

Over-indebtedness – a Growing Problem

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1 Introduction

Questions concerning the avoidance of over-indebtedness¹ and ways of resolving the situation of over-indebted persons have been topics of discussion since the end of the 1980s.² Household indebtedness in Sweden has distinctly grown in recent years. Bank loans have risen by 74%, home mortgages by 95% and finance company loans by 422% since 1998.³ Unsecured loans in particular are growing at record speed.⁴ The "debt ratio"⁵ at the end of 2005 was 135%, i.e. as high as at the end of the 1980s (just before the Swedish financial crisis of 1991-1993), the difference, however, being that the burden of interest today is considerably lighter.⁶ Now that borrowing has grown easier, there is a greater risk of individuals and families being affected by over-indebtedness. Persons thus affected⁷ often incur a lower standard of living, due among other things to distraint. A person who is unemployed and over-indebted very often has more difficulty than others in finding employment. It can be hard for a person with serious payment difficulties to obtain a home tenancy, obtain new credits, take out a telephone or Internet subscription, take out life insurance, pension policies etc. Many over-indebted persons face a steady growth of indebtedness, due to compound interest effects and various penalty charges. Research has also revealed a clear connection between impaired physical/mental health and over-indebtedness.⁸ Many people with financial problems suffer from depression, stress-related symptoms of illness, and thoughts of suicide, feelings of helplessness, shame or second-class citizenship. Only too often, over-indebtedness leads to very severe social exclusion. Vigorous action is called for

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- 1 There is no commonly accepted definition of over-indebtedness, but as a rule a person is considered to be over-indebted when they are unable to meet their financial commitments and their available income over a certain length of time does not cover current expenditure and borrowing. See Engström, J. & Josefsson, M. & Ahlström, R., *Krisbetingade känsloreaktioner hos överskuldssatta*, TemaNord 2004:513 Hushållens överskuldssättning i Norden. Rapport från ett samnordiskt forskningsseminarium om orsakerna till och konsekvenserna av nordiska konsumenters överskuldssättning, p. 142.
 - 2 This article is excerpted from my book in preparation. See Persson, A.H., *Överskuldssättning - ett växande problem*, 2008.
 - 3 Address given by Ann-Christin Nykvist at the AGM of Yrkesföreningen för Budget- och skuldrådgivare i kommunal tjänst (Association of budget and debt restructuring counsellors in municipal service), 21st April 2005.
 - 4 See Wahlin, E. & Leijonhufvud, J., *Lån utan säkerhet växer i rekordfart*, SvD Näringsliv, 2006-05-04 p. 4. Cf. Finansinspektionens rapporter 2005:4 and 2006:12. *Blancokrediter till konsumenter I-II*.
 - 5 Meaning financial debts in relation to financial assets exclusive of collective insurance saving.
 - 6 See Finansinspektionens rapport dnr 04-4090-610, 7th June 2004 p. 5 (cf. 10 f). See Privata affärer, 2006-11-23, "www.privataaffarer.se/newsText.asp?src=pa&a=18001".
 - 7 See Engström, J. & Josefsson, M. & Ahlström, R., *Krisbetingade känsloreaktioner hos överskuldssatta*, TemaNord 2004:513, p. 142.
 - 8 See Ahlström, R., *Ohälsa och marginalisering till följd av överskuldssättning*. PM 2003:04, bilaga 7, p. 1.

to deal with this social phenomenon, over-indebtedness being a serious threat, not only to the individuals directly concerned but also to society as a whole. What instruments exist for (1) preventing over-indebtedness, (2) helping people with payment difficulties or (3) clearing the debts of people who are already over-indebted? But the way in which this problem is to be solved is not only a national concern, it is also on the agenda of the European Union.⁹ There have been disturbing reports from several European countries concerning the scale of over-indebtedness.¹⁰ Given that over-indebtedness is a growing problem in many European countries, one may ask whether Swedish legislation includes any instruments which may be of service to legislators, authorities and agencies in others countries working to prevent over-indebtedness or to alleviate its consequences to the over-indebted.¹¹

The purpose of this article is to shed light on a number of areas of Swedish law which afford instruments for the avoidance of over-indebtedness and for helping the over-indebted. In a European perspective, rules of this kind may be found in the law of contract, consumer law, the law of insolvency, procedural law, family law, constitutional law, the law of real property and the law of personal property (security interests). We will here confine ourselves to a general consideration of the first three fields mentioned.

2 General Contract Law

The reasons for a person becoming over-indebted cannot be pinned down by a simple explanatory model, such as the person in question being afflicted with illness, unemployment, divorce, bankruptcy and so on. These causes may very often be the crucial factor leading to over-indebtedness, but often the snapping shut of the repayment trap is due to a combination of circumstances.¹² Many people encounter such difficulties without becoming over-indebted, and so the fact of others becoming over-indebted must be due to a variety of other factors. Low incomes, narrow margins and changed circumstances coupled with credit

9 Opinion of the Economic and Social Committee on “Household over-indebtedness”, Celex 520021E0511. See also the report with reference to this opinion, See Reifner, U. & Niemi-Kiesiläinen, J. & Huls, N. & Springeneer, H., *Consumer Overindebtedness and Consumer Law in the European Union*, 2003. See also Nordiska rådets report on household indebtedness in the Nordic countries, TemaNord 2004:513 and Niemi-Kiesiläinen, J., & Henrikson, A-S., *Legal Solutions to Debt Problems in Credit Societies – a report to the Council of Europe*, 2006.

10 *High indebtedness in the EU, Europe’s politicians weigh jobs against debt*, Fair Pay, no. 2 2005 p. 4. Cf. Niemi-Kiesiläinen, J. & Henrikson, A-S., *Legal Solutions to Debt Problems in Credit Societies*, 2006, p. 13.

11 Conversely, one may ask if other countries have instruments which are lacking in the Swedish legal system and can remedy the problem. That issue, however, cannot be examined here, and reference is made instead to the book which will be appearing shortly: Persson, A. H., *Överskuldssättning - ett växande problem*, 2008.

12 Konsumentverkets Pm 2004:09. *Kommunal budget- och skuldrådgivning*. See also Konsumentverkets PM 2004:17, *En samordnad uppföljning av skuldsaneringsprocessen*.

and other commitments augment the risk of over-indebtedness.¹³ There are many ways of preventing over-indebtedness, e.g. society providing (a) financial education for all, (b) advisory services for the general public through budget and debt clearance counsellors, and (c) an advanced civic safety net offering free medical care, unemployment compensation and other social benefits.¹⁴ Another way of preventing over-indebtedness is for certain credit commitments manifestly disproportionate to the debtor's financial means to be declared unfair.¹⁵ If a debtor has had to enter into a credit agreement which is out of proportion to his financial capacity and the credit provider has thus defaulted on his assessment of the debtor's creditworthiness, then in Swedish law the creditor's claim may come to be adjusted under Section 36 of the Contracts Act (1915:218).¹⁶ That provision, which is peremptory, lays down that contract conditions may be modified or disregarded if they are oppressive, having regard to the content of the agreement, circumstances attending the making of it, conditions arising subsequently and circumstances generally. If the condition is of such importance for the agreement that the latter cannot reasonably be required to apply unaltered, the agreement may also be modified in another respect or disregarded in its entirety. In the examination of oppressiveness, special consideration shall be paid to the need of protection for the party who, as consumer or otherwise, is at a disadvantage in the contractual relationship. By authority of this provision, for example, oppressive credit agreements or surety agreements have been modified. If those agreements would not have been modified, perhaps the debtor and/or the guarantor would have been placed in a situation of over-indebtedness. The following case will serve to illustrate this point. In its judgment (NJA 1997 p. 524), the Swedish Supreme Court found for example that a guarantor's payment liability should be modified in accordance with that provision. In that case a 64-year-old woman with no significant assets had entered into a suretyship for a commercial leasing agreement. The guarantor's daughter's cohabitant had leased a lorry from a finance company. The guarantor issued an indemnity (*proprieborgen*) for the debtors obligations under the agreement. After the debtor had stopped paying the leasing charges, the guarantor was presented with a demand for payment. The lorry had been purchased for SEK 401,245, but by the time of its repossession 8 months later its value had fallen to SEK 55,000. The leasing company now demanded payment from the guarantor of the amount outstanding under the leasing agreement, namely SEK 337,818. The Supreme Court found that the guarantor's liability must be modified under Section 36 of the Contracts Act, even though the leasing agreement was inherently fair. The court reasoned that the guarantor had entered into the suretyship, not with a view to gain but in order to help the lessee. She

13 See Niemi-Kiesiläinen, J. & Ramsay, I. & Whitford, W., *Consumer bankruptcy in global perspective*, 2003, p. 7.

14 See Kiesiläinen, J. & Henrikson, A-S, *Legal Solutions to Debt Problems in Credit Societies*, 2006, p. 18.

15 See Niemi-Kiesiläinen, J. & Ramsay, I. & Whitford, W., *Consumer bankruptcy in global perspective*, 2003, p. 7.

16 See Lag (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område.

had no part in the business and no possibility of judging the outcome of it when entering into her commitment or while the business was ongoing. Furthermore, the indemnity clause occasioning such a heavy demand for payment occupied an obscure position in the text of the leasing agreement. It should have been made clear to her in a suitable manner by the credit provider. The guarantor was ordered to pay the credit provider SEK 50,000 plus interest.

As mentioned earlier, Section 36 of the Contracts Act makes it possible, after a contract condition has been voided, for the rest of the contract to remain in force. Indeed, the condition need not be voided but can be modified in the interests of fairness. Because special allowance has to be made for the positions of the parties, this provision makes it possible for cases to be considered which are not covered by any particular consumer protection legislation, and so it is an important instrument for the prevention of over-indebtedness.

3 Consumer Credit Law

Many Swedish households are heavily dependent on credit, with the result that sudden and unpredictable events in the world at large can pose a serious threat to their finances¹⁷ This applies particularly to young and other financially vulnerable consumers in the credit market, whose finances are already hanging by a brittle thread. Because payment difficulties, the first step towards over-indebtedness, arise out of a debtor's credit commitments, the legislature, in Sweden as in many other countries, has been intent on strengthening the law of consumer credits.¹⁸ The Consumer Credit Act (1992:830) is therefore another important instrument for the prevention of over-indebtedness. Section 5 of the Consumer Credit Act requires a businessman to observe accepted credit provision practice in his dealings with the consumer and at the same time to provide with due care for the consumer's interests. Section 5 a of the Consumer Credit Act requires the businessman, before granting credit, to investigate whether the consumer is financially capable of honouring his or her commitments under the credit agreement. The *travaux préparatoires* of the Consumer Credit Act define the main purpose of this stipulation concerning credit examination to be that of counteracting over-indebtedness among consumers.¹⁹ The requirement of accepted credit-granting practice means that, both prior to a credit agreement being entered into and while it is in force, the credit provider must act judiciously and responsibly towards the consumer. The credit provider must act on the premise that a credit agreement is often of great moment of the consumer's financial circumstances. Normally, therefore, when granting credit the credit provider must carry out a credit assessment, with the

17 See Finansinspektionens rapport, *Hushållens ekonomiska förmåga*, 2007-6-27, where it states that every fifth household in Sweden is unable to handle an unforeseen expense of SEK 20,000, approximately 2,100 Euro.

18 See Finansinspektionens rapport, *Blancokrediter till konsumenter*, 2005:4, p. 7.

19 See prop. 1991/92:83 p. 106, prop. 2002/03:139 p. 252, p. 587.

aim of preventing private persons from becoming excessively indebted in proportion to their incomes and other financial circumstances.

No credit assessment is needed, however, if, by virtue of his knowledge of the consumer or other circumstances, the credit provider has firm reason to suppose that the consumer is financially capable of honouring his or her commitments. Nor does the credit assessment requirement apply if the credit is of at most three months duration and to be repaid all at once, or if the credit is for a small amount. The requirement of accepted credit-granting practice is also taken to imply that the creditor must give the consumer accurate information about the credit, e.g. inform the consumer of the effective rate of interest on the credit. The requirement of good credit-providing practice also implies that certain demands can be made on the credit provider's marketing. The credit provider is obliged to observe a certain restraint and moderation in his marketing and to avoid the kind of marketing conveying the message that the credit will not be a burden on the consumer's finances. Finally, the concept of accepted credit-granting practice implies that the terms of the agreement must be sufficiently lucid and fair. Thus they should not be misleading or hidden or imply any pitfall. The Consumer Credit Act is supplemented by recommendations and general advice from the Swedish Financial Supervisory Authority (Finansinspektionen)²⁰ and the Swedish Consumer Agency.²¹ Section 5 of Consumer Credit Act carries no penal sanctions, but if a credit provider is in breach of accepted credit-granting practice, this can lead to the debtor's liability being modified or voided altogether under Section 36 of Contract Act or to the Swedish Consumer Agency ordering the businessman to discontinue the granting of credits (Section 37 of the Consumer Credit Act).

Despite the far-reaching aim of the Consumer Credit Act to prevent over-indebtedness, there are forms of credit in the Swedish market which can turn into a repayment trap. These include SMS loans, meaning that the borrower can obtain a credit of between SEK 1,000 and 3,000 by sending an SMS to the credit provider. According to the advertisements, the credit is granted within 15 minutes. There are several reasons why an SMS loan can turn into a repayment trap. One of them is that the credit provider does not need to carry out a credit assessment of the consumer beforehand. As has already been stated, the credit provider is normally obliged, under Section 5 a of the Consumer Credit Act, to carry out a credit assessment when granting a consumer credit, but not if, by virtue of his knowledge of the consumer or other circumstances, the credit provider has firm reason to suppose that the consumer is financially capable of honouring his or her commitments. Nor does the credit assessment requirement apply if the credit is of at most three months duration and to be repaid all at once, or if the credit does not exceed 1/10 of the price-related base amount under the National Insurance Act (1962:381)²² When the exception from credit assessment was introduced, what the legislator had in mind was the exclusion from the requirement of "invoice credits", since it is common practice for consumers to

20 See FFFS 2005:3, *Allmänna råd om krediter i konsumentförhållanden*.

21 See KOVFS 2004:6, *Konsumentverkets allmänna råd om konsumentkrediter*.

22 The price-related base amount for 2007 was SEK 41,100.

be allowed credit for a brief period before settling an invoice for goods or services purchased. Since it was considered impracticable for the credit provider to carry out a credit assessment in such cases, and because there was felt to be little risk of such credits contributing towards consumer over-indebtedness, an exception was made from the credit assessment requirement. A corresponding exception was made for credits involving minor amounts.²³ But events have proved SMS instant loans to be a repayment trap. More and more young people, for example, are landing on the books of the Enforcement Authority after contracting such loans. According to a survey report by the Enforcement Authority in 2006, 44% of applications for payment injunctions referred to SMS instant loans to persons aged between 18 and 25, many of whom, 59%, had another debt registered with the Enforcement Authority already. The Enforcement Authority has warned that the applications for payment injunctions referred to SMS instant loans will rise to over 10 000 during 2007. Many of the borrowers were compulsive gamblers and had contracted the loan in connection with on-line poker games. Clearly, then, SMS instant loans are a temptation to a group whose finances are already overstretched.

Another reason why SMS loans can turn into a repayment trap is their very high rate of “interest”. An SMS credit of SEK 3,000 is repayable within 30 days, and carries a charge of SEK 600, giving an effective annual interest rate of 792%. A debt of SEK 3,000 can grow to SEK 5,500 in two months, with reminder charges, interest, demand costs and collection charges included. Here again, the Swedish Consumer Credit Act must be termed inadequate. Under Section 6 of the Consumer Credit Act, “minor credits”, i.e. those involving not more than SEK 1,500, and credits repayable within three months, are excluded from the requirement of information concerning the effective rate of interest. If anything, the loan is marketed as interest free, which gives the consumer the impression of credit on favourable terms. As we have already seen, a surcharge is levied instead of interest. Section 12 of the Consumer Credit Act contains provisions intended to protect the consumer against charges levied in connection with consumer credits.²⁴ The charge must correspond to the credit provider’s costs in connection with granting the credit, and it may only be levied if specially indicated in the agreement. Surcharges usually operate to the disadvantage of consumers, who tend to be more observant of particulars concerning the rate of interest than those concerning surcharges, which makes an interest rate of zero per cent an alluring prospect. More often than not, the customer overlooks the surcharges.²⁵ This is especially the case with SMS loans, because a credit agreement of this kind need not be put down in writing (Section 9 (3) of the Consumer Credit Act). At present there is no special maximum limit beyond which a credit can be deemed usurious. That issue, consequently, has to be decided on the merits, but there has been talk of introducing such a limit.

23 See prop. 2002/03:139 p. 587.

24 See Eriksson, A. & Lambertz, G., *Konsumentkrediter: Kommentar till 1992 års konsumentkreditlag*, 1993, p. 152.

25 See Finansinspektionens rapport, *Blancokrediter till konsumenter*, 2005:4, p. 8.

A further problem concerns SMS fraudsters. With this kind of fraud, someone buys a prepaid calling card for a mobile phone. The card is then registered in the name of another person, using that person's national registration number, after which the fraudster can SMS a credit application, giving his own account particulars. The demand for repayment of the loan is then sent to the person whose personal particulars have been used. Most often these frauds are due to credit providers not checking up properly on their borrowers. With the credit application being processed within 15 minutes, there is no time for any such check. The rapidity of credit provision is in itself debatable from the viewpoint of the Consumer Credit Act. Where the marketing of credits is concerned, accepted credit-granting practice makes it the credit provider's duty to observe a certain restraint and moderation in his marketing and to avoid the kind of marketing conveying the message that the credit will not be a burden on the consumer's finances. A marketing formulation which amounts to directly urging the consumer to apply for an "instant credit" has been found contrary to accepted business practice.²⁶ The Swedish Consumer Agency has criticised credit providers offering SMS loans for infringing the Consumer Credit Act in this respect, by emphasising the rapidity of credit provision and concealing the true cost of the loan and the long repayment period. How the problems of these heavily criticised SMS loans are to be dealt with remains for the time being an open question.

Various efforts are in progress, on both national and international levels, to devise instruments for counteracting over-indebtedness and strengthening consumer protection in the financial sector. Mention can be made in this connection of current work within the EU on a new consumer credit directive. During the spring of 2007 the ministers in the EU Competitiveness Council reached a "political agreement" on a new Consumer Credit Directive (CDD). That proposal has now gone to the European Parliament for a second reading. If enacted by the EP, the directive is to be implemented by 2009.²⁷ The directive, which is based on full harmonisation in this sector, includes among other things provisions on the marketing of credits, credit assessment, a right of withdrawal for the borrower and a ceiling on early repayment penalties.

In Sweden, statutory changes have been proposed which are designed to protect consumers from excessive interest rates, unlimited liability and irresponsible marketing.²⁸ A tightening up of the Consumer Credit Act is also proposed. If, for example, a credit offered by the businessman to the consumer cannot, by reason of its price, the consumer's financial position or other special circumstances, be deemed reasonable beneficial to the consumer, the businessman will be duty bound to advise the consumer against contracting the

26 See Marknadsdomstolens avgörande, MD 1991:8.

27 See COM (2002) 443, COM (2004) 747, and COM (2005) 483 final. See further amendments in 13193/05 CONSOM 37, 2006-10-02, CONSOM 87, 13357/06, 8860/07, CONSOM 43 CODEC 374 JUSTCIV 93 and DS 626/07. See faktapromemoria 2005/06:FPM88, and rådspromemoria 2007-05-03, Bilaga till EU-nämndens sammanträde 2007-05-16.

28 See Eriksson, A., *Konsumentskyddet inom det finansiella området*, PM 2005-09-12, FI 2005/1958.

credit. Thus it will be the credit provider's responsibility to try to prevent private persons contracting excessive debts.²⁹ If the businessman defaults in the matter of credit assessment and a thorough credit assessment would have shown that the consumer was incapable of repaying the credit wholly or in part, the businessman's claim is to be correspondingly reduced, failing special reason to the contrary.³⁰ This proposal is currently being processed in conjunction with other amendments to the Consumer Credit Act and the intention is for a Government Bill to be put before the Riksdag (parliament) in 2008.³¹ The amendments to national legislation are of course conditional on their not being at variance with the impending EU directive.

Another characteristic of the 21st century is the wide variety of financial services and products which are offered to consumers.³² Credits to finance home purchases and the purchase of goods and services are common practice. It is common for banks to offer their customers on-line services whereby the customers can conduct all the usual types of banking business, such as payments, savings and loans. Payments are to a very great extent effected by consumers using charge cards, bank cards and credit cards when making their purchases. Bills of exchange and cheques, by contrast, are more rarely used. In the insurance sector, consumers are offered various kinds of personal insurance, property insurance, endowment insurance, pension insurance, house insurance etc., and they are buying shares and other securities to a far greater extent than before. This changed behaviour has prompted a spate of legislation concerning both credit and finance. In addition to the 1992 Consumer Credit Act, Sweden also has, for example, the Financial Advisory Services to Consumers Act (2003:862), the Distance Contracts and Doorstep Sales Contracts Act (2005:59), the Insurance Contracts Act (2005:104), Chap. 8 of the Banking and Financing Business Act (2004:297) and the Marketing Act (1995:450). Effective supervision is needed, however, to ensure that the rules are actually complied with by the players in the finance sector and that sanctions are available. Supervision of consumer safeguards in the financial sector, however, has been criticised for inadequacy³³, and further statutory amendments to the existing regulatory system are therefore under consideration with a view to strengthening consumer safeguards.

Given that over-indebtedness among private persons is on the increase in all EU countries, due to credit market competition, low rates of interest, a high level of economic activity and steeply rising property prices, the legislator may be

29 See Eriksson, A., *Konsumentskyddet inom det finansiella området*, PM 2005-09-12, FI 2005/1958, p. 73.

30 See op. cit., p. 73. Cf. also SOU 2005:108 on liability for unauthorised use of bank cards etc., proposing a limit to the account-holder's liability.

31 Betänkande 2005/06:LU 35.

32 See Eriksson, A., *Konsumentskyddet inom det finansiella området*, PM 2005-09-12, FI 2005/1958, p. 5.

33 See framställning av Riksrevisionens styrelse angående konsumentskyddet inom det finansiella området, 2006/07:RRS4 and RIR 2006:12, *Konsumentskyddet inom det finansiella området - fungerar tillsynen?*

forced in the long run to create additional instruments for tackling this problem.³⁴ Consumer protection comes high on the agenda, and a great number of the civil law directives which have appeared hitherto have been specifically and essentially concerned with the need for consumer protection. This is no doubt a long-term trend which is destined to continue, with greater consideration being paid to consumers' need to cope with the obtrusive attentions of various commercial forces.

4 Debt Restructuring

Debt restructuring for natural persons as an instrument for helping persons who are heavily in debt has been under discussion in Swedish law since the end of the 1980s.³⁵ The Debt Restructuring Act (1994:334) entered into force on 1st July 1994 as a consequence of that debate.³⁶ Debt restructuring has a number of purposes, the main one being rehabilitation. People who are heavily indebted must be given the chance of solving their financial problems and in this way of leading more adequate and socially useful lives.³⁷ This rehabilitative purpose, however has to be balanced against the individual creditors' rightful interest in asserting their financial claims. The institute of debt restructuring is designed to make even-handed provision for these somewhat contradictory interests. The Act also has a preventive purpose, in the sense of making credits less readily available so as to ensure that fewer people will get into situations of over-indebtedness. A third purpose of debt restructuring is to favour the creditor collective in the sense of debtors coming to pay at least part of what is owing. Through debt restructuring the debtor usually pays more than would otherwise have been the case. If both the debtor and his creditors benefit, society will be spared a great deal of expense in various fields. It is also important that the debt restructuring system should not impair general payment morale³⁸ and that it should be constructed so as to gain the confidence of the general public.³⁹ To these three ends, the Act builds on three basic principles, namely (1) that the institute is general, i.e. debt restructuring should in principle include all the debtor's liabilities, (2) that the claims included in a debt restructuring are all to be treated equally, and (3) that the institute is to be definitive in character.⁴⁰

34 *High indebtedness in the EU, Europe's politicians weigh jobs against debt*, Fair Pay, no. 2 2005 p. 4. See also Civilutskottets beslut 2006/7:30, showing that one of the questions to which the European Commission desire an answer is whether an overarching EU law is needed in the consumer sector (Green Paper on the Review of the Consumer Acquis COM (2006) 744 final). The Swedish Government has expressed itself in favour.

35 See Dir. 1988:52. *Utredningen av vissa konkursrättsliga frågor*.

36 See SOU 1990:74, prop. 1993/94:123.

37 See prop. 1993/94:123 p. 73, SOU 2004:81 p. 56.

38 See prop. 1993/94:123 p. 77, SOU 2004:81 p. 56.

39 See prop. 1993/94:123 p. 95.

40 See prop. 1993/94:123 p. 76, SOU 2004:81 p. 57.

The Debt Restructuring Act has been a subject of continuous monitoring and evaluation ever since it came into force.⁴¹ The main points of criticism have been that debt restructuring cases take too long to process and the allocation of roles between the authorities involved has been unclear. Following a review of the legislation and the presentation of legislative proposals, a new Debt Restructuring Act (2006:548) has been passed, effective from 1st January 2007.⁴² The new Act, however, is still constructed on the same lines as the old one. Among other changes, the debt restructuring procedure is no longer to be divided into several stages but is concentrated in a single proceeding by the Enforcement Authority. Accordingly, a debtor can approach the Enforcement Authority directly, without first having attempted to make an arrangement with his creditors.

Section 2 of the Debt Restructuring Act requires the Enforcement Authority to both examine and reconsider an application for debt restructuring. The intention here is for the Authority to be able to grant debt restructuring despite one or more creditors objecting to the proposal. In this way the district/city courts are allotted a purely judicial role. A different role is also allotted to municipal budget and debt restructuring counsellors, namely that of helping to prevent over-indebtedness and also that of helping persons in debt to find a solution to their problems. The Swedish Consumer Agency is made the co-ordinating central authority for municipal budget and debt restructuring advisory services. Thus the main responsibility for drawing up the debt restructuring scheme devolves on the Enforcement Authority (Section 19 of the Debt Restructuring Act, cf. Section 9), but the proposal must be endorsed by the debtor, which required in various ways to actively assist the investigation of the matter.

Under Section 4 of the Debt Restructuring Act, debt restructuring can be granted to a natural person domiciled in Sweden if he is insolvent and so indebted that he cannot be presumed capable of paying off his debts within the foreseeable future (this is the “qualified insolvency requirement”) and if, having regard to the debtor’s personal and financial circumstances, it is reasonable that debt restructuring be granted him (the “general equity requirement”). It should be noted that the two requirements in Section 4 of the Debt Restructuring Act are cumulative, i.e. both have to be satisfied in order for debt restructuring to be granted. In the assessment of the general equity requirement, special consideration shall be paid to the age of the debts, the circumstances surrounding their occurrence, the efforts which the debtor has made to discharge his obligations and reach unaided a settlement with his creditors, and the manner in which the debtor has assisted with the conduct of the debt restructuring proceedings. The two material requirements – the qualified insolvency requirement and the general equity requirement – are deliberately couched in

41 See, e.g., Konsumentverket (Swedish Consumer Agency) report: *Utvärdering av skuldsaneringslagen*, 1995/96:34, Riksskatteverket (National Tax Board) report *Rapport från skuldsaneringsprojektet december 2001*, (RSV Rapport 2002:5), and SOU 2000:29 p. 197. Cf. Dir. 2002:139.

42 See Directive 2002:139, SOU 2004:81 and prop. 2005/06:124.

general terms. For this reason, case law has an important bearing on more detailed decision-making as to when debt restructuring can be granted.⁴³

The grant of debt restructuring means the debtor having to subsist for a certain period – usually five years – on limited financial resources and any surplus being distributed between his creditors.⁴⁴ Distribution conforms to a payment plan drawn up when debt restructuring is granted, unless the debtor is incapable of paying. In that case no payment plan is drawn up and the debtor is directly exempted from liability for the debts restructured. Under Section 37 of the Debt Restructuring Act, a debt restructuring order can be enforced without having acquired force of law. Thus, even if the decision is appealed, the debtor is obliged to comply with the payment plan decided on, and accordingly the plan starts to run from the time of the introductory decision.⁴⁵

The new Debt Restructuring Act can be seen as a step towards a more efficient way of dealing with the over-indebtedness problems of individual persons. The fact is, however, that not very many people have been granted debt restructuring since it entered into force in 1994. Between 1994 and 2004 debt restructuring was granted to only 14,561 out of 35,803 applicants. In other words, 21,242 applications were refused, rejected or written off.⁴⁶ The balance of the sexes among debt restructuring applicants is roughly equal, and the number of women granted debt restructuring does not differ appreciably from the number of men.⁴⁷ Women, on the other hand, are over-represented among applicants in relation to the number of debtors noted by the Enforcement Authority as being in arrears.

Events have shown the recent amendments to the Debt Restructuring Act to be insufficient. One problem concerns overindebted entrepreneurs with personal liability for the debts of their businesses. In principle the Debt Restructuring Act only applies to private persons, but a business proprietor who is a natural person can obtain debt restructuring, subject to the conditions laid down in Section 5 of

43 See further Mellqvist, M., *Praxis i skuldsaneringsärenden*, SvJT 1998 p. 134, Persson, H. A., *Förutsättningar för att bevilja skuldsanering*, JT 2003-04 p. 910, Persson, H. A., *Hur behandlas en okänd och tvistig fordran i ett skuldsaneringsärende*, JT 2004-05 p. 157, Persson, H. A., *Allmänna villkor för skuldsanering uppfyllda?* JT 2003-04 p. 125.

44 A shorter period may, however, apply in special cases, e.g. if the debtor is an elderly person or is suffering from a life-threatening illness, or if it was already apparent at the time of debt restructuring being granted that, owing to impaired financial circumstances, the debtor would be unable to pay anything at all. When reviewing a restructuring order, however, the payment plan may not be prolonged by more than 7 years (Section 26 of the Debt Restructuring Act). See Hovrätten för Övre Norrland, ÖÅ270-05, beslut 2005-06-03, in which an 82-year-old man was granted debt restructuring with a three-year payment plan. See also NJA 2003 C 6, in which debt restructuring was granted to a man suffering from severe obesity and hypertension, and HD Ö 559-06 beslut 2006-03-21, in which HD (the Supreme Court) ruled that the court of appeal had been in error when it refused leave to appeal in a debt restructuring case involving a man with heart disease. See SOU 2004:81 p. 137, p. 234, prop. 2005/06:124 p. 52. Cf. prop. 1993/94:123 p. 108 and NJA 1998 p. 15.

45 See prop. 2005/06:124 p. 56, SOU 2004:81 p. 242, p. 281, cf. p. 271.

46 SOU 2004:81 p. 110, 140. See Konsumentverkets PM 2003:26, *En samordnad uppföljning av skuldsaneringsprocessen*.

47 See SOU 2004:81 p. 110.

the Debt Restructuring Act.⁴⁸ This, under Section 5, so long as the conditions of Section 4 are also satisfied, a business proprietor can be granted debt restructuring if there are special reasons for so doing, having regard to the limited extent and simple character of the business activity. Up till now, no debtor is known to have been granted debt restructuring under this section.⁴⁹ Nor may the debtor be the subject of a trading prohibition under the Trading Prohibition Act (1986:436) or have been granted debt restructuring previously (Section 6 of the Debt Restructuring Act). In Swedish law, natural persons remain liable for debts outstanding after a bankruptcy. An active entrepreneur debarred from the possibility of applying for debt restructuring is in great danger of over-indebtedness. For many entrepreneur who are declared bankrupt, failure spells private financial disaster. They have to contend with a heavy burden of debt which precludes any new entrepreneurial activity for a long time ahead. On account of this problem a Commission has been appointed to consider the possibility of granting debt reduction to active business proprietors.⁵⁰ The situation of “perpetual debtors” is also to be investigated. What keeps a person in this position of qualified insolvency from applying for or being granted debt restructuring? The intention is for legislation to be introduced in the autumn of 2008.

5 Concluding Remarks

A host of proposals have been put forward, both nationally and internationally, aimed at solving and averting the problems of over-indebtedness. Legislators in several countries have endeavoured among other things to tighten up the rules on the granting of credit, to prevent the unduly aggressive marketing of credits by credit institutions, to impose restrictions on the penal interest which can be agreed on, and to increase the written information supplied to borrowers and guarantors. Other measures have, for example, included permitting non-profit institutions which are part of the municipal social welfare system to lend money – “social credits” – to persons who are otherwise unable to obtain loans on reasonable terms. These organisations can also furnish security for overindebted persons, thus enabling them to contract a loan on relatively good terms in order to restructure their finances – restructuring loans.⁵¹ A third measure is the introduction of a rule of absolute limitation on financial claims, whereby a claim in civil law cannot endure in all perpetuity. A fourth proposal is the definition of an ultimate limit on the length of time for which the enforcement authority can collect debts at all. A fifth measure for preventing over-indebtedness is for a national agency to be empowered to issue credit

48 Cf. Section 5 of the Debt Restructuring Act. *See* prop. 2005/06:124 p. 78.

49 *See* Hellners, T. & Mellqvist, M., *Skuldsaneringslagen. En kommentar till 2006 års lag*, 2007, p. 104.

50 Dir. 2007:29 *Samordnat insolvensförfarande*.

51 *See* PM 2003:04, bilaga 6. The Netherlands and Finland have these procedures. *See* also Betänkande 2006/07:FiU9.

guarantees to credit institutions lending money to individual persons for home purchasing (“purchasing guarantees”).⁵² Purchasing guarantees may refer to first-time buyers’ interest payments for the purchase of a tenant-owner or freehold home. They are intended for persons who wish to own their homes and are capable of paying but at present are not approved by the credit institutions on account of individual risk indications. This can mean persons with marginal savings for up-front payment on home purchases, a short credit record, project-based job employment or otherwise insecure job tenure. Purchase guarantees make the award of credits less of a risk for the credit providers, enabling them to expand their clientèle to include groups which would not otherwise be accepted as borrowers, as well as giving first-time buyers – e.g. young persons and tenants wishing to convert to tenant-ownership – better chances of home ownership. The credit guarantee safeguards a credit provider against losses, while at the same time serving to improve credit conditions for the borrower, the ultimate aim being for more people to obtain housing finance.

Developments in property legislation – which includes matters of over-indebtedness – have gradually shifted since the 1950s from Franco-German to more Anglo-American influence, but the Swedish system of insolvency law is a good deal more creditor-friendly than its Anglo-American counterpart. The Swedish Debt Restructuring Act, for example, as been criticised for penalising debtors instead of rehabilitating them. With the debtor obliged to live for an excessive period of time on the bread line, ill-health and social problems can follow.⁵³ Future developments in property legislation are none too easily foreseeable. There is a close connection between the structure of the economy in general and the developments in the field of property law. The legislation is characterised by considered social views concerning, for example, the necessity of protecting a weaker party against a stronger one when entering into property agreements. At the same time it is important to protect the financial interests of the players involved. The similarity of business conditions in several countries has resulted in a similarity of principles and thinking as to how property law has and should be developed. This is manifestly the case not least within the EU. But the present-day situation for the overindebted arouses concern for the future. Only a very small proportion (some 10%) of the households in Sweden afflicted with over-indebtedness during the critical years of the 1990s have today found a solution to their problems, e.g. through debt restructuring.⁵⁴ There is, however, a risk of a new spate of over-indebtedness, and it is to be hoped that the legal systems of Europe, Sweden’s included, will be better equipped to deal with it than they were last time.

52 Promemoria Fi 2007/4536/BO. *Statliga kreditgarantier för att underlätta etablering i bostadsrätter och egnahem för förstagångsköpare.*

53 See Sundin, K., *Några funderingar och anledningar med juridiska aspekter till att överskuldssättning kan uppstå: Förslag till förändringar*, TemaNord 2004:513, p. 100.

54 Engström, J. & Josefsson, M. & Ahlström, R., *Krisbetingade känslreaktioner hos överskuldssatta*, TemaNord 2004:513 p. 143.