresponds effectively to actual needs."[91] Oddly enough, apparently no one thought to mention that the German system originally required a seven-year repayment period, as well, though the arbitrary choice of seven years was heavily criticized there, too.[92]

In contrast, legislators in Belgium wrestled mightily with the question of how long to demand that debtors live under such plans. In the 1996 bill that ultimately became the Belgian law, the government proposed a duration of seven years for all plans. It explained that the plan should not be so long as to discourage the debtor,

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[88] *See* Doc. parl. no. 4409/08, *available at* http://www.chd.lu/servlet/Merge?lot=J-1999-O-0439&lib=chdl; Doc. parl. no. 4409/11, *supra* note 11, at 16.

[89] *See* Law of 8 Dec. 2000, art. 14

[90] *See* Doc. parl. no. 4409, *supra* note 11, at 8–9, 16 (proposed art. 24 and commentary on art. 24).

[91] Doc. parl. no. 4409/11, *supra* note 11, at 16.

[92] *See* Kilborn, *supra* note 3, at 282–83 & n.161.

given the privations to which the debtor would be subjected over the life of the plan, but it offered scant explanation of why seven years—rather than four, which had been proposed in an earlier bill[93]—would be the right choice. The bill and the subsequent House report suggested simply that any shorter period might not allow a maximum number of debtors to achieve the goals of the law—to pay off their debts during the plan.[94]

Among the first proposed amendments to the bill was one to reduce the maximum plan duration to four years, on the matter-of-fact basis that "seven years seems excessive."[95] Finally, a second series of proposed amendments suggested a five-year limit, which was ultimately adopted. Though other proposed amendments to the duration limit were advanced and fiercely defended, the legislative history oddly contains no discussion of the reason why the committee and the full legislature ultimately adopted the "five-year compromise."[96]

Perhaps five years was chosen because it was supported by a particularly cogent justification focusing on the *debtor's* perspective (as opposed to maximizing returns to creditors). Proponents of the five-year maximum plan duration rationalized this choice in terms of the *debtor's* demonstrating *worthiness* for relief. They proposed curtly but convincingly that "[i]t is reasonable to think that a delay of 5 years is sufficient to prove the willingness of the overindebted person to make a serious effort."[97]

In other words, *quid pro quo*, but enough is enough. If five years is not enough to pay all debts, the debtor has proven her worthiness for a discharge of any remaining claims. Indeed, a five-year limit probably also reflects the reality of how long many creditors realistically will pursue a defaulted debt. After five years of non-payment, most debts will be abandoned and written off, discharged "de facto" if not "de jure."

The duration of a plan that discharges debts in principal (available only in Belgium) differs in two important respects. First, a "non-capital discharge" plan can extend beyond the five-year limit to allow the debtor more time to pay off long-term debt, primarily mortgage debt.[98] A "capital-discharge" plan may not exceed

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[93] *See* Doc. parl. Chambre no. 274/3, *supra* note 9, at 118. In discussions of this earlier proposal, the royal union of credit institutions had argued that 7 years was the minimum that would allow viable full-payment plans while respecting debtors' human dignity. *See id.* at 49.

[94] *See* Doc. parl. Chambre no. 1073/1, *supra* note 9, at 10, 42; Doc. parl. Chambre no. 1073/11, *supra* note 1, at 6.

[95] Doc. parl. Chambre (1996-1997) no. 1073/2, p. 4, *available at* http://www.lachambre.be/FLWB/pdf/49/1073/49K1073002.pdf. The argument that 7 is years is just "too long" appears again and again. *See, e.g.,* Doc. parl. Chambre no. 1073/11, *supra* note 1, at 10.

[96] *See* Doc. parl. Chambre no. 1073/11, *supra* note 1, at 69, 70, 83, 127–28; CJ/GW art. 1675/12 § 2.

[97] Doc. parl. Chambre (1996-1997) no. 1073/3, p. 4, *available at* http://www.lachambre.be/FLWB/pdf/49/1073/49K1073003.pdf.

[98] Like in France, the plan can extend for five years *plus* 50% of the remaining term of any outstanding long-term debts. *See* CJ/GW arts. 1675/12 § 2.

five years.[99] In the bill introducing the new law, the government made it quite clear that debtors who could not pay off their mortgage loans in a five-year plan should sell their homes and find other, more affordable housing.[100]

Second, the Belgian law imposes a floor as well as a ceiling on the duration of a capital-discharge plan. Not only must the debtor prove her worthiness for *any* relief by living under a payment plan for up to five years, she must additionally prove her worthiness for the *extraordinary* relief of capital discharge by submitting to a plan for *at least* three years.[101]

A proposal to eliminate this minimum period arose immediately in the House on the basis that it seemed "incomprehensible that the legislator could oblige a debtor . . . to continue to live in this situation [of financial distress] for three years, even in the case where no debt could be completely paid off."[102] Other proposals to reduce the minimum to one year were advanced on similar grounds.[103] Both the House and Senate roundly rejected all such proposals, however, explaining that reducing or eliminating the minimum would "compromise the equilibrium" of the law.[104] Perhaps the recent implementation in France of the "personal recovery" procedure, with immediate discharge for low-income debtors, portends an eventual softening of the Belgian position, but the government appears unwilling to move in this direction yet.

The theory seems to be that, even if a "purely symbolic" three-year plan will produce little for creditors, it will evidence (and perhaps inculcate) the social responsibility that the modern open-credit economy demands of consumers seeking the "ultimate" economic relief. How to pay for a system that produces no returns for creditors is a more troubling question, and the unique Belgian response is addressed in Part III.B., below.

2. Squeezing Blood From a Turnip?—Debt Payment v. "Human Dignity"

In both Belgium and Luxembourg, the overarching restriction on what any plan may demand is stated simply and vaguely: debtors and their families must be guaranteed the ability "to lead a life in conformity with human dignity."[105] These

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[99] *Cf. id*. art. 1675/13 § 2.

[100] *See Doc. parl*. Chambre no. 1073/1, *supra* note 9, at 46.

[101] *See* Doc. parl. Sénat no. 929/5, *supra* note 9, at 48.

[102] Doc. parl. Chambre no. 1073/2, *supra* note 95, at 5–6; *see also* Doc. parl. Sénat no. 929/3, *supra* note 10, at 7 (same proposal in the Senate, also rejected without discussion).

[103] *See Doc. parl* Chambre (1996-1997) no. 1073/10, p. 8, *available at* http://www.lachambre.be/FLWB/pdf/49/1073/49K1073010.pdf; Doc. parl. Sénat no. 929/3, *supra* note 10, at 7.

[104] *See* Doc. parl. Chambre no. 1073/11, *supra* note 1, at 83, 128; Doc. parl. Sénat no. 929/5, *supra* note 9, at 47–48.

[105] *See* CJ/GW arts. 1675/3, 1675/12 § 4, 1675/13 § 5; Law of 8 Dec. 2000, art. 1. The Belgian law *had* to proceed from this baseline, as the Belgian Constitution establishes this basic right as a generally applicable proposition. *See* CONST. BELG. art. 23 ("Everyone has the right to lead a life in conformity with human

new laws inexplicably reject the French (and German) approach of fixing a clear maximum payment of all non-exempt income. The law in Luxembourg intentionally leaves this vague standard open for discretionary judicial interpretation.[106] Belgian legislators defined slightly more specific restrictions on judicial plans.

In the Belgian law, at least in the context of judicial plans, "human dignity" is "defined" in terms of three levels of protection: First, like in every other system, tangible property that is exempt outside bankruptcy is exempt in bankruptcy, as well.[107] The law requires liquidation of the debtor's assets prior to the establishment of a capital-discharge plan, but only those assets that are "seizable" (non-exempt). As we will see below, a judicial plan may derogate from protections for *future income*, but it may not reduce any protection of the debtor's *tangible property*. The law as ultimately adopted holds the property exemptions sacrosanct, a sort of absolute baseline for preserving human dignity.[108]

Second, on the central issue of how much *future payment* to demand of debtors, the Belgian law is ambivalent about incorporating the generally applicable law exempting certain levels of income from seizure. Without saying so directly, the provisions on judicial plans seem to assume that, as in France and Germany, general income exemptions serve as an initial "human dignity" fund into which the judge should not dip to reach for more payments to creditors.

What these provisions *do* clearly say, however, is that the judge *may* deviate from general income protections (in cases both with *and without* capital discharge) "by specially motivated decision."[109] The legislative history suggests several possible motivations for dipping into generally exempt income, such as the debtor's light family-related burden (although the exemptions are based on household makeup), the debtor's spouse's level of exempt income, or "the relative size of debts and income."[110] One legislator doubted how a plan that derogated from income exemptions could preserve human dignity when these exemptions were designed precisely to ensure a minimal level of human dignity. The House and Senate brushed aside this concern. The Belgian Parliament accepted the government explanation that public debt counselors often proposed out-of-court arrangements that dipped into exempt income. The government explained that, in many cases, a

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dignity."). The legislature in Luxembourg borrowed this notion from Belgian law. *See* Doc. parl. no. 4409/11, *supra* note 11, at 11.

[106] *See* Doc. parl. no. 4409/11, *supra* note 11, at 11 (stating simply that this approach is "preferable" to identifying a minimum figure, such as the "minimum guaranteed revenue" established by law in Luxembourg).

[107] The list of exempt assets in Belgium is very similar to the list in Germany, France, and moderately generous U.S. states—basically, household items and tools of the debtor's trade. *See* CJ/GW art. 1408.

[108] The bill as originally proposed would have allowed the judge to derogate from property exemptions, just as it allows derogation from income exemptions. *See* Doc. parl. Chambre no. 1073/10, *supra* note 103, at 10; Doc. parl. Chambre no. 1073/11, *supra* note 1, at 71, 85.

[109] CJ/GW arts. 1675/12 § 4, 1675/13 § 5.

[110] Doc. parl. Chambre no. 1073/1, *supra* note 9, at 43; Doc. parl. Chambre no. 1073/11, *supra* note 1, at 72.

viable and agreeable plan could be created *only* by ceding some exempt income to creditors. The 10-15,000 francs (about €250-€370, $300-$450) per month that separated the income exemption levels from the bare-minimum "existence minimum" (discussed below) constituted the "make or break" investment for many plans.[111]

To appreciate the impact of invading exempt income, one must understand how generous Belgian income exemptions can be, especially after they were substantially increased in 1993.[112] Like the laws of other European states, Belgian law exempts most low-level income and exempts less and less of higher incomes. For 2005, 100% of an individual's monthly income up to €889 (about $1100) is exempt, while 100% of monthly income above €1152 is available to creditors. Income between these two amounts is subject to a sliding scale of protection, ranging from 80% exemption at the bottom to 60% at the top.[113] Thus, every individual is guaranteed a minimum absolutely exempt amount of €10,668 per year (about $13,500). After subtracting the non-exempt portions reserved for creditors, single childless debtors earning at least €1152 per month can shield from creditors only an absolute maximum of €1071 per month (about $16,000 per year). Note, however, that these limits are doubled for two-breadwinner households, and they are increased by €54 per month for each dependent child. So, the income of a double-income household might be 100% exempt up to €21,336 per year (about $26,500), and if they have one or more children, up to €22,000 per year (about $27,500). At least for two-member households in which both members are employed, Belgian law protects quite a pool of income, which legislators felt they had to make available to judges if there was to be any hope of creating viable plans in most cases. Of course, French exemption levels are quite similar, and French legislators have established exempt income as an inviolable budget for debtors since 1999. Time will tell whether the Belgian approach will face the very problems that the 1999 French revision attempted to solve.

Third and finally, rather than using exempt income as the absolutely inviolable floor, as in the French system, Belgian legislators lowered the floor significantly. If judges were to be allowed to derogate from exempt income, the last bastion of human dignity would be the level of income established by the law of 7 August

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[111] *See* Doc. parl. Chambre no. 1073/2, *supra* note 95, at 6; Doc. parl. Chambre no. 1073/10, *supra* note 103, at 8; Doc. parl. Chambre no. 1073/11, *supra* note 1, at 71–72, 85; Doc. parl. Sénat no. 929/5, *supra* note 9, at 12.

[112] *See* Doc. parl. Chambre no. 274/3, *supra* note 9, at 33 (noting the increase per the law of 14 January 1993).

[113] For 2005, 20% of income between €889.01 and €954 is subject to seizure, 30% between €954.01 and €1053, and 40% between €1053.01 and €1152. The Judicial Code makes varying levels of income exempt from either voluntary cession or involuntary seizure, and these levels are amended annually each November by Royal Order to reflect fluctuations in the consumer price index. *See* CJ/GW arts. 1409–12. The levels for 2005 were established by Royal Order of 9 Dec. 2004, M.B. 15 Dec. 2004 (ed. 2), p. 84449.

1974 "instituting the right to a minimum of means of existence."[114] Called the "revenue of [social] integration" since mid-2002, the absolute floor of income that all judicial plans must leave to debtors rises slightly every year,[115] but it remains painfully low. For plans adopted after October 2004, all judicial plans must leave a minimum income of about €7450 per year (about $9300) to singles living alone and about €9950 per year (about $12,500) to most other debtors (including all married couples with any number of children).[116] The "revenue of integration" hardly seems to ensure a life of human dignity for virtually any debtor, but particularly for families with children. In 1999, the year in which the poverty level was last published, the poverty level in Belgium for a couple with two children was €1493 per month—€17,916/yr.—or almost *double* the "revenue of integration."[117]

I searched in vain for any indication of the degree to which judges invade exempt income in forging judicial plans. A 2004 survey of debt-mediators in southern Belgium indicated that 35% of administered cases had involved payments from exempt income—with no indication, however, of the proportion of consensual and judicial plans or of the extent of exempt income used.[118] The mediators who responded to the survey explained that the plans had derogated from income exemptions primarily for two reasons: to enable a viable plan to be negotiated, or to limit the length of a plan. The full results of that survey, reported below, suggest that the Belgian mediators and courts are balancing the demands of creditors and the needs of debtors fairly well so far, but the statute sets quite a low theoretical floor of "human dignity."

3. "*De-responsible-ization"* and Discharge—"Part" or "Most"?

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[114] *See* CJ/GW arts 1675/12 § 4, 1675/13 § 5. The amount of this existence minimum had risen gradually over the years, and it was raised one last time by Royal Order of 24 December 2001, M.B. 29 Dec. 2001, ed. 2, p. 45538, to the level from which it would be continued under a different name—the "revenue of social integration"—pursuant to the law of 26 May 2002 "concerning the right to social integration," art. 14, M.B. 31 July 2002, p. 33610, 33613. The new 2002 "social integration" law abrogated the 1974 "minimum means of existence" law, *see* Law of 26 May 2002, art. 54, M.B. 31 July 2002, p. 33621, but the notion and amount of a minimum income level continues essentially unchanged for the purpose of the consumer debt arrangement law.

[115] *See* Law of 26 May 2002, art. 15, M.B. 31 July 2002, p. 33610, 33613 (tying revenue of integration to consumer price index, base 103.14 as of 1 June 1999). A Royal Order increased the base rates for 2005 and will increase them further for 2006 and 2007. *See* Royal Order of 3 Sept. 2004, arts. 1-2, M.B. 27 Sept. 2004, p. 69308, 69309.

[116] These amounts are not increased if the debtor has more children who represent the third or fourth, etc., member of the family. I arrived at these numbers by increasing the higher base rates in the 3 September 2004 Royal Order by the percent change in the consumer price index from 103.14, the number established as the base index in art. 15 of the 26 May 2002 law on social integration, and calculating the October index, as art. 15 requires, in accordance with the law of 2 August 1971, M.B. 20 Aug. 1971, art. 4, § 1. For future changes in the consumer price index, see the heading "Économie, La conjoncture" on the Belgian statistical agency's website at http://statbel.fgov.be/pub/home_fr.asp?x=14&y=5.

[117] *See* OCE REPORT, *supra* note 61, at 23.

[118] *See id.* at 22.

The question of whether or not to undermine credit contracts and discharge unpaid debts has produced perhaps the deepest divisions in the European debate about what to do for overindebted consumers. The experiences in Belgium and Luxembourg continued this trend. Both of these states' laws accepted the notion that some debtors would be unable to pay off their debts, but both mitigated concerns about discharging unpaid debt through interesting legislative compromises. The law in Luxembourg allows for no discharge *per se*, but Luxembourg's innovative approach to *indirectly* freeing debtors from claims is described below in Part III.A.

In Belgium, concerns about undermining the "security of contracts" and warnings of general "*déresponsabilisation*" of consumers appear immediately and persistently in the legislative history of the new law.[119] The Prime Minister, for example, fought the notion of discharge of capital from the beginning.[120] But as one member of a discussion committee remarked early on, just because *some* consumers might be "de-responsible-ized," that is insufficient reason to deprive *all* debtors of the possibility of relief through discharge. In addition, early comparative observers pointed out that the absence of a judicial discharge in the French law had reduced the effectiveness of that system.[121] The government ultimately relented, acknowledging that there could be no room for argument about "de-responsible-ization" in light of the strict conditions of a judicial payment plan with discharge.[122] After all, even opponents of discharge pointed out that remission already occurs de facto, as creditors commonly write off bad debts when they realize that legal restrictions make collection impossible or impractical.[123]

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[119] *See, e.g.,* Doc. parl. Chambre no. 274/3, *supra* note 9, at 41–42, 50 (warning of a movement into a "culture of overindebtedness," noting that the "American example is striking in this regard," and explaining that U.S. law is designed to encourage risk-taking, which is unjustifiable in the context of a household economy); Doc. parl. Chambre no. 1073/11, *supra* note 1, at 9, 15–16, 20, 77. The notion of "de-responsible-ization"—and the French word—appear in the legislative record in Luxembourg, as well. *See* Doc. parl. no. 3813, Débat, *supra* note 9, at 217; Doc. parl. no. 4409, *supra* note 11, at 11 (commentary on art. 5).

[120] *See, e.g.,* Doc. parl. Chambre no. 274/3, *supra* note 9, at 122–23, 140 (citing the U.S. example and warning of *déresponsabilisation*). The finance ministry in particular opposed categorically *any* forced remission of debts to the public fisc, citing art. 172 of Belgian Constitution, which establishes that only a law can moderate a tax obligations, not a judicial plan or order. *See* Doc. parl. Chambre no. 274/3, *supra* note 9, at 71–72. The Prime Minister consistently rejected this notion, *see id.* at 121. In the first few years of the new law, the fisc and the social security administration undermined the consensual system by systematically refusing to agree to any sort of remission of debt. *See, e.g.,* Doc. parl. Chambre no. 1285/006, *supra* note 77, at 5–7, 14–17. Internal guidelines forbid state agencies to consent to any sort of discharge plan with debtors. *See id.* at 15. The latest reform proposal expressly allows state creditors to agree to a remission, thus attempting to fix this problem. *See Doc. parl*. Chambre (2003-2004) no. 1309/001, pp. 16–17, 53–54, *available at* http://www.lachambre.be/FLWB/pdf/51/1309/51K1309001.pdf.

[121] *See* Doc. parl. Chambre no. 274/3, *supra* note 9, at 56–57, 123. As noted above, the French law now provides for a judicially imposed remission (discharge) of debt in certain cases.

[122] *See* Doc. parl. Chambre no. 1073/1, *supra* note 9, at 44–45; *cf.* Doc. parl. Chambre no. 1073/11, *supra* note 1, at 78.

[123] *See* Doc. parl. Chambre no. 274/3, *supra* note 9, at 17.

This reticence about allowing discharge was never fully overcome, however. Though willing to accept the notion of a discharge of debt, legislators insisted that it be limited to extreme cases of last resort.[124] And just like their French and German counterparts, Belgian lawmakers fiercely rejected the U.S. notion of an immediate discharge and the undermining effect they perceived it as having on consumer responsibility. Legislators insisted that "[i]n no case will the remission [discharge] of debts be unconditional. In all cases, the advantages that it procures will only be able to be acquired if the debtor respects the plan of arrangement."[125]

Indeed, discharge is conditioned not only on the debtor's fulfilling a payment plan, but on the debtor's material situation not "returning to better fortune" before the end of the plan term.[126] One legislator warned that this vague notion of "return to better fortune" should be clarified in the statute to avoid the vicissitudes of varying jurisprudence,[127] but this warning went unheeded. The government explained that this language was intended to deny a discharge only to debtors who had enjoyed a "fundamental" windfall, such as winning the lottery or receiving a large inheritance; *i.e.*, a fortunate event that allowed the debtor to pay off *all* of her remaining debts *quickly*. So long as the debtor's material situation had not enjoyed such a "serious amelioration" within the plan period, the government explained, the discharge should be allowed.[128]

Moreover, the law as current written seems to allow the judge to order only a *partial* discharge—not a *total* discharge.[129] Immediately questions arose about those debtors whose meager income would allow for no substantial repayment of debt. Would these debtors remain forever encumbered by the portion of their debts remaining after a "partial" discharge? The government's response remained consistent and unambiguous: In such extreme situations, the judge should order a "quasi-total discharge," such as a "partial" discharge leaving only a nominal debt, like one franc. In such cases, the plan would retain only a "symbolic character," with the debtor simply demonstrating worthiness for discharge by living under the plan conditions and furnishing an *effort* to pay her debts.[130] The government insisted

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[124] *See, e.g.,* Doc. parl. Chambre no. 1073/11, *supra* note 1, at 15.

[125] Doc. parl. Chambre no. 274/3, *supra* note 9, at 96.

[126] *See* CJ/GW art. 1675/13 § 1.

[127] *See* Doc. parl. Chambre no. 1073/11, *supra* note 1, at 15.

[128] *See* Doc. parl. Chambre no. 274/3, *supra* note 9, at 123; Doc. parl. Chambre no. 1073/1, *supra* note 9, at 46; Doc. parl. Chambre no. 1073/11, *supra* note 1, at 75–76.

[129] *See* CJ/GW art. 1675/13 § 1 ("[T]he judge may order any other *partial* remission of debts, even in capital, on the following conditions . . . .") (emphasis added). In the very first proposals, total discharge was envisioned for "the most inextricable cases of overindebtedness." *See* Doc. parl. Chambre no. 274/3, *supra* note 9, at 96–97. But the 1996 government bill that ultimately became the final law mentions only partial discharge—offering no explanation of where the total discharge language went, even though the government's discussion of the bill continued to mention total discharge. *Compare* Doc. parl. Chambre no. 1073/1, *supra* note 9, at 11 (total or partial remission) *with id.* at 103 (setting out new art. 1675/13, which now allowed only partial discharge) *and* Doc. parl. Chambre no. 1073/11, *supra* note 1, at 6 (still mentioning total discharge late in the discussion of the bill).

[130] *See* Doc. parl. Chambre no. 1073/1, *supra* note 9, at 44.

that "*it goes without saying* that, at the conclusion of a plan containing the measures provided in article 1675/13 [the capital-discharge provision], the debtor will *no longer be held to the payment of his debts*. At the conclusion of this plan, the debtor is *incontestably* liberated from his debts . . . ."[131]

Apparently, the lower courts disagreed with the government, but the Belgian constitutional court finally settled the issue in line with the government's assurances of the availability of "quasi-total" discharges. Many courts instituted a minimum required payout for debtors to be eligible for a capital-discharge plan, and debtors unable to make the required minimum payment were thus unable to seek effective relief under the new law.[132] In April 2003, the Belgian constitutional court (the Court of Arbitration)[133] held that limiting relief to those debtors who could pay a substantial portion of their debt violated the equality provisions of the Belgian Constitution. The Court held that insufficient income could not justify refusing to construct a plan that would ultimately discharge *all* of the debtor's pre-petition debt—despite the language of the law authorizing only "partial" discharge.[134] The Court thus essentially read the word "partial" out the law. It relied instead on the government's insistence in the legislative history about the possibility of "quasi-total" discharges.[135]

D. Initial Experience With Consensual and Judicial Plans: A Pan-European Trend

Limited statistics describe the first six years of consumer "bankruptcy" practice in Belgium and three years in Luxembourg. Though these statistics offer insufficient foundation for "hard" conclusions, the experience of Belgium and Luxembourg seems to have continued the general European trend toward more generous treatment of debtors in terms of both budget and relief. Consensual plans

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[131] *See* Doc. parl. Sénat no. 929/5, s*upra* note 9, at 46–47 (emphasis added).

[132] *See, e.g.,* http://www.dignitas.be/fr/le_regelement_collectif.php. This same "local legal culture" problem has plagued U.S. practice under chapter 13 of the Bankruptcy Code for years. *See* Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 532, 546–47, 550–51 (1993) (revealing that the Bankruptcy Court in San Antonio, TX, required chapter 13 plans to offer 100% payment to creditors, but in Austin, TX, only 25-33%, in Cincinnati, OH, 70%, but in Dayton, OH, only 10%).

[133] *See* http://www.arbitrage.be/fr/presentation/presentation_institutions.html.

[134] *See* Order No. 38/2003 (Apr. 3, 2003), *available at* http://www.arbitrage.be/public/f/2003/2003-038f.pdf.

[135] *See* CJ/GW art. 1675/12 § 3. On April 5, 2003—two days after the Court released its decision—the Belgian government initiated discussion of a reform proposal to amend the law to allow for total discharge, but the proposal stands firm on requiring even totally impecunious debtor to undergo a three-year minimum plan. *See Doc. parl*. Chambre no. 1309/001, *supra* note 120, at 19–21, 53–54; Compte Rendu Intégral, Commissions, No. 030, at 4 (Oct. 21, 2003), *available at* http://www.lachambre.be/doc/CCRI/pdf/51/ic030.pdf. Belgian lawmakers have consistently rejected proposals to eliminate this "purely symbolic" waiting period for debtors with no disposable income. *See, e.g., Doc parl.* Chambre (2003-2004) no. 199/001, pp. 15-16, *available at* http://www.lachambre.be/FLWB/pdf/51/0199/51K0199001.pdf. The government deposited its pending reform bill before the House on July 28, 2004.

continue to emerge from the majority of administered cases, and unfortunately little data exist on the content of these plans. The few available indicators suggest that plans in Belgium are allocating meager but sufficient budgets to debtors, although many stretch out over far more years than debtors are likely able to bear. Many plans in Luxembourg , in contrast, are ending successfully long before the statutory seven-year maximum term. As for the "ultimate relief," the "French" courts of southern Belgium seem even more willing than their counterparts in France to impose a discharge, though I could find no reports from the "Dutch" courts of northern Belgium. Though the law in Luxembourg provides for no "official" discharge, Part III.A. reveals how debtors there are achieving the functional equivalent.

1. Belgium: Rising Filings, Long Waits, and Moderately Demanding Plans

A general dearth of statistical data in all areas has been described derisively as a "tradition" in Belgium.[136] Luckily, the National Bank of Belgium is in charge of the national consumer credit reporting database, which includes data on all consumer "bankruptcy" filings.[137] The Bank reports only aggregate data, offering no information on, for example, the specific content of consensual or judicial plans or the proportion of judicial plans with and without a capital discharge. The Bank's latest report[138] does indicate three important statistical trends:

First, formal requests for relief have risen by about 1000 in almost every year since implementation of the new law six years ago. At just over 8000 in 2003 and just over 9250 in 2004, though, filings remain quite modest—about 9 filings per 10,000 residents.[139] This hardly compares with the over 1.6 million non-business filings in the U.S. in 2003—about 55 filings per 10,000 U.S. residents—or even the 166,000 consumer filings in 2003 in France—about 27 filings per 10,000 residents of France.[140] Of course, returning to where this paper began, debt levels in Belgium are, on average, quite low.

A shift in the makeup of the consumer debt portfolio in Belgium, however, may herald a coming upswing in filings. From 2000 to 2004, the total number of consumer installment loans (mainly from banks) in default fell 14.5% from 235,846 to 201,693, while the number of defaults on consumer "lines of credit" (*ouvertures*

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[136] *See, e.g., Doc. parl*. Chambre no. 1073/11, *supra* note 1, at 19.

[137] *See* http://www.nbb.be/pub/06_00_00_00_00/06_06_00_00_00/06_06_01_00_00.htm?l=en&t=ho.

[138] *See* BANQUE NATIONAL DE BELGIQUE, CENTRALE DES CRÉDITS AUX PARTICULIERS, STATISTIQUES (2005), *available at* http://www.nbb.be/doc/cr/Publications/BROCKPSTAT2005_06F.pdf [hereinafter NBB STATISTICS].

[139] *See id*. at 31 tbl.2.4.2; CIA, THE WORLD FACT BOOK, *available at* http://www.cia.gov/cia/publications/factbook/geos/be.html (estimating total population in Belgium as of July 2005 at 10,364,388).

[140] *See* Kilborn, *supra* note 12. According to the CIA World Factbook, the age structure (and hence the likely population of adult debtors) of each of these three countries is comparable, with about four-fifths of the population over age 14.

de crédit/kredietopeningen)—the equivalent of a revolving credit card account, mainly offered by non-banks—rose 33.4% from 150,604 to 200,908. At the end of 2004, over 3 million of these "lines of credit" had been opened, with a total available limit of over 8 billion Euros, while only 1.4 million installment loans remained outstanding with a total loan amount of just over 18 billion Euros.[141] While installment loans generally will be retired by the expiration of a relatively short fixed term, "lines of credit" remain open indefinitely. Moreover, unlike in the installment loan application process, the consumer's creditworthiness is not scrutinized upon each draw on one of these "lines of credit." Thus, Belgian consumers seem to be moving toward potentially uncontrolled and perpetual indebtedness through a device that has seen a marked rise in defaults over the past several years and has contributed so famously to the "culture of consumption" and excessive debt in the U.S.

Second, a very large proportion of Belgian cases seem to be delayed for years after the decision of admissibility, or they are falling off the radar entirely. From entry into force of the new law on January 1, 1999, to the end of 2004, a total of 41,207 cases had been deemed admissible by the court and registered in the Bank's consumer credit database.[142] Of these, only 16,918—only 41%— had concluded with a consensual or judicial plan by the end of 2004.[143] Thus, in just under 60% of cases, either the debtors are abandoning the process or the mediators and courts are delaying the cases for extended periods.[144] The courts appear to bear much of the blame for these delays. Some courts have reportedly returned cases to the failed consensual stage multiple times (which the law does not seem to permit) or continued the judicial plan proceedings for up to 3 years.[145] To the courts' credit, the proportion of total cases admitted in each year to the number of confirmed consensual or judicial plans grew steadily in every year but 2004. In 1999, only about 8% of the 4542 cases admitted that year concluded with a plan of one sort or another,[146] but that percentage grew steadily to almost 52% in 2003 before falling back to 47% in 2004.[147] The large backlog of cases admitted in previous years appears to account for most of the plans executed in later years, but at least the numbers of initial "successes" are rising.

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[141] *See* NBB STATISTICS, *supra* note 138, at 11–12, 18.

[142] I could find no statistics at all on the rate of rejection (orders of inadmissibility) of consumer cases, but I suspect the rate is very low, like in France, no more than 10%, and probably much lower.

[143] *See* NBB STATISTICS, *supra* note 138, at 31 tbl.2.4.1, 32.

[144] Recall that the statutory maximum delay at the consensual stage is 4 months. *See* CJ/GW art. 1675/11 § 1.

[145] *See* OCE REPORT, *supra* note 61, at 20, 33 (reporting delays in some cases of 1 to 2 years between filing and implementation of a plan); BERTEL DE GROOTE, ACTUELE VRAAGSTUKKEN BRETREFFENDE DE COLLECTIEVE SCHULDENREGELING § 7 (2004).

[146] For 1999 figures, *see* BANQUE NATIONAL DE BELGIQUE, CENTRALE DES CRÉDITS AUX PARTICULIERS, STATISTIQUES 32-33 & tbls.3.4.1, 3.4.2 (2004) [hereinafter NBB 1999 STATISTICS].

[147] *See* NBB STATISTICS, *supra* note 138, at 31 tbl.2.4.2.

Third, legislators correctly predicted that Belgian creditors would agree to consensual plans for fear of smaller returns in judicial plans. Continuing the trend in France, consensual plans represent approximately 70% of all plans confirmed in Belgium in the first six years of the new law.[148] Due to the delays described above, however, as a percentage of total admitted cases, the numbers are less impressive. Of the 41,207 total cases admitted from 1999 to 2004, 11,739 (28.5%) have concluded with a confirmed consensual plan.[149] This percentage is pulled down by early delays, though, and the rate of conclusion of consensual plans has risen steadily over the past five years. In 1999, only 5.8% of the cases admitted that year concluded with a consensual plan, but that proportion jumped to 22% in 2000 and climbed steadily to 34.8% in 2003 before falling slightly to 33.8% in 2004. The intermediation of the central bank was not apparently necessary, as it was in France, to spur Belgian creditors into accepting consensual plans, but as discussed below, a substantial number of these consensual plans may be destined for failure.

These aggregate statistics offer some interesting information, but the most significant question remains unanswered: How will these plans perform? Unfortunately, the national data offer no information on the content of these plans or the extent to which the courts are or are not preserving "human dignity" with plans that demand more sacrifice than debtors can reasonably bear. Getting a consensual or judicial plan in place is only the first step—the debtor has to *live* under the plan for many years to receive the needed relief. Real "success" cannot be declared when plans are *confirmed,* but only when the plans are *completed*. One clear trend in Europe is the lack of follow-up on confirmed plans. We need to know how the plans are doing to gauge whether the system is really effective or not, and very little data is gathered to measure this.

What little evidence one can find in public sources suggests that the initial "success" represented by the high percentage of confirmed *consensual* plans may well lead to a future of troubling failure. For example, the private Observatory of Credit and Indebtedness conducted an admittedly "unscientific" survey in May and June 2004 of 40 debt-mediators in the southern, French half of Belgium and the Brussels region.[150] The survey results indicated that the average duration of consensual plans was just under 82 months (6 years, 10 months)—well over the five years prescribed for judicial plans.[151] In an October 2001 letter to the Belgian House

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[148] *See* NBB 1999 STATISTICS, *supra* note 146, at 33 & tbl.3.4.2; NBB STATISTICS, *supra* note 138, at 31 tbl.2.4.2.

[149] *See* NBB STATISTICS, *supra* note 138, at 30, 31 tbl.2.4.2.

[150] Although the sample focused only on the French-speaking southern part of Belgium, the results of this survey are likely relatively representative. Of the total admitted cases and confirmed consensual and judicial plans, just short of half in every category come from regions in Wallonia and Brussels (the area surveyed). *See* NBB STATISTICS, *supra* note 138, at 30 tbl.2.4.1. Unfortunately, the few Dutch websites of debt counseling agencies and consumer centers in Flanders, such as the Vereniging van Vlaamse Steden en Gemeenten (http://www.vvsg.be/index.shtml), Steunpunt Algemeen Welzijnswerk (http://www.caw.be/), and Verbrauchersatelje (http://www.verbruikersateljee.be), offer no statistical information at all.

[151] *See* OCE REPORT, *supra* note 61, at 22.

of Representatives, one judge from Flanders reported that very often, consumers in his area are able to pay only 2-3000 francs per month (about €50-€75, $60-$90) on substantial debts, so the repayment period in consensual plans is often "markedly longer" than the five-year limit for judicial plans. He remarked that in "innumerable" cases the debtors were willing to enter into plans for ten years or more.[152]

Similarly, in a reform proposal submitted to the House in late 2003 (and subsequently stalled in committee), two Belgian legislators complained that the consumer debt relief system had failed "far too often" due to consensual plans that stretched over as many as fifteen years, or plans that allocated a budget to debtors in some cases as small as €210 for 2 weeks for a household with two children—far less than would be *guaranteed* to debtors in a judicial plan.[153] If "human dignity" is defined in terms of exempt income and the "revenue of inclusion" for judicial plans, why not apply the same minimal baselines to consensual plans? Some unrepresented debtors, desperate for any relief available, are apparently agreeing to unworkable plans at the consensual stage. Just as it did in France, this will undoubtedly pose problems for the ultimate effectiveness of the Belgian system.

As for *judicial* plans, the Observatory survey indicates that judicial plans offering a capital discharge outnumber those not offering a discharge three to one.[154] This makes sense, given that the consensual plan stage is likely to dispose of most cases in which no discharge is needed. Unfortunately, the survey does not indicate what percentage of debts were slated for discharge in judicial plans on average and under what conditions.

For all types of plans, the Observatory survey suggests that, in the aggregate, mediators and courts are allocating tight but relatively livable budgets to most debtors. The survey results reflect that Belgian couples with multiple children, however, fall into the same sort of "two-income trap" as their U.S. counterparts.[155] The average allocation for parents with two or more children lies several hundred Euros per year below the most recently reported official poverty level.[156] Childless singles and couples seem to receive marginally adequate budgets, but as children are introduced into the equation, the numbers don't seem to add up to much "human dignity."

Budget allocations varied significantly among debt-mediators, but those surveyed reported that the average monthly amounts left to debtors and paid to creditors in plans in early 2004 were as follows:[157]

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[152] *See Doc parl.* Chambre no. 1285/006, *supra* note 77, at 14–15.
[153] *See Doc parl.* Chambre no. 199/001, *supra* note 135, at 4–5, 10–11.
[154] *See* OCE REPORT, *supra* note 61, at 22.
[155] *See* ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE (Basic Books 2003).
[156] *See supra* note 117 and accompanying text.
[157] *See* OCE REPORT, *supra* note 61, at 23.

	Monthly Budget Left to Debtor(s)	**Monthly Payment to Creditors**	**Monthly Budget X 12 (yearly budget, for comparison)**	**2005 "Revenue of Inclusion" (minimum for judicial plan, for comparison)**
Single debtors	€945	€210	€11,340 (≈ $14,000)	€7450 per year
Single debtors with dependent	€1139	€141	€13,668 (≈ $17,000)	€9950 per year
Adult cohabitants	€1321	€370	€15,852 (≈ $20,000)	€9950 per year
Cohabitants w/ one dependent	€1533	€494	€18,396 (≈ $23,000)	€9950 per year
Cohabitants with 2+	€1444	€225	€17,328 (≈ $21,500)	€9950 per year

By way of rough contrast, the 2004 annual poverty thresholds for similarly situated debtors in the United States were approximately as follows: singles—$9800; single parents—$13,000; childless couples—$12,650; couples with one and two children—$15,200 and $19,150.[158] Thus, on average, all of these groups other than couples with multiple children seem able to support a very modest but not threadbare lifestyle on budgets $4000-$8000 above U.S. poverty thresholds.

2. Luxembourg: Informal Debt Counseling Success, Few Formal Cases

In its first few years, the new overindebtedness law in Luxembourg has barely been implemented. Only a few cases have made it to the formal overindebtedness system. The Services seem to be continuing quite successfully their previous mission of offering budgetary advice and brokering informal arrangements with creditors. This may change in the near future, as the government has recently suggested that the time has come for a modification of the new system, in part to allow for a formal "personal bankruptcy" system focused more on discharging debt than on reconciling creditors and debtors to repayment plans.[159] This would mark a

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[158] *See* UNITED STATES CENSUS BUREAU, POVERTY THRESHOLDS 2004, *available at* http://www.census.gov/hhes/poverty/threshld/thresh04.html.

[159] *See* MINISTÈRE DE LA FAMILLE ET DE L'INTÉGERATION, RAPPORT D'ACTIVITÉ 2004, § III.1 at 127, *available at* http://www.gouvernement.lu/publications/informations_gouvernementales/rapports_activite/rapports_activite_2004/famille/famille.pdf [hereinafter, MINFAM REPORT 2004]

significant departure from past policy. Time will tell whether sufficient political will and social change support a radical new "bankruptcy" policy in Luxembourg.

The first official petition for admission to the new procedure was filed with one of the two Services in late November 2001, and the first proposed plan was submitted to the Mediation Commission in late February 2002. In all of 2002 and 2003, however, the Services initiated formal overindebtedness proceedings and submitted plans to the Commission in only 42 cases. During this same period, the Services had opened 557 debt consultation files.[160] In 2004, the Services opened 205 new debt counseling files, but they presented only six new cases to the Commission.[161] Thus, the percentage of cases of financial distress making their way into the formal relief process has fallen from about 7.5% in 2002 and 2003 to less than 3% in 2004. Apparently, most of these cases are handled informally and conclude with some form of voluntary, Service-brokered arrangement, just as the Services had been doing since the early 1990s.

The Commission, in contrast, seems to be enjoying less and less success in achieving agreements. Of the 31 cases submitted to it in 2002, 18 (58%) resulted in consensual payment plans, but plans emerged in only 4 of 11 (36%) cases in 2003 and in only one of six (17%) in 2004. Most of the remaining cases passed through the Commission to the judicial stage, for which I could find no information.[162]

Unfortunately, I found no clear reports on the duration or content of any consensual or judicial plan, or even on the total number of confirmed judicial plans. One indirect indication of the content of some of these plans is the rising number of early completions. The first two plans, executed in 2002, had already concluded by 2003. One ended because the entire debt had been paid off, and the other because only one creditor remained, and the debtor had worked out a side arrangement with

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[160] *See* LIGUE LUXEMBOURGEOISE DE PRÉVENTION ET D'ACTION MEDICO-SOCIALES, RAPPORT D'ACTIVITÉ 2001, § 3.4 at 72, *available at* http://www.ligue.lu/pictures/download/rapport_2001_innet.pdf; MINISTÈRE DE LA FAMILLE, DE LA SOLIDARITÉ SOCIALE ET DE LA JEUNESSE, RAPPORT D'ACTIVITÉ 2001, § 3.9(II) at 117, *available at* http://www.gouvernement.lu/publications/informations_gouvernementales/rapports_activite/rapports2001/2001ra_fam/fami.pdf; MINISTÈRE DE LA FAMILLE, DE LA SOLIDARITÉ SOCIALE ET DE LA JEUNESSE, RAPPORT D'ACTIVITÉ 2002, § 3.5(2) at 108–09, *available at* http://www.gouvernement.lu/publications/informations_gouvernementales/rapports_activite/rapports2002/2002ra_famille/Famille_2002.pdf [hereinafter, MINFAM REPORT 2002]; Question parlementaire no. 2268, Réponse, p. 2, *available at* http://www.chd.lu/servlet/Merge?lot=Q-2002-O-E-2268&lib=chdl; MINISTÈRE DE LA FAMILLE, DE LA SOLIDARITÉ SOCIALE ET DE LA JEUNESSE, RAPPORT D'ACTIVITÉ 2003, § 3.5(II) at 108-10, *available at* http://www.gouvernement.lu/publications/informations_gouvernementales/rapports_activite/rapportactivite_2003/2003_rapp_Famille/2003_rapp_Famille.pdf [hereinafter, MINFAM REPORT 2003].

[161] *See* MINFAM REPORT 2004, *supra* note 159, § III.2.2 at 132–33.

[162] Some of these cases are abandoned by the debtor after the "consensual" stage before the Commission. In 2002, 5 of 31 (16%) ended unsuccessfully at this first stage, and in 2003, 1 of the 11 formal cases ended at the consensual stage. *See supra* sources cited in note 160. Sometimes debtors abandon their cases even after initiating the judicial stage. *See* LIGUE LUXEMBOURGEOISE DE PRÉVENTION ET D'ACTION MEDICO-SOCIALES, RAPPORT D'ACTIVITÉ 2002, § 1.2.2 at 49, *available at* http://www.ligue.lu/pictures/download/rapport_2002_innet.pdf.

that creditor.[163] Similarly, two more plans (one each from 2002 and 2003) concluded with a full payoff of debt in 2004, and two more from 2002 were scheduled to conclude in January 2005.[164] Thus, five of the 18 plans from 2002 (28%) concluded successfully in three years or less, and one of the four 2003 plans concluded in less than two years. With one-quarter of these plans ending in such a short time, perhaps a significant portion of the remaining plans will conclude in the near future, as well.

III. CREATIVE TWISTS—INNOVATION

Diverging radically from existing models, including the law in France, the new laws in both Belgium and Luxembourg have made innovative use of special funds specifically designed to support the process of relieving overindebtedness. The source of financing for these funds and their function within the two systems differ, but the notion of setting up a financing device as part of the system is an intriguing one that deserves a brief exploration. Part III.A describes how the fund in Luxembourg facilitates the only significant discharge allowed in that system. Parts III.B and III.C reveal how the Belgian fund focuses on *creditor* responsibility by reallocating to lenders part of the costs of treating and even preventing overindebtedness. This brilliantly surprising innovation deserves serious consideration, both by legislators considering new systems and by those evaluating current systems.

A. Creditor Welfare Instead of Debtor Discharge in Luxembourg

As noted above, unlike similar European laws, the overindebtedness law in Luxembourg does not allow for judicially imposed discharge of most types of debt. Nonetheless, the law does provide for a potential *indirect* discharge in certain cases in two unusual ways, one of which has helped several debtors already.

First, the law created a state-financed "Fund for Recovery in Matters of Overindebtedness" to offer consolidation loans to debtors, and these loans ultimately can be forgiven. The original bill proposed the creation of a fund to make small loans to debtors to kick-start the plan process. The experience of debt counselors had suggested that the path to consensual and judicial plans might be eased if debtors could pay off small debts immediately or offer partial payments to creditors to entice them to agree to a partial discharge.[165] The Ministry of Families manages the Fund, which is financed primarily from the state budget.[166]

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[163] *See* MINFAM REPORT 2003, *supra* note 160, at 109.
[164] *See* MINFAM REPORT 2004, *supra* note 159, at 132.
[165] *See* Doc. parl. no. 4409, *supra* note 11, at 4, 9–10, 17 (arts. 31-37 and commentary on arts. 31-37).
[166] *See* Law of 8 Dec. 2000, arts. 23–24, *as amended by* Law of 21 Dec. 2001, art. 41, Mém. A, no. 148, 27 Dec. 2001, p. 2999, 3016–17 (requiring repayments from prior loans to go back into the Fund).

On the initiative of the Mediation Commission or the court, the Fund manager can offer debtors "consolidation loans" at the judicial interest rate up to a statutory maximum amount, which is indexed for changes in the consumer price index. Only relatively small, "seed money" loans are envisioned from this Fund. The current maximum loan is approximately €11,625.[167] These loans are supposed to be repaid over no more than 7 years (*i.e.*, the life of a plan), but the Fund manager can follow the Commission's or the court's recommendation to alter the terms of the loan in a number of ways, ranging from reducing or suppressing interest to transforming the "loan" into a non-recourse grant.[168]

The Fund manger's discretion to forgive these loans represents the first type of "mini-discharge" in Luxembourg. The state essentially buys certain creditors' claims, to a statutorily limited degree, and the state can then offer the consensual discharge that these creditors refused to offer. For all the concern expressed about "de-responsible-izing" debtors by offering relief from debt, this system of state-funded "creditor welfare" seems like an open invitation to creditor recalcitrance in the consensual plan process. Hold out long enough, and the Commission might recommend that the state essentially buy certain creditors' claims. Given the continuously high rate of conclusion of informal arrangements and consensual plan in Luxembourg, though, creditors do not yet seem to be responding to this perverse incentive.

So far, the Fund has offered loans to a significant percentage of the few debtors in the formal system, and several loans have already been forgiven. The Fund made four loans for a total of €10,491.36 in 2002,[169] one loan of €5802.48 in 2003, and two more totaling €7392.33 in 2004.[170] The Families Ministry reported that three of the four debtors receiving loans in 2002 began repayment in 2003, which seems to suggest that the fourth loan was forgiven.[171] More recently, the Ministry reported definitively that the remaining € 3574.59 of three other loans was forgiven in 2004.[172] Thus, although the law does not appear to offer consumers a discharge, the Fund has offered several debtors the equivalent of at least a partial state-financed discharge.

The second type of discharge-like measure in Luxembourg is similar to the first, but more far-reaching—and thus more exceptional still. Concerned about the plight of debtors with no ability to pay anything to their creditors, the Families Ministry

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[167] *See* Law of 8 Dec. 2000, art. 26. The current amount results from applying the permanent conversion rate of 40.3399 Luxembourguish Francs per Euro, *see* http://www.oanda.com/site/euro.shtml, to the 70,000 franc limit in article 26, increased by the change in the "cost of life" index (consumer price index) between Jan. 1, 1948, and Jan. 1, 2005, about +670%. *See* http://www.statistiques.public.lu/stat/tableviewer/document.aspx?FileId=507.

[168] *See* Law of 8 Dec. 2000, art. 26.

[169] *See* MINFAM REPORT 2002, *supra* note 160, at 112.

[170] *See* MINFAM REPORT 2004, *supra* note 159, at 136.

[171] *See* MINFAM REPORT 2003, *supra* note 160, at 114.

[172] *See* MINFAM REPORT 2004, *supra* note 159, at 136.

inserted a provision near the end of parliamentary debate that allows the Fund in "exceptional cases" to pay off all or a part of the debt remaining after the debtor has completed a 7-year plan. This is the only element of the law that the record describes as being equivalent to the U.S. notion of a "fresh start" (actually using the English phrase, along with its German version, *"Restschuldbefreiung"*).[173]

Of course, this exceptional possibility is riddled with provisos. First, such a state-funded discharge is available only for debtors whose financial situation is "permanently compromised," whose "manifest insolvency" has made paying off all debts impossible over the life of a 7-year plan, and whose assets, if liquidated, at the conclusion of the plan would be insufficient to retire any "significant" part of her debts. Second, this second "discharge-like" procedure is not available to cover alimentary debts, debts to the public fisc, or any debts due to "professionals of the financial sector," which leads one to wonder how often this procedure will be able to provide any effective relief. Finally, the debtor can obtain only one such debt repayment every 10 years.[174] The first plans for which such a state-funded "discharge" might be available would conclude no earlier than spring 2009, so it remains to be seen how the Commission and courts will interpret the ambiguous requirements of this relief. Given the strict limitations, it appears as though this procedure will apply to very few debtors and offer very little relief.

B. Quid Pro Quo From Belgian Lenders, Too

The Belgian law also establishes a fund, but its financing and operation differ substantially from that of the fund in Luxembourg. Just as European legislators fear that new debt relief systems will undermine responsible borrowing by consumers, many are similarly concerned about a lack of responsibility among lenders in the 21st century consumer credit free-for-all. In most of these new systems, central consumer credit history databases play a key role in encouraging and facilitating responsible lending in the eyes of European lawmakers.[175] But the Belgian system has taken one more innovative step to redirect the consequences of lax consumer lending practices back onto the lenders themselves.

Very early on in the consideration of consumer debt relief, Belgian legislators proposed a fund to defray some of the costs of consumer overindebtedness proceedings. Generally, the debt-mediator's fees are chargeable to the debtor and paid in priority to all other debts through the payment plan.[176] This fund would cover the mediator's fees in cases in which the debtors were unable to pay those fees in full.[177] The government failed to include any such fund in the 1996 bill that

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[173] *See* Doc. parl. no. 4409/08, *supra* note 87, at 3; Doc. parl. no. 4409/11, *supra* note 10, at 18.
[174] *See* Law of 8 Dec. 2000, art. 26.
[175] *See, e.g.,* Law of 5 July 1998, art. 19, M.B. 31 July 1998, p. 24613, 24621.
[176] *See* CJ/GW art. 1675/19.
[177] *See* Doc. parl. Chambre no. 274/3, *supra* note 8, at 2, 64, 122, 129.

would become the final law, but legislators quickly inserted provisions for such a fund with very little discussion and virtually no opposition.[178]

Unlike the consolidation loan fund in Luxembourg, however, the Belgian fund is financed by a kind of tax on consumer lenders. Responding to fears about hampering access for low-income debtors forced to bear the costs of the mediator, legislators reasoned that shifting these costs to the highly lucrative and extremely large and growing consumer credit market was a small price to pay for the salve that mollifies the pain caused by this market.[179] "It is normal," one legislator opined, "that the costs tied to the treatment of overindebtedness should be, in part at least, incorporated into the cost of credit."[180]

Consistent with this "cost of doing business" rationale, all consumer lenders (both for consumption and housing) were originally to pay into the fund, but this aspect of the new system fell under attack within a month after entry into force of the new law. A number of professional consumer credit entities challenged this new "tax," arguing that singling them out from among all types of claimants in consumer cases violated the equality principle of the Belgian Constitution. In February 2000, the Belgian constitutional court rejected this challenge.[181] The Court of Arbitration held that the Constitution allowed the legislature to draw rational, objective distinctions among potential consumer creditors. It agreed with the legislature that singling out professional lenders to bear the burden of financing part of the consumer debt relief system was quite sensible. The legislative record pointed out that debts to consumer *lenders* were present and substantial in *all* cases of consumer overindebtedness, whereas debts to utilities, the state, and other potential claimants were not. Moreover, the water and energy utilities are also singled out to pay into similar, separate funds administered by the three Belgian regions, which help to defray the cost of utilities for low-income residents.[182]

Consumer lenders had lost in the courts, but they ultimately won in the legislature. Implementation of the new "Fund for the Treatment of Overindebtedness" was suspended pending resolution of this legal challenge, and legislators modified the fund provisions in the meantime. After two years of reflection, the government decided that it would be more equitable to concentrate the burden of the "taxes" to be paid into the Fund on lenders with a more direct

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[178] *See, e.g.*, Doc. parl. Chambre no. 1073/2, *supra* note 94, at 8; *Doc. parl* Chambre no. 1073/10, *supra* note 102, at 3-6; Doc. parl. Chambre no. 1073/11, *supra* note 1, at 124–25, 130; Law of 5 July 1998, art. 20, M.B. 31 July 1998, p. 24613, 24622.

[179] *See* Doc. parl. Chambre no. 1073/2, *supra* note 94, at 9; Doc. parl. Chambre no. 1073/11, *supra* note 1, at 10.

[180] *See* Doc. parl. Chambre no. 1073/10, *supra* note 102, at 5.

[181] *See* Order No. 22/2000 of Feb. 23, 2000, *available at* http://www.arbitrage.be/public/f/2000/2000-022f.pdf.

[182] *See also* Doc. parl. Chambre no 1073/11, *supra* note 1, at 124–25; Doc. parl. Sénat no. 929/5, *supra* note 8, at 18; OCE REPORT, *supra* note 60, at 25–26.

connection to—indeed, more direct responsibility for—the consumer debt relief system.

Now, the "tax" to be paid into the Fund is assessed only on that portion of the total consumer lending portfolio *in default* as of the end of each year.[183] Lawmakers explicitly aimed to "responsible-ize" overly aggressive or lax lenders by diverting to them part of the costs of relieving the pain of excessive debt—bringing home the consequences of these lenders' unrestrained risk-taking (even more than losses on defaulted loans already did). Conversely, this modification was designed to reward and encourage responsible lenders who analyze the solvency of their consumer borrowers more carefully and reduce the level of default in their loan portfolios.[184] One suspects that lenders will soon develop creative ways of accounting for defaulted consumer loans to avoid the imposition of this tax, but the idea of this fund is intriguing. What better way to target one of the supposed primary contributors to consumer overindebtedness where it will get their attention the most—their bottom line.

With this concentration of the "tax base," the tax rate consequently increased substantially. It was originally limited to a maximum of 0.005% of all consumer mortgage loans and 0.025% of all non-mortgage consumer loans outstanding at year's end, with the *actual* rate to be established by Royal Order.[185] Now, the maximum rate for *defaulted* mortgage loans has quadrupled to 0.02%, and the maximum rate for *defaulted* consumer loans increased by a factor of eight to 0.2%.[186] A Royal Order has set the actual rate at the maximum.[187]

The first disbursements from the Fund reveal that many Belgian debtors have very little disposable income to finance a payment plan. The first creditor assessments were paid into the Fund on October 15, 2002, and the first reimbursements were made to debt-mediators on June 2, 2003.[188] Those mediators' fees that debtors had already proven unable to pay are being reimbursed little by little by application to a special governing body for the Fund.[189] As of November 2004, the Fund had paid out €922,617 to 909 debt-mediators, all of whose fees had accrued in 2003.[190] Of the some 8000 new cases admitted in 2003, 909 represents a significant proportion (over 11%) of almost totally impecunious debtors. And an

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[183] *See* Law of 19 April 2002, art. 2, M.B. 7 June 2002, p. 26229.

[184] *See* Doc. parl. Chambre (2000-2001) no. 1285/001, pp. 4–6, *available at* http://www.lachambre.be/FLWB/pdf/50/1285/50K1285001.pdf; *Doc. parl.* Sénat (2001-2002) no. 2-986/3, p. 2, *available at* http://www.senat.be/wwwcgi/get_pdf?33577277.

[185] *See* Law of 5 July 1998, art. 20 § 3, M.B. 31 July 1998, p. 24613, 24622.

[186] *See* Law of 19 April 2002, art. 2, M.B. 7 June 2002, p. 26229, 26230.

[187] *See* Royal Order of 9 Aug. 2002, art. 2, M.B. 6 Sept. 2002, p. 39443, 39444.

[188] *See* Questions et réponses écrites, Bulletin no. 007, pp. 725, 726–27, *available at* http://www.lachambre.be/QRVA/pdf/51/51K0007.pdf.

[189] *See* Doc. parl. Chambre. 1285/001, *supra* note 183, at 9; Royal Order of 9 August 2002, Report to the King, M.B. 6 September 2002, p. 39441.

[190] OCE REPORT, *supra* note 60, at 27 & n.2 (reporting a division of €248,773 for 282 cases from the French part of Belgium, and €673,844 for 627 cases from the Dutch part).

average reimbursed cost per case of about €1015 (about $1250) reveals the significant expense of this labor-intensive "mediation" system—which does not include the expenses of the *judicial* side of the ledger.

It is revealing to focus in conclusion on what creditors are *really* being forced to pay for. Creditor assessments from the Fund pay only the mediator fees of those debtors with "purely symbolic" plans that cannot cover even basic administrative costs, let alone offering anything to creditors. This is a wonderfully creative and sensible way of allocating what would otherwise be senseless cost. Faced with debtors with such miserly incomes, lenders should face facts (as many do) and write off these consumers' debts outside of the insolvency system altogether. If recalcitrant lenders are serious about forcing "can't pay" debtors into economically valueless judicial payment plans, they (rather than taxpayers) should by all rights foot the bill. Of course, lenders may plow these costs back into higher interest rates, but I have found no evidence of complaints of any increased burden on "average" consumer borrowers in Belgium.

C. Financing Financial Education From the Belgian Fund

With the Fund firmly in place, Belgian lawmakers took an even bolder next step. Buried in article 430 of a massive law surreptitiously entitled "Program-Law," the Belgian Parliament authorized draws from the Fund to finance not only unpaid mediator fees, but also the costs of a public information campaign about the new consumer debt relief law, as well as "more generally, the financing of measures of information and of sensitization concerning overindebtedness."[191] In June 2004, King Albert's administration issued a Royal Order authorizing 25% of the Fund to be used for this campaign of "overindebtedness information and sensitization," and empowering the governing body of the Fund to select the specific programs to be financed.[192]

Far from discouraging consumers from seeking relief from their debts, the Belgian legislature and government are using a creditor-financed fund to *advertise* such relief. And at least one European state is finally putting its money (actually, lenders' money) where its mouth is in terms of attempting to *cure* the problem of excessive debt through education, rather than contenting itself with the limited treatment offered by the debt relief law. It remains to be seen what effect, if any, these new initiatives will have on the future of overindebtedness in Belgium, but this is definitely an intriguing potential to keep an eye on in the months and years to come. Will we eventually see this Fund used to make loans to consumer debtors to facilitate payment plans? Perhaps this is where the systems in Belgium and Luxembourg will converge.

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[191] *See* Law of 22 Dec. 2003, art. 430, M.B. 31 Dec. 2003, p. 62160, 62246.
[192] *See* Royal Order of 23 June 2004, M.B. 15 July 2004, p. 55467.

IV. CONCLUSION

As states around the world liberalize access to consumer credit, consumer financial distress is bound to follow close behind. Many European states have learned this bitter lesson in the past two decades. A growing number of these states have accepted that this new consumer financial distress, while perhaps not universal, is real, serious, and worthy of focused attention. More and more states have adopted the notion that societies that enjoy the benefits of a modern credit economy must also address its attendant burdens sensitively and humanely. Opinions differ from state to state on how much relief to offer overextended consumers and how much responsibility to demand that they take for their own financial distress. These differences are likely driven by a variety of factors, including culture, politics, and the relative degree of consumer indebtedness.

One important constant, though, is becoming increasingly clear—consumer debt relief, including a discharge of unpaid debts, is not a concept compatible only with the pragmatic, economics-driven approach of "Anglo-American common law" systems. Civil law states like France, Belgium, and Luxembourg have softened what appeared to be their rigidly formalistic position with respect to the "sanctity of contracts" in light of the new challenges of the modern "open credit society." One can no longer attribute the distinction between states with and without consumer debt relief to one more contrast of "civil law" versus "common law."

Other states that identify their legal roots in the Code Napoléon are likely to look to models of consumer debt relief created and tested by their like-minded civilian neighbors. Recent experience in Belgium and Luxembourg illustrates this tendency. It also illustrates some potential dangers of borrowing ready-made laws, even from other civil law systems "within the family." The learning process in consumer debt relief is far from over in Europe. The French law has undergone a string of amendments in 1995, 1998, and 2003, and failing to pick up the latest response to festering problems in the "parent" system means incorporating latent problems in the "daughter" system.

The new laws in Belgium and Luxembourg seem to reflect a healthy level of continuity and change from the French model. But they might also have missed some important lessons. The future may well show, for example, that invading exempt income in Belgium, refusing to discharge most debt in Luxembourg, and requiring payment plans of even the most desperate and destitute of debtors in both systems will require modifications like those recently implemented in France. On the other hand, Belgium and Luxembourg have contributed to the next generation of consumer debt relief laws with new lessons of their own through innovative use of special funds to finance the treatment and even prevention of consumer overindebtedness. These two states have set the stage for another imminent round of continuity, change, and innovation in other consumer debt-relief systems that are sure to emerge soon on both sides of the Atlantic.