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The Quiet-Loud-Quiet Politics of Post-Crisis Consumer Bankruptcy Law: the case of Ireland and the Troika

Joseph Spooner[*]

A decade after the Global Financial Crisis, many developed economies continue to strain under excessive household debt. This article presents evidence suggesting that the failure of policymakers to enact debt relief measures may lie in the superior influence of the coordinated and concentrated financial sector over legislative processes as compared to the diffuse and disorganised interests of consumer debtors. Post-crisis popular interest in technical issues of personal insolvency law created only a narrow space of political opportunity. Soon these questions returned to the domain of technocratic actors and corporate influence. The article examines this situation through an inter-disciplinary case study of consumer bankruptcy reform in Ireland under 'Troika' supervision. Proposals initially billed as assisting over-indebted households developed into increasingly creditor-friendly legislation in 'quieter' stages of technocratic decision-making. The stark implications of these findings highlight obstacles to resolving household debt problems and consequent risks of economic and political instability.

INTRODUCTION

Have we wasted a good crisis? A decade after the Global Financial Crisis and the beginning of the Great Recession, advanced economies continue to strain under the burden of

[*] Assistant Professor of Law, London School of Economics and Political Science. The author thanks all participants at workshops at LSE and Brooklyn Law School, as well as at the Household Finance CRN of the Law and Society Association, where earlier drafts of this paper were presented and discussed. The author also wishes to thank for their particular insight, advice and encouragement Iain Ramsay, Stephanie Ben-Ishai, Susan Block-Lieb, Jason Kilborn, Jay Westbrook and Henrietta Zeffert. The author worked as Principal Legal Researcher on the Law Reform Commission of Ireland's project on *Personal Debt Management and Debt Enforcement*, and contributed to the *World Bank Report on the Treatment of the Insolvency of Natural Persons.* All opinions, errors and omissions are the author's own.

excessive household debt.[1] Radical post-crisis activism has over time been joined by mainstream commentary in highlighting the negative effects of these unduly high debt levels.[2] International institutions line up to illustrate how "debt overhang" is stifling economic growth, and to urge national policymakers to enact extensive household debt relief policies.[3] In the UK, now that household debt is returning to pre-crisis levels, the Bank of England is forced to remind us with increasing urgency of the risks this involves.[4] The pressure this debt burden places on households, alongside failures to "bail out" financially

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[1] International Monetary Fund, 'Gaining Momentum? World Economic Outlook April 2017' (2017); Bank for International Settlements, 'The Global Economy: Maturing Recoveries, Turning Financial Cycles?' (2017).

[2] For example, "debt refusal" campaigns featured amongst the activities of the post-crisis Occupy movement, while other debtor activist and civil society groups have also developed in recent years: *see e.g.* T. Gitlin, 'Occupy's Predicament: The Moment and the Prospects for the Movement' (2013) 64 The British Journal of Sociology 3; E. Hoekstra, 'Andrew Ross on the Anti-Debt Movement' in D. Hartmann and C. Uggen (eds), *Owned* (W W Norton & Company 2015) ch 7; J. Montgomerie and others, 'The Politics of Indebtedness in the UK' (Goldsmiths University Public Interest Report 2015) 31–36. For more mainstream conversion to this view, *see e.g.* P. Bunn and M. Rostom, 'Household Debt and Spending in the UK' (Bank of England Staff Working Paper No. 554, 2015) 554. S. Lo and K. Rogoff, 'Secular Stagnation, Debt Overhang and Other Rationales for Sluggish Growth, Six Years On' (BIS Working Papers No. 482, 2015) 10; International Monetary Fund, 'Fiscal Monitor - Debt: Use It Wisely' (IMF 2016); Bank for International Settlements, 'Global Economy' n 1 above, 48–50; Bank of England, 'Financial Stability Report: June 2017' (2017) 1–49. The scholarship of Mian and Sufi has been particularly influential in disseminating this realisation: see e.g. A. Mian and A. Sufi, *House of Debt: How They (and You) Caused the Great Recession, and How We Can Prevent It from Happening Again* (University of Chicago Press 2014).

[3] *See e.g.* International Monetary Fund, 'Dealing with Household Debt', *World Economic Outlook 2012* (IMF 2012); International Monetary Fund, 'Fiscal Monitor - Debt: Use It Wisely' n 2 above.

[4] Bank of England n 2 above; A. Brazier, '"Debt Strikes Back" or "The Return of the Regulator"?' (Institute for Risk and Uncertainty, University of Liverpool, 24 July 2017) at <http://www.bankofengland.co.uk/publications/Pages/speeches/2017/992.aspx> (last visited 6 April 2018).

struggling households while governments and taxpayers rescued the financial sector, have contributed to inequality and accompanying political unrest.[5] It appears that after the crisis "the Great Conversation that many were expecting never took place";[6] reforms that seemed inevitable remain unrealised; and economies still depend on unsustainably high levels of household borrowing.

This article presents evidence suggesting that policymakers' failure to address household debt problems through debt relief measures may lie in the superior influence over the legislative process of the coordinated and concentrated financial sector, compared to the diffuse and disorganised group of consumer debtors.[7] The article's findings suggest

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[5] *See e.g.* M. Blyth and M. Matthijs, 'Black Swans, Lame Ducks, and the Mystery of IPE's Missing Macroeconomy' (2017) 24 Review of International Political Economy 203; I. Ramsay, *Personal Insolvency in the 21st Century: A Comparative Analysis of the US and Europe* (Hart Publishing 2017) 10; European Central Bank, 'Financial Stability Review' (ECB 2015) 148; I. Martin and C. Niedt, *Foreclosed America* (Stanford Briefs 2015) ch 4.

[6] D. Graeber, *Debt : The First 5,000 Years* (Melville House 2012) 381.

[7] By "consumer debtors", this article refers to individuals and households in financial difficulty due to debts incurred for personal finance and/or small business purposes, as opposed to traders and investors who borrowed to fund high-end business activities. This latter category may be disproportionately represented in media coverage and even in bankruptcy literature, given how several high-profile businesspeople of the Celtic Tiger economy fell from grace and into insolvency litigation, sometimes as "bankruptcy tourists": see e.g. *Irish Bank Resolution Corporation Limited v Quinn* (2012) [2012] NICh 1; C.Paulus, 'Shaping the Contours of a Hybrid Concept - Mr Quinn's COMI: Irish Bank Resolution Corporation v Quinn [2012] NICh 1' (2012) 25 Insolvency Intelligence 75. This article examines primarily the political influence of the large minority group of financially troubled debtors who fell into mortgage arrears after the crisis – a group of relatively lower incomes, employment and familial stability, and educational attainment: Y. McCarthy, 'Disentangling the Mortgage Arrears Crisis: The Role of the Labour Market, Income Volatility and Housing Equity', Central Bank of Ireland Research Technical Paper 2/RT/14 (2014), 6–9. The interests of this group diverge at times from those of consumers more broadly, as discussed in text to notes 229-243.

that only a narrow space of political opportunity was created by post-crisis popular interest in technical issues of personal insolvency law (and financial regulation more generally), before these questions returned to the domain of administrative actors and corporate influence. While pro-debtor positions gained momentum in early 'loud' public policymaking stages following the crisis, they were supplanted by pro-creditor positions developed in the 'quieter' stages of bureaucratic and technocratic decision-making. These findings are consistent with Olson's classic logic of collective action, and its core idea that small groups with converging interests can use superior organisation to influence policymaking more effectively than large groups holding diverging interests.[8] The results suggest that notwithstanding the turmoil of the Global Financial Crisis, this time was not so different,[9] and core ideas of collective action theory remain intact. This is despite recent literature that poses challenges to this classic position. Certain studies stress how the influence of concentrated interests is inversely related to the political salience of an issue,[10] with authors using this insight to argue that the shock of financial crisis has allowed diffuse groups to outbid concentrated interests in the policy market.[11] Another perspective, argued

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[8] M. Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Revised, Harvard University Press 1974). Existing bankruptcy literature supports an understanding of policy change founded on collective action theory: *see e.g.* D. Skeel, *Debt's Dominion : A History of Bankruptcy Law in America* (Princeton University Press, 2001); I. Ramsay, 'Interest Groups and the Politics of Consumer Bankruptcy Reform in Canada' (2003) 53 University of Toronto LJ 379; M. Dickerson, 'Regulating Bankruptcy: Public Choice, Ideology, and Beyond' (2006) 84 Washington U L Rev 1861.

[9] C. Reinhart and K. Rogoff, *This Time Is Different: Eight Centuries of Financial Folly* (Reprint edition, Princeton University Press 2011).

[10] B. Farrand, 'Lobbying and Lawmaking in the European Union: The Development of Copyright Law and the Rejection of the Anti-Counterfeiting Trade Agreement' (2015) 35 OJLS 487.

[11] *See e.g.* L. Kastner, ''Much Ado about Nothing?' Transnational Civil Society, Consumer Protection and Financial Regulatory Reform' (2014) 21 Rev Intl Political Economy 1313.

recently by Trumbull, is that the key to shaping consumer protection policy lies not in a group's ability to organise, but rather its capacity to present its preferred policies as publicly legitimate (in the sense of benefitting a wider constituency or the 'public interest').[12] My study suggests that such insights do not undermine the continuing relevance of the traditional logic of collective action, at least when supplemented by Culpepper's nuance that business influence is strongest in times and spaces of 'quiet politics'.[13] Final legislative provisions developed bureaucratically were much more favourable to creditors than the extensive debt relief promised in early public stages of the personal insolvency reform process.

The article reaches these findings through a detailed case study of Irish personal insolvency law reform. The second section of this article shows how this study offers particular insight due to the unique status of personal insolvency law as an institution offering debt relief routinely and as of right. Few other societal institutions address more directly the issue of how to deal with excessive household debt levels, and the more delicate question of how the risks inherent in debt-dependent economies (brought into vivid perspective by the crisis) should be distributed across society. This section also illustrates why the study takes place in Ireland, a country chosen for the extent to which its experience exemplifies particularly strongly the past decade of financial crisis and austerity,[14] and a

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[12] Gunnar Trumbull, *Strength in Numbers* (Harvard University Press 2012) 22–32. Trumbull echoes earlier supply-side views of the regulatory market, which emphasised politicians' need to form large heterogeneous coalitions behind policies: James Q Wilson, 'The Politics of Regulation' in James Q Wilson (ed), *The Politics of Regulation* (Basic Books 1980) 361.

[13] P.D. Culpepper, *Quiet Politics and Business Power: Corporate Control in Europe and Japan* (CUP 2010).

[14] *See e.g.* S. Kinsella, 'Is Ireland Really the Role Model for Austerity?' (2012) 36 Cambridge Journal of Economics 223; R. Waldron and D. Redmond, 'The Extent of the Mortgage Crisis in Ireland and Policy

global failure to tackle household debt problems. Ireland's recent economic history is emblematic of our contemporary era of financialised capitalism,[15] the "defining feature of [which] is the new centrality of debt."[16]

The third section proposes a method for categorising personal insolvency law provisions as favouring either creditor or debtor interests. Its analysis based on this method shows that amendments introduced in successive drafts moved the Irish legislation increasingly towards a pro-creditor paradigm emphasising the aim of debt collection, rather than one of debt relief. The final section of the article uses content analysis and process tracing methods[17] to extend the empirical enquiry to policy documents, legislative history, and interest group submissions. This evidence suggests that the crisis has not caused the process of policymaking to overtake the lasting ideas of collective action theory. Through this approach, the article offers a novel methodological contribution to the study of post-crisis politics and law-making. The detailed empirical case study of one policy measure – Ireland's new personal insolvency legislation – is presented from the legal perspective of a consumer bankruptcy specialist. In this way the article illustrates the contribution academic lawyers can make to studies of policy change. It also offers a reminder that socio-legal studies must not neglect the processes of the making of 'law on the books' while tending to

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Responses' (2014) 29 Housing Studies 149; W. Roche, P. O'Connell and A. Prothero (eds), *Austerity and Recovery in Ireland: Europe's Poster Child and the Great Recession* (OUP 2016).

[15] *See e.g.* S. Ó Riain, 'The Road to Austerity' in Roche and others ibid, 23.

[16] N. Fraser, 'Contradictions of Capital and Care' [2016] New Left Review 99, 112.

[17] S. Talesh, 'Institutional and Political Sources of Legislative Change: Explaining How Private Organizations Influence the Form and Content of Consumer Protection Legislation' (2014) 39 Law & Social Inquiry 973, 982–984; D. Collier, 'Understanding Process Tracing' (2011) 44 Political Science & Politics 823.

focus more readily on 'law in action'.[18] This article thus extends beyond policy change studies that have tended to measure broad legal developments from non-specialist perspectives,[19] and also goes further than specialist studies that limit analysis to binary questions of whether political factors lead to proposed legislation being enacted or abandoned.[20] These approaches risk focusing on only the more visible elements of legislation rather than assessing laws systematically, and accordingly may overstate the influence of weak interests such as consumers and over-indebted households.[21]

In contrast, this study's central finding is that while debtor interests appeared successful in adding issues to the policy agenda and making advances in early public legislative fora, the final detail of enacted legislation increasingly favoured creditor interests.[22] The article concludes by illustrating the negative consequences of this position, arguing that if the Irish experience is replicated more widely (as it indeed appears to have been), then policymakers' failure to confront excessive household debt levels may

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[18] B. Carruthers and T. Halliday, *Rescuing Business: The Making of Corporate Bankruptcy Law in England and the United States* (Clarendon Press 1998) 45–46.

[19] E.g. Kastner n 11 above; Trumbull n 12 above.

[20] E.g. Farrand n 10 above.

[21] Some studies emphasising civil society groups' success in influencing policy agendas admit that measures were often diluted by industry lobbyists: Kastner n 11 above, 1333.

[22] For similar results, see e.g. A. Mian, A.Sufi and F. Trebbi, 'Resolving Debt Overhang: Political Constraints in the Aftermath of Financial Crises' (2014) 6 American Economic Journal: Macroeconomics 1.

contribute significantly to contemporary global challenges of economic stagnation,[23] inequality,[24] and political instability.[25]

PERSONAL INSOLVENCY, IRELAND, AND POST-CRISIS POLICYMAKING

The Irish government enacted the Personal Insolvency Act 2012 with fanfare, presenting it as a 'radical and comprehensive' flagship reform and 'a fundamental part of the government's strategy to return this country to stability and economic growth.'[26] International organisations initially presented the law as a model for reform;[27] with IMF Managing Director Christine Lagarde hailing it as a 'good example' of measures countries could take to restore economic growth by addressing the problem of household debt overhang.[28] Yet in 2014, when high debt levels left over 100,000 Irish households in

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[23] *See* sources cited in n 2 above.

[24] *See e.g.* Joseph Stiglitz, *The Price of Inequality: The Avoidable Causes and Invisible Costs of Inequality* (Allen Lane 2012) ch 7; Susanne Soederberg, *Debtfare States and the Poverty Industry: Money, Discipline and the Surplus Population* (Routledge 2014).

[25] See sources cited in n 5 above.

[26] Department of Justice and Equality, 'Personal Insolvency Bill 2012 Passed by Houses of Oireachtas' (19 December 2012) <http://www.justice.ie/en/JELR/Pages/PR12000365> (last visited 6 April 2018).

[27] *See e.g.* European Investment Bank, 'Unlocking Lending in Europe' (23 October 2014) 36–38; B. Mesnard and others, 'Non-Performing Loans in the Banking Union: Stocktaking and Challenges' (PE 574.400, 18 March 2016) 8. Troika-supervised personal insolvency reforms in Cyprus were modelled on the Irish law: *see* International Monetary Fund, *Cyprus: Eighth Review Under the Extended Arrangement Under the Extended Fund Facility* (Country Report No 15/271, 25 September 2015) 46.

[28] C. Lagarde, 'IMF Videos - Jobs and Growth: Supporting the European Recovery' (28 January 2014) <http://www.imf.org/external/mmedia/view.aspx?vid=3117816385001> (last visited 6 April 2018).

residential mortgage arrears, the law's first year of operation produced fewer than 1000 cases.[29] In a review of its work alongside the European Commission and European Central Bank as part of the 'Troika', the IMF criticised the reforms both for their delayed enactment and substantive content, which did not build on international best practices.[30] The European Commission condemned a law 'characterised by high costs and relatively complex processes', which 'did not succeed in reducing household arrears'.[31] Similar criticisms arrived from the different perspective of the UN Committee on Economic, Social and Cultural Rights, which saw human rights standards as necessitating more substantial mortgage debt relief measures than those offered by Irish legislators.[32] Perhaps the most significant condemnation came from the Irish government itself, who accepted the law's failure to meet expectations (the government had predicted over 20,000 annual cases) and responded with multiple legislative amendments. It explained changes enacted in 2015 as being necessary to 'ensure a better balance between the interests of secured lenders and the interests of those facing unsustainable mortgages',[33] acknowledging the original legislation's inability to weigh optimally creditor and debtor interests. This paper starts from this position, accepting that the legislation was skewed unduly towards creditor interests. It then aims to explain, by focusing on the law's political development, how this

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[29] See Figure 2 below.

[30] International Monetary Fund, 'Ireland: Ex Post Evaluation of Exceptional Access under the 2010 Extended Arrangement' (IMF Country Report No. 15/20, 2015) 25.

[31] European Commission, 'Ex Post Evaluation of the Economic Adjustment Programme - Ireland, 2010-2013' (Institutional Paper 4, 2015) 57.

[32] UN Committee on Economic, Social and Cultural Rights, 'Concluding Observations on the 3rd Periodic Report of Ireland' (E/C.12/IRL/CO/3, 2015) 8.

[33] Seanad Éireann Debate vol 241 No. 9 cols 687-8, 16 July 2015 (Minister Aodhán Ó Ríordáin T.D.).

result arose from legislative proposals initially described as aiming to offer relief to financially troubled households.[34]

This study's relevance extends far beyond Ireland and highlights a wider failure of policymakers in advanced economies to address household debt problems. Commentators in several jurisdictions criticise policy responses to the Global Financial Crisis and Great Recession for prioritising the protection of financial institutions over assisting indebted households. US authors note how legislation responding to mortgage debt crisis has 'inured to the benefit of banks and financial institutions',[35] with policymakers' abandonment of proposals to introduce mortgage principal reduction in bankruptcy ('cram-down') representing 'a stark choice of supporting Wall Street [over] Main Street interests'.[36] Political commentators have gone so far as to link this choice, criticised as President Obama's 'great betrayal' of voters,[37] to political instability and President Trump's election.[38]

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[34] *See* text to notes 179-182 below.

[35] L. Coco, 'Foaming the Runway for Homeowners: U.S. Bankruptcy Courts Preserving Homeownership in the Wake of the Affordable Modification Program' (2015) 23 Am Bankr Inst L Rev 421, 421.

[36] A. Levitin, 'Politics of Financial Regulation and the Regulation of Financial Politics: A Review Essay, The' (2013) 127 Harv L Rev 1991, 2007; A. Mian and A. Sufi n 2 above, 122, 133–134; A. Mian, A. Sufi and F. Trebbi, 'The Political Economy of the US Mortgage Default Crisis' (2010) 100 American Econ Rev 1967.

[37] J. Taub, *Other People's Houses* (Yale University Press 2014) 247–266.

[38] D. Dayen, 'Obama Failed to Mitigate America's Foreclosure Crisis' [2016] *The Atlantic* (4 December 2016) <https://www.theatlantic.com/politics/archive/2016/12/obamas-failure-to-mitigate-americas-foreclosure-crisis/510485/> (last visited 6 April 2018); G. Younge, 'How Barack Obama Paved the Way for Donald Trump' *The Guardian* (16 January 2017) <https://www.theguardian.com/commentisfree/2017/jan/16/how-barack-obama-paved-way-donald-trump-racism> (last visited 6 April 2018). S*ee also* Blyth and Matthijs' argument that the populism of Trump, Brexit and elsewhere can be understood as "a political reaction to the reversal of power between creditors and debtors" represented in decades of policies producing "a creditors'

Personal insolvency law reforms in European jurisdictions have similarly fallen short,[39] in a context of policymakers' general eagerness to protect banking sectors and appease international financial markets (particularly in fiscally imbalanced states).[40] The Irish case offers significant insight into how policy responses tended to prioritise financial sector interests over those of financially troubled households. It is an exemplar case of financial crisis, and the influence of the Troika's international organisations ensures its relevance to wider perspectives on these global problems. Any inadequacies of the legislation reflect failings not just of domestic policymakers but of the crisis management abilities of these international organisations. These institutions' shaping of domestic personal insolvency reforms may be particularly insightful as the IMF now exhorts national policymakers to enact debt reduction policies,[41] and the European Commission takes first steps towards proposing the harmonisation of substantive national insolvency laws.[42] The Irish case also

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paradise" of high household debt, ultra-low inflation and a reduced share of growth for labour: Blyth and Matthijs n 5 above, 215, 219.

[39] *See e.g.* M. Mouzouraki, '(Failure to Set up an Efficient) Out-of-Court System to Deal with Debtors in Financial Distress in Greece' and G. Comparato, 'The Italian Law against Over-Indebtedness: Fresh Start, Debt Advice and Financial Education' in F. Ferretti (ed), *Comparative Perspectives of Consumer Over-Indebtedness* (Eleven International Publishing 2016).

[40] W. Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (Verso Books 2014); M. Sandbu, *Europe's Orphan: The Future of the Euro and the Politics of Debt* (Princeton University Press 2015); I. Ramsay, 'Two Cheers for Europe: Austerity, Mortgage Foreclosures and Personal Insolvency Policy in the EU' in H. Micklitz and I. Domurath (eds), *Consumer Debt and Social Exclusion* (Routledge 2015).

[41] International Monetary Fund, 'Debt: Use It Wisely' n 2 above. See also earlier IMF institutional and staff reports: International Monetary Fund, 'Dealing with Household Debt' n 3 above; J. Andritzky, 'Resolving Residential Mortgage Distress: Time to Modify?' (IMF Working Paper WP/14/226, 2014).

[42] The European Commission initially suggested that legislation should extend to consumer insolvency, but its latest Proposal limits itself to corporate and "entrepreneur" debtors, merely "inviting" Member States to apply debt discharge provisions to consumers: European Commission, 'Initiative on Insolvency: Inception Impact

offers insight to wider debates regarding the appropriate influence of the Troika over domestic policymaking,[43] and the extent to which decisions of politically insulated technocratic actors can outweigh democratic demands.[44]

Similarly, legislation in this area offers a unique crucible for testing the extent to which policies advance either household or financial sector interests. Personal insolvency law is usually conceptualised as representing a balance between two primary objectives: debt collection and the maximisation of creditor returns on one hand, and on the other the provision of debt relief to over-indebted individuals under the 'fresh start' policy.[45] Tensions arise due to the difficulty of reconciling these aims, so that meaningful policy decisions often cannot avoid prioritising one over the other. By observing choices in

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Assessment' (2016/JUST/025, 2016) 5; European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Preventive Restructuring Frameworks, Second Chance and Measures to Increase the Efficiency of Restructuring, Insolvency and Discharge Procedures and Amending Directive 2012/30/EU', 2016/0359 (COD) COM(2016) 723 final 14. The European Central Bank is also directing Member States to reform substantive insolvency laws in its focus on addressing problems of non-performing loans (NPLs) among European banks: European Central Bank, 'Stocktake of National Supervisory Practices and Legal Frameworks Related to NPLs' (ECB 2016).

[43] *See e.g.* C. Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' (2015) 35 Oxford Journal of Legal Studies 325; European Parliament Committee on Economic and Monetary Affairs, 'Report on the Enquiry on the Role and Operations of the Troika (ECB, Commission and IMF) with Regard to the Euro Area Programme Countries' (28 February 2014).

[44] Levitin n 36 above, 1994; Streeck n 40 above.

[45] See e.g. C. Hallinan, 'The Fresh Start Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory' (1986) 21 U Rich L Rev 49, 50; E. Warren, 'Principled Approach to Consumer Bankruptcy, A' (1997) 71 Am Bankr LJ 483, 483; P. Shuchman, 'An Attempt at a 'Philosophy of Bankruptcy'' (1973) 21 UCLA L Rev 403, 450; I. Fletcher, 'Bankruptcy Law Reform: The Interim Report of the Cork Committee, and the Department of Trade Green Paper' (1981) 44 MLR 77, 81.

personal insolvency reform, we can therefore see policymakers preferring either creditor or debtor interests. Personal insolvency policymaking also may reveal glimpses of actors' wider worldviews. Given that the justifications for bankruptcy prioritising its debt collection aim derive from the contractarian 'creditors' bargain' theory,[46] the extent of one's adherence to this view offers a test of one's faith in the efficiency of free markets. In contrast, those believing that the 'predominant purpose - if not the sole purpose' of bankruptcy law is to discharge debtors' liabilities and offer them a 'fresh start',[47] see consumer credit markets as prone to failure and demanding regulatory intervention. Those emphasising efficiency over equity will require bankruptcy to enforce contracts and replicate market allocations 'with as few dislocations as possible'.[48] Contrarily, those committed to alleviating inequality condemn pro-creditor bankruptcy laws as contributing to distributive injustice and related macroeconomic harm.[49] Policymakers prioritising the maximisation of creditor returns are likely to adhere to the dominant 'bank lending' understanding of the financial crisis and recession,[50] seeing these events as caused by a banking crisis and necessitating policy responses that protect banks and their credit intermediation function. In contrast, those viewing the provision of a fresh start to over-indebted households as being necessary for economic growth are likely to understand the

[46] T. Jackson, *The Logic and Limits of Bankruptcy Law* (Harvard University Press 1986).

[47] J. Kilborn, 'Mercy, Rehabilitation, and Quid Pro Quo: A Radical Reassessment of Individual Bankruptcy' (2003) 64 Ohio St LJ 855, 866.

[48] Jackson n 46 above, 253.

[49] Stiglitz n 24 above, ch 7; Mian and Sufi n 2 above, 135–151.

[50] Mian and Sufi n 2 above, 10–11.

recession as a crisis of collapsing consumption among debt-laden households.[51] The study of bankruptcy policy thus offers perspective on a range of political currents post-crisis.

AN OUTLINE OF IRISH PERSONAL INSOLVENCY LAW REFORM

Inadequacy of Ireland's pre-crisis debt laws

This paper documents, and seeks to explain, how a post-crisis policy measure originally presented as protective of over-indebted households increasingly became *relatively* more favourable to financial institution interests throughout its successive drafts. This paper does not claim that the Personal Insolvency Act 2012 enshrined an objectively 'creditor friendly' bankruptcy law. It is sceptical of such absolute characterisations of laws as either creditor or debtor friendly,[52] and acknowledges that Ireland's law may be considered less creditor friendly than those of comparable jurisdictions.[53] Further, the Act undoubtedly improves the legal position of over-indebted households, who previously were offered no debt relief. When a household debt crisis struck in 2008, Ireland effectively lacked consumer insolvency law.[54] The bankruptcy law on the books (the Bankruptcy Act 1988)

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[51] International Monetary Fund, 'Dealing with Household Debt', n 3 above; Mian and Sufi n 2 above; Adair Turner, *Between Debt and the Devil: Money, Credit, and Fixing Global Finance* (Princeton University Press 2015); Bunn and Rostom, n 2 above.

[52] R. Cranston, 'Theorizing Transnational Commercial Law' (2007) 42 Tex Intl LJ 597, 610–614.

[53] *See e.g.* J. Kilborn, 'Reflections of the World Bank's Report on the Treatment of the Insolvency of Natural Persons in the Newest Consumer Bankruptcy Laws: Colombia, Italy, Ireland' (2015) 27 Pace Intl L Rev [i], 329–344.

[54] *See e.g.* J. Spooner, 'Long Overdue: What the belated reform of Irish Personal Insolvency Law tells us about Comparative Consumer Bankruptcy' 86(2) American Bankruptcy LJ (2012); Law Reform Commission of

was almost unused, with 8, 15, 29, 33 and 35 bankruptcies in the respective crisis years from 2008 to 2012. In 2008 many more debtors (276) were imprisoned under severe legislation enacted in the post-Civil War-era,[55] which applied until judicially expunged on human rights grounds in 2009.[56] Few debtors who could afford to negotiate the unwieldy procedure wished to petition to enter what was effectively a lifelong bankruptcy, which was reduced to a 12-year process only in 2011, on the introduction of the automatic discharge principle.[57] For tens of thousands of households in mortgage arrears by late 2008, options were limited to negotiating extra-legal settlements with creditors. Often the State-funded Money Advice and Budgeting Service (MABS) assisted,[58] renegotiating and/or managing debts on behalf of 16,600 debtors in 2008.[59] The Central Bank of Ireland also instituted a temporary repossession moratorium and a mortgage debt renegotiation scheme in 2009.[60] This may have contributed to the successful maintenance of home repossessions at relatively low levels despite severe mortgage arrears levels, though the unwillingness of banks to crystallise losses of a plummeting housing market may also explain their reluctance to seize homes.[61] Despite the restructuring of almost 115,000 mortgages by the

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Ireland, *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009, 2009) para 3.143 et seq.

[55] Law Reform Commission of Ireland n 54 above, 151–157.

[56] *See McCann v Judge of Monaghan District Court and Others*, [2009] IEHC 276; J. Spooner, 'Enforcement of Court Orders (Amendment) Act 2009, in R. Clark (ed.), *Irish Current Law Statutes Annotated 2009* (Thomson Reuters 2010).

[57] Civil Law (Miscellaneous Provisions) Act 2011 (23/2011), s.30

[58] *See* J. Spooner n 54 above, 262-266.

[59] Money Advice and Budgeting Service, 'MABS Yearly Statistics for 2008' (2009) <https://www.mabs.ie/downloads/statistics/MABS_stats_Q4_2009_1_.pdf> (last visited 6 April 2018).

[60] Law Reform Commission of Ireland n 54 above, para 3.106-3.115; Waldron and Redmond n 14 above, 157.

[61] Andritzky n 41 above, 25.

end of 2014 (approximately 15 per cent of all residential mortgages), this scheme left banks free to determine the terms of restructures.[62] Commentators have criticised the process as being unduly slow,[63] producing restructures of dubious sustainability,[64] and addressing readily solved cases while ignoring more difficult situations.[65]

Ireland's new law: key features

Irish law was thus ill equipped for a household debt crisis. Successive governments identified the need to reform personal insolvency law, and the resultant 2012 Act amends the outdated bankruptcy procedure while also establishing three new procedures.[66] Under the Debt Settlement Arrangement (DSA) procedure, a debtor who satisfies a qualified insolvency test and other conditions may, via a statutorily qualified personal insolvency practitioner, negotiate a repayment arrangement with her *unsecured* creditors under court protection.[67] If 65 per cent in value of creditors agree to the debtor's proposal, it comes into effect as a Debt Settlement Arrangement on court approval.[68] The parties, subject to certain statutory mandatory terms, decide repayment conditions.[69] This mechanism effectively

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[62] *See Irish Life and Permanent plc v Dunne; Irish Life and Permanent plc v Dunphy* [2015] IESC 46.

[63] International Monetary Fund. 'Ex Post Evaluation' n 30 above, 20–21.

[64] International Monetary Fund, 'Ireland: Twelfth Review under the Extended Arrangement and Proposal for Post-program Monitoring (IMF Country Report No. 13/366. December 2013), para 46.

[65] P. Joyce and Free Legal Advice Centres, 'Owner-Occupier Mortgage Arrears: What Progress Has Been Made towards Resolution?' (January 2015) 6 <http://www.flac.ie/publications/paper-owner-occupier-mortgage-arrearsprogress-on/> (last visited 6 April 2018).

[66] J. Spooner, 'Sympathy for the Debtor? The Modernisation of Irish Personal Insolvency Law' (2012) 25(7) Insolvency Intelligence 97; Kilborn, 'Reflections' n 53 above, 329–344.

[67] Personal Insolvency Act 2012 (44/2012), ss. 54–88. ('2012 Act')

[68] 2012 Act, ss. 73(6), 78–79.

[69] ibid ss. 67–69.

provides 'hold-out' creditors with a 'veto' over debtor proposals,[70] with about 20 per cent of cases rejected at the creditor voting phase.[71] Repayment levels must afford the debtor a reasonable standard of living (taking into account statutory guidelines issued by newly created agency the Insolvency Service of Ireland (ISI)). Repayment plans can last for no longer than six years,[72] at the end of which the debtor's remaining obligations are discharged (with an average write-down of 87 per cent of a debtor's unsecured debt in accepted cases).[73] Priority creditors and secured creditors are protected from discharge, however. At least procedural, if not substantive, protection is afforded to the debtor's home through requirements that practitioners prepare arrangements on such terms as will not require debtors to leave residences, insofar as reasonably practicable.[74] The debtor must cooperate and act in good faith throughout, on sanction of criminal penalty or termination of the arrangement.[75]

The Personal Insolvency Arrangement (PIA) procedure is largely similar, subject to the following differences. Access conditions are more onerous (for example, debtors applying must show six months' cooperation with creditors in respect of rescheduled

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[70] *See O'Callaghan (A Bankrupt)* [2015] IEHC 185 at [13] (Costello J).

[71] Insolvency Service of Ireland, 'ISI Statistics Quarter 4 2017' (15 March 2018) 7 https://www.isi.gov.ie/en/ISI/Q4%20Statistics%20Report%20Final.pdf/Files/Q4%20Statistics%20Report%20Final.pdf (last visited 6 April 2018).

[72] Most comparable laws offer discharge after three to five years: World Bank, *Report on the Treatment of the Insolvency of Natural Persons* (1 January 2014) para 269.

[73] Insolvency Service of Ireland, 'ISI Statistics Quarter 4 2015' (2016) 6 <https://www.isi.gov.ie/en/ISI/ISI_Statistics_2015_Quarter_4.pdf/Files/ISI_Statistics_2015_Quarter_4.pdf> (last visited 6 April 2018).

[74] 2012 Act, ss. 69, 104.

[75] ibid, ss. 81, 83, 87, 126–30.

mortgage loans).[76] The PIA procedure allows for both secured and unsecured debt to be renegotiated, but only where the 65 per cent creditor approval includes support of over half of both unsecured creditors and secured creditors.[77] These criteria are satisfied in approximately only half of cases that proceed past the initial application stage.[78] While all non-excluded unsecured debts are discharged on completion of a repayment plan enduring for a maximum of seven years, secured debts are only discharged to the extent specified in the arrangement.[79] The legislation merely sets out various options as to how creditors might agree to treat mortgage debt.[80] This procedure has resulted in an average write-down of 82 per cent of debtors' unsecured debt in accepted cases, and 17 per cent of secured debt.[81] The legislation protects strongly the rights of any secured creditor who consents to participate in a PIA, however. Most significantly, a 'claw-back' provision entitles a secured creditor whose mortgage debt is reduced in a PIA to recover the principal reduction if the debtor's home is sold at a higher value any time within a period of 20 years.[82] Therefore even on PIA completion, debtors might not obtain a true 'fresh start'.

The third new procedure introduced is the means-tested 'no income, no assets' Debt Relief Notice (DRN). This offers qualifying debtors a debt discharge (after a three-year waiting period[83]) without surrender of income and assets. Access is controlled by a qualified insolvency test and certain debtor conduct requirements, as well as income, asset and debt

[76] ibid, ss. 52(3), 91(1)(g).

[77] ibid, ss. 91, 111.

[78] Insolvency Service of Ireland, 'ISI Statistics Quarter 4 2017' n 71 above, 7.

[79] 2012 Act, ss. 99, 125.

[80] 2012 Act, s.100(2).

[81] The Insolvency Service of Ireland, 'Statistics Quarter 4 2015' n 74 above, 6.

[82] 2012 Act, ss. 88, 121.

[83] ibid s. 34.

limits.[84] The procedure is largely administrative (albeit subject to court oversight), with the debtor applying to the ISI, via an approved intermediary (a debt counsellor). Duties of good faith and cooperation apply to debtors throughout, with sanctions of postponement or denial of discharge.[85] One idiosyncratic aspect is that the Irish legislation introduces a debt collection function into a procedure of a type considered in other jurisdictions to serve a sole aim of 'unadulterated debt relief'.[86] Thus the DRN requires a debtor to make payments to creditors if she receives property or increased income during the three year period.[87]

Finally, the legislation amended the bankruptcy procedure, reducing the standard waiting period for automatic discharge from twelve to three years.[88] It also increased property exemption levels (including providing new protection of debtors' pensions).[89] Longstanding and potentially outdated doctrines of 'fraudulent' preferences and 'acts of bankruptcy' persist,[90] however, alongside many debtor restrictions and sanctions of questionable compatibility with human rights standards.[91] Provisions introduced in 2012 (reformed in 2015) provided for debtors to make repayments to creditors for up to five years after discharge.[92] The length of the pre-bankruptcy period during which debtors'

[84] ibid ss. 26, 34, 46.

[85] ibid ss. 34, 36, 43, 44.

[86] *R (Cooper and Payne) v Secretary of State for Work and Pensions* Court of Appeal, England and Wales [2010] EWCA Civ. 1431at [85] (Toulson LJ).

[87] 2012 Act, s. 36.

[88] ibid s. 157. A 2015 amendment since reduced this period to one year: text to fn242-9.

[89] ibid ss. 150–151.

[90] On the historical origins of the 'acts of bankruptcy' doctrine, *see*: I. Treiman, 'Acts of Bankruptcy: A Medieval Concept in Modern Bankruptcy Law' (1938) 52 Harv L Rev189.

[91] The European Court of Human Rights has condemned similar Italian provisions: *Lourdo v Italy* App no 32190/96 (ECtHR, 17 October 2003); *Campagnano v Italy* (2009) 48 EHHR 43.

[92] 2012 Act, s.157.

transactions may be investigated for prohibited undervalued or preferential dealing was extended from one year to three.[93] Finally, the legislation failed to remedy problems of accessing bankruptcy procedures under prior law,[94] and in fact created new obstacles. The 2012 Act emphasises the negotiation of consensual repayment arrangements and avoidance of bankruptcy, rather than embracing a more liberal bankruptcy debt discharge.[95] Before applying for bankruptcy, debtors must engage a Personal Insolvency Practitioner to affirm to the court that the debtor has made 'reasonable efforts' to negotiate a rescheduling agreement with creditors by applying for a DSA or PIA, if viable.[96]

Inefficacy and imbalance of the new law

This last feature marks a chief criticism of the 2012 legislation and a perennial risk in consumer bankruptcy law: that the prioritisation of consensual renegotiation over legislatively defined outcomes will lead creditors to use their strong bargaining position to advance their interests over public policy aims.[97] A purely voluntary process, as evident

[93] ibid ss.151–154, 158.

[94] The legislation removed one condition requiring debtors to make assets worth at least €1,900 available to creditors: ibid s. 148.

[95] 2012 Act, Long Title. *See also In Re Nugent & the Personal Insolvency Acts* [2016] IEHC 127, at [5]-[9] (Baker J).

[96] 2012 Act, ss. 145–147.

[97] *See e.g.* World Bank n 72 above, para 212.

from experiences in other jurisdictions,[98] is unlikely to persuade creditors to write down loans to market value and to offer substantial debt forgiveness.[99] While the bankruptcy procedure provides comparatively generous debt relief, this hides behind onerous access conditions, conduct obligations and procedural complexity. These factors directly impede access but also raise administrative and professional representation costs,[100] risking indirect exclusion of poorly-resourced debtors.[101] Consequently, both the ability and incentives of debtors to enter all procedures are reduced, contributing to the legislation's low take-up rate.[102] In the first four full years of operation *combined*, there were fewer than 2,000 bankruptcies, just over 1,000 DRNs, fewer~~less~~ than 700 DSAs, and just over 2,000 PIAs.[103] These figures are remarkably small compared to, say, neighbouring England and Wales, particularly given that over 95,000 Irish households were in mortgage loan arrears of over 90 days when the law came into effect (Figures 1, 2). The use of the new procedures has been significantly below government expectations, which had predicted *annual* figures of 3,000-4,000 bankruptcies, 3,000-4,000 DRNs and approximately 15,000 DSA/PIA

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[98] *See e.g.* A. White, 'Deleveraging the American Homeowner: The Failure of 2008 Voluntary Mortgage Contract Modifications' (2008) 41 Conn L Rev 1107; A. White and C. Reid, 'Saving Homes - Bankruptcies and Loan Modifications in the Foreclosure Crisis' (2013) 65 Fla L Rev 1713.

[99] European Commission, 'Ex Post Evaluation' n 31 above, 57.

[100] Andritzky n 41 above, 22.

[101] *See e.g.* J. Braucher, 'Increasing Uniformity in Consumer Bankruptcy: Means Testing as a Distraction and the National Bankruptcy Review Commission's Proposals as a Starting Point' (1998) 6 Am Bankr Inst L Rev 1, 10.

[102] European Commission, 'Ex Post Evaluation' n 31 above, 57.

[103] Insolvency Service of Ireland statistical releases, 2014 to 2018: https://www.isi.gov.ie/en/ISI/Pages/Media_&_Statistics (last visited 6 April 2018). ,

applications (Figure 2).[104] Despite few applications, attrition rates seem high, with 4,001 PIA applications in 2017 and only 733 approved arrangements.[105]

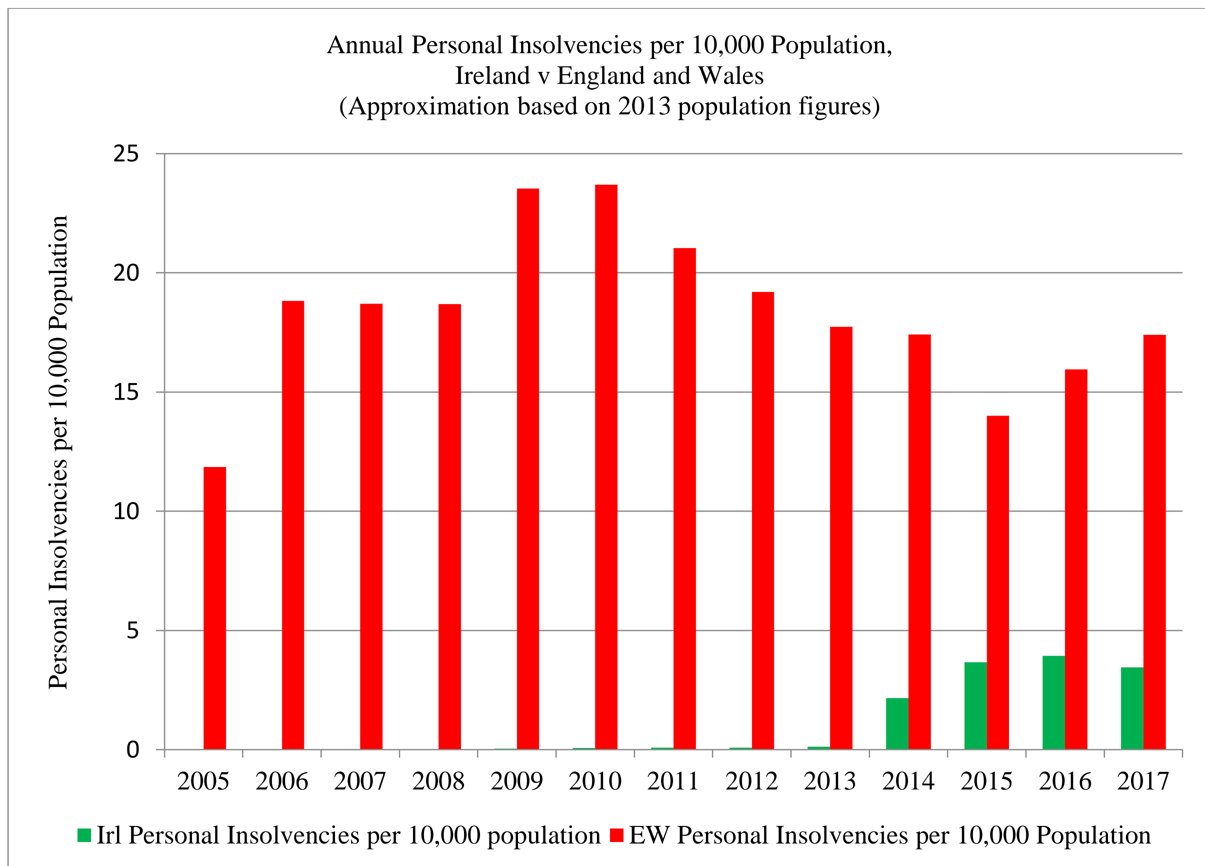

Figure 1: Personal Insolvencies per 10,000 Population, Ireland v England and Wales. Source: Insolvency Service; Insolvency Service of Ireland

[104] Seanad Éireann Debate vol 219 no. 6 col 465, 5 December 2012 (Minister Alan Shatter T.D.).

[105] Insolvency Service of Ireland, 'Statistics Quarter 4 2017' n 71 above.

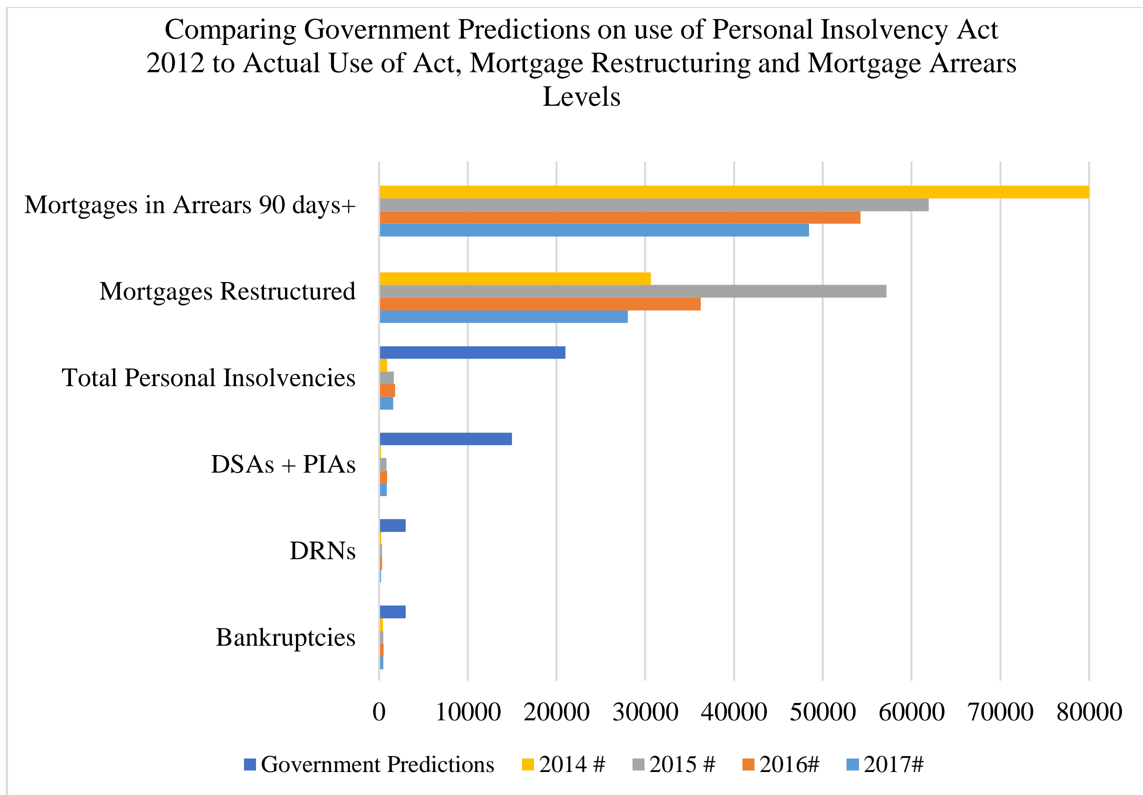

Figure 2: The Personal Insolvency Act 2012 procedures have been underused compared to government predictions and to levels of household mortgage arrears. Source: Central Bank of Ireland, Insolvency Service of Ireland, Government of Ireland.

The government accepted these criticisms to some degree in amending the 2012 legislation. The complexity of the Act generated 'operational difficulties'[106] and clarifying legislation was passed within a year of its enactment, effecting over 70 'technical drafting amendments'.[107] A further amendment responded to concerns that the €20,000 cap on debts of DRN applicants was 'overly stringent and excluded many indebted persons from

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[106] Seanad Éireann Debate vol 227 no. 13 col 881, 27 November 2013 (Minister of State Seán Sherlock T.D.).

[107] Dáil Éireann Debate vol 812 no. 1 col 16, 17 July 2013 (Minister Alan Shatter, T.D.). See Courts and Civil Law (Miscellaneous Provisions) Act 2013 (32/2013); Companies (Miscellaneous Provisions) Act 2013 (46/2013).

returning to solvency.'[108] The limit was raised to €35,000,[109] but this reform has not resulted in increased use of the procedure.[110] In an ideological departure from the initial 'user pay' model of market provision of public services,[111] cost reduction measures included state agencies waiving administration fees payable by debtors and funding free access to personal insolvency practitioners.[112] Most visibly, bankruptcy's waiting period for discharge was reduced to just one year, with the maximum duration of debtor repayments shortened to three years.[113] Significantly, the government admitted problems created by the 'veto' of creditors over proposed arrangements, at least for mortgage debt. It introduced a form of 'cram-down' mechanism whereby courts are empowered, in limited circumstances, to review and overturn creditors' rejection of a debtor's PIA proposal.[114] The government considered this reform necessary to produce 'fair and sustainable debt restructuring', better

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[108] Dáil Éireann Debate vol 887 no. 1, col 79, 14 July 2015 (Minister Frances Fitzgerald T.D.).

[109] Personal Insolvency (Amendment) Act 2015, s. 3.

[110] The reform took effect from Q4 2015, but there were only ten more DRNs in 2016 (357) compared to 2015 (347). DRN numbers fell significantly in 2017 (222): Insolvency Service of Ireland, 'ISI Statistics Quarter 4 2017' n 71, 11.

[111] I. Ramsay, 'Between Neo-Liberalism and the Social Market: Approaches to Debt Adjustment and Consumer Insolvency in the EU' (2012) 35 Journal of Consumer Policy 421, 430; A.Paz-Fuchs, 'Social Rights and User Charges' in T. Kotkas and K. Veitch (eds), *Social Rights in the Welfare State: Origins and Transformations* (1 edition, Routledge 2017) 157.

[112] Insolvency Service of Ireland, 'Insolvency Service Launches 'Back on Track' Information Campaign for People in Debt Following Research - ISI Eliminates Application Fees for Solutions' (7 October 2014) <http://www.isi.gov.ie/en/ISI/Pages/FI14000041> (last visited 6 April 2018); Insolvency Service of Ireland, 'ISI Welcomes 'Abhaile' the New Mortgage Arrears Resolution Service' (3 October 2016) <https://www.isi.gov.ie/en/ISI/Pages/Abhaile_new_Mortgage_Arrears_Resolution_Service_and_ISI_Information_Campaign_launch> (last visited 6 April 2018).

[113] Bankruptcy (Amendment) Act 2015 (60/2015), ss. 10-12.

[114] Personal Insolvency (Amendment) Act 2015 (32/2015), s. 21; 2012 Act, s. 115A.

balancing the interests of creditors and debtors and allowing borrowers to 'work their way out of debt with a view to keeping their homes'.[115] This measure coincides with a sharp increase in PIA applications, but has had little impact on the number of concluded arrangements.[116]

These post-2012 reforms all reflect debtor-friendly amendments, recognising that the original Act was overly weighted towards the interests of creditors, and that this skew contributed to the law's inefficacy. Comparative consumer bankruptcy observers may be frustrated by the predictability of these problems, based on experiences of reform in other jurisdictions.[117] Irish legislators added to a recognisable trend of policymakers initially adopting laws insufficiently supportive of debt relief objectives, before being forced into subsequent amendments offering more extensive relief.[118] While others have noted that policymakers are frequently unresponsive to bankruptcy research's findings,[119] questions arise as to why these predictable problems were designed into the 2012 law, and as to why successive preliminary drafts of the law became increasingly creditor friendly. This is particularly puzzling as a technical policy case for expansive debt relief laws builds ever more widely. In the past decade of financial crisis and sluggish global recovery, academic research and policy papers of organisations such as the IMF have increasingly recognised

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[115] Seanad Éireann Debate vol 241 no. 9, col 687-688, 16 July 2015 (Minister Aodhán Ó Ríordáin T.D.).

[116] Q3 2016 saw 703 PIA applications, compared to 300 in Q3 2015. There were only 201 approved arrangements in Q4 2017, however, compared to 185 in Q3 2015: Insolvency Service of Ireland, 'ISI Statistics Quarter 4 2015' n 73 above, 11; Insolvency Service of Ireland, 'ISI Statistics Quarter 4 2017' n 71, 11.

[117] See e.g. World Bank n 72 above.

[118] *See e.g.* J. Westbrook, 'Local Legal Culture and the Fear of Abuse' (1998) 6 Am Bankr Inst L Rev 25; J. Kilborn, 'Still Chasing Chimeras but Finally Slaying Some Dragons in the Quest for Consumer Bankruptcy Reform' (2012) 25 Loyola Consumer L Rev 1.

[119] M. Howard, 'Bankruptcy Empiricism: Lighthouse Still No Good' (2000) 17 Bankr Dev J 425.

the 'debt overhang' problem, under which excessive household debt levels constrain consumption and so economic growth.[120] The 'harshness of debt' shifts losses of economic downturn onto society's borrowers (as employment, incomes and house prices fall), while creditors are protected in retaining claims both to security and full loan repayment.[121] Since society's debtors have a higher marginal propensity to consume than its creditors, this unequal distribution of the costs of crisis leads to significant falls in aggregate demand and consequent economic downturn. A vicious cycle can develop, in which slow economic growth makes household deleveraging difficult, while debt overhang impedes growth.[122] Measures such as household debt relief laws can then offer a means of breaking this cycle, restoring debtors' ability to contribute to growth through increased consumption.[123] Irish crisis conditions presented a particularly strong case for using debt relief to address debt overhang.[124] Following the Troika programme the IMF judged that debt burdens continued to restrict household spending, suggesting that measures such as the 2012 Act were inadequate.[125] This all raises questions as to why the 2012 Act did not offer more extensive household debt relief.

[120] *See e.g.* International Monetary Fund, 'Dealing with Household Debt' n 3 above; World Bank n 72 above; Mian and Sufi n 2 above; Turner n 51 above; Bunn and Rostom n 2 above; International Monetary Fund, 'Debt: Use It Wisely' n 2 above.

[121] Mian and Sufi n 2 above, 18–19.

[122] Lo and Rogoff n 2 above, 10.

[123] Mian and Sufi n 2 above, 135-151, 167–187.

[124] K. McQuinn and Y. McCarthy, 'Consumption and the Housing Market: An Irish Perspective' (Economic and Social Research Institute, Budget Perspectives No. 2015/1, 2014).

[125] International Monetary Fund, 'Ex Post Evaluation' n 30 above, para 26.

THE PRO-CREDITOR DEVELOPMENT OF THE PERSONAL INSOLVENCY ACT 2012

Categorising personal insolvency legislative provisions as more/less favourable to creditor/debtor interests

This section shows how a law deemed overly creditor friendly resulted from the introduction of a series of pro-creditor amendments to an initial legislative proposal presented as assisting over-indebted households. This paper uses a consumer bankruptcy specialist's knowledge of insolvency legislation and literature to carry out detailed interpretation necessary to identify differences in subsequent legislative drafts. It then categorises amendments in accordance with the extent to which they reflect more closely debt collection (creditor wealth maximisation) or debt relief (fresh start) paradigms rooted in theoretical understandings of personal insolvency law. The study used what can broadly be considered as content analysis and process tracing methods.[126] It involved close examination and coding of three successive drafts of the Irish legislation (and one parliamentary report). It began by examining each provision of the drafts and ascertaining at which stage it was inserted into the legislative text. It also analysed legislative history and policy documents to identify justifications advanced in support of each amendment. The next step was a qualitative relative coding process for comparing successive drafts of the legislation. This grouped individual provisions of each draft into categories based on eleven key features identified in literature as forming fundamental elements of a consumer

[126] See Note 17 above.

bankruptcy law.[127] Each category of provisions was then coded as representing either a 'Debt Collection' or 'Debt Relief' change, where the draft in question moved this category of provisions towards the respective debt collection/creditor wealth maximisation or debt relief/fresh start paradigms.[128] These steps were then replicated in respect of each of the four procedures introduced or reformed by the 2012 Act (DRN, DSA, PIA and bankruptcy), and in respect of each subsequent legislative draft.

The method is one of qualitative analysis and relative coding of legislative provisions, differing from quantitative studies that seek to assign numerical values to legislative provisions using an absolute scale.[129] The present method confines itself to indicating whether a draft is closer to debt collection or debt relief paradigms than its previous iteration, avoiding blunt designations of a statute as absolutely 'creditor friendly' or 'debtor friendly'.[130] This method bypasses difficulties of weighting legal features of varying

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[127] *See e.g.* N. Huls, *Overindebtedness of Consumers in the E.C. Member States : Facts and Search for Solutions* (Centre de Droit de la Consommation, 1994); INSOL International, *Consumer Debt Report: Report of Findings and Recommendations* (2011); U. Reifner and others, *Consumer Overindebtedness and Consumer Law in the European Union* (IFS, Erasmus University Rotterdam, University of Helsinki 2003); European Commission, Enterprise Directorate General, *Best Project on Restructuring, Bankruptcy and a Fresh Start - Final Report of the Expert Group* (2003); S. Djankov and others, 'Debt Enforcement Around the World' (NBER Working Paper 12807, 2006) pt 5; J. Kilborn, 'Expert Recommendations and the Evolution of European Best Practices for the Treatment of Overindebtedness, 1984-2010' (August 21 2010). Available at SSRN: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1663108> (last visited 6 April 2018); World Bank n 72 above.

[128] A third 'Unchanged' code was assigned where a draft did not alter a category's prior provisions.

[129] *See* M. Siems, 'Numerical Comparative Law: Do We Need Statistical Evidence in Law in Order to Reduce Complexity?' (2005) 13 Cardozo J Intl Comp L 521; Armour and others ibid.

[130] Cranston n 52 above, 610–614.

importance and complexity,[131] and comparing legal rules across jurisdictions.[132] While 'it is inevitable that opinions may differ over the appropriate coding of particular provisions',[133] the study's method, and particularly its reliance on expert legal interpretation, facilitates more systematic analysis of policy change than non-specialist analyses that depend on broader indicators such as whether or not legislation has been enacted.[134]

Provisional results: successive drafts towards an increasingly pro-creditor law

The emerging picture is of legislation that moved increasingly towards a debt collection paradigm throughout its evolution, apart from the isolated event of a parliamentary committee report proposing amendments that would have directed the law in a debt relief direction (Tables 2-5, Appendix). The first government draft (Draft General Scheme of Personal Insolvency Bill, hereinafter 'Draft 1'), when compared to the proposed legislation of non-political public agency the Law Reform Commission ('LRC'), involved moves towards a debt collection paradigm across all four procedures and in up to ten of eleven categories (Table 2).[135] In contrast, parliamentary committee recommendations following public

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[131] Armour and others n 129 above, 350–1; Siems n 130 above, 531. One trade-off, however, is that the current method has limited ability to distinguish between a significant change in one category and an incremental change in another.

[132] Siems n 130 above, 531–532.

[133] J. Armour and others, 'Shareholder Protection and Stock Market Development: An Empirical Test of the Legal Origins Hypothesis' (2009) 6 JELS 343, 351–2. To address this issue, I am happy to make available my data set and the basis for coding judgments.

[134] See text to notes 19-22.

[135] The study uses the LRC Report as a benchmark due to its chronological position (preceding the legislative process) and largely apolitical nature. It acknowledges, nonetheless, that the LRC is not entirely insulated from

hearings moved towards a 'debt relief' paradigm in seven of eleven categories, compared to Draft 1 (Table 3). The introduction of the Personal Insolvency Bill to parliament evidenced an opposite trend, as it ignored the committee's recommendations and represented a shift even further towards the debt collection paradigm than Draft 1. Provisions were coded as moving in this direction in eight categories (Table 4). These changes were primarily limited to the DRN and DSA procedures, as the PIA procedure as established in the first government draft (the LRC not having proposed such a procedure specialised to address mortgage debt) already leaned more heavily towards a debt collection paradigm than comparable original DSA provisions. The Bill's approach to the bankruptcy procedure remained more closely aligned with the debt relief paradigm, with two categories of amendments moving in this direction. The Bill represented the final round of major developments to the legislation, and the Personal Insolvency Act 2012 passed by parliament largely remained unchanged from the Bill. Two categories of the final Act moved towards the debt collection paradigm, with two moving in the opposite direction in respect of bankruptcy, and one in respect of the other procedures (Table 5).

QUIET-LOUD-QUIET POLITICS OF HOUSEHOLD DEBT IN A TIME OF CRISIS

The core concern of this paper is to consider explanations for this veering of the 2012 law towards a debt collection paradigm throughout its development, so as to shed light on wider policy failures in addressing household debt problems in advanced economies. While

politics, since it consults with stakeholders and has its own institutional legitimacy interest in seeing recommendations implemented.

acknowledging the important role that *ideas* play in policy change,[136] this section applies collective action theory to assess the influence of *interests* in shaping the law.[137] Personal insolvency legislation often represents 'a compromise between organised creditor groups and the countervailing pressures of populism and other pro-debtor movements.'[138] This analysis assesses the extent to which these factors explain the development of the 2012 Act and its apparent prioritisation of financial sector interests over those of troubled households. It considers particularly whether this case supports arguments that traditional understandings of collective action theory were ruptured by post-crisis politics, as the heightened salience of financial regulation and creditor-debtor laws created space for popular influence over policymaking. This section maps the coding of legislative drafts against a content analysis of domestic policy documents, parliamentary debates, interest group submissions, and reviews of Ireland's financial assistance programme by the 'Troika' of the ECB, European Commission and IMF. The findings are consistent with traditional collective action theory, read with the 'Quiet Politics' thesis of policy change.[139] This thesis argues that popular and diffuse interests are advanced furthest in public fora, while less visible bureaucratic and technocratic stages produce outcomes more favourable to concentrated business interests.

Under classic collective action logic, the most successful policy influencers in competitions between interest groups are small concentrated groups of politically organised actors with harmonious, cohesive and intense interests.[140] The financial sector

[136] *See e.g.* Kastner n 11 above, 1330–1331.

[137] It can be difficult, however, to distinguish between the respective influences of ideas and interests: *see e.g.* J. Kwak, *Economism: Bad Economics and the Rise of Inequality* (Pantheon Books 2017) 29–37.

[138] Skeel n 8 above, 16.

[139] Culpepper n 13 above.

[140] Olson n 8 above.

fits this description as clearly as consumer or debtor groups do not,[141] and consumer bankruptcy literature often highlights creditors' influence over legislative development.[142] Such sway is well recognised in political discourse, with one Irish politician for example criticising the 'obvious and regrettable' influence of the Irish banking industry over the draft personal insolvency legislation.[143] Success of various interest groups in winning favourable legislation depends, however, on 'environmental conditions'. These include the technical complexity of the policy in question, its salience, the institutional context of policymaking (for example whether actors are transnational or domestic), and the stage (or forum) of the policymaking process.[144] Discussion below considers how factors of salience and technical complexity may explain developments at various stages of the process of reforming household debt laws during the Irish economic crisis. This section first outlines the institutional context, however.

Institutional context: democratic and technocratic policymaking

The legislation was introduced by the Irish government and enacted by the Irish legislative arm, the *Oireachtas*, which consists of an elected figurehead President, and a parliament of a wholly elected lower chamber (*Dáil Éireann*) and partially elected upper chamber (*Seanad Éireann*). The domestic policymakers were therefore politicians, who literature assumes to

[141] Carruthers and Halliday n 18 above, 72; Mian, Sufi and Trebbi 'Resolving Debt Overhang' n 22 above.

[142] See note 8 above.

[143] Dáil Éireann Debate vol 771 no. 3 col 827, 5 July 2012 (Shane Ross T.D.).

[144] S. Pagliari and K. Young, 'The Interest Ecology of Financial Regulation: Interest Group Plurality in the Design of Financial Regulatory Policies' (2016) 14 Socio-Economic Rev 309, 313–214.

hold primary aims of seeking re-election and enacting their desired policies.[145] As well as requiring politicians to follow popular opinion and win approval of the 'median voter',[146] these aims also necessitate the support of interest groups and party activists.[147] Concentrated business, and particularly financial, organisations hold particular influence due to governments' reliance on corporate tax revenues, economic expertise, and funding of political and public relations campaigns.[148] These factors were heightened in the Irish context of a financialised economy,[149] which became subsumed by the European banking crisis and accompanying 'problems for politicians' ability to distinguish the interests of banks from those of the state, let alone the population'.[150] Politicians must adopt various strategies to balance popular opinion, their sense of 'good public policy' and preferences of influential interest groups and activists. Through 'strategic shirking', they may use tools such as legislative rules and procedures to obscure unappealing policy attributes from voters who have difficulty monitoring such action, while reassuring closer observers (party colleagues, attentive interest groups) that their preferences are secure.[151] Alternatively, politicians may seek to change public opinion in order to win support for policy.[152]

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[145] L. Jacobs and R. Shapiro, *Politicians Don't Pander: Political Manipulation And The Loss Of Democratic Responsiveness* (2nd edition, University of Chicago Press 2000) 9–12.

[146] The median voter theory proposes that the 'competition of officeholders and candidates to win elections creates a tendency to use their actions and statements to appeal to centrist opinion': ibid 13. The theory may not be as effective in explaining political strategies in proportional representation systems such as Ireland's, compared to first-past-the-post systems.

[147] ibid 17–18.

[148] Trumbull n 12 above, 4; Culpepper n 13 above, 9; Dickerson n 8 above, 1877–1878.

[149] Ó Riain, n 15 above, 27–34.

[150] Sandbu n 40 above, 87.

[151] Jacobs and Shapiro n 145 above, 21.

[152] ibid 21–25.

A further constraint on politicians' actions arises from a state's financing needs. In the modern 'debt state', politicians may be subject not just to their political constituency, but also to a second 'constituency' of creditors who finance government operations.[153] Governments of course must maintain ongoing support of interest groups and activists, and win over public opinion in periodic elections. Their policies must also, however, earn confidence of closely monitoring international investors, to encourage favourable trading activity in continual sovereign bond auctions.[154] Governments thus might be led to favour sovereign debt service over public expenditure and the protection of bank balance sheets over those of households. In the context of banking crises, governments also may adopt bank-friendly policies as a sales pitch to investors who represent potential purchasers of non-performing loans (NPLs) of bailed out banks,[155] or of shares of nationalised banks which governments intend to return to private ownership. Acknowledgement of state finances (and the intertwined issue of banking solvency) highlights the role of technocratic, rather than democratic, policymakers, particularly during (sovereign debt) crises. Such circumstances bring *de facto* transfers of power to technical institutions such as independent central banks, due to technical complexity, polarised political conflict and ultimately 'political paralysis'.[156] Thus the Central Bank of Ireland necessarily played a key

[153] Streeck n 40 above, 79–90.

[154] ibid 81–82.

[155] Policy documents of international institutions advocate various measures to address the problem of NPLs, among which reforms to insolvency law (generally of a creditor-focused nature) feature alongside recommendations for the development of markets for distressed debt. *See e.g.* European Investment Bank (n 27); Shekhar Aiyar and others, 'A Strategy for Resolving Europe's Problem Loans' (IMF 2015) IMF Staff Discussion Note SDN/15/19; Mesnard and others (n 27).

[156] M. Everson, 'The Fault of (European) Law in (Political and Social) Economic Crisis' (2013) 24 Law and Critique 107, 109; Mian, Sufi and Trebbi. 'Resolving Debt Overhang' n 22 above; Streeck n 40 above, 39.

role in Ireland's crisis management.[157] When a state's actions lose the favour of their financial constituency, consequences can include further political constraints in the form of funding arrangements agreed with international organisations.[158] Domestic policymakers' freedom was limited by Ireland's entry into financial assistance programmes with the European Commission and IMF, with funding conditional on pursuit of certain policies under monitoring by the 'Troika'.[159]

These institutions presented themselves as serving technical aims of stabilising Ireland's banking sector and public finances.[160] The Troika's actions cannot be divorced from their own complex (sometimes conflicting) interests and political influences, however.[161] While the IMF remained responsible to the country seeking financial assistance, the European Commission negotiated on behalf of the Eurogroup. The Commission's decisions involved wider concerns such as Eurozone contagion, and represented a

[157] B. Clarke, 'Banking Regulation' in Roche and others n 14 above, 107.

[158] The Court of Justice of the EU draws a link between government satisfaction of its financial constituency and conditions attached by international organisation lenders: Case C-370/12 *Pringle v Government of Ireland* [2012] ECR I-756 at [135–137]. *For criticism, see* H. Schepel, 'The Bank, the Bond, and the Bail-out: On the Legal Construction of Market Discipline in the Eurozone' (2017) 44 JLS 79.

[159] Government of Ireland, 'Ireland: Memorandum of Economic and Financial Policies', in European Commission *The Economic Adjustment Programme for Ireland* (EEOP 76, Brussels 2011); Government of Ireland, 'IMF, Ireland: Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding' (3 December 2010) <http://www.imf.org/external/np/loi/2010/irl/120310.pdf>. See also European Court of Auditors, 'Financial Assistance Provided to Countries in Difficulties' (Special Report no. 18/2015, 26 January 2015).

[160] European Commission, 'Ex Post Evaluation' n 31 above, 17; International Monetary Fund, 'Ex Post Evaluation' n 30 above, 9.

[161] 'Indeed the biggest disagreements did not occur between the Troika and the Irish government, but within the Troika itself': L. Ahamed, *Money and Tough Love: Inside the IMF* (Visual Editions 2014) 114.

compromise of various political pressures exerted on national governments.[162] The IMF's Independent Evaluation Office thus found that collaboration with the Commission subjected the institution's technical judgment to political interference.[163] The role of the ECB as part of the Troika also is controversial.[164] Links between the Irish Central Bank and ECB (with national Central Bank governors being ECB members) raised possible conflicts as these actors effectively sat on 'both sides of the table', alongside both national authorities and international lenders.[165] The European Parliament also identified conflicts arising from the role of the ECB in the Troika as both 'technical advisor' and creditor.[166]

Irrespective of these divisions and conflicting interests, theory suggests that if policy is made by international organisations such as the Troika, outcomes might again favour financial interests. Moving decision making to the realm of 'international financial diplomacy', away from domestic elected bodies, shifts distributional conflict further from popular control.[167] Transnational policymaking also raises costs of mobilisation for interest groups, limiting influence to only the better resourced groups.[168]

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[162] Independent Evaluation Office of the IMF, 'The IMF and the Crises in Greece, Ireland, and Portugal' (Evaluation Report, 2016) 44.

[163] ibid vi–viii, 8, 42.

[164] *See e.g.* ibid 44–46; European Parliament n 43 above.

[165] Independent Evaluation Office of the IMF n 162 above, 44–45.

[166] European Parliament n 43 above, 17.

[167] Streeck n 40 above, 46; F. de Witte, 'EU Law, Politics, and the Social Question' (2013) 14 German LJ 581, 591.

[168] Pagliari and Young n 144 above, 314.

Policy Salience, Crisis and Personal Insolvency Law's Arrival on the Policy Agenda

'Acute awareness of households' financial stress'

Recent post-crisis literature has questioned classic collective action theory positions emphasising financial sector influence, however.[169] The influence of business holds certain fragility 'because [it is] a function of public inattention'.[170] Crisis or scandal can delegitimise concentrated interests' expertise, and bring sudden salience to previously 'quiet' areas, making policymakers more responsive to public opinion and diffuse interests such as consumers. The influence of concentrated interests may be limited by a 'need to justify their preferred policy in terms of a narrative that link[s] their specific preferences to the interests of a diffuse group',[171] or to the health of the wider economy.[172]

The raising of political stakes in the distributional fall-out of the Irish crisis transformed personal insolvency law from a politically ignored area into one of high salience (see Figure 3).[173] The sheer number of households in debt difficulty created a

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[169] Culpepper n 13 above; Trumbull n 12 above; Kastner n 11 above.

[170] Culpepper n 13 above, 178.

[171] Trumbull n 12 above, 29.

[172] Kastner n 11 above, 1333.

[173] Mian, Sufi and Trebbi, 'Resolving Debt Overhang' n 22 above, 3. As an indication of this issue's salience, 59 members of *Dáil Éireann* spoke during opening debates on the Personal Insolvency Bill 2012, amounting to almost 100,000 words. In contrast, debates on the following related legislation motivated fewer legislators to intervene: Bankruptcy Bill 1982: eight speakers, 18,000 words; Consumer Credit Bill 1994: nine speakers, 23,000 words; Consumer Protection Bill 2007: 13 speakers, 23,000 words. Figures compiled by author from www.oireachtas.ie.

considerable political demand for debt relief.[174] Typical difficulties in mobilising consumers (especially debtors[175]) existed in the crisis' early years,[176] but proved less problematic over time as new groups formed to advance debtor interests.[177] The 'loud' politics of salient issues thus created conditions where wider public or consumer interests might win out over the interests of the narrow few.[178]

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[174] On responsiveness of US politicians to constituent demands for debt relief legislation, see Mian, Sufi and Trebbi, 'Political Economy' n 36 above.

[175] T. Halliday, S. Block-Lieb and B. Carruthers, 'Missing Debtors: National Lawmaking and Global Norm-Making of Corporate Bankruptcy Regimes', in R. Brubaker and others (eds), *A Debtor World: Interdisciplinary Perspectives on Debt* (OUP 2012).

[176] Despite difficulties in direct debtor organisation, debt charities, regulatory agencies and professional organisations can advance interests of consumers (and debtors) indirectly, and have influenced bankruptcy law reform in other jurisdictions. In Ireland, the lack of a functioning bankruptcy system meant that no body of professionals was in place to play such a role. Lack of policy recognition of household debt problems (and so of related funding) during a period of economic boom and generally favourable attitudes towards household credit, also limited the existence and influence of charitable and regulatory agencies in this area. For fuller discussion *see e.g.* Spooner, n 54 above, 276-283.

[177] Note contributions of newly-formed groups 'New Beginning' and 'Irish Mortgage Holders Organisation' in parliamentary committee hearings: Houses of the Oireachtas, Joint Committee on Justice, Defence and Equality, *Report on Hearings in Relation to the Scheme of the Personal Insolvency Bill* (31/JDAE/004, February 2012).

[178] Kastner n 11 above, 1318.

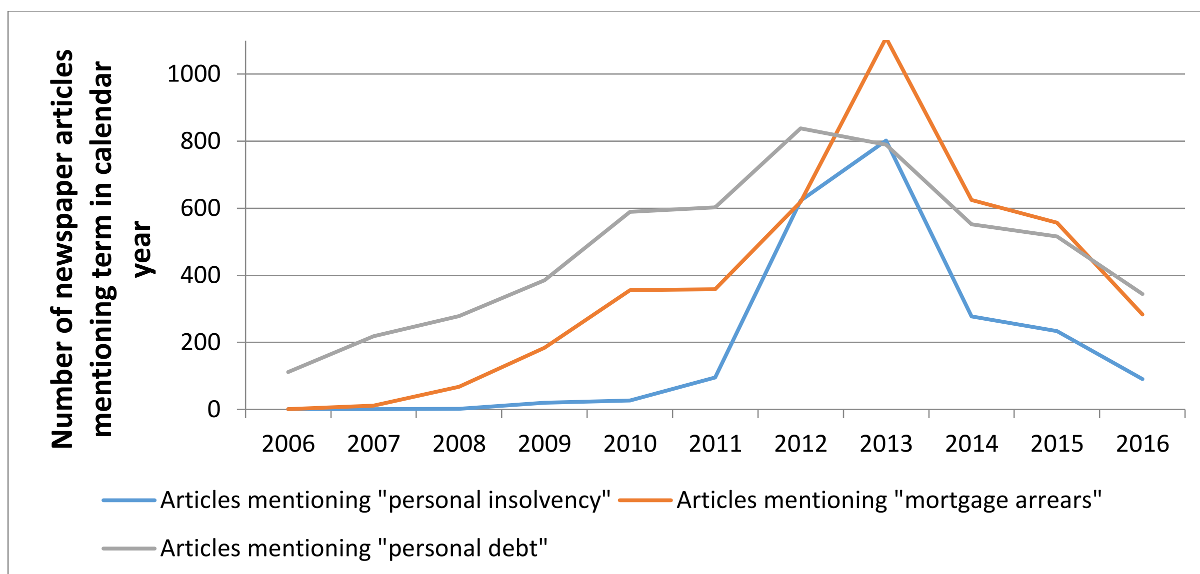

Figure 3: The increasing salience of issues relating to household debt is reflected in mentions of related terms in Irish newspapers. Source: Nexis search of leading Irish newspapers based on circulation numbers and subject-matter (Sunday Independent, Irish Independent, Irish Times, Irish Daily Mail, Evening Herald and Metro Herald, Irish Daily Mirror, Sunday Business Post, Irish Examiner, Sunday Mirror, and Sunday Tribune).

The initial addition of personal insolvency law to the policy agenda, after years of policymakers ignoring this issue, suggests such success for diffuse interest groups, and political responsiveness to popular demand for household debt relief. The recently elected Irish government launched the initial draft legislation in 2012 as a 'crucial promise' to voters, which would assist 'those in unexpected difficulties as a result of the current fiscal, economic and employment conditions.'[179] The government proclaimed itself 'acutely aware of the financial stress that households are facing', and 'committed to assisting those who cannot pay' by rebalancing 'the rights of the borrower and lender in a fairer manner.'[180]

[179] Department of Justice and Equality, 'Minister Shatter and Minister Noonan Publish Scheme of Personal Insolvency Bill' (25 January 2012) <http://www.justice.ie/en/JELR/Pages/PR12000013> (last visited 6 April 2018).

[180] ibid.

This commitment to enact consumer bankruptcy legislation, 'introducing effective relief where none had existed before',[181] might initially seem like a rare victory for 'Main Street' over 'Wall Street'.[182]

From policy recognition to legislative detail

The content of Draft 1, however, shows that any declaration of an unlikely defeat for concentrated financial sector interests was premature. While the draft legislation followed the structure proposed by the LRC, its details contained significant differences, generally leaning towards a debt collection paradigm (Table 2). The draft introduced more onerous access conditions for what was to become the DRN procedure, while extending the duration of debtor repayments and adding debtor sanctions in the bankruptcy procedure. In respect of the DSA procedure, and the new government-designed PIA procedure, the draft featured more onerous access conditions, raised the level of creditor approval required for an arrangement to become effective, weakened property exemptions, extended the duration of the repayment period prior to debtor discharge, and added controls on debtor behaviour.

This might be explained by the fact that in an environment of widespread default , debtors become a large enough constituency to require recognition on policy agendas but may remain insufficiently organised to shape legislative detail.[183] Even this agenda setting ability may not have been solely within the power of debtor interest groups and voters, however. The Irish Banking Federation (IBF) had not opposed reforms, and instead limited

[181] Kilborn, 'Reflections' n 53 above, 338.

[182] Levitin n 36 above, 1994.

[183] Mian, Sufi and Trebbi, 'Resolving Debt Overhang' n 22 above; Kastner n 11 above.

its public statements to framing discussions regarding the shape of legislation. It argued primarily for a model of consensual restructuring, rather than mandatory imposition of debt relief.[184] Similarly, the government announced its proposals as fulfilling the state's obligation under its Troika agreements, showing that popular support alone did not force this legislation onto the agenda.[185] A further complication is that while debtors represent a large electoral constituency, they remain a minority population, capable of being outvoted by a wider public hostile to overly generous debt relief laws. This point is discussed further below.

Loud Politics, a Public Stage and Political Responsiveness to Popular Demand

The next stage of the legislative process involved a public consultation period, as well as parliamentary committee scrutiny of Draft 1.[186] Following public hearings, the committee published an evaluation report and proposed amendments oriented towards the provision of more extensive debt relief (Table 3). Most notably, the committee departed significantly

[184] Spooner n 54 above, 278-280.

[185] Department of Justice and Equality n 179 above.

[186] *See* Houses of the Oireachtas n 177 above.

from the draft's 'market-based debt resolution' model,[187] in proposing a 'cram-down' mechanism in the DSA and PIA procedures. This would have removed creditors' 'veto' power and allowed an independent adjudicatory body to impose arrangements on dissenting creditors. The committee further recommended that access to the procedures should be better facilitated, and that income repayment periods should be reduced to three years, from Draft 1's position of six (DSA) and seven (PIA).

These debtor-friendly developments may result from the salience and visibility of the public parliamentary committee process,[188] and the procedural design which facilitated pluralistic interest group participation.[189] These are conditions of 'loud politics', which favour public opinion and diffuse interests, in contrast with the usual dominance of concentrated interests in times of 'quiet politics'.[190] The committee received and published stakeholder submissions and held open hearings in which consumer/debtor organisations were well represented. Actors such as the Free Legal Advice Centres (FLAC) brought considerable expert knowledge to these public hearings.[191] This reduced politicians' reliance on banking interests for information, while the proceedings' salience offered potential rewards of voter approval for politicians who invested in understanding the

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[187] This terminology appears in several IMF documents: International Monetary Fund, 'Dealing with Household Debt' n 3 above, 14; Y. Liu and C. Rosenberg, 'Dealing with Private Debt Distress in the Wake of the European Financial Crisis: A Review of the Economics and Legal Toolbox' (IMF Working Paper WP/13/44, 2013) 7.

[188] Committee findings were widely reported in national media, *see e.g.* C. Pope, 'Take Debt Veto from Banks, Says Cross-Party Committee' *The Irish Times* (7 March 2012), <http://www.irishtimes.com/news/take-debt-veto-from-banks-says-cross-party-committee-1.476449> (last visited 6 April 2018).

[189] Pagliari and Young n 144 above, 312.

[190] Culpepper n 13 above, 188–192.

[191] This organisation has long researched and campaigned in relation to consumer debt issues: *see* P. Joyce, *An End Based on Means?* (Free Legal Advice Centres 2003); P. Joyce, *To No One's Credit* (Free Legal Advice Centres 2009).

evidence. Based on similar analysis and coding to that carried out above in relation to draft legislation, stakeholder submissions show consumer and practitioner groups proposing specific recommendations directing the legislation closer to a debt relief paradigm (Table 7). Submissions urged the introduction of more lenient access, income repayment and debt discharge conditions.[192] All submissions also focused on the increasingly contentious issue of the creditors' 'veto' in respect of the DSA/PIA procedures. Consumers and practitioners called for the imposition of outcomes on recalcitrant creditors. The IBF contrastingly supported the consensual restructuring model, claiming it would produce better results for debtors and creditors than statutorily-mandated outcomes in bankruptcy. Consistent with literature suggesting financial sector interests prefer to influence policy privately,[193] the IBF confined its argument narrowly and appealed to general economic and moral principles rather than specific legislative details.

A Return to Quiet Politics: Technical Complexity, Opaque Fora and Potential Creditor Influence

Gains for diffuse interests and the debt relief paradigm were effaced, however, on publication of the Personal Insolvency Bill 2012 two months later. As Table 4 illustrates, the Bill failed to adopt the parliamentary committee proposals, and its amendments involved significant moves closer to the debt collection perspective than even the original draft. Access conditions for the DRN, DSA and bankruptcy procedures were tightened, including

[192] *See* Houses of the Oireachtas n 177 above.

[193] C. McCabe, 'False Economy: The Financialisation of Ireland and the Roots of Austerity' in C. Coulter and A. Nagle (eds), *Ireland Under Austerity: Neoliberal Crisis, Neoliberal Solutions* (Manchester University Press 2015) 47.

increased court oversight of debtor entry to the DRN and DSA procedures. Debtor property exemptions under the DSA procedure were weakened, and under all procedures the category of debts excluded from discharge was expanded to include tax debts. Further behavioural obligations were imposed on debtors in all procedures. It was at this stage that the DRN procedure was transformed from a one-year 'no income, no assets' procedure, to a three-year procedure with repayment to creditors from increased debtor income or assets.

This trend may relate to the 'quiet politics' of the Bill's drafting in the opaque forum of government departments, without further public consultation or hearings. Public visibility was further reduced by the technical nature of this drafting process.[194] The Bill's provisions were more complex than the framework legislative 'Heads' of Draft 1, or the high-level recommendations of the parliamentary committee. Under the 'issue attention cycle', it is difficult to keep questions salient for long periods, particularly where legislation is complex and citizens may be unable to ascertain whether details advance their interests.[195] This opens space for creditor groups (who have resources to disseminate technical analysis in short timeframes), as well as practitioners and government officials, to influence legislation.[196] In a jurisdiction previously lacking a consumer insolvency law and so practitioners, judges and researchers in this field, politicians may find it hard to challenge 'expertise' drawn solely from banking sector opinion.[197] Industry representatives constrained in the public forum of a highly salient parliamentary hearing might thus find opportunities for private influence in the technical process of drafting detailed

[194] Culpepper n 13 above, 8.

[195] ibid 198; Pagliari and Young n 144 above, 313–314.

[196] W. Gormley, 'Regulatory Issue Networks in a Federal System' (1986) 18 Polity 595, 605.

[197] Culpepper n 13 above, 9.

provisions.[198] When faced with allegations of financial sector influence on presenting the Bill to parliament, the government pointed to the consultation process and public hearings on the Draft Scheme (despite the government's Bill ultimately ignoring the debtor friendly recommendations arising from this process).[199] This approach seems consistent with accounts of 'strategic shirking'. Politicians could pursue positions fitting their policy preferences, and potentially those of influential interest groups, in the 'quiet' legislative stages, while maintaining an image of wider participation in the ultimately inconsequential 'louder' stages.

Governing politicians' actions were of course constrained by Ireland's commitments under its financial assistance programme. The extent of these limitations is evident in the Memoranda of Understanding signed between Ireland and the Troika, and the quarterly European Commission and IMF reviews of Ireland's performance of its commitments – documents described as complex and 'barely analysed sources'.[200] This study's analysis isolated personal insolvency recommendations in these sources and matched these to the eleven categories of legislative provisions identified above.[201] It then coded each recommendation as leaning towards 'debt collection' or 'debt relief' paradigms (or as 'neutral'). The results show that Troika positions largely directed the draft legislation towards a debt collection paradigm (Table 6). To confirm this trend, a content analysis of IMF and European Commission reports shows that these documents mention themes

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[198] Kastner n 11 above, 1335; C. Crouch, 'From Markets versus States to Corporations versus Civil Society?' in W. Streeck and A. Schäfer (eds), *Politics in the Age of Austerity* (Polity Press 2013) 219. See opposition *Dáil* members' criticism of banking representatives' private meetings with government members: Dáil Éireann Debate vol 771 no. 3 col 827, 13 July 2012 (Shane Ross T.D.).

[199] Dáil Éireann Debate vol 773 no 2, col 680, 18 July 2012 (Minister Alex White T.D.)

[200] Kilpatrick n 43 above, 326, 333–342.

[201] Text to notes 126-134 above.

associated with the debt collection paradigm more frequently than references to debt relief (Table 1 and Figure 4).[202]

Table 1: Themes associated with 'Debt Collection' and 'Debt Collection' paradigms, neutral themes in IMF and European Commission quarterly reviews

Debt Collection Themes	***Debt Relief Themes***	***Neutral Themes***
Promotion of bank lending	Restructuring unsustainable debts (fresh start)	Overall efficiency of new system
Personal insolvency as means of regulating problems of excessive non-performing loans on bank balance sheets	Debt overhang rationale (debt relief to remove lags on aggregate demand)	'Balance' between debtors and creditors, between competing aims
Concerns re debtor 'engagement'/cooperation	Concerns re debtor access costs	Court capacity
Need for increased repossessions (foreclosures)	Saving homes	
Need for debtor discipline (moral hazard concerns)	Reduction of waiting period for bankruptcy discharge	
Consensual renegotiation promoted over mandatory debt write-downs		
Protecting State as creditor		
Concerns re debtor friendly public opinion		

[202] For an example of similar methods, *see e.g.* S. Hager, *Public Debt, Inequality, and Power* (University of California Press 2016) 89–92.

Protection of creditor rights		

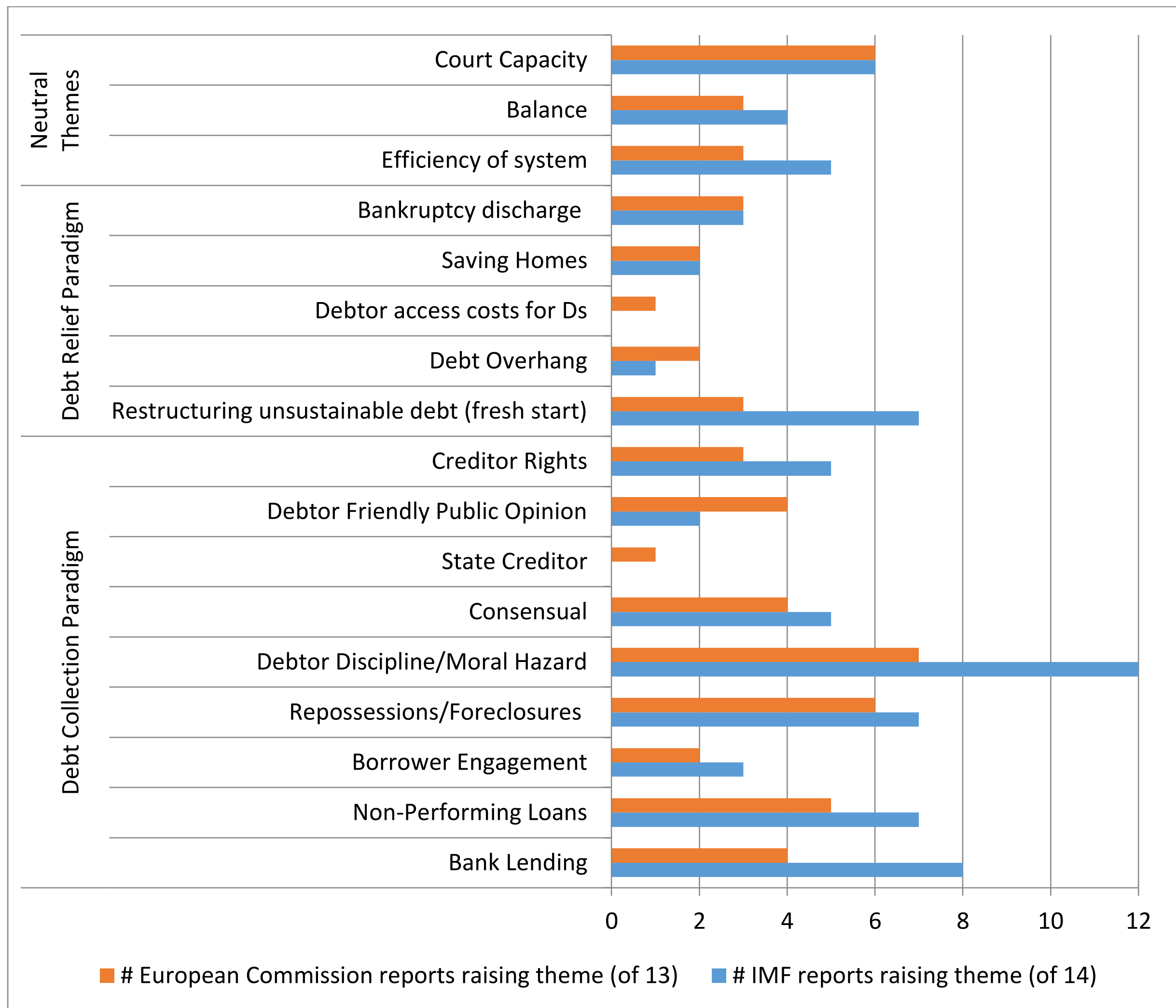

Figure 4: Themes mentioned in IMF, European Commission report discussions of Personal Insolvency Legislation. Sources: European Commission Economic Adjustment Programme Reviews, Summer 2011-Autumn 2014; IMF Staff Article IV Report (2010), IMF Reviews under the Extended Arrangement (Ireland), 1st Review to 12th Review, IMF Ireland: First Post-Programme Monitoring Discussions (2014), IMF Ireland: Ex Post Evaluation of Exceptional Access under the 2010 Extended Arrangement (2015).

The European Commission warned that any personal insolvency legislation could endanger Ireland's overall economic adjustment programme,[203] and so 'should be carefully formulated in order to prevent an adverse impact on borrower behaviour and unintended consequences for the profitability of Irish banks'.[204] Similarly, the European Central Bank considered that new measures 'should not result in blanket mortgage debt forgiveness and should be geared to minimising the risk of abuse' and avoiding 'negative implications for credit institutions... [and] the financial system'.[205] The Commission supported the current Bill as being 'broadly in line with programme understanding',[206] now that 'earlier concerns with the protections of creditors' rights [had] been addressed through strengthened appeal provisions and greater involvement of the courts...'[207] The Commission also approved of additional access conditions for entering the DRN and PIA procedures, and supported provisions excluding tax debts from discharge, on the grounds that this 'protects fiscal resources'.[208]

Theoretical understandings of how international organisation policymaking favours concentrated interests may explain the pro-creditor veering of the Troika

[203] European Commission Directorate-General for Economic and Financial Affairs, 'Economic Adjustment Programme for Ireland: Spring 2012 Review' (EEOP 96, Brussels 2012) 6.

[204] European Commission Directorate-General for Economic and Financial Affairs, 'Economic Adjustment Programme for Ireland: Winter 2011 Review' (EEOP 93, Brussels 2012) 24.

[205] Opinion of the European Central Bank of 14 September 2012 on measures relating to personal insolvency (CON/2012/270, 14 September 2012) para 2.3.

[206] European Commission Directorate-General for Economic and Financial Affairs, 'Economic Adjustment Programme for Ireland: Autumn 2012 Review' (EEOP 127, Brussels 2013) 5.

[207] European Commission Directorate-General for Economic and Financial Affairs, 'Economic Adjustment Programme for Ireland: Summer 2012 Review' (EEOP 115, Brussels 2012) 5.

[208] ibid 29.

recommendations.[209] The IMF emphasises the importance of 'national ownership' of programmes, requiring domestic authorities to assume political responsibility for policies.[210] The Fund thus aims to win public support and in Ireland 'engage[d] in extensive outreach activities vis-à-vis the media and other stakeholders'.[211] The European Commission was less inclined to participate in such activities,[212] while stakeholders (such as trade unions) and observers criticised the ECB as 'hawkish' and unmoved by democratic and distributive considerations.[213] In a context of reduced influence of diffuse groups in Commission and ECB decision-making, it is significant that the IMF was 'overruled by the European partners' in relation to important aspects of Ireland's programme.[214] The mandates of these actors, and the financial assistance programmes' emphasis on restoring 'banking stability' and 'financial market confidence', mean that their technical understandings of 'good public policy' might align with financial sector interests.[215] Inevitably these organisations worked closely with the financial sector, and relied on it for information of market conditions. For example, IMF and Commission documents cite banks'

[209] Text to notes 167-168 above.

[210] Independent Evaluation Office of the IMF n 162 above, 34.

[211] ibid.

[212] ibid 34–35.

[213] Ahamed n 161 above, 123–4; Sandbu n 40 above, 98–105; F. Dukelow, '"Pushing against an Open Door": Reinforcing the Neo-Liberal Policy Paradigm in Ireland and the Impact of EU Intrusion' (2015) 13 Comparative European Politics 93, 103. Kilpatrick criticises the EU institutions' complex and inaccessible decision-making as further obstructing popular and stakeholder engagement, while even threatening the rule of law: Kilpatrick n 43 above.

[214] Independent Evaluation Office of the IMF n 162 above, 44.

[215] Mian and Sufi n 2 above, 119–134.

reports of uncooperative defaulting borrowers,[216] and deteriorating 'mortgage payment discipline'.[217]

Managing 'Rising Political Pressure' in the Final Legislative Passage

The Bill remained to be debated in the Irish Parliament before enactment, potentially opening another opportunity for influence of popular opinion and a plurality of stakeholders. Troika documents show acute awareness of this possibility, frequently citing challenges to policy proposals posed by 'political constraints',[218] 'rising political pressure',[219] and increasing 'calls… for some form of debt forgiveness for stretched mortgage borrowers'.[220] The European Commission cautioned against the Bill's technocratic consensus being undermined by popular demand for more extensive debt relief during the parliamentary process:

> The authorities took great care to ensure that adequate safeguards were included in the draft legislation to avoid any possible negative repercussions on overall payment discipline. It will be important to ensure that these safeguards are maintained as the bill progresses through Parliament.[221]

[216] International Monetary Fund, 'Ireland: Twelfth Review under the Extended Arrangement and Proposal for Post-Program Monitoring' (IMF Country Report 13/366, 2013) 19.

[217] European Commission, 'Spring 2012 Review' n 208 above, 14–15.

[218] International Monetary Fund, 'Ex Post Evaluation' n 30 above, 20, 24.

[219] European Commission, Directorate-General for Economic and Financial Affairs, 'Post-Programme Surveillance for Ireland Spring 2014 Report' (EEOP 195, Brussels 2014) 21.

[220] European Commission Directorate-General for Economic and Financial Affairs, 'Economic Adjustment Programme for Ireland: Autumn 2011 Review' (EEOP 88, Brussels 2011) 39

[221] European Commission, 'Summer 2012 Review' n 208 above, 35.

Despite many politicians' statements expressing demand for debt relief among financially troubled constituents,[222] the government ensured the 2012 Act was enacted in a near identical format to the Bill it had designed with Troika approval (Table 5). Again, the technical nature of the detailed legislation may have limited voters' ability to monitor and influence amendments.[223] Technicality's challenge to political responsiveness is illustrated by opposition politicians' necessary limiting of focus to key salient features of the Bill – primarily the issue of the creditors' 'veto' - rather than attempting to claw back all the pro-creditor ground made by previous drafts. The government defended this point legalistically, citing advice cautioning that a 'cram-down' mechanism would breach creditors' constitutional rights.[224] This approach of clouding a contested issue with depoliticising technicality could be interpreted as 'strategic shirking', facilitating the government's pursuit of preferred policy. Even without such devices, the discipline of the Irish parliament's Westminster-style system means that government legislation is usually comfortably passed.[225] Individual politicians are neither as accountable nor responsible outside of election season as legislators in countries such as the United States.[226] A proposed

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[222] One politician stated that '[a]s noted by many speakers, it is the ordinary people, who were not looking to make millions or who borrowed irresponsibly, who are in dire need of this legislation… to get their lives back on track.' Dáil Éireann Debate vol 772 no 3, col 605, 12 July 2012 (Alan Farrell T.D.)

[223] Gormley n 196 above, 618.

[224] Dáil Éireann Select Committee on Justice, Defence and Equality Debate 13 September 2012, vol. 1 no 15, col 87-8 (Minister Alan Shatter, T.D.). The European Court of Human Rights found that protection of property rights posed no obstacles to imposing arrangements on dissenting unsecured creditors under Finnish consumer debt settlement law: *Back v Finland* (2005) 40 EHRR 48. As discussed below, a cram-down mechanism was eventually introduced in 2015 without constitutional amendment.

[225] N. Duxbury, *Elements of Legislation* (Cambridge University Press 2012) 81.

[226] In contrast, *see* Mian, Sufi and Trebbi, 'Political Economy' n 36 above.

opposition amendment that would have weakened the creditor veto was thus out-voted easily.[227]

Alternatively, the Irish government may have calculated that the majority of - personally unaffected, intermittently observant - voters might have lacked enthusiasm for monitoring legislative details so as to ensure debt relief is offered to the large minority at the expense of repaying borrowers and taxpayers.[228] The Government cited this idea of fairness as between debtors to the Troika as a political concern influencing policy.[229] It argued in parliament that measures such as mortgage debt 'cram-down' would jeopardise the supply of credit and reduce access for 'financially viable' borrowers.[230] Here lines blur, however, between political arguments responding to perceived public opinion, and efforts of politicians and interest groups to shape public opinion to advance their prior positions.[231] This argument exemplifies Trumbull's insight that an interest group may win influence by presenting a powerful legitimating narrative of market access which draws diffuse interests (non-defaulting consumer borrowers; taxpayers; homeowners concerned about falling asset values[232]) together in support of an industry-friendly position.[233] The message of the disastrous consequences of restricting creditors' rights is a well-worn 'winning strategy' for

[227] The amendment lost by 81 votes to 38: Dáil Éireann Debate vol 781 no 2, col 724-5, 7 November 2012.

[228] Dáil Éireann Debate 5 July 2012, vol 773 no. 2, col 693 (Minister Alan Shatter T.D. *See* also K. Gross, 'Demonizing Debtors: A Response to the Honsberger-Ziegel Debate' (1999) 37 Osgoode Hall LJ 263, 271–272.

[229] IMF Staff Report for the 2010 Article IV Consultation (IMF Country Report No. 10/209, 2010), para. 29. On the importance of public perceptions of fairness in policymaking, see Wilson n 12 above, 367–368.

[230] Dáil Éireann Committee Stage Debate vol 1 no 15, col 59, 13 September 2012 (Minister Alan Shatter T.D.).

[231] Jacobs and Shapiro n 148 above, 27–28, 45–67.

[232] M. Watson, 'Headlong into the Polanyian Dilemma: The Impact of Middle-Class Moral Panic on the British Government's Response to the Sub-prime Crisis' (2009) 11 British J Politics & Intl Relations 422.

[233] Trumbull n 12 above, 26–29. This 'cost of credit' argument was one of few proposed by the Irish Banking Federation during parliamentary hearings: Houses of the Oireachtas n 180 above, 27.

gaining legitimacy and political support for policies favourable to financial interests.[234] Such narratives may be particularly powerful in the Irish context of a bailed out and nationalised banking sector, in which taxpayers fund creditor losses. Just as opposition to rescuing perceived irresponsible households militated against US bankruptcy reform,[235] Irish politicians cited concerns of their constituents regarding 'why they should bail people out when [the constituents] did not go mad and spend big during the boom.'[236] The 'self-evident' logic that 'one has to pay one's debts' is also powerful,[237] and can convince publics to acquiesce to policies (such as austerity) that harm many.[238] The political majority in Ireland may have been content with responding to the household debt crisis by 'legislating around the edges, softening the impact, eliminating obvious abuses',[239] without embracing an idea of widespread debt relief. While debtor imprisonment and mass home repossessions were politically unacceptable,[240] the popular conscience may have been soothed at avoiding these salient and egregious outcomes. It may not have enquired as to how legislative detail impacted society's weaker members,[241] even if these also represent

[234] T. Sullivan, 'Debt and the Simulation of Social Class' in R. Brubaker and others (eds), *A Debtor World: Interdisciplinary Perspectives on Debt* (OUP 2012) 83.

[235] Mian, Sufi and Trebbi, 'Resolving Debt Overhang' n 22 above, 135–137; Levitin n 36 above, 2022–2023.

[236] Dáil Éireann Debate 5 July 2012, vol 772 no 3, col 595 (Martin Heydon T.D.)

[237] Graeber n 6 above, 2–4.

[238] L. Stanley, ''We're Reaping What We Sowed': Everyday Crisis Narratives and Acquiescence to the Age of Austerity' (2014) 19 New Political Economy 895. On popular support of Irish austerity policies, *see* J. Mercille, 'The Role of the Media in Fiscal Consolidation Programmes: The Case of Ireland' [2013] Cambridge J Econ 68.

[239] Graeber n 6 above, 390–391.

[240] International Monetary Fund, 'Ex Post Evaluation' n 30 above, 24.

[241] K. Gross, *Failure and Forgiveness: Rebalancing the Bankruptcy System* (Yale University Press 1997) 102.

those with the highest marginal propensity to consume, on whom society's economic growth depends.[242]

CONCLUSIONS

The European Commission's review of Ireland's economic adjustment programme described the country's new personal insolvency law as 'based on a broad political consensus, which balanced the interests of debtors and creditors.'[243] Such description conceals the political contestation involved in the development of the legislation and hides how a balance between debtors and creditors can be tilted by legislative detail to produce losers and winners. This article has sought to correct this record by illustrating how recognised pro-creditor legislation emerged through 'quiet politics' of bureaucratic and technocratic decision-making in opaque fora, despite opposing positions advanced through popular opinion and diffuse interests in 'louder' public fora. As comparative consumer bankruptcy literature would predict, and technical and political accounts subsequently admitted, the undue pro-creditor leaning of the legislation contributed to its inefficacy.

Key post-2012 pro-debtor reforms undertaken by the Irish Government in response are consistent with the trend identified in this paper. Most notably these amendments included the reduction of the waiting period for the debtor's bankruptcy discharge,[244] and the introduction of a limited 'cram-down' mechanism for mortgage debt.[245] The timing of these amendments is relevant: they came soon after Ireland's Troika commitments had

[242] Text to notes 1-5, 120-125 above.

[243] European Commission, 'Ex Post Evaluation' n 31 above, 57.

[244] Bankruptcy (Amendment) Act 2015 (60/2015), s. 10.

[245] Personal Insolvency (Amendment) Act 2015 (32/2015), s. 21.

ended and the IMF and Commission had both acknowledged the failures of the 2012 Act.[246] Both reforms also arrived in the period preceding a general election, when politicians have little time to shape public opinion and respond most readily to the public's heightened scrutiny of their actions.[247] These reforms confined themselves to salient issues, rather than undoing the pro-creditor gains represented in the detailed provisions of the legislation. The reform process also evidences a degree of 'strategic shirking'. Though undoubtedly benefitting affected debtors, the reduction in the waiting period for bankruptcy discharge ultimately may not be of great economic significance. Instead it may merely expedite the accrual of inevitable costs to creditors. This highly visible reform was championed by a 'policy entrepreneur',[248] drawn from the junior party of the Irish coalition government, which was predicted (correctly) to suffer heavy electoral losses.[249] It was designated for public consultation and parliamentary hearings, but these were narrowly confined to 'one very specific matter' of reducing the bankruptcy term from three years to one, with other aspects of personal insolvency law shielded tightly from discussion.[250] The public process produced the simple and popular recommendation of reducing the period, which was promptly enacted. In contrast, the issue of mortgage cram-down – of tremendous economic significance and direct consequence to creditors – was addressed in the opaque forum of government departments. This process produced a limited and technically complicated

[246] Notes 30-31 above.

[247] Jacobs and Shapiro n 145 above, 42–47.

[248] *See e.g.* D. Béland, 'Ideas and Social Policy: An Institutionalist Perspective' (2005) 39 Social Policy & Administration 1; Wilson (n 12) 370–371.

[249] N. O'Connor, 'Bankruptcy Term Vital for Penrose's Election Decision' *Irish Independent* (20 October 2015) <http://www.independent.ie/irish-news/politics/bankruptcy-term-vital-for-penroses-election-decision-34123709.html> (last visited 6 April 2018).

[250] Houses of the Oireachtas, Joint Committee on Justice, Defence and Equality, 'Report on the Term of Bankruptcy in Ireland' (31/JDAE/030, 8 July 2015) 2.

reform, which places tight constraints on judicial power to impose mortgage debt forgiveness on recalcitrant creditors.[251] While popular opinion and diffuse interests may have pushed the removal of the 'creditor veto' onto the policy agenda, the detailed reforms may not deliver debt relief to the extent expected.

This study acknowledges the need to distinguish causation from association in analyses of corporate power.[252] Outcomes favourable to financial sector interests might not necessarily result from business lobbying or 'insider' policymaking. Further studies might explore the extent to which such outcomes result from prevailing ideas.[253] These might range from technical analyses viewing personal insolvency law as less a matter of saving homes and more of saving bank balance sheets from losses on 'non-performing loans' (NPLs),[254] to political ideology adopting a 'quasi-theological view of debt'.[255] While the technical case for household debt relief becomes increasingly accepted, its obstacles include not only political constraints, but also continued technical disagreement between, as well as within, international policymaking organisations.[256] This may contribute, for example, to

[251] A High Court judge noted the 'harsh' conditions can deny relief even to a debtor who had 'made every effort and been diligent in seeking to meet her repayments': *In the matter of Sarah Hill* [2017] IEHC 18 at [38–52] (Baker J).

[252] Hager n 207 above, 90, citing J. Hacker and P. Pierson, 'Business Power and Social Policy: Employers and the Formation of the American Welfare State' (2002) 30 Politics & Society 277.

[253] *See e.g.* J. Hopkin and K. Alexander Shaw, 'Organized Combat or Structural Advantage? The Politics of Inequality and the Winner-Take-All Economy in the United Kingdom' (2016) 44 Politics & Society 345.

[254] *See e.g.* Mesnard and others, Aiyar and others, European Investment Bank, n 27 above.

[255] Sandbu n 40 above, 105.

[256] Further study might explore why international consensus is more readily built in relation to *ex ante* consumer credit regulation (such as acceptance of the 'responsible lending' principle) than for consumer bankruptcy laws: S. Block-Lieb, 'Austerity, Debt Overhang, and the Design of International Standards on Sovereign, Corporate and Consumer Debt Restructuring Symposium' (2015) 22 Indiana J Global L Studies 487.

the contrast between the pro-creditor advice of the IMF and Commission teams on Ireland's personal insolvency reform, and the conflicting emphasis on debt relief visible in policy and staff documents of these institutions.[257] While this article shows the role of the Troika to have been undoubtedly influential,[258] Irish domestic politicians had also embraced neo-liberal austerity policies even before entering into commitments with these international organisations.[259] As noted above, the Irish experience finds parallels in other countries following the crisis, but it may not speak for all cases at all times. The story of pre-crisis US bankruptcy reform, for example, is one of pro-debtor legislation being introduced through 'quiet' politics which deliberately avoided controversy and 'drew little attention', while pro-creditor amendments were pushed through during an 'enormously controversial' 'fierce struggle'.[260]

Despite these caveats, this study argues that traditional accounts of collective action theory appear to hold firm under conditions of post-crisis, recession politics. Though the crisis brought into focus issues of financial regulation and household debt, the power of popular opinion and diffuse interest groups remains insufficient to avoid policy outcomes more favourable to concentrated interest groups. Policymaking in 'quiet' bureaucratic and technocratic fora produces these effects particularly. The consequences are stark. Over one quarter of Irish residential mortgages remain in arrears or in largely unforgiving

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[257] *See e.g.* text to notes 120-125 above; European Commission, 'Initiative on Insolvency: Inception Impact Assessment' (2016/JUST/025, 2016).

[258] This article recognises its reliance on scrutiny of publicly available documents, some of which (particularly Troika reports) are politically negotiated publications, and which do not reveal private discussions.

[259] Dukelow n 214.

[260] Skeel n 8 above, 187.

restructuring arrangements,[261] and household debt levels rank high even among the elevated standards of contemporary European economies.[262] It has long been recognised that a heavily indebted society is an unequal one,[263] while it is now increasingly accepted that a society that unduly pushes risks onto its debtors will not fulfil its economic potential. This study argues that policymaking in contemporary democratic capitalism may struggle to address these effects, and instead inequality of market outcomes may be replicated in 'differential access to political power.'[264] Financial institutions' political and economic significance may equip them not just with a veto power over insolvency arrangements under 'market-based debt resolution' laws, but also with a veto over the content of such laws themselves. Insolvency legislation itself risks becoming a 'creditors' bargain',[265] as debtors are excluded from political negotiation and contestation. During the long legislative process, one Irish politician noted that

> 'telling constituents that legislation to assist is coming has been frustrating. One constituent replied, "So is Christmas". People are frustrated and it is imperative that the Bill not frustrate and alienate them further.'[266]

The negative consequences of such alienation in household debt policymaking, if not avoided, are likely to extend to significant and ongoing economic, social, and political risks.

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[261] Central Bank of Ireland, 'Residential Mortgage Arrears and Repossessions Statistics: Q4 2016' (Statistical Release, 30 December 2016).

[262] Central Bank of Ireland, 'Household Credit Market Report' (H2 2016, 7 November 2016).

[263] *See generally* M. Lazzarato and J. Jordan, *The Making of the Indebted Man: Essay on the Neoliberal Condition* (Reprint edition, MIT Press 2012); Graeber n 6 above.

[264] C. Crouch, *Post-Democracy* (1 edition, Polity Press 2004) 52.

[265] See note 46 above.

[266] Dáil Éireann Debate vol 772 no 3, col 622, 5 July 2012 (Mary Mitchell O'Connor T.D.).

INSERT APPENDIX TABLES HERE

The Quiet-Loud-Quiet Politics of Post-Crisis Consumer Bankruptcy Law: the case of Ireland and the Troika

Appendix

Tables showing trends of amendments in the draft legislation.

Key:

White = category of provisions not considered in this draft of the legislation
Blue = Pro-creditor/Debt collection group of amendments: position adopted in relation to this category is closer to a Debt Collection/Creditor Wealth Maximisation paradigm than the position adopted in the previous draft legislation/proposal.
Red = Pro-debtor/debt relief group of amendments: position adopted in relation to this category is closer to a Debt Relief/Debtor Friendly paradigm than the position adopted in the previous legislation/proposal.
Grey = Unchanged: category considered in this draft, but position unchanged from previous draft of legislation

Table 1 Tracking trends of draft legislation amendments: Draft General Scheme of Personal Insolvency Bill

Draft General Scheme of Personal Insolvency Bill: Comparison with Law Reform Commission Report/Bill											
	Access – Cost	Access – Other Conditions	Institution	Mandatory v 'Market-Based'	Repayment Plan in All cases?	Property Exemptions	Income Exemptions	Waiting Period for Discharge	Duration of Repayment Plan	Excluded Debts	Sanctions
Debt Relief Notice											
DSA											
PIA											
Bankruptcy											

Table 2: Tracking trends of draft legislation amendments: Parliamentary Joint Committee Report

Oireachtas Joint Committee Report: Comparison with Draft General Scheme of Bill											
	Access – Cost	Access – Other Conditions	Institution	Mandatory v "Market-Based"	Repayment Plan in All cases?	Property Exemptions	Income Exemptions	Waiting Period for Discharge	Duration of Repayment Plan	Excluded Debts	Sanctions
Debt Relief Notice											
DSA											
PIA											
Bankruptcy											

Table 3: Tracking trends of draft legislation amendments: Bill as introduced to Parliament

Bill as Introduced to Oireachtas: Comparison with Draft General Scheme of Bill											
	Access – Cost	Access – Other Conditions	Institution	Mandatory v "Market-Based"	Repayment Plan in All cases?	Property Exemptions	Income Exemptions	Waiting Period for Discharge	Duration of Repayment Plan	Excluded Debts	Sanctions
Debt Relief Notice											
DSA											
PIA											
Bankruptcy											

Table 4: Tracking trends of draft legislation amendments: Personal Insolvency Act 2012 as enacted

Personal Insolvency Act 2012 as Enacted (including relevant secondary legislation): Comparison with Bill as introduced to Oireachtas (Parliament)											
	Access – Cost	Access – Other Conditions	Institution	Mandatory v "Market-Based"	Repayment Plan in All cases?	Property Exemptions	Income Exemptions	Waiting Period for Discharge	Duration of Repayment Plan	Excluded Debts	Sanctions
Debt Relief Notice											
DSA											
PIA											
Bankruptcy											

Table 6: Positions adopted by European Commission and IMF relating to personal insolvency legislation in quarterly reports on Ireland's financial assistance programme.

Troika Positions (combined positions relating to all procedures)											
	Access – Cost	Access – Other Conditions	Institution	Mandatory v "Market-Based"	Repayment Plan in All cases?	Property Exemptions	Income Exemptions	Waiting Period for Discharge	Duration of Repayment Plan	Excluded Debts	Sanctions
European Commission											
IMF											
ECB											

Table 7: Positions adopted by interest groups in response to Draft General Scheme of Personal Insolvency Bill

Positions adopted by interest groups in response to Draft General Scheme of Personal Insolvency Bill (see Key in Figure 6 below)

	Access – Cost	Access – Other Conditions	Institution	Mandatory v "Market-Based"	Repayment Plan in All cases?	Property Exemptions	Income Exemptions	Waiting Period for Discharge	Duration of Repayment Plan	Excluded Debts	Sanctions
Debt Relief Notice		**FLAC** **NB** **ISIP** **IBF**				**SFA**	**FLAC**	**FLAC**	**FLAC**		
DSA	**FLAC** **MABS** **ISIP**	**IBF**	**FLAC** **NB**	**FLAC** **SFA** **NB** **MABS** **IBF**			**FLAC** **NB** **MABS**	**FLAC**	**FLAC**	**SFA**	**NB**
PIA	**FLAC** **MABS** **ISIP**	**IBF** **ISIP**	**AAM** **FLAC** **NB**	**AAM** **FLAC** **NB** **MABS** **ISIP** IBF			**FLAC** **NB** **MABS**	**AAM** **FLAC** **ISIP**	**AAM** **FLAC**		**NB**
Bank-ruptcy	**ISIP**	**ISIP** IBF	**ISIP**					**ISIP**	**FLAC** **NB** **ISIP**		

Debtor/Consumer Representation		**Creditor Representation (Bank)**	**Business**	**Government Department**	**Practitioner Representation**
NGO	*Public Debtor Advice Agency*				
FLAC (Free Legal Advice Centres)	Money Advice and Budgeting Service (MABS);	Irish Banking Federation (IBF)	Small Firms Association (SFA)	Dept. of Social Protection	Irish Society for Insolvency Practitioners (ISIP)
New Beginning (NB)	Citizens' Information Board (CIB)	Irish Mortgage Council		Citizens' Information Board (CIB)	
Ask About Money (AAM)					

Figure 6: Participants at discussion of Oireachtas Joint Committee on Justice, Defence and Equality on the Personal Insolvency Bill, 15 February 2012