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Moser, Katharina

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Making Sense of the Numbers: The Shift from Non-Consensual to Consensual Debt Relief and the Construction of the Consumer Debtor

KATHARINA MÖSER*

This article analyses trends in the number of individual insolvency proceedings in England and Wales, particularly a shift from non-consensual debt relief to consensual Individual Voluntary Arrangements (IVAs) and, connected to that, an increased privatisation of the process. Seeking to conceptualise IVA users, it builds on US scholarship linking the development of bankruptcy rates to the construction of the consumer debtor. Based on this theory and empirical evidence, its findings broadly indicate that a majority of IVA users do not match the image of a strategic actor. Rather, they belong to the most vulnerable groups, whose decision in favour of IVAs is the result of external constraints and irrational biases, which commercial providers tend to exploit. Building on this characterisation of IVA users, the article contributes to the critical discussion of aforementioned trends, arguing that reforms should be contemplated to partially reverse them.

INTRODUCTION

Due to a dramatic increase in personal debt levels, annual individual insolvencies have risen steadily since 2015.¹ This increase in the overall number of individual insolvencies is largely driven by a record number of people using consensual debt relief procedures – Individual Voluntary Arrangements (IVAs),² rather than non-consensual ones – bankruptcy and debt relief orders (DROs). As a consensual debt relief procedure, IVAs are based on an agreement between the debtor and her creditors.³ In contrast, bankruptcy and DROs provide statutory debt relief.⁴

* *Birmingham Law School, University of Birmingham, B15 2TT, Birmingham.*
k.moser@bham.ac.uk

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¹ See Insolvency Service, *Insolvency Statistics – July to September 2018 (Q3 2018)* (2018) 11; P. Inman, ‘UK insolvencies hit six-year high as finances come under pressure’ *Guardian*, 27 July 2018 <<https://www.theguardian.com/money/2018/jul/27/uk-insolvencies-hit-six-year-high-as-record-number-take-out-ivas>>.

² The number of IVAs in of 2017 (59220) was the largest annual number of IVAs since they were introduced in 1987.

³ See Insolvency Act 1986 (IA 1986), ss257, 258, 260; Insolvency Rules 2016 (IR 2016), r15.34 (6) for procedural details and effects of such an agreement.

⁴ See the discharge provisions for bankruptcy (IA 1986, ss278-281) and DROs (IA 1986, ss251H, I).

The increase in annual IVA numbers is a long-term trend that started after 2003.⁵ The *Insolvency Act 1986* had introduced IVAs with a view to their potential benefit for a very particular section of the indebted population: a small group of self-employed traders.⁶ However, after 2003, commercial IVA providers converted them into a mass remedy for over-indebted consumers.⁷ Although these market developments ran counter to the original intention of the legislature, official government policy endorsed and indeed encouraged them as part of a ‘can pay should pay’ strategy.⁸ In contrast, the overall numerical significance of non-consensual debt remedies has declined. More precisely, since 2010 there has been a dramatic fall in bankruptcies.⁹ Although the newly introduced DRO procedure, which since 2009 provides a simplified process for the so-called ‘no-income, no asset’ debtors,¹⁰ explains part of this development, it certainly fails to do so completely.¹¹ Taken together, these developments have significantly changed the characteristics of consumer insolvency. Notably, there has been a major shift from non-consensual remedies to IVAs¹² and, linked to that, an increasing privatisation and marketisation of debt relief processes.

Examining these trends from the perspective of IVA users, this article sets out the findings from a study that exposes a major consumer protection concern: tens of thousands of debtors are annually entering into IVAs at great expense, while these provide less benefit and less protection than non-consensual remedies. The article analyses these issues in context of a wider government strategy ruthlessly aimed at reducing reliance on public support systems. This strategy affects non-consensual debt relief procedures, but also other social assistance programmes such as social insurance (consumer insolvency is considered in this light) and means-tested social assistance. Beyond personal insolvency law, this article’s findings are

⁵ See tables, BACKGROUND AND CONTEXT, 1.

⁶ Report of the Review Committee, *Insolvency Law and Practice* (1982) ch. 7.

⁷ I. Ramsay, *Personal Insolvency in the 21st Century* (2017) 86; ‘A Tale of Two Debtors: Responding to the Shock of Over-Indebtedness in France and England – a Story from the Trente Piteuses’ (2012) 75 *Modern Law Rev.* 212, at 240; A. Walters, ‘Individual Voluntary Arrangements: A ‘Fresh Start’ for Salaried Consumer Debtors in England and Wales?’ (2009) 18 *International Insolvency Rev.* 5, at 25-27.

⁸ See BACKGROUND AND CONTEXT, 2. below.

⁹ Plummeting for eight years, their annual number has fallen from 74670 in 2009 to 15084 in 2017, which is the lowest level since the early 1990s.

¹⁰ See Department of Constitutional Affairs, *A Choice of Paths – Better Options to Manage Over-indebtedness and Multiple Debt* (2004); Department of Trade and Industry, *Relief for the Indebted – An Alternative to Bankruptcy* (2005).

¹¹ Taken together, the total number of bankruptcies and DROs in 2017 amounted to 41202, while in 2009 the number of bankruptcies alone was at a much higher level (74670).

¹² While in 2002 bankruptcies still constituted the standard debt relief remedy (79.42% bankruptcies/ 20.58% IVAs), it is now IVAs that are exceeding the overall number of non-consensual proceedings (59.7% IVAs in 2017).

relevant to contemporary debates on welfare reforms, including measures such as the benefit cap¹³ and a continuous increase in sanctioned forms of behavioural conditionality.¹⁴

The analysis in this study is informed by a body of US scholarship that has examined the development of US insolvency filing rates through the lens of different constructions of the consumer debtor, namely: the strategic, structural and behavioural actor models. These belong to a taxonomy of human decision-making processes that, among other areas, are discussed in context of the design and delivery of social support systems.

First, the strategic model is founded on the neo-classical economic concept of the rational chooser, meaning that individuals are assumed to be rational utility maximisers. They rationally rank the opportunities available to them in terms of preference, and make their choice in accordance with this ranking. They are deemed to have complete information and have stable preferences.¹⁵ Scholars have identified this model as a guiding principle for wide areas of public policymaking: assuming that individuals operate on the basis of a rational cost-benefit analysis, their behaviour can be anticipated as a systematic response to regulatory incentives.¹⁶ Problematically, under this model, debt relief laws, like other forms of public support may create ‘perverse’ incentives for opportunistic abuse.¹⁷ Indeed, fears of such abuse have been one of the driving forces for this country’s welfare reforms, which through work incentives, like the benefit cap and a continuous increase in sanctioned forms of behavioural conditionality, aim to counter a perceived welfare over-reliance.¹⁸

In contrast, the structural model is compatible with the idea of individual rationality, but assumes that, due to their situational constraints, individuals may have no leeway to act strategically, because, quite simply, they are left without choice between different opportunities. The structural model is therefore not opposed to rational choice theory, which

¹³ This cap imposes a limit on the total amount of benefit that most households can get, see Department of Work and Pensions, *Universal Credit: Welfare that Works* (2010).

¹⁴ See B. Watts et al., *Welfare Sanctions and Conditionality in the UK* (2014); B. Watts and S. Fitzpatrick, *Welfare Conditionality* (2018), 82-83; P. Dwyer and S. Wright, ‘Universal Credit, Ubiquitous Conditionality and its Implications for Social Citizenship’ (2014) 22 *Journal of Poverty and Social Justice* 27.

¹⁵ G.S. Becker, *The Economic Approach to Human Behaviour* (1976) 14; H. R. Varian, *Intermediate Microeconomics* (2014) 35-89.

¹⁶ J. Stewart, ‘Rational Choice Theory, Public Policy and the Liberal State’ (1993) 26 *Policy Sciences* 317.

¹⁷ N. Barr, *Economics of the Welfare State* (2012) 83-100, 147-149; D. S. King and H. Ward, ‘Working for Benefits: Rational Choice and the Rise of Work-Welfare Programmes’ (1992) *Political Studies* 479; for discussion B. Watts and S. Fitzpatrick, *Welfare Conditionality* (2018), 2; D. R. Fletcher et al., ‘Gamers or Victims of the System? Welfare Reform, Cynical Manipulation and Vulnerability’ (2016) 24 *Journal of Poverty and Social Justice* 171; J. D. Kasarda and K.F. Ting, ‘Joblessness and Poverty in America’s Central Cities: Causes and Policy Prescriptions (1996) 7 *Housing Policy Debate* 387.

¹⁸ Department of Work and Pensions, op. cit., n. 13.

of course accepts that individual choices are subject to constraints,¹⁹ but denies its relevance in certain contexts. Outside the scope of insolvency law, this model is applied by scholars, who perceive welfare reliance as a structural problem caused by societal-level factors, such as barriers to workforce participation for sick or disabled welfare recipients and weak demand for labour, rather than strategic behaviour.²⁰ Finally, the behavioural model uses social psychology to modify the assumptions of the rational actor model. In accordance with this model, individuals are typically prone to over-optimism and present-biased preferences,²¹ limiting their responsiveness to regulatory incentives. This includes incentives for strategic welfare abuse, as well as those aiming to counter such abuse.²²

The divide between these approaches was reflected in the deep and heated ideological debates about the role of bankruptcy law in the US prior to the enactment of the *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005* (BAPCPA). The legislative reform was prompted by an explosive rise in filing rates under Chapter 7 of the *US Bankruptcy Code*. Based on a strategic actor model, it reversed the US's liberal 'fresh start' tradition, with the introduction of a means test, precluding debtors from immediate debt relief under Chapter 7, if they were capable of fulfilling a five year payment plan under Chapter 13. This study draws upon these debates to inform the analysis of the English context. Ultimately, it becomes apparent, that both the structural and behavioural debtor models are in conflict with the strategic actor model concerning the way in which personal insolvency law should exercise its debt relief function. If the structural and/or behavioural debtor models were to be followed, the legislation would have built on the idea of a social insurance, whereby debt relief laws should perform the function of allocating risk between the debtor and her creditors with a view to alleviating the *ex post* effects of financial failure. Were the strategic actor model to be followed, the legislation would also need to take account of the creation of *ex ante* incentives, including those for strategic abuse.

¹⁹ Most importantly budget constraints, Varian, *op. cit.*, n. 15, p. 20-72.

²⁰ B. Watts et. al., *op. cit.* n. 14, p. 16 for a literature overview; see also Fletcher et al., *op. cit.*, n. 17; Kasarda and Ting, *op. cit.*, n. 17.

²¹ For an outline of general ideas, C. Jolls et al., 'A Behavioral Approach to Law and Economics', 50 (1997-1998) *Stanford Law Rev.*, 1471; S. Schwartz, 'Personal Bankruptcy Law: A Behavioural Perspective' in *Consumer Bankruptcy in Global Perspective*, ed. J. Niemi-Kiesläinen et al. (2003) 61.

²² For discussion, see B. Watts et. al., *op. cit.* n. 14, p. 15.

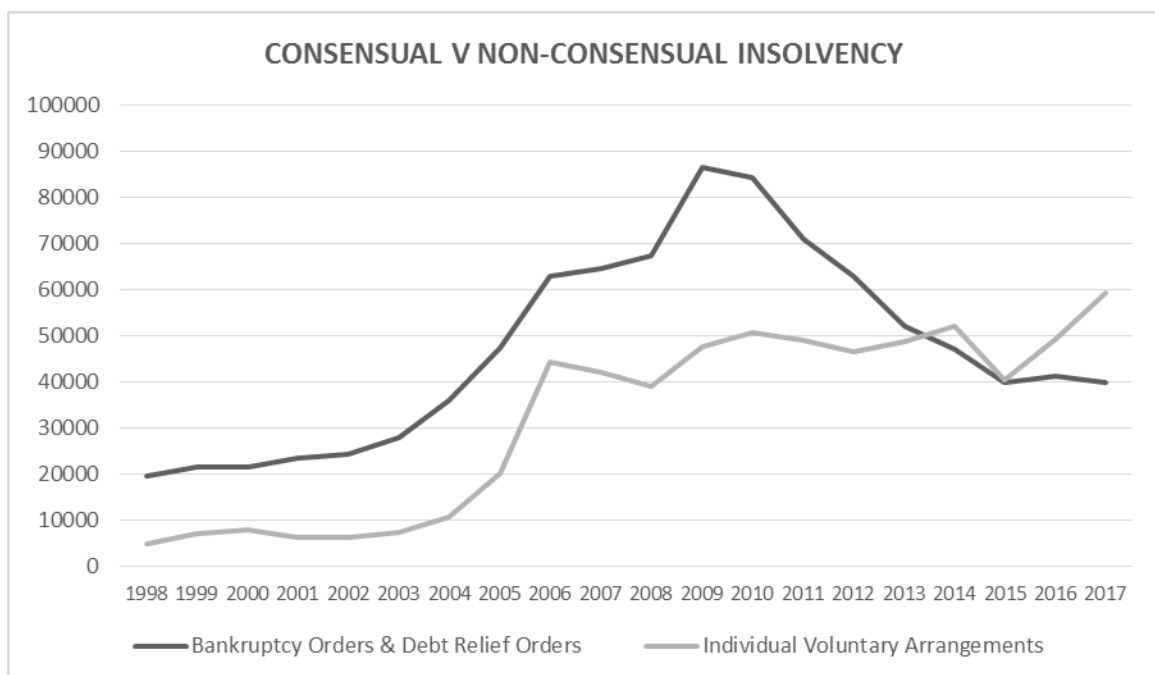
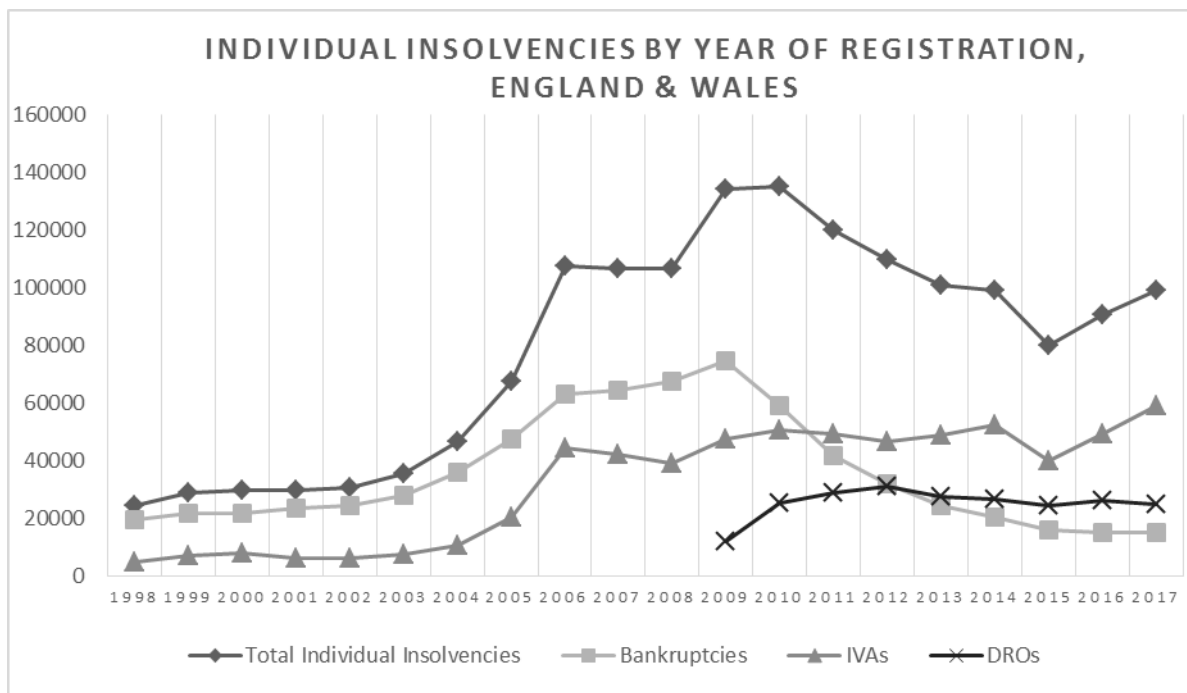
Building on the aforementioned debtor models, the article suggests that the majority of IVA users do not match the image of a strategic actor, but rather belong to the most vulnerable groups in society. As structural debtors, they enter into IVAs because they are the victims of financial shocks, leaving them unable to overcome economic barriers to access non-consensual procedures, or, as behavioural debtors, they are the victims of their own behavioural biases, which commercial debt solution providers tend to exploit. Based on this conceptualisation of IVA users, the article makes reform proposals seeking to direct structural and behavioural debtors towards more appropriate non-consensual debt solutions, thereby systematically addressing the aforementioned consumer protection failure. More generally, the analysis increases the body of evidence that rational choice theory may not be adequate as a guiding principle for the design and delivery of public support systems.

This analysis has four parts. The first part illustrates the numerical shift from non-consensual to consensual remedies, describes the privatisation and marketisation process linked to this shift and outlines the policy environment supportive of this shift. The second part analyses the aforementioned debtor models and assesses their hypothetical relevance for England and Wales. Testing the validity of these findings, the third part provides an empirical examination of the factors influencing debtors when choosing IVAs instead of non-consensual remedies. The fourth part discusses the resulting policy implications and reform proposals.

BACKGROUND AND CONTEXT

1. Recent Trends in the Development of Insolvency Numbers Linked to an Increasing Privatisation and Marketisation of Debt Solutions

The figures in the graphs below illustrate the numerical shift in favour of IVAs, as described in the introduction. As indicated in the introduction, this shift has wider implications leading to an increased privatisation of debt relief processes, which can be characterised as forms of substantive and procedural privatisation. The first graph shows individual insolvencies in England and Wales, by year, displayed as a total, and then broken down by bankruptcies, IVAs and DROs. The second graph denotes the breakdown of consensual and non-consensual insolvency arrangements.



Source: Insolvency Service

On a substantive level, the graphs demonstrate a reduction of state intervention in favour of the debtor. Statutory debt relief, as provided by the bankruptcy and DRO procedure, restricts the debtor's contractual payment obligations and, therefore, ultimately changes the balance of power in the credit marketplace in the debtor's favour. On the other hand, as IVAs are based on a private re-negotiation plan, these allow creditors to exercise their market power. Still,

even IVAs provide some debtor support, thus creating a compromise solution between bankruptcy and informal debt solutions, such as Debt Management Plans (DMPs).²³ Firstly, unlike DMPs, IVAs are legally binding,²⁴ therefore preventing the collection efforts of individual creditors and providing for guaranteed interest freezes. Also, due to their binding nature, after the completion of a repayment period, IVAs can guarantee permanent debt relief, whereas DMPs only allow for a stretching out of the repayment period. Furthermore, IVAs provide a ‘cram down’ mechanism, meaning that the debtor only needs to gain the approval of the creditors by a majority of three-quarters in value, in order to conclude an agreement that binds all creditors.²⁵ Finally, since 2008, minimum standards regarding the content of the agreement are laid down in a voluntary code of practice, called the *IVA Protocol*.²⁶ It is questionable, however, whether its operation actually improves the position of debtors. The government had brokered this document through the *Insolvency Service* with the intention of supporting continued growth of IVAs, in response to the institutional creditors ‘strike’ of 2007, when they refused to accept the amount of debt that was being written down in a growing number of IVAs.²⁷ To restore their cooperation, creditors were given major input in the drafting process,²⁸ which, as a result, cemented, rather than curtailed, their market power.²⁹

At a procedural level, we can distinguish between procedures that are publicly or privately managed. Non-consensual procedures, such as DROs and the vast majority of consumer bankruptcies, are administered by the *Official Receiver*, who, as a civil servant of the *Insolvency Service*, is a public officer.³⁰ On the other hand, IVAs and DMPs are managed by private intermediaries, and unlike DMPs, IVAs require the compulsory involvement of a private sector insolvency practitioner.³¹ As a result, the role of the state is gradually reduced

²³ Walters, op. cit., n. 7, p. 22.

²⁴ For details of this binding effect, see IA 1986, s260.

²⁵ Op. cit., n. 3.

²⁶ For current version, <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/530293/IVA_Protocol_2016.pdf>.

²⁷ Walters, op. cit., n. 7, p. 29-31; also Ramsay, op. cit.(2017), n. 7, pp. 94-96; M. Green, ‘New Labour: More Debt – The Political Response’, in *Consumer Credit, Debt and Bankruptcy: Comparative and International Perspectives*, ed. J. Niemi et al., (2009) 393, at 408.

²⁸ Ramsay, id.

²⁹ Id., pp. 94-98; J. Spooner, ‘Recalling the Public Interest in Personal Insolvency Law: A Note on Professor Fletcher’s Foresight’ (2015) 3 *Nottingham Insolvency and Business Law eJournal* <https://www.ntu.ac.uk/nls/Research/insolvency_journal/index.html> 537, at 560.

³⁰ Walters, op. cit., n. 7, pp. 16-17; Ramsay, op. cit. (2012), n. 7, p. 239.

³¹ IA 1986, Part VIII.

from one of manager of insolvency procedures to that of regulator.³² This privatisation process has led to the development of an insolvency market, allowing key players, such as institutional creditors and private IVA providers, to influence directly the development of filing rates. Indeed, as previously revealed by Walters, market-driven explanations affecting the *supply side* of IVAs relief have such a pronounced effect on the development of IVA numbers that they appear to be the key factor in explaining the numerical shift in their favour.³³ First, there is a direct link between the explosive IVA growth after 2003 and the emergence of so-called ‘IVA factories’, which through volume-processes made consumer IVAs commercially viable.³⁴ Secondly, the stalling growth of IVAs in 2007/2008³⁵ can equally be explained by market processes, namely institutional creditors exercising their market power to press for higher IVA repayment thresholds, which, as mentioned above, prompted the introduction of the *IVA Protocol*. Finally, the fluctuations in IVA numbers in 2015/16³⁶ are likely to be the consequence of market disruptions caused by regulatory requirements imposed by the *Financial Conduct Authority* (FCA), which had taken over the regulatory responsibility for debt management companies in 2014.³⁷ Since 2016, following a substantial restructuring process, the IVA market is governed by a small number of so-called ‘mono-line personal insolvency providers’ (Creditfix, Aperture Debt Solutions, Hanover Insolvency, Payplan, Vanguard, Harrington Brooks), which have avoided the regulatory control of the FCA³⁸ and now control over 70% of market share.³⁹

2. The Policy Context

³² Indeed, insolvency practitioners are subjected only to the regulatory control of the *Insolvency Practitioners Association* and various other professional bodies (see Insolvency Service, *Review of the Monitoring and Regulation of Insolvency Practitioners* (2018), 3) and some indirect regulatory control exercised by the *Insolvency Service* (for see A. Walters and M. Seneviratne, *Complaints Handling in the Insolvency Practitioner Profession, A Report Prepared for the Insolvency Practices Council* (2008) 2-7; S. Morgan, *Causes of Early Failures in Individual Voluntary Arrangements* (2008) 5-7).

³³ Walters, op. cit., n. 7, 25.

³⁴ Id., 25-27; for a description of these processes, see also Insolvency Service, op. cit. 32, 10.

³⁵ See tables above.

³⁶ Id.

³⁷ Any provider of DMPs must now be authorised by the FCA and is expected to meet the standards set out in the FCA’s *Handbook of Rules and Guidance* (CONC 8).

³⁸ S. Williams, ‘Insolvency Numbers Up – but Rising Debt Isn’t the Main Cause’ <<https://debtcamel.co.uk/2016-insolvency-increases/>>.

³⁹ Insolvency Service, *Individual Voluntary Arrangements: Outcome Status and Provider Breakdown, 1990 – 2016* (2018) 6.

Government policy endorsed and indeed encouraged the shift in favour of IVAs. It had its origins in the findings of a stakeholder working group,⁴⁰ which the *Insolvency Service* established in 2004. Responding to this group's findings, the *Insolvency Service* proposed reforms to streamline the IVA process for consumers,⁴¹ making it "the best product in the market".⁴² While these reforms were later dropped in favour of the IVA protocol, due to creditor pressure described above, the government's enthusiasm for consumer IVAs remained unabated. Thus, when introducing the DRO procedure, it was presented as a remedy of last resort; debtors should in the first instance seek a market solution and use "other remedies available to people who get into debt".⁴³

This policy was based on a 'can pay should pay' narrative, which was supported by the empirical research the *Insolvency Service* had commissioned from Michael Green.⁴⁴ "For those in work", as opposed to those in the dependent economy, the IVA process should be preferred to non-consensual proceedings. Firstly, Green suggested that, compared to bankruptcy, IVAs resulted in higher yields for creditors. Secondly, IVAs forced 'can pay' debtors to 'foot the bill' for the benefit of debt relief, hence limiting state expenditure on non-consensual procedures. Like the government's policy on other social assistance programs, the "can pay should pay" policy was therefore aimed at reducing reliance on public support systems. Thirdly, like in welfare contexts, this approach was linked to a rational choice argument. Importantly, the 2004 reform discussions took place against the background of an increase in bankruptcy numbers⁴⁵ and a (questionable)⁴⁶ perception that insolvency proceedings were increasingly used by a new type of middle-class individual, who had actively caused their over-indebtedness by 'living beyond their means'.⁴⁷ The financial discipline required for the completion of an IVA therefore offered an opportune riposte to arguments that generous provision of debt relief, as available under bankruptcy law, provided an incentive for strategic abuse.⁴⁸ Remarkably, on this point, the policy case in favour of the

⁴⁰ Representation was dominated by Insolvency Practitioners and other intermediaries, Ramsay, op. cit., n. 7 (2017), p. 93.

⁴¹ Insolvency Service, *Improving Individual Voluntary Arrangements* (2005).

⁴² Id., Cm. 21

⁴³ Insolvency Service, op. cit. (2005), n. 9.

⁴⁴ *Individual Voluntary Arrangements – Over-Indebtedness and the Insolvency Regime, Short Form Report* (2002); also op. cit., n. 27, pp. 399-405; Walters, op. cit., n. 7, pp. 27-28.

⁴⁵ See table above.

⁴⁶ Critically Ramsay, op. cit. n. 7 (2017), p. 92.

⁴⁷ Green, op. cit. n. 44; op. cit. n. 27, p. 400.

⁴⁸ Walters, op. cit. n. 7, p. 28.

consumer IVA remains strangely incomplete. While rational choice logic may be invoked to contend that IVAs are preferable to easy debt write-offs under non-consensual proceedings, in order to provide a coherent argument it would also have to be complemented by a rational choice explanation of why consumer debtors overwhelmingly decide in favour of IVAs. Yet, the relevant policy papers fall short of addressing the central issue of what has caused the consumer demand for IVAs.

THE CONSTRUCTION OF THE CONSUMER DEBTOR – THE THEORETICAL DEBATE

As outlined in the introduction, the article seeks to fill this gap by drawing on different consumer debtor constructions, as identified in the US debate. Consequently, the following section describes the different characterisations of consumer debtors and then considers their potential relevance for England and Wales.

1. The Consumer Debtor as a Victim of Exogenous Shocks – Structural Debtor

Adherents of this model assume that debtors are pushed over the financial edge by economic shocks – events such as job loss, divorce, or illness, whose occurrence lies outside their control. Debt relief laws are therefore understood as an instrument to manage the risk of uncertain future events, fulfilling a function resembling that of a social insurance, minimising the *ex post* losses of financial failure.⁴⁹ Similar to other forms of social insurance, they allow for pooling; that is, the exchange of a small, but certain, present loss (the premium) for a much larger, but uncertain, future loss. Through the discharge of debt, they transfer the risk of financial failure from consumer debtors (the insured) to creditors (insurers), with debtors paying an interest rate as a risk-adjusted premium.⁵⁰ Such intervention serves debtors' welfare by protecting them from the consequences of over-indebtedness, such as persistent contact from creditors, destabilisation of their family and other personal relationships, mental health

⁴⁹ T. A. Sullivan et al., *As We Forgive Our Debtors* (1999); 'Less stigma or more financial distress: An empirical analysis of the extraordinary increase in bankruptcy filings', (2006) 29 *Stanford Law Rev.* 213; *The Fragile Middle Class: Americans in Debt* (2000).

⁵⁰ C. G. Hallinan, 'The Fresh Start Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory' (1986) 21 *University of Richmond Law Rev.* 49, at 103-109; J. Spooner, 'Seeking Shelter in Personal Insolvency Law: Recession, Eviction and Bankruptcy's Social Safety Net' (2017) 44 *Journal of Law and Society* 374, at 384.

problems and other stress-related health problems.⁵¹ Equally, as for other forms of social insurance,⁵² it is assumed that debt relief laws reduce negative externalities, thereby decreasing the costs to be borne by the general public.⁵³ They restore the debtors' economic productivity and – connected to that – lead to an increase in tax revenue and contributions to the social security system on the one hand and a reduction of transfer payments on the other.⁵⁴ Also, such debt relief laws return debtors to positions in which they can resume spending; this is understood to be essential for aggregate demand and economic growth.⁵⁵

Under the premise that debt relief laws serve the victims of exogenous shocks, scholars assume that micro-economic factors indicative of financial distress, such as the debt-to-income ratio of individual households, in particular, are directly linked to the development of filing rates.⁵⁶ Because an increased level of financial distress amplifies the financial vulnerability of households, it makes them more susceptible to these shocks, ultimately leading to an increase in insolvency numbers.⁵⁷ The debt-to-income ratio therefore serves as a proxy for exogenous shocks. Ultimately, according to this model, filing rates are determined by structural, rather than behavioural factors. Similar to structural perspectives on other areas of state reliance,⁵⁸ this model therefore inherently reduces the scope for rational choice considerations.

Supporters of this model have argued that exogenous shocks explained the overall rise in US filing rates and were also the reason for debtors not committing themselves to payments in accordance with Chapter 13. As a consequence of their economic shock, the majority of insolvents simply lacked the means to do so.⁵⁹ Thus, consumer advocates lambasted the credit industry's proposal to introduce a means test, which forced debtors to use Chapter 7, instead of Chapter 13. With the vast majority of debtors lacking sufficient income, the introduction of such a test was a pointless exercise. By raising the costs of the bankruptcy process, it would

⁵¹ The Centre of Social Justice, *Maxed Out* (2013) 87-105.

⁵² Barr, *op. cit.*, n. 17, p. 138.

⁵³ Hallinan, *op. cit.*, n. 50, p. 122.

⁵⁴ The Centre of Social Justice, *op. cit.* n. 51.

⁵⁵ A. Mian and A. Sufi, *House of Debt* (2014); A. Turner, *Between Debt and the Devil: Money, Credit, and Fixing Global Finance* (2015) 3; International Monetary Fund, *Dealing with Household Debt*, Chapter 3 (2012).

⁵⁶ See the methods used by R. J. Mann, 'Making Sense of Nation-Level Bankruptcy Filing Rates' in *Consumer Credit, Debt and Bankruptcy: Comparative and International Perspectives*, ed. J. Niemi et al., (2009) 225, at 247.; R. Lawless, 'The Paradox of Consumer Credit' (2007) *University of Illinois Law Rev.* 347; Sullivan et al., *op. cit.*, n. 49 (2006), pp. 229-233.

⁵⁷ *Id.*

⁵⁸ See INTRODUCTION.

⁵⁹ D. A. Skeel Jr., *Debt's Dominion* (2003) 200, 210.

de facto bar the desperately over-indebted from accessing the procedure:⁶⁰ this would result in a loss of debtors' welfare and wider externalities. As Elizabeth Warren has pointedly formulated: “*Those who want to say the way to solve rising consumer bankruptcy is by changing the law are the same people who would have said during a malaria epidemic that the way to cut down on hospital admissions is to lock the door.*”⁶¹

If we assume that IVA users are the victims of exogenous shocks, following Warren's logic, the shift in favour of IVAs may be explicable by the existence of external constraints limiting their access to non-consensual options (so-called front-end factors). These may consist of strict eligibility requirements, affecting the victims of exogenous shocks as they might affect any other debtor type. In addition, structural debtors may be confronted with economic bars, which, due to their vulnerable economic position, *de facto* excluded them from these procedures, meaning that the consequences of the shock might also limit their choice of remedies. Contrary to the ‘can pay should pay’ approach underpinning the government's policy stance, IVAs would therefore systematically attract the poorest, rather than ‘can pay’ debtors. Being barred from access to non-consensual solutions, these debtors would resort to IVAs, not because they served their self-interest, but as a substitute for inaccessible non-consensual debt relief. As described in the previous section, if non-consensual debt relief is replaced by IVAs, this increases the leeway for creditors to exercise their market power, thus presumably reducing the debtors' insurance protection, as compared to non-consensual remedies. The diversion of debtors into consensual solutions is therefore likely to have negative effects on debtors' welfare and, at the same time, lead to an increase of externalities, similar to those associated with the complete denial of debt relief.

2. The Debtor as Strategic Actor

As indicated in the introduction, scholars that construe the consumer debtor as strategic actor focus on an *ex-ante* incentives analysis. Some of them assume that legal factors determining the economic value of the discharge should therefore prove central to the explanation of the overall development of filing rates, as well as debtors' choices between different types of

⁶⁰ Id., 210, 211.

⁶¹ P. Pae and S. Stoughton, ‘Personal Bankruptcy Filings Hit Record; Easy Credit Blamed; Congress May Act’ *Washington Post*, 7 June 1998.

remedies.⁶² This approach has been expanded by scholars assuming that debtors may also consider a wider range of costs associated with personal insolvency, such as the availability of post-bankruptcy credit, but also costs of a non-monetary nature, such as the social stigma of bankruptcy.⁶³

Principally, the private and social efficiency arguments speaking in favour of the provision of debt relief, as they have been set out in the previous section, are also present in the strategic actor model. Problematically, however, under this model, debt relief may create a risk of strategic abuse. The availability of discharge may encourage debtors to borrow with an eye to insolvency and to abuse debt relief procedures in order to reduce their efforts towards the repayment of their debts.⁶⁴ Debt relief laws that incentivise such behaviour increase the costs to be borne by the creditors, which at least to some extent will have to be borne by all borrowers as a group, because creditors would have to recoup these costs by charging higher interest rates or introducing other measures increasing the cost of credit.⁶⁵ Eventually, they might perversely aggravate the problem of consumer over-indebtedness.⁶⁶ As indicated in the introduction, this type of argument replicates rational choice perspectives on other forms of social assistance, where there are similar fears that individuals may free-ride on other citizens who are compulsorily contributing to this scheme. Ultimately, by creating disincentives to work, they create a poverty trap.⁶⁷

As with other forms of social assistance, the proponents of the strategic actor model therefore assume that if the protection provided by debt relief laws is too generous, they may cause externalities exceeding their potential benefits. To avoid such implications, debt relief laws have to provide a trade-off between a speedy resolution of financial distress and fine-tuning of debt relief so to reduce wrong incentives; that is, the costs of debt relief have to be so high that debtors would only enter bankruptcy where it contributed to aggregate welfare for them

⁶² M. J. White, 'Why it Pays to File for Bankruptcy: a Critical Look at Incentives under US Bankruptcy Laws and a Proposal for Change' (1998) 65 *University of Chicago Law Rev.* 685; 'Economic versus Sociological Approaches to Legal Research: The Case of Bankruptcy' (1991) 25 *Law & Society Rev.* 685; A. Schwartz et al., 'Regulating Consumer Bankruptcy: A Theoretical Inquiry' (2000) 29 *The Journal of Legal Studies* 585.

⁶³ T. J. Zywicki, 'Institutions, Incentives and Consumer Bankruptcy Reform' 62 (2005) *Washington. & Lee Law Rev.* 1071; 'An Economic Analysis of the Consumer Bankruptcy Crisis' (2004-2005) 99 *Northwestern University Law Rev.* 1463.

⁶⁴ White, op. cit., n. 62 (1991), p. 686.

⁶⁵ R. Posner, 'The Bankruptcy Reform Act--Posner' <<http://www.becker-posner-blog.com/2005/03/index.html>>.

⁶⁶ Ibid; G.R. Elgueta, 'The Paradoxical Bankruptcy Discharge: Rereading the Common Law – Civil Law Relationship' (2014) 19 *Fordham Journal of Corporate & Financial Law* 293, at 335.

⁶⁷ Barr, op. cit., n.17, pp. 147, 148; see also the other works cited at n. 17; C. Murray, *Losing Ground: American Social Policy, 1950-1980* (2015); with regard to Universal Credit, Department of Work and Pension, op. cit. n. 13, Cm. 27.

to do so.⁶⁸ Accordingly, policymakers may show different reactions. If they wish to achieve higher rates of insolvency filings to speed the resolution of financial distress, they might decrease the costs of discharge; or, being concerned that spiralling filing rates reflect strategic abuse of debt relief provisions, they may increase its costs.⁶⁹ The BAPCPA reforms may be understood as an attempt to do the latter. Assuming that debtors excessively used Chapter 7, particularly after a decline in the stigma of bankruptcy had increased the room for strategic filings,⁷⁰ the proponents of this model agreed with the introduction of a means test. This precluded debtors from immediate debt relief under Chapter 7, if they were able to make payments under Chapter 13, thus increasing the costs of debt relief.

Applying this model to explain recent trends in England and Wales, we would assume that debtors deciding in favour of an IVA, rather than a non-consensual remedy, would do so on the basis of a rational cost-benefit analysis. Unlike the decision of structural debtors, that of strategic actors would not necessarily be determined by economic bars to non-consensual solutions. It is possible that access fees could deter strategic actors, on the basis that they will subject the various remedies to a cost-benefit-analysis, which would include these fees. They would, however, not be deterred by these fees, if in the long term a non-consensual solution turned out to be the more cost-effective option, as compared to an IVA.

On the other hand, if as a result of a wider cost-benefit analysis, potentially including issues such as stigma, the costs associated with IVAs were lower than those of non-consensual remedies, strategic actors would voluntarily decide in favour of IVAs. After 2003, when the market supply of IVAs was widened considerably, we should see larger numbers of strategic actor consumers choosing IVAs, instead of bankruptcy or DMPs. If so, the question remains whether, as a consensual, rather than statutory, procedure, IVAs provide an adequate trade-off weighing the need to alleviate the *ex post* effects of financial distress against that to prevent strategic abuse. Indeed, the fact that they are based on a protocol, whose development was subject to major creditor influence, may raise fears that the current practice neglects to provide such balance.⁷¹

3. The Behavioural Debtor

⁶⁸ International Monetary Fund, *op. cit.*, n. 55, p. 121.

⁶⁹ Mann, *op. cit.*, n. 56, p. 229.

⁷⁰ See the works cited under n. 62, 63.

⁷¹ Critically, Ramsay, *op. cit.*, n. 7 (2017), p. 98.

The behavioural model, like the strategic actor model, considers that it is not only exogenous factors that influence filing rates. Using social psychology, it suggests, however, that in specific situational contexts individuals are unable to pursue rationally their self-interest, but typically display over-optimism and present-biased preferences.⁷²

Already in 1985, Jackson had used both of these ideas in the context of US bankruptcy legislation.⁷³ Applying the notion of over-optimism, he presumed that individuals systematically underestimated the likelihood of not being able to repay their consumer credit obligations.⁷⁴ In addition, he relied on the concept of time-inconsistent preferences, explaining systematic over-borrowing by noting that individuals could not effectively prevent themselves from taking on too much debt. Rather, in order to fund more immediate consumption, they made credit decisions, which at a later stage, they were inclined to regret.⁷⁵ Building on these findings, later research reinforced his argument by referring to the practices of commercial lenders, strategically abusing these behavioural weaknesses.⁷⁶

Preceding the BAPCPA reforms, the adherents to the behavioural debtor construction lined up with those supporting the structural debtor construction in opposing them.⁷⁷ Even if over-indebted consumers were not just the victims of external circumstances, but had, in fact, incurred an unreasonable amount of credit, they were the victims of their own behavioural biases requiring an equally strong state intervention in their favour. Furthermore, as behavioural debtors they were subject to behavioural distortions limiting their responsiveness to the incentives created by insolvency law, including those for abuse. Any focus on *ex ante* incentives was therefore misguided.⁷⁸ Also, supporters of the behavioural debtor model highlighted the problem that debtors' choice in favour of Chapter 13, rather than Chapter 7 may be influenced by behavioural bias. High failure rates under Chapter 13 indicated that debtors over-optimistically filed doomed applications under this Chapter in some irrational hope that "everything would come out right". Also, in line with the idea of time-inconsistent

⁷² See the works cited under n. 21.

⁷³ 'Fresh-Start Policy in Bankruptcy Law' (1985) 98 *Harvard Law Rev.* 1393.

⁷⁴ *Id.*, p. 1412.

⁷⁵ *Id.*, p. 1409.

⁷⁶ S. Block-Lieb and E. J. Janger, 'The Myth of the Rational Borrower: Rationality, Behavioralism, and the Misguided Reform of Bankruptcy Law', (2005-2006) 84 *Texas Law Rev.* 1481; R. Harris and E. Albin, 'Bankruptcy Policy in Light of Manipulation in Credit Advertising' (2006) 7 *Theoretical Inquiries in Law* 431; C. R. Sunstein, 'Boundedly Rational Borrowing: A Consumer's Guide' (2006) 73 *University of Chicago Law Rev.* 249; O. Bar-Gill, 'Seduction by Plastic' (2004) 98 *Northwestern University Law Rev.* 137.

⁷⁷ Block-Lieb and Janger, *id.*, p. 1559.

⁷⁸ *Id.*

preferences, the desire of debtors to save assets, particularly homes, may have blinded them to the fact that in the long term they had little capacity to make the necessary payments.⁷⁹

Remarkably, debtors' decision in favour of IVAs may be similarly explained. IVA users may be prone to over-optimism, causing them to underestimate the probability of events impairing their future ability to fulfil these agreements. Also, they may decide in favour of IVAs, because their immediate costs may be lower than those of non-consensual solutions. In doing so, they may neglect to factor in the long-term risks of IVAs, thereby making their choice on the basis of time-inconsistent preferences. Notably, with regard to the behavioural model, the combination of procedural privatisation and market influence of commercial IVA providers may be problematic too. Paralleling the argument with regard to commercial lenders, IVA providers too may have an incentive to exploit the behavioural weaknesses of consumers.

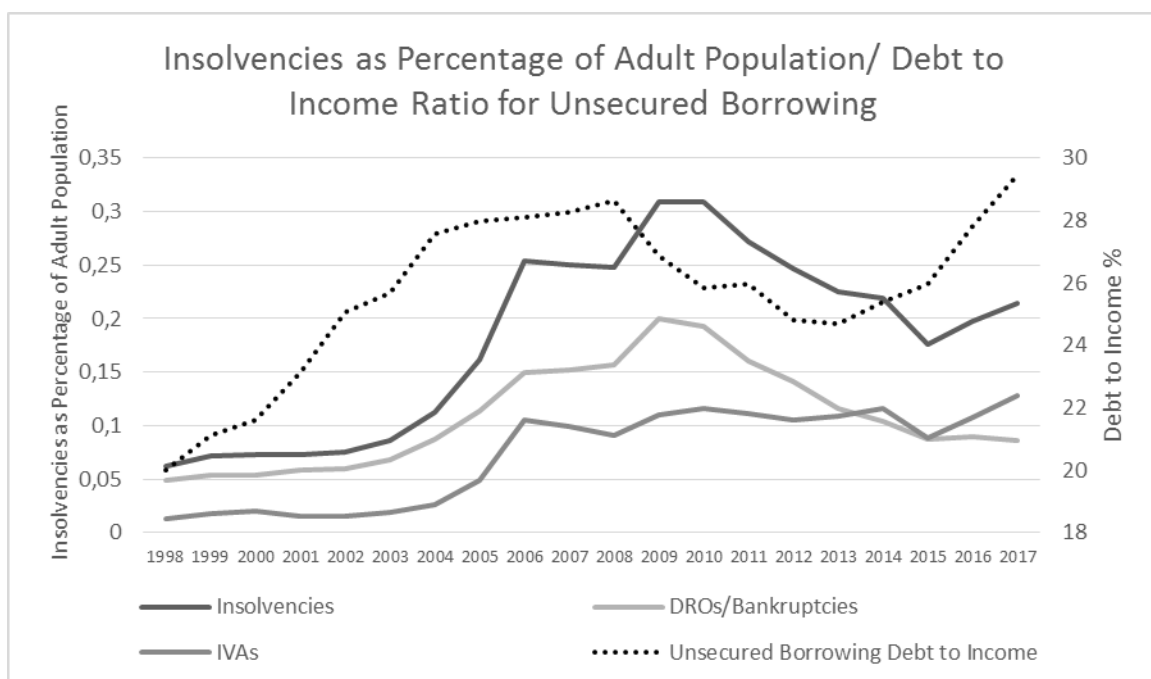
**THE REAL-LIFE CHARACTERISTICS OF CONSUMER DEBTORS SUBJECTED
TO IVAS –AN EXAMINATION OF THE FACTORS INFLUENCING THE
CONSUMER DEBTORS' DECISION IN FAVOUR OF IVAS**

The analysis of the empirical evidence seeks to gain an understanding of the factors determining debtors' decision in favour of an IVA, so as to assess the adequacy of the debtor constructions presented above. If one constructs IVA users as structural debtors, IVA demand would be understandably fuelled by a combination of micro-economic and front-end factors (including legal and economic factors) limiting the user's ability to access non-consensual debt relief. If one relied on the rational actor model, the debtor's choice could equally be determined by strict legal eligibility criteria. In this case, however, economic front-end factors would only form part of a wider cost-benefit analysis; this would include the factors determining the economic value of the discharge, but also costs of a non-monetary nature, such as stigma. Finally, if the behavioural construction of the debtor were correct, the demand for IVAs should be driven by consumers' behavioural biases and their exploitation by commercial providers.

1. Micro-economic Factors - the Level of Financial Household Distress

⁷⁹ Sullivan et al., op. cit., n. 49 (1999), p. 223.

The structural debtor conception assumes that the debt-to-income ratio of individual households should be directly linked to the development of filing rates.⁸⁰ The most differentiated analysis of such connections is provided by Lawless,⁸¹ whose work on US bankruptcy rates shows that, in the short term, increases in consumer credit lead to a decline in bankruptcy filings, because consumers use emergency credit to avoid falling into bankruptcy. As one would intuitively assume, they nevertheless contribute to the rise of bankruptcy filings, but only a couple of years later. An examination of the graph below⁸² indicates that a broadly similar pattern exists in England and Wales.



Source: Insolvency Service,⁸³ Office of National Statistics⁸⁴

For the purposes of this analysis, the developments in 2003, when the increased supply in IVAs was generated, are critical. When looking at the figures above, one notes an explosive growth in the overall insolvency numbers, which was preceded by a more gradual increase of consumer debt. The considerable growth in IVAs was therefore obviously due to debtors, who

⁸⁰ See the works cited under n. 56.

⁸¹ Id.

⁸² It uses a method that has been previously used by TUC, *Comparison of UK household debt data, 2000 to 2015* (2015).

⁸³ Left side of the table: Insolvency numbers as percentage of adult population.

⁸⁴ Right side of the table: Gross disposable income (QWND) as percentage of unsecured loans (=total loans (NNRE) – loans secured on dwellings (NNRP)).

for some reason had not made use of formal insolvency proceedings previously and who were now seeking debt relief in the form of an IVA. This evolution would be easy to reconcile with the ideas of the strategic actor model. If the costs associated with IVAs were lower than those of non-consensual proceedings, this could have convinced a new type of salaried, potentially more middle-class debtor, and particularly those previously subjected to a DMP, to make use of the increased supply of IVAs.

Looking at later developments, there is a second anomaly after 2010, when it is possible to identify a fall in non-consensual proceedings, which is much stronger than would have been expected, when compared to the simultaneous rise of household distress. As the number of IVAs rapidly grew, it seems that debtors, who in previous years would have opted for non-consensual proceedings, were being converted to choosing IVAs instead. This is unlike what happened after 2003, when IVAs were accessed by debtors who previously would not have made use of formal insolvency proceedings. Thus, factors concerning the accessibility of non-consensual procedures may have been relevant and may have guided the decisions of structural debtors. Such a conclusion may also be supported by data provided by the TDX group⁸⁵ confirming that newer IVA customer groups tended to have less debt and to rely more on benefits for their income.⁸⁶

2. Legal and Social Factors

(a) Front-end Barriers

A debtor applying for bankruptcy has to overcome financial obstacles, in the form of a deposit and fees to be paid in advance of the proceedings. While secondary legislation has regularly increased these charges, there were particularly large increases in 2010/2011.⁸⁷ This coincided with the beginning of the marked fall of bankruptcy numbers.

	2000	2004	2005	2007	2009	2010	2011	2014	2016
Court/ adjudicator fee	135	same	150	same	same	same	175	180	130
Deposit	250	335	same	345	360	450	525	same	550

⁸⁵ <<http://www.tdxgroup.com/>>.

⁸⁶ TDX, *Debt Review*, (2016) 2.

⁸⁷ J. Tribe, 'The Lightfoot Paradox: Financing the Cost of Personal Insolvency Relief through Bankruptcy Revenue Stamps and Sliding Scales: Part B' (2016) 29 *Insolvency Intelligence* 116, at 117.

Total	385	470	485	495	510	600	700	705	680
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Whilst the DRO procedure is subject to a comparably modest up-front fee of only £90,⁸⁸ access to this procedure is limited by strict eligibility requirements.⁸⁹ Originally, debtors could only apply for this procedure if they had a monthly income surplus not exceeding £50, as well as assets of no more than £300 and a debt level not above £15000.⁹⁰ While bankruptcy fees, to be paid by those debtors who do not fulfil the DRO eligibility criteria, might not deter strategic debtors (for whom these costs might be an item to be included in a much wider cost benefit analysis), they are likely to constitute an absolute bar to structural debtors. Indeed, this assumption has been substantiated by the *Review of Debt Relief Orders* conducted in 2014,⁹¹ where debt advice agencies, such as *Christians Against Poverty* and the *Citizens Advice Bureau* (CAB) demonstrated that a significant proportion of their clients – 35% in case of *Christians Against Poverty* – could neither access the DRO procedure nor afford to apply for bankruptcy.⁹² Even though the 2015 legislation⁹³ raised the DRO asset limit to £1,000 and the debt limit to £20,000, the issue is unlikely to be resolved. Rather, the data provided by the CAB indicates that even before the 2015 reform, the majority of their clients exceeded the debt limit that was soon to be introduced.⁹⁴ Due to the continued existence of a debt limit, the fundamental problem of an arbitrary and unprincipled distinction between low-income debtors who are eligible for a DRO and those who are not, remains unaddressed.⁹⁵

If front-end barriers prevent structural debtors from accessing adequate non-consensual remedies, one would expect them to remain trapped in a state of over-indebtedness or to resort to IVAs. If the latter was true, this would confirm the hypothesis that they resorted to IVAs as a substitute for non-consensual debt relief.⁹⁶ While, unlike non-consensual remedies, IVAs do

⁸⁸ Insolvency Proceedings Fees (Amendment) Order 2009 (SI 2009/645).

⁸⁹ See IA 1986, SCHEDULE 4ZA setting out the DRO eligibility requirements.

⁹⁰ Insolvency Proceedings (Monetary Limits) (Amendment) Order 2009 (SI 2009/645).

⁹¹ The Insolvency Service, *Insolvency Proceedings: Debt Relief Orders and Bankruptcy Petition Limit, Call for Evidence and Analysis of Responses* (2014).

⁹² *Christians Against Poverty, Too Poor to Go Bankrupt, A Report on CAP's Insolvency Demographic and the Problems Posed by the Current DRO Eligibility Criteria* (2014), 5; CAB, *Debt Relief Orders and the Bankruptcy Petition Limit: Citizens Advice Response to the Insolvency Service, Evidence: a Citizens Advice Social Policy Publication* (2014) 3.

⁹³ *Insolvency Proceedings (Monetary Limits) (Amendment) Order 2015* (SI 2015/26)

⁹⁴ Among the debtors the CAB advised about bankruptcy 54% had debts of over £ 25000.

⁹⁵ I. Ramsay and J. Spooner, *Insolvency Proceedings: Debt Relief Orders and the Bankruptcy Petition Limit, Submission to the Insolvency Service Call for Evidence* (2014).

⁹⁶ THE CONSTRUCTION OF THE CONSUMER DEBTOR – THE THEORETICAL DEBATE, 1.

not require the payment of any up-front fees,⁹⁷ their success depends instead on the availability of a regular surplus income. Even though IVAs may not seem an option for debtors who are too poor to shoulder even the bankruptcy fees, two reasons combine to change this perception. First, in recent years firms have continuously lowered their expectations regarding debtors' monthly payment obligations, with major providers now advertising monthly contributions of £50⁹⁸-£70⁹⁹ as acceptable; this means that IVAs are being offered to clients in DRO territory.¹⁰⁰ This finding explains the previous observation of low-income debtors, who in recent years would have opted for non-consensual proceedings, now choosing IVAs instead.¹⁰¹ Second, even though it may be right to fear that in the long term this type of debtor may not be able to afford even modest contributions, based on an unrealistic specification of their disposable income, they may nevertheless enter an IVA agreement.¹⁰² Being desperate to escape the symptoms of over-indebtedness, debtors who are barred from non-consensual remedies, in the absence of another way out, may commit to IVAs, disregarding that in the long term these may be unsustainable.¹⁰³ Furthermore, in accordance with the idea of time-inconsistent preferences,¹⁰⁴ even debtors, who, under effort, may be able to afford the bankruptcy fee, may ignore the long-term problems of an IVA in order to avoid this immediate cost.

While up-front factors therefore have some relevance in explaining the decreasing use of non-consensual solutions and to some extent the rise in IVAs, it is unlikely that they have caused these developments on their own. Indeed, the very fact that the rapid growth of IVAs began in 2003, before the dramatic increase in bankruptcy fees, seems to contradict this assumption. Furthermore, if one looks at the post- 2010 period, the extent to which the overall number of non-consensual proceedings has fallen is astonishing, especially when factoring in the introduction of DROs that, notwithstanding their eligibility requirements, should have extended access to non-consensual remedies to some extent. This is even more so if we look at the development of DRO numbers after the 2015 reforms. These reforms may be criticised

⁹⁷ <<https://www.creditfix.co.uk/debt-solutions/iva/>>; <<https://www.harringtonbrooks.co.uk/debt-solutions/iva-faqs/>>; <<http://www.hanoverinsolvency.co.uk/individual-voluntary-arrangements.html>>; <<https://apertureiva.com/debt-options/iva-faqs/#8>>; <<http://www.vanguardinsolvency.co.uk/iva-our-fees.asp>>.

⁹⁸ <<https://apertureiva.com/debt-options/iva/>>; <<https://www.payplan.com/iva/>>.

⁹⁹ <<http://www.hanoverinsolvency.co.uk/about.html>>; <<https://www.harringtonbrooks.co.uk/debt-solutions/iva/?tab=iva-faqs>>; <<https://www.harringtonbrooks.co.uk/comparing-debt-solutions/>>.

¹⁰⁰ Williams, *op. cit.*, n. 38; '2017 Insolvency Statistics – The Real Story' <<https://debtcamel.co.uk/2017-insolvency-statistics/>>.

¹⁰¹ See 1.

¹⁰² IVA providers may support such practices, see 3.

¹⁰³ See (b) (i) below.

¹⁰⁴ THE CONSTRUCTION OF THE CONSUMER DEBTOR – THE THEORETICAL DEBATE, 3.

as insufficient, but the raise of the debt limit from 15000 to 20000 was expected to lead to an increase in the annual DRO numbers by several thousand.¹⁰⁵ So what appears to be an increase of 8% by 2017¹⁰⁶ actually masks a significant fall in the number of DROs against the expected numbers.¹⁰⁷ This becomes even clearer if we take account of a 23% rise in the overall number of personal insolvencies within the same period.¹⁰⁸

(b) Back-end Factors

Applying the strategic actor paradigm, one might assume that legal and social factors determining the overall costs of debt relief explain the debtors' decision in favour of IVAs.

(i) Payment Obligations

Debtors subjected to a DRO procedure are under no obligation to fulfil any payment obligations. While bankruptcy proceedings may entail some payment obligations, they will regularly be less severe than those of an IVA. Significantly, although the legislature had originally envisaged that an acceptable payment period for an IVA would be three years and therefore similar in length to that of bankruptcy,¹⁰⁹ due to creditor pressure this period has gradually been extended to five¹¹⁰ or six¹¹¹ years, so that it is now substantially longer compared to the period for bankruptcy.¹¹² Also, the remedies are different regarding their risk allocation, if, due to a change of exogenous circumstances, the debtor should experience payment problems. If, due to such change, a bankrupt can no longer afford to make a contribution, her payment level can be varied accordingly,¹¹³ meaning that the exogenous circumstances will neither lead to an extension of her payment period nor will it impair her achievement of debt relief. The IVA Protocol also provides that the debtor may be allowed to take payment holidays or make reduced payments for a certain period (currently nine months).¹¹⁴ However, by contrast with bankruptcy, these periods will be added to the overall duration of the IVA. Also, if the nine-month period is exceeded, the debtor is at the mercy of

¹⁰⁵ It was expected that the changes would allow approximately 3600 more people a year to enter into a DRO <<https://www.gov.uk/government/news/improved-help-for-people-struggling-with-problem-debt>>.

¹⁰⁶ The number of DROs increased from 24175 in 2015 to 24894 in 2017.

¹⁰⁷ Williams (2017), op. cit., n. 100.

¹⁰⁸ Personal insolvency numbers have risen from 80404 in 2015 to 99196 in 2017.

¹⁰⁹ For details of payment obligations under bankruptcy proceedings, IA1986, ss310, 310A; IR 2016, Part 10, ch. 10, 11.

¹¹⁰ <<https://www.harringtonbrooks.co.uk/debt-lutions/iva/?tab=iva-faqs>>.

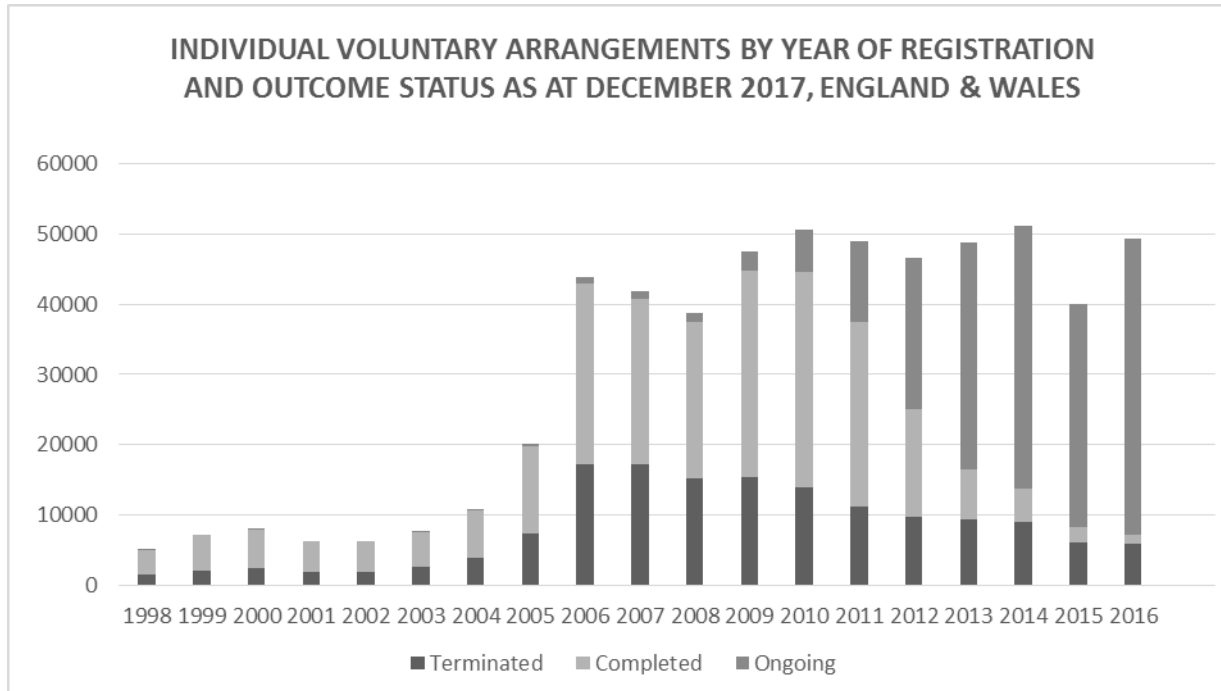
¹¹¹ <<https://apertureiva.com/debt-options/iva-faqs/#1>>.

¹¹² Green, op. cit., n. 27, p. 412.

¹¹³ For the detailed terms of variation, see IA 1986, ss310 (4), (6), 310A (4); IR 2016, rr10.112, 10.117.

¹¹⁴ 2016 IVA Protocol, 10.8.

her creditors, who may decide to extend the payment period further or to terminate the agreement, meaning that she is again exposed to unrestrained enforcement efforts.¹¹⁵ Because of substantial fees owed to the IVA provider,¹¹⁶ the IVA may even have increased the debtor's financial difficulties. The below table gives an indication of IVA termination rates:



Source: Insolvency Service

While the IVA failure rate has always been disturbingly high, it has clearly followed an upward trend from 29.8% for 2002 registrations to 41.2% for 2007 registrations.¹¹⁷ From 2007 the failure rates have, however, continuously decreased. Yet, due to an equally continuous rise in the number of IVAs that are still ongoing, any assumption that IVAs may have become more sustainable seems premature.¹¹⁸ Large numbers of ongoing IVAs could still fail, especially if there were to be a change in economic conditions, for example as a consequence of Brexit. Indeed, due to the recent influx of debtors with narrow financial margins,¹¹⁹ even minor changes in economic conditions may have a harmful effect. Against

¹¹⁵ Morgan, *op. cit.*, n. 32.

¹¹⁶ *Op. cit.*, n. 97.

¹¹⁷ Insolvency Service, *op. cit.*, n. 39.

¹¹⁸ I. Ramsay, 'More questions raised by Individual Voluntary Arrangement Statistics' <<https://creditdebtandinsolvency.wordpress.com/2017/01/29/more-questions-raised-by-individual-voluntary-arrangement-statistics/>>.

¹¹⁹ Above 1., 2.(a).

this background it seems alarming that in recent years early failure rates of IVAs have risen again.¹²⁰

Importantly, the fixation on failure rates does not reveal the whole extent of the problem, which only becomes apparent, if we consider the low level of success rates. Even though the commonly agreed repayment period is five to six years, according to the data published in 2018, only 53.5% of the IVAs registered in 2011 and 32.7% of the IVAs registered in 2012 have been successfully completed. If we go back even further looking at IVAs that were registered more than ten years ago, the completion rate is still only 56.2%. In addition, a recent review published by the *Insolvency Service* indicates further issues, affecting even those IVAs that officially have been completed.¹²¹ During the course of on-site monitoring visits to major IVA providers, the *Insolvency Service* has learned that some of them offer ‘early exit’ loans, which are loans enabling debtors to settle their IVA early with a loan equivalent to the total value of the remaining contributions. Typically these loans last longer than the remainder of the IVA and ultimately cost the debtor significantly more, due to an uncompetitive annual interest rate.¹²² Overall, this data indicates that debtors, who enter into these agreements in great numbers, do not seem to act strategically, but rather show a high level of over-optimism.

(ii) Homeownership and the Threat of Eviction

The assessment becomes less clear-cut if we take into account the issue of home-ownership and the potential threat of losing essential accommodation. Whereas bankruptcy forces the debtor to surrender her property,¹²³ which usually includes the loss of a family home,¹²⁴ an IVA theoretically gives the option to avoid this loss.¹²⁵ This issue is not relevant to all debtors, however, but only to those who actually possess such assets. TDX numbers¹²⁶ indicate that since 2012 the number of people in IVAs who were homeowners decreased from around 45% to just over 20% in 2016.

¹²⁰ Current one-year IVA failure rates have risen from a recent low of 4.0% in 2013 to 7.7% in 2016. Also, two-year failure rates have risen from a low of 10.7% in 2014 to 12.7% in 2015, *Insolvency Service*, op. cit., n. 39, p. 5.

¹²¹ *Insolvency Service*, op. cit. n. 32.

¹²² *Id.*, p. 17.

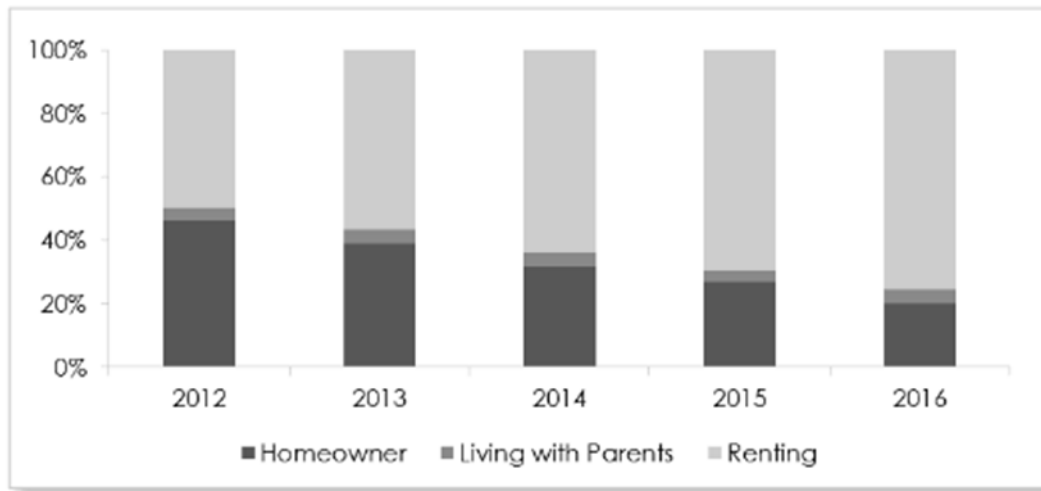
¹²³ See IA 1986, ss306, 322–332 for the procedural details.

¹²⁴ For limited safeguards, IA 1986, ss283A, 313A, 335A.

¹²⁵ For details see IVA Protocol 2016, 9.1-9.9, Appendix 6.

¹²⁶ *Op. cit.*, n. 86, p. 106.

Residential status in TX IVAs (fig. 4)



Assuming these figures are correct, this means that for the vast majority of debtors, legal differences in the treatment of homeowners should not be significant. While the reliability of these figures may be questionable, they reflect the general trend of decreasing home ownership,¹²⁷ as well as the previous finding that in recent years, debtors from lower income groups, who previously would have opted for non-consensual proceedings, have chosen IVAs instead.¹²⁸ Furthermore, even if the debtor is a homeowner, there is an expectation that at some time before the end of the IVA an attempt will be made to release a proportion (currently 85%¹²⁹) of the consumer's net worth in the property. Therefore, the question whether an IVA provides a direct economic advantage to homeowners is not straightforward, but depends on the value of the property concerned, the amount of the agreed payment obligations and the highly insecure conditions of equity release.¹³⁰ Nevertheless, unlike bankruptcy, IVAs allow debtors physically to stay in their house, which allows them to avoid the wider costs connected to the loss of a family home. Due to the adverse impact of insolvency proceedings on their credit rating,¹³¹ debtors losing their family residence may

¹²⁷ Conventional figures assume that since 2003 homeownership has fallen from 71% in 2003 to 63% in 2016-17, Ministry of Housing, Communities and Local Government (2016-17, Cm. 1.4). An alternative survey by the *Resolution Foundation* focuses on the proportion of people who own their homes, rather than the proportion of properties occupied by their owner. It indicates a homeownership rate of only 51%, <<http://www.resolutionfoundation.org/media/blog/only-half-of-families-own-their-own-home-how-do-the-other-half-live/>>.

¹²⁸ See 1., 2. (a) above.

¹²⁹ Op. cit., n. 125.

¹³⁰ The equity release is supposed to be achieved through re-mortgaging or other secured lending such as a secured loan, S. Williams, 'IVAs – do you have to get a secured loan?' <<https://debtcamel.co.uk/iva-secured-loan/>>.

¹³¹ See below (iii).

face significant problems in obtaining a new mortgage or even a tenancy.¹³² Assuming the debtors can avoid the most extreme threat of homelessness, they are confronted with transaction costs, and potentially other adverse social consequences; for example, concerning their children's education and development.¹³³ Indeed, it therefore seems that homeowners may make a strategic decision in favour of an IVA, rather than non-consensual remedies. This finding fits the narrative of salaried, more middle-class debtors as the natural constituents of the IVAs.¹³⁴ While, in principle, accepting a longer payment period under an IVA, so as to protect one's family home, is of course reasonable, it will not be if the IVA is unsustainable. Yet, the devastating IVA failure rate, characteristic of earlier years,¹³⁵ indicates a high level of over-optimism and time-inconsistent preferences affecting this potential group of more middle-class debtors. Trying to cling on to their homes, they have underestimated the risks associated with IVAs.

Fears associated with the loss of essential accommodation not only affect homeowners, but also tenants. As the Court of Appeal has clarified in *Places for People Homes Ltd. v. Sharples*,¹³⁶ neither a bankruptcy order nor a DRO precludes the making of a possession order on the ground of rent arrears. Given that rent arrears must be included in a bankruptcy order or a DRO, there is evidence of some landlords pursuing a policy not to accept the use of these remedies and to threaten eviction against tenants, who nevertheless intend to use these remedies intend to do so.¹³⁷ This evidence has to be seen in the context of data indicating the increasing numerical strength of a new type of IVA user, typically coming from lower income groups and living in rented accommodation. Looking at the reality of these individuals' situation it is probably correct to classify them as structural, rather than strategic, debtors. Unable to clear their rent arrears, they are confronted with a situation leaving them no leeway to act strategically. Rather, the threat of losing essential accommodation is so severe that, similar to up-front fees, it creates a *de facto* barrier preventing them from making a more adequate choice in favour of a non-consensual remedy. As described by the CAB, these debtors are trapped in spiralling debt, because they cannot afford to deal adequately with their

¹³² Spooner, op. cit. n. 50, pp. 397, 398.

¹³³ Id.

¹³⁴ See, BACKGROUND AND CONTEXT, 2.

¹³⁵ See 2. (b) (i).

¹³⁶ *Places for People Homes Ltd v Sharples; A2 Dominion Homes Ltd v Godfrey* [2011] HLR 45.

¹³⁷ Over 20% of CAB advisors reported experiences of landlords threatening or pursuing eviction, CAB, *Cutting our Losses: the Need for Good Debt Collection Practice for People with Debt Relief Orders* (2015), 14.

creditors, but cannot risk the loss of their home either.¹³⁸ In addition to front-end barriers, the threat of eviction may therefore be a second main reason convincing structural debtors to choose IVAs, instead of non-consensual solutions.

(iii) Credit Rating

While there is little knowledge of the wider consequences insolvents experience in this country, as in the context of the US debate,¹³⁹ the most common concern relates to their credit rating. To be sure, bankruptcies, DROs and IVAs are entered on the statutory insolvency register.¹⁴⁰ This information will then be picked up by credit reference agencies,¹⁴¹ which for a period of six years, will make it available for credit checks by financial institutions and other users, such as letting agencies. There is no certainty, however, that the negative consequences of these practices affect individuals (formerly) subjugated to non-consensual proceedings in a way which is more severe than those who have chosen an IVA instead. Rather, advice provided by organisations such as the CAB suggests that any of these practices may affect debtors for as long as it impairs their credit rating,¹⁴² meaning that this issue, on its own, provides no rational reason to decide in favour of an IVA, rather than non-consensual remedies.

(iv) The Stigma associated with Non-consensual Insolvency Proceedings

The stigma associated with non-consensual debt relief may also deter debtors from making use of this option. While it is impossible to quantify the relevance of this factor, one objective place to look for indicators of a strong moral disposition against non-consensual remedies is the fact that, unlike individuals subject to IVAs, those subject to bankruptcy or DROs are subject to legal disabilities.¹⁴³ While for the vast majority of consumer debtors these are unlikely to be of practical relevance,¹⁴⁴ such disabilities would not persist in a society that did not have a strong cultural disposition against these non-consensual remedies.¹⁴⁵ This is

¹³⁸ *Id.*, p. 17.

¹³⁹ THE CONSTRUCTION OF THE CONSUMER DEBTOR – THE THEORETICAL DEBATE, 2.

¹⁴⁰ The registration requirements are set out in IA 1986, s251W, IR 2016, rr11.14, 11.16, 11.18.

¹⁴¹ <<https://www.experian.co.uk>>; <<https://www.equifax.co.uk>>; <<http://www.callcredit.co.uk/>>.

¹⁴² <<https://www.citizensadvice.org.uk/debt-and-money/debt-solutions>>.

¹⁴³ IA 1986, s360 (restrictions on obtaining credit; engaging in business), *Companies Directors Disqualification Act 1986*, s11 (restrictions on involvement in the management of a company).

¹⁴⁴ K. Möser, 'Restrictions after Personal Insolvency' (2013) *Journal of Business Law* 679, at 701-702.

¹⁴⁵ Mann, *op. cit.*, n. 56, p. 238.

confirmed by data provided by a 2014 FCA report¹⁴⁶ suggesting that many individuals believe that it is shameful to go down the route of bankruptcy. One of the respondents described her feelings as follows: *'I'd die a death, I'd rather jump off the M42 bridge than be declared bankrupt, because that's failure to me. I don't want to owe anybody anything that I can't afford to pay back. We're just very straight like that.'*¹⁴⁷ As assumed by the strategic actor model, the moral stigma might constitute a significant factor convincing 'can-pay' debtors – against their direct economic interest – to decide in favour of an IVA, rather than bankruptcy. Also, however, the desire to avoid the shame of non-consensual debt relief may motivate over-optimism and time-inconsistent preferences. Being driven by the desire to avoid the acute psychological costs of bankruptcy, debtors may enter into unsustainable IVAs.

3. Market Practices of Commercial Providers

IVA providers have a direct financial interest in the conclusion of these agreements. Each IVA generates substantial fees for the providers,¹⁴⁸ and because a set-up fee (the so-called nominee's fee) is payable to them before any payments are made to creditors, they even have a financial interest in the conclusion of unsustainable agreements. It seems therefore that IVA providers have an incentive to use market practices exploiting the behavioural weaknesses of behavioural debtors. This assumption is supported by some limited evidence provided by the above-mentioned 2014 FCA report and recent research conducted by the *Insolvency Service*,¹⁴⁹ which, for the purposes of this article, will be reviewed against the practices of the six major IVA providers¹⁵⁰ as disclosed on their websites.

The websites of all major providers count on the fact that debtors may be prone to impulsive behaviour. Unanimously, they urge debtors to make immediate contact,¹⁵¹ especially before making a decision in favour of an alternative debt solution, such as bankruptcy.¹⁵² These findings are re-enforced by the *Insolvency Service*, who during the course of its on-site

¹⁴⁶ FCA, *Consumer Credit Research: Payday Loans, Logbook Loans and Debt Management Services* (2014).

¹⁴⁷ *Id.*, p. 34.

¹⁴⁸ *Op. cit.*, n. 97; see also *Insolvency Service*, *op. cit.* n. 32, 13-16.

¹⁴⁹ *Insolvency Service*, *op. cit.* n. 32.

¹⁵⁰ See BACKGROUND AND CONTEXT, 1.

¹⁵¹ "Struggling with debt? Call today and find out how we can help." <<https://www.creditfix.co.uk/debt-solutions/bankruptcy/#1>>"To find out more about how an IVA could help you, call us today on 0333 939 7919 or contact our team of experts below." <<https://apertureiva.com/>>, "Take back **control** call us **NOW** on 0800 019 8383." <<https://www.vanguardinsolvency.co.uk/iva.asp>>.

¹⁵² "If you are considering bankruptcy, there are other debt solutions available to you. Contact Creditfix to speak with one of our advisers ...", <<https://www.creditfix.co.uk/debt-solutions/bankruptcy>>.

monitoring visits to major IVA providers, recognised a widespread practice of using introducer firms to generate potential IVA clients.¹⁵³ Furthermore, the FCA report suggests that during the later sales process, commercial providers show little inclination to stop consumers from making hasty decisions. Rather, there is evidence of salespeople actively hurrying consumers through the process, leaving little time for thought and reflection.¹⁵⁴

Also, it seems that IVA providers actively encourage consumer over-optimism. The websites of several providers state that an IVA lasts ‘typically’ five¹⁵⁵ or six¹⁵⁶ years, which, given the realities of completion periods,¹⁵⁷ is a gross understatement. Other providers play down the risks associated with an IVA claiming that after “*an agreed number of years you will be debt free and able to get on with your life*”,¹⁵⁸ and in particular play down unforeseen financial difficulties (“*A solution of some sort is achievable in the vast majority of cases*”, because “*almost every problem has a remedy.*”¹⁵⁹). As described before,¹⁶⁰ IVA providers are not effective at identifying instances where the consumer’s assessment of their ability to meet the payment requirements is unrealistic. Indeed, the data collected by the FCA describe instances of providers deliberately misrepresenting the disposable income of consumers.¹⁶¹ Similar instances were observed by the *Insolvency Service*, during the course of its monitoring visits.¹⁶²

4. The Results of the Analysis: A Complex Image of the Consumer Debtor

As a result of this analysis it appears that the shift from non-consensual to consensual debt relief is not explicable by a single model. Presumably, there is a group of salaried, potentially home owning debtors, which prior to 2003 shied away from the use of non-consensual remedies, but resorted to consumer IVAs after the market supply for this remedy had been generated. Members of this group may have made a strategic choice in favour of IVAs, so as to avoid the loss of their family home and/or the stigma associated with non-consensual debt relief. It is likely that strategic actors would also take account of a substantial rise of

¹⁵³ *Insolvency Service*, op. cit. n. 32, 12.

¹⁵⁴ FCA, op. cit., n. 146, p. 42.

¹⁵⁵ <<http://www.vanguardinsolvency.co.uk/iva.asp>>.

¹⁵⁶ <<https://apertureiva.com/debt-options/iva-faqs/#1>>.

¹⁵⁷ See 2. (b) (i).

¹⁵⁸ <<https://www.payplan.com/iva/pros-cons-iva/>>.

¹⁵⁹ <<https://apertureiva.com/debt-options/iva-faqs/#37>>.

¹⁶⁰ See 2. (b) (i).

¹⁶¹ FCA, op. cit., n. 146, p. 39.

¹⁶² *Insolvency Service*, op. cit. n. 32, 12.

bankruptcy fees, as it was introduced in 2010/ 2011. For them, however, these fees are only one factor in a much more comprehensive cost-benefit analysis, including IVA back-end costs on the one hand and aforementioned bankruptcy costs – loss of family residence and/ or social stigma – on the other. Ultimately, it seems therefore unlikely that the increase in fees was a deciding factor for many strategic debtors.

Rather, while possibly more prevalent in earlier years, the group of strategic IVA users seems to have become a minority among IVA users in recent years. This is due to an influx in lower-income debtors, who rely more on benefits for their income and live in rented accommodation. Instead of adhering to the strategic actor paradigm, debtors belonging to this group are more likely to show the characteristics of structural debtors. Thus, up-front charges, but also the existential threat of losing their accommodation, may amount to insurmountable barriers preventing them from accessing non-consensual remedies and forcing them into ‘low value’ IVAs instead. In addition, it seems that both more middle-class and low-income debtors seem to be prone to behavioural bias, which are exploited by commercial IVA providers.

Since the research fails to single out a debtor construction that explains the shift in favour of IVAs, one potential criticism may be that these results appear somewhat indecisive. Indeed, there is a degree of uncertainty resulting from the quality of the ‘facts on the ground’. Even if the quality of data was better, it is doubtful whether the findings would be more clear-cut. Instead, the examination highlights that IVA users come from different socio-economic backgrounds and may have different reasons to resort to this remedy.

Despite the aforementioned complexity, the article identifies structural and behavioural debtors as the likely dominating models at present. This result makes sense if one takes into account that the contemporary position in England and Wales is almost the opposite of that of the US prior to the BAPCPA reforms. While in the US large numbers of debtors benefited from the use of Chapter 7, in England and Wales debtors appear to be opting in large numbers for the IVA procedure, even though it holds fewer benefits for them than non-consensual options. Therefore, the present case makes it much easier than that of the US to challenge the strategic actor model: this model simply does not explain the evolution.

CONCLUSIONS AND REFORM PROPOSALS

The article suggests that not all, but a majority of IVA users can be classified as structural or behavioural debtors, rather than strategic actors. These debtors are unable to effectively pursue their self-interest, but enter into IVAs, even though this is inimical to their own welfare. The current government policy supportive of IVAs therefore ignores and aggravates a major consumer protection problem. Building on this finding, the article contributes to the critical discussion of this policy. The analysis focuses on a user perspective and does not pretend to analyse fully the effects of this shift from the perspective of other stakeholders, such as creditors or taxpayers. As mentioned earlier,¹⁶³ the prospect of higher creditor returns and a reduction in government spending on non-consensual procedures were important elements of government policy. If one accepts debt relief as the primary objective of consumer insolvency law,¹⁶⁴ such user-centered analysis should, however, form an essential building block for a more comprehensive policy debate. And, as the findings of the article show, it is of paramount importance to start this debate with a distinction between different debtor groups.

First, strategic IVA users appear to be in the minority. This group may be able to navigate personal insolvency law that provides a trade-off minimising *ex post* effects of financial distress, on the one hand, and *ex ante* incentive distortions on the other. As described above, government policy supporting consumer IVAs relies on rational choice logic that appears to be targeted at this user group. If so, the question remains whether the current IVA Protocol, whose development was subject to strong creditor influence, provides an adequate basis for such a compromise. In fact, empirical evidence concerning increasingly extended repayment periods and the use of home equity to compensate unsecured creditors suggests that this may well not be the case. These issues take a severe toll on debtor welfare, but also impair public policy interests in the financial rehabilitation of these debtors, thus potentially resulting in substantial externalities. Despite government support, these outcomes may therefore be suboptimal from a public policy perspective. Hence, the study's findings support a more comprehensive cost-benefit analysis of IVAs,¹⁶⁵ taking account of the positions of creditors and taxpayers, which this article has not fully explored. As a result of such analysis, the

¹⁶³ BACKGROUND AND CONTEXT, 2.

¹⁶⁴ Spooner, *op. cit.*, n. 50.

¹⁶⁵ See Ramsay, *op. cit.*, n. 7 (2017), p. 98.

legislature could then initiate reforms that would tighten the regulation of IVAs or even replace them with a new, non-consensual solution.

Secondly, the majority of IVA users are structural and behavioural actors, and they need the protection of law and policy that addresses their approach to decision-making. Because these types of debtors are unlikely to act strategically, any focus on opportunistic abuse is misguided. While, due to their situational constraints, structural debtors have no leeway for such abuse, behavioural debtors are subject to behavioural distortions limiting their responsiveness to the incentives created by insolvency law, including those for strategic abuse. Instead, the law should therefore concentrate on a straightforward social insurance function minimising the *ex post* effects of financial distress, which, as the theory and empirical evidence suggests, would be better performed by non-consensual remedies, instead of IVAs.

Also, given the severity of the problems experienced by these groups (high failure rates, extreme duration of IVAs) it is hard to imagine that the perspectives of other stakeholders could change this overall assessment. This is even more so, because IVAs involving structural or behavioural debtors are unlikely to generate substantial creditor returns, which besides fears of strategic abuse was the second main argument for the government's support of IVAs. As set out before, structural debtors resort to 'low value' IVAs as a substitute, because economic bars (up-front fees, inability to repay their rent arrears) *de facto* bar them from non-consensual procedures. Contrary to what has been assumed by the government, the IVA procedure therefore attracts some of the poorest debtors, rather than salaried 'can pay' debtors. Equally, the argument of increased creditor returns is compromised if IVAs attract over-optimistic, behavioural debtors, who are likely to enter into unsustainable agreements. Finally, government policy relies on the argument that IVAs make debtors, rather than taxpayers, pay for the benefit of debt relief. This argument too seems deficient, if structural or behavioural debtors lack the financial capacity to successfully complete these agreements. All basic assumptions of the 'can pay should pay' policy approach are therefore incompatible with the reality of these debtor groups. As a result, the article suggests the following reforms to direct these debtors towards more appropriate non-consensual solutions. First, the economic barriers to non-consensual debt relief affecting these types of debtors should be removed. This

study supports earlier work¹⁶⁶ arguing for a change of government policy maintaining a debt limit restricting access to the DRO procedure. Instead, affordable access to the DRO procedure should be expanded so as to include all cases, in which there is no debt collection objective to be pursued due to the low levels of the debtor's income and assets. Such change of policy would ensure that upfront fees no longer constitute an absolute bar to structural debtors, who are in most urgent need of state support. Instead, the fee-requirement would only apply to debtors with surplus income or significant assets, ensuring that policymakers' concerns regarding abuse of social programmes would focus only on those with the resources necessary to act strategically. The legislature should also consider intervening so as to abolish the eviction threat faced by tenants with rent arrears who have entered into these forms of insolvency arrangements.¹⁶⁷ Again, this issue typically affects structural debtors, and is so drastic that its effects are similar to the absolute bar imposed by eligibility requirements. Furthermore, policy change should be considered so as to rectify consumer bias and improve the take-up of non-consensual remedies. One possible solution would consist of an increase in regulatory control over IVA providers,¹⁶⁸ with the option of subjecting them to FCA control as was previously done with DMP providers. Such control should prevent practices of IVAs mis-selling to consumers, who would be better served by non-consensual solutions. Additionally, if one believes the problem to be originating from the demand side of debt relief, one could consider a requirement of debt advice. This would mean that before debtors were allowed to conclude an IVA or any other consensual debt solution, they would need to obtain something like a "Certificate of Advice" issued by a publicly funded advice body. Unlike commercial providers, this body would aim to address, rather than reinforce, their behavioural biases, seeking to steer users towards non-consensual debt relief, when appropriate. Such measures should be subjected to careful consideration, however. First, this added administrative burden may prevent IVA applications from debtors, for whom IVAs would provide a suitable solution.¹⁶⁹ Also, this would not necessarily succeed in rectifying all irrational consumer decisions. Indeed, there are general concerns regarding the limitations of

¹⁶⁶ Ramsay and Spooner, *op. cit.*, n. 95.

¹⁶⁷ For discussion, see Spooner, *op. cit.*, n. 50.

¹⁶⁸ For failures of the current monitoring system, see Insolvency Service, *op. cit.* n. 32.

¹⁶⁹ See the discussion of mandatory debtor counselling under the BAPCPA having similar effects on bankruptcy applications, J. D. Eaton, 'Locked out: The unwary debtor and the BAPCPA's pre-file credit counselling requirement' (2010) 32 *Thomas Jefferson Law Rev.* 261.

advice in relation to consumers' financial decisions, and the problem of correcting behavioural biases in particular.¹⁷⁰

More generally, the article's findings should be read in the context of recent studies that raise doubts about work incentives, such as the benefit cap¹⁷¹ or increasing behavioural conditionality¹⁷² and their effects on the labour market integration of welfare recipients. By perceiving of personal insolvency as a specific form of social assistance, it contributes to existing evidence demonstrating the limited utility of rational choice theory in the design and delivery of public support systems. As the example of personal insolvency law shows, policymakers tend to design social assistance programmes to safeguard against the kind of strategic behaviour that, due to their structural or behavioural constraints, many intended users are simply unable to engage in. While such an approach may be successful in reducing reliance on these programmes, this is achieved by denying protection to society's most vulnerable groups.

¹⁷⁰ L. Willis, 'Evidence and ideology in assessing the effectiveness of Financial Literacy Education' (2009) 46 *San Diego Law Rev.* 415; 'The Financial Education Fallacy (2011) 101 *American Economic Rev. Papers and Proceedings* 429.

¹⁷¹ Studies assume that only about 4.7% of those affected by the cap responded to it by moving into work, Department of Work & Pensions, *Benefit Cap: Analysis of Outcomes of Capped Claimants* (2014), see Executive Summary; Institute of Fiscal Studies, 'Coping with the Cap' <<https://www.ifs.org.uk/publications/7482>>.

¹⁷² Watts and Fitzpatrick, *op. cit.* n. 14, pp. 93-99; B. Watts et. al., *op. cit.* n. 14, pp. 7-9; P. Dwyer, *Welfare Conditionality, Sanctions, Support and Behaviour Change, Final Findings* (2018); National Audit Office, *Benefit Sanctions* (2016, Cm. 3.1-3.6).