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ADVANTAGES AND DISADVANTAGES OF GERMAN CONSUMER BANKRUPTCY MODEL: GUIDELINES FOR CROATIAN LAWMAKER*

Abstract

Legal transplant, as a legal phenomenon, has always been present in legal history, and was especially brought to the fore in terms of creating major economic integrations, such as the European Union (EU). Membership of the Republic of Croatia in the EU has its strong legal basis because it belongs to the con-tinental law school initially based on the reception of Roman law, and later German law. The Croatian academic community believes that the harmonization of bankruptcy and legal regulations with the EU laws is not a goal in itself, but has a strong economic rationale. In this context, a number of ambiguities in the current bankruptcy legislation are indicated, one of them being the absence of *lex specialis* regulations for consumer bankruptcy. As the legislator showed an initiative for the reception of a model of consumer bankruptcy (*the Foundation for the Introduction of Personal Bankruptcy, Ministry of Justice, Zagreb, 2012, pp. 1-6, and Draft Proposal of the Statement of the Regulatory Impact Assessment for the Preparation of the Draft of the Consumer Bankruptcy Law Proposal, Ministry of Justice, Zagreb, 2012, pp. 1-5 and finally Draft of the Consumer Bankruptcy Law Proposal, Ministry of Justice, Zagreb, June 2014*) modeled on German legal solutions, the authors analyze the justification of such regulation in this paper.

Keywords: consumer bankruptcy, German role model, justification of implementation.

1. Introduction

Bankruptcy legislation in the Republic of Croatia is directly related to the aspects of the existing socio-economic relations. Since World War II onwards there have been several changes in the field of bankruptcy legislation which were mainly an expression of market specificities and conditions (Bodul et al., 2013). Until 1997, Compulsory Settlement, Bankruptcy and Liquidation Act (Official Gazette (OG) 53/91 and 44/96) was effective. Due to the necessity of a more contemporary regulation of bankruptcy, within the reform process, a new law, Bankruptcy Law (OG 44/96, 29/99, 129/00, 123/03, 82/06, 116/10, 25/12 and 133/1 – further referred to as BL) was introduced. The starting point for the new BL was the German Insolvency Law from 1999 which itself radically changed German insolvency legislation (Bodul, 2011).[1] The aspects of the new law are such that the Croatian regulation concerning

this field is now largely in accordance with modern world solutions even though there are some comments on this law as well. However, the present BL omitted the category of consumer as a possible subject of bankruptcy and the research problem arises as a consequence. The authors believe that the consumer is unjustifiably omitted from the bankruptcy legislation, which can be corrected by adopting a *lex specialis* law that will regulate the field of con-sumer bankruptcy. Therefore, the purpose of the re-search is to analyze the justification of introducing regulations governing consumer bankruptcy in the Republic of Croatia modeled on the German legal solutions.

In Croatia, there still isn't a single textbook, monograph or more significant work in the field of consumer bankruptcy, as opposed to major work, research papers as well as the judicial practice that exists in, for example, German law.

There are only a few scientific texts dealing with this, still very "new" scientific discipline (see Garašić, 2011, Odobaša, 2011, Bejaković, 2010, Bodul, 2011 and Bodul, Smokvina, 2012).

Therefore, the present research for the case of the Republic of Croatia will have a fundamental significance, and will represent the first systematic and scientifically based analysis of a possible approach towards reform of subjective assumptions for the application of bankruptcy legislation and consumers' right to bankruptcy proceedings.

2. The problem of choosing a suitable consumer bankruptcy model

When drafting new legislation (in former socialist countries) the question whether the traditional continental European or the Anglo-American models, which are sometimes considered as more "modern", should be adopted, appears almost regularly. Or perhaps, according to the slogan "the best of both worlds", elements of both systems should be combined. Namely, American and continental European legal models of consumer bankruptcy are based on different theoretical grounds, which necessarily causes the differences between these systems. Un-til the 1980s, European countries did not have a regulated consumer bankruptcy as a special form of bankruptcy proceedings. Economic conditions required its introduction to the legal system. In the EU Member States' practice there are a number of different options in a situation where the consumer finds himself in a financial crisis and all those options are closely related and directly influenced by the "regular" bankruptcy law. Although all these countries have as a general and identical aim to modernize their law systems, they still have their own tradition, issues and conditions and therefore are facing individual challenges. However, an evident orientation of the Croatian legislation to the already existing German bankruptcy consumer model is coherent, because it enables the use of foreign judicial practice and literature as an aid in solving the issues that will arise in the application of the "new" law (Berkowitz et al., 2003).

3. Legislative resolution of the German model of consumer bankruptcy proceedings

The new Insolvency Code (Ger. *Insolvenzordnung*) entered into force in Germany in 1999.[2] In accordance with the rules of consumer insolvency proceedings,[3] the consumer debtor's aim is to be relieved from remaining debts by liquidation of assets that can be seized and the proportional settlement of creditors. Special insolvency provisions provide consumers with the right to discharge debts in three stages.

The first is determined in the consumer's attempt to reach an out-of-court agreement on the debt regulation with his creditors. An attempt, and not reaching an out-of-court agreement on the debt regulation, is a prerequisite for the initiation of insolvency proceedings.

Within the framework of insolvency proceedings, a new attempt for reaching an out-of-court agree-ment on debt regulation follows.

If within the second stage of the proceedings the creditors do not accept the plan for regulating the consumer's debts, there follows the liquidation of the debtor's assets that can be seized under judicial procedure. For this judicial procedure, simplified rules are applied and depending on the motion of the debtor, he can be relieved of the remaining debts over a period of six years (i.e. the period of good behavior).

The indicated period of six years was introduced by the insolvency legislation reform in 2001, before which it had been considered that the period should

last for seven years. However, as the period of the so-called good behavior is essentially only one of the phases of consumer bankruptcy, preceded first-ly by an out-of -court and then a court reaching of an agreement on debt regulation, it has been demonstrated in practice that debt relief should be waited for almost 11 years, and even more. Furthermore, in practice, the frequency of payments based on debt repayment plan has proved questionable, since in many cases the creditors do not realize economic benefits. A step forward was made by the speci-fied Amendments of Insolvency Code in 2001, according to which the debtor is entitled to defer the payment of legal expenses, meaning that the debtor can settle them upon completion of the insolvency proceedings.

Before the implementation of the stated amendment, the rules of consumer bankruptcy demanded the rejection of the proposal to initiate consumer bankruptcy if bankruptcy estate was not sufficient to cover the expenses of the proceedings. However, in the case where consumers are able to defray the expenses, there is a significant problem in the inability of the debtor to meet the creditors' claims during the period of good behavior. Namely, the basic requirement is that during the six-year period, the debtor transfers as much as possible of his assets to the creditor. However, this goal is often unrealizable. It has been shown (Lechner, 2011) that most of the consumers are unable to settle any part of the debt, so this leads to questioning the six-year period rationale, and also the fact that most consumers live "on the edge of existence" during the period of debt repayment should be bore in mind. It was anticipated that the reform legislation in 2001 and the structure according to which the payment of the expenses "transfers" to the completion of the debt repayment plan, would provide certainty of payment of expenses of the proceedings. Actually, the idea of the amendment is focused on adjusting the rules of bankruptcy proceedings to financial and social situation of insolvent consumers. Nevertheless, the reform not only hasn't contributed to a more efficient and expeditious completion of the proceedings, but resulted in a larger number of submitted propos-als for bankruptcy. From the above stated, it can be concluded that the intention of the German legislature to delay the payment of expenses of the proceedings, until the end of the debt repayment, has not provided satisfactory results. Moreover, it has been shown in practice that there have been more and more consumer bankruptcy proceedings. In regard to this, it can be concluded that this system of designing the institution of consumer bankruptcy, imposes debtors to a very long period of debt repayment, high and irreversible expenses of administration of the local government, and mainly it doesn't help achieve the settlement of the creditors (Braun, 2005; Kilborn, 2004).

3.1. The necessity of reform of the consumer in-solvency proceedings and the remaining debt relief proceedings

Every twelfth German household can't meet its financial liabilities due.[4] The number of proposals to initiate the consumer insolvency proceedings from 1999 to 2005 increased from 3,357 to 68,898.[5] Be-hind the U.S. with the rate of 12.7%, Germany has the highest insolvency rate of 8.1% at the interna-tional level. Only 6% of indebted households in Germany experienced benefits from the remaining debt relief.[6] Due to the increasing number of over-indebted persons, debt consultants and Consumer Protection Offices have demanded amendments to consumer insolvency proceedings and the remain-ing debt relief proceedings which would enable a less complex debt relief for the insolvent custom-ers. At the center of criticism is the fact that these proceedings, in cases of insufficient bankruptcy es-tate, which amount to 80% of all cases according to the Federal Ministry of Justice, are too demanding and do not contribute to the settlement of credi-tors' claims, which is the stated goal of insolvency proceedings. A model of the solution § 304ff. of the Insolvency Code has been marked as "having significant shortcomings", which is a consequence of the fact that, unlike other elements of the reform of the Insolvency Code, it didn't ensue as a result of several years of preliminary actions (Goldenberg, 2006).

In a mandatory attempt to reach an out-of-court agreement, the "artificially inflated demand for insolvency advisory services" is criticized because of the unfeasibility in the cases of inability of "zero debt repayment plans", disproportionate advisory efforts even in the cases of successful agreements and the unacceptability of the advisory model in practice (Goldenberg, 2006).

In an attempt to reach a court agreement, the criticism was related to the fact that such a model nei-

ther encourages creditors to reach any agreement nor offers contextual benefits compared with a plan of out-of-court debt regulation. In simplified insolvency proceedings, which generate the majority of expenses, the entire proceeding was criticized since in the cases with no bankruptcy estate, or due to the insufficiency of a debtor's bankruptcy estate, there is no economic rationale. In the remaining debt relief proceedings, the remark primarily refers to the meaningless burdening and financial expenses of the judicial system, e.g. because of the inclusion of trustees, especially in cases with no bankruptcy estate.

The criticism of the theory goes further and emphasizes that the disadvantages of the proceedings, besides the fact that even the debtors who have insufficient means undergo a long and complex proceeding, and that the creditors have to participate in an attempt to regulate the debts without expecting some sort of economic benefits, also affect the justice system which is overloaded with a large number of proceedings with no bankruptcy estate. The biggest criticism is related to the fact that insolvency proceedings for consumers with no means gener-ate high costs and the consequence was that the reforms of consumer insolvency proceedings were primarily fiscally motivated. Insolvency proceed-ings with no assets have become financially unsus-tainable for budgets, primarily due to the deferred payment of expenses of the proceedings in accord-ance with § 4a ff. of the Insolvency Code. Therefore, the solutions are searched for in new approaches that would generate less cost. The burdening of budgets due to the delay of payment of expenses of the proceedings is certainly not a topic that should simply be ignored. It is questionable whether this issue should be in the forefront of reform efforts that should ensure the creation of new legislation for debt relief. The attention should also be paid to the fact that it is still arguable whether the budgets were as burdened as claimed. Hence the share of the cases of granted deferred payment of expenses, in which the repayment doesn't follow for the biggest part, is according to some estimation 2/3, and ac-cording to other, an estimated 90%. The possibility of delaying payment of expenses of the proceedings exists only since 2001, and a significant increase of insolvency cases has been recorded only from 2003. In order to obtain data on the basis of which conclusions can be made, a time lapse of at least 10 years is required (the period of good behavior, and 4 years of additional warranty period (Ger. *Nachhaftungszeitraum*). Therefore, the theory holds that the first solid comprehension should be expected in the period from 2011 to 2014 (Lechner, 2011). Even if there would be speculation about the possible returns of deferred payments of expenses related to cost recovery for 2005, which amount to 48.29 million euros or for 2006, when the estimated amount is 55.253 million euros, conclusions can't be drawn, because there are no reliable data so far on the share of the proceedings in which the debtors were granted deferred payment of expenses, so it is not possible to compare the data on the return of the payments and the deferred payments (Goldenberg, 2006).

Already in 2002, German judges and senior judicial officers called for the "re-establishment of the functionality of insolvency courts and the Insolvency Code" and demanded a reform of the consumer insolvency proceedings and the remaining debt relief proceedings. Such a reform should enable a faster and more economical remaining debt relief proceeding. However, this reform was not necessary in order to spare the over indebted consumers of the complexity of the current proceedings, but to re-duce the workload of the judicial system, which has become overloaded due to an increase in proposals for initiating insolvency proceedings (Goldenberg, 2006).

In the mid-2003 the German Federal Ministry of Justice proposed the initial Draft of the Act on Amendments of the Insolvency Code, Civil Code and other laws.[7] In the foreground was a proposal of merging attempts of reaching an out-of-court agreement and court proceedings of debt regulation. The Draft Act on Amendments of the Insolvency Code, Credit System Law and other laws which were created by officers, was published in September 2004. At the same time a discussion with certain discrepancies from the original draft continued (Wiedemann, 2004). The Bavarian State Ministry of Justice proposed a withdrawal of the Draft and the establishment of a *Bund-Länder Commission* (working group at the level of federal country-federal states) that would examine legal procedural requirements and offer appropriate solutions for the cases with no bankruptcy estate, which is the biggest shortcoming of the existing regulations, in the opinion of the Ministry.[8] In November 2004, Justice Ministers' Conference[9] established the *Bund-Länder Commission*, which consisted of representatives of the Federal

Ministry of Justice and State Ministries of Justice. In spring 2005, the Federal Ministry of Justice pre-pared a Draft proposal containing key issues, titled "Alternative forms of remaining debt relief - key is-sues of the possible reform"[10]. It focused on "the pro-ceedings of debt relief with no trustees" for debtors with no bankruptcy estate, which is also called the "Obsolescence Model" (Ger. *Verjährungsmodell*). According to this model, the consumer insolvency proceedings and the remaining debt relief proceed-ings in their present form would be implemented only for debtors with bankruptcy estate. The con-sumer insolvency proceedings would not be appli-cable to debtors with no means or with insufficient bankruptcy estate. A special debt relief proceeding would be applicable to debtors with no means or with insufficient bankruptcy estate. The main fea-tures of that proceedings are debt relief through obsolescence after the eight-year period expiration, the permissibility of enforcement measures that are otherwise prohibited in insolvency proceedings, absence of trustees and non-obsolescence of claims that the debtor didn't indicate (Hofmeister, Jäger, 2005). In June 2005, at the Conference of Ministers of Justice, the *Bund-Länder* Commission proposed an interim report "New Paths towards the remain-ing debt relief".[11] The commission advocates for the idea of "rectified (relocated) proceedings" (Ger. *ausgelagertes Verfahren*) for debtors with no bank-ruptcy estate (Springeneer, 2006). In March 2006, the Federal Ministry of Justice forwarded a proposal for discussion to the members of the *Bund-Länder* Commission, titled "Draft of the Act on debt relief for persons with no means and on amendments to insolvency proceedings for consumers" (Ger.
Entwurf eines Gesetzes zur Entschuldung völlig mittelloser Personen und zur Änderung des Verbraucherinsolvenzverfahrens).[12] The proposal was supposed to be the basis for discussion within the commission, but despite its name, it still didn't rep-resent a Draft of the Act of the Federal Government. The conclusions of the discussion at the Conference of Ministers of Justice were presented in 2006, and were the basis for the Draft of the Act prepared by the Federal Ministry of Justice (Goldenberg, 2006).[13]

3.2. Debt relief structure for the most vulner-able consumers through a Draft of Act on debt relief for persons with no means and on amendments to insolvency proceedings for consumers

In the Draft of the Act on debt relief for persons with no means and on amendments to insolvency proceedings for consumers (hereinafter: the Draft) proposed by the Federal Ministry of Justice, the central focus is on a special debt relief proceeding for debtors with no means and on amendments to insolvency proceedings for consumers with the relief of the remaining debts which would encompass all other individuals.[14]

3.2.1. The debt relief proceedings for consumers with no means

The theory advocates the position that a special debt relief proceeding should be available to all consumers with no means. The proceedings would be initiated by a specific person or a department responsible for issuing certificates of inability to reach an agreement with creditors and for the preparation of forms for submission of proposals. After determining the insufficiency of bankruptcy estate, the insolvency court should inform the creditors which the debtor had indicated in the list of creditors and claims about the proceedings, and invite creditors to submit a proposal for rejection and state the rea-sons for rejection within one month period. If the court does not receive the request for rejection, it determines by a decision that the debtor would be relieved from debts no later than eight years after the decision, unless the proposal is rejected during that period. There is no need to register or deter-mine claims[15] or appoint trustees. In accordance with §4a-4d of the InsO, the institute of deferred payment of the proceeding expenses should not be applied, because no costs incur for the debtor in the debt relief proceedings. During the eight-year period, the creditor can generally initiate the enforcement procedure, but the enforcement may be limited under certain circumstances. The Draft contains several options for limiting the enforce-ment, but they haven't been completely defined and are subject to further discussions of the *Bund-Länder* Commission. After the expiration of the debt relief period, the debtor would be exempt from

creditor's claims which the creditor indicated, but the relief would have no effect on the remaining claims (Goldenberg, 2006).

3.2.2. Insolvency proceedings for consumers and the remaining debt relief proceedings

According to the Draft, the insolvency proceedings for consumers and the proceedings for remaining debt relief should be available to all individuals who at the time of the proposal submission do not carry out entrepreneurial activities, and who can cover the expenses of the proceedings. The theory sug-gests a sort of merging of attempts aimed at reach-ing an out-of-court or a court agreement in order to maximize the prospects for concluding an agreement, as well as to remove the differences between regular and simplified insolvency proceedings and the breakdown of the duration of the good behav-ior period. If the debtor reimburses at least 20% of the creditors' claims, then his period of good be-havior reduces to four years, and in the case of reimbursement of at least 40%, the period reduces to two years. In other cases, the good behavior period would last as usual, for six years. The Draft further on implies an expansion of the list of reasons for rejection from §290 of the Insolvency Code, and the rejection by virtue of the office when there are obvious reasons for it. Moreover, a catalog of excluded claims is also implied.[16] It is important to emphasize that the maintenance liability that a debtor has, but deliberately does not meet it, would not be covered by the remaining debt relief (Goldenberg, 2006).

The Draft implies that the insolvency proceedings for consumers and the proceedings for the remaining debt relief, unlike complete debt relief, should last less in order to motivate the debtor to pay the proceeding expenses. Thus, the Federal Ministry of Justice as the author of the Draft "in the interest of the over-indebted and in order to protect the resources of the judicial system" (Ger. *im Interesse der Überschuldeten und um die Ressourcen der Justiz zu schonen*), has set the goal of finding less complex ways of debt relief and amendments to consumer insolvency proceedings so that the proceedings would be as flexible and efficient as they can be and to demand less effort.[17]

3.2.3. The main criticism of the planned amend-ments

For the most part, the Draft anticipates a regula-tion which coincides with the current proposal of the Bund-Länder Commission. Important discrep-ancies are evident in the possibilities of limiting enforcement measures during the debt relief proceedings, where the enforcement procedure would still be permitted. The permission of the enforcement procedure is the central point of criticism of the model of Bund-Länder Commission. Thus, it remains to be determined which restriction possibilities from the Draft will enter the new Act. If the restrictions are not carried over, the permission of the enforcement procedure will again become the center of criticism. Considerations arising from the scientific community, the legal profession and debt consultants indicate the misgiving that despite the fact that the debtors have no assets, it will result in a "flood" of enforcement procedures on accounts, with account closings as the final result. The re-quests for protection, which debtors may submit ac-cording to § 850 k of ZPO,[18] will lead to an increased burden of courts for enforcement and credit institu-tions to which enforcement procedure represents a considerable expense. This way the debtor's efforts in finding a new job are endangered, along with his economic reintegration, because employers, as the debtor's debtors, are often reluctant to burden themselves with enforcement procedures on sala-ries (Goldenberg, 2006).

The following criticism of the theory applies to a limited impact of debt relief only for the creditors' claims indicated by the debtor himself. The aim of a serious debt relief cannot be a solution for only a part of debts, but a sustainable relief from all debts and the debtor's re-inclusion in the regular economic and working life. That is achievable only by regulating the limited impact of debt relief, since often all the creditors cannot be specified and also frequently several years pass since the principal debt was incurred and before the advisory service is contacted. Also, it happens that even though there is a record of a creditor, his title or the amount of the claim aren't known or he does not respond to invitations. Further on, it is difficult to find justification for the fact that the creditors that the debtor indicated, have to accept his debt relief, while others may still persist in their demands (Goldenberg, 2006).

The limited effect of debt relief in the Draft is justified with the fact that on one hand, the debtor is encouraged to be more active, and on the other, the limitation of enforcement measures for all the creditors requires that they are at least informed about the proceedings, which would imply a consider-ably more arduous and expensive proceeding. This should be avoided, so that the debt relief proceed-ings would be shorter (Goldenberg, 2006).

Further criticism of the theory was related to the eight-year duration of the debt relief proceedings that in the Draft, among other things, is explained by the fact that this should motivate the debtor to pay the proceeding expenses, in order that he passes to the good behavior period within the remaining debt relief. However, the experience shows that the six-year period is difficult as it is for the consumers, so the extension of this period cannot be justified. A dilemma has also arisen about achieving an objective of the Draft related to the financial relief of the budget. In this context, the estimation regard-ing budget relief for the justice system, meaning the transfer of expenses to budgets of other depart-ments and institutions, is "too optimistic". Certainly the repeal of deferred payments of the proceeding expenses would partially reduce the burden on justice budgets. However, since the amendments to the debt relief proceedings do not imply the payment of fees, even if the insolvency court was involved in the proceedings to a certain extent, the proceeding expenses would be charged to the justice budget (e.g. costs of checking the general assumptions of the admissibility of the opening of the proceed-ings, examining requests for rejection, debt relief denial ex officio, decisions on requests for debt re-lief or revocation of a decision on debt relief). In addition, expenses associated with permitted en-forcement procedures during the debt relief would incur, due to the fact that the debtors with no as-sets would file objections to enforcement in order to protect themselves from the growing number of creditors' requests for enforcement procedures. The debt relief proceedings could create additional expenses for the budgets of other departments and institutions. Thus, the permissibility of enforcement would lead to the fact that mediation in the employ-ment of unemployed debtors wouldn't be successful in most cases, because the employer has to take into account that an enforcement procedure on salaries may be initiated during the period of eight years, though only by the creditors that the debtor had not previously specified, as the Draft includes an option for limiting enforcement (Goldenberg, 2006).

Moreover, the compliance of the proposed amendments to consumer insolvency proceedings and remaining debt relief proceedings with the principle of equal treatment is ambiguous. Namely, regula-tions with different actions against the debtor who has certain bankruptcy estate and against a debtor with no bankruptcy estate, by putting such a debtor in a worse position, would lead to a „legal right of two classes" and „exclusion" of debtors with lowest incomes, meaning those who do not have any income. Such legislative regulation would significantly violate the principle of equal treatment which is not in accordance with §3, sub-section 1 of the Constitution (Goldenberg, 2006).

3.3. Alternative structures

Theoretical discussions about the necessity of amendments on insolvency proceedings for consumers and the proceedings for remaining debt relief have led to the fact that in recent years, dif-ferent individuals and groups of people have de-veloped various structures for reshaping the pro-ceedings. It is still not clear whether and to which extent these proposals will affect the final Draft of the Act. Therefore, it is necessary to introduce vari-ous models and their main determinants in order to gain a better insight into the overall issues and that the present Draft could be assessed from different perspectives (Goldenberg, 2006).

3.3.1. "The Wustrau Regulation"

At the beginning of 2005, as a result of the criticism of the dualistic regulation depending on whether the debtor has any assets (bankruptcy estate), the German Ministry of Justice invited representatives of the State Ministries of Justice, Federal Ministry of the Family, associations of creditors, lawyers and insolvency administrators, insolvency administrators, debt consultants, insolvency courts and the scientific community to the Judicial Academy in Wustrau in order to develop a new concept. „Two ways towards the same goal – the legal remaining debt relief" were developed in the context of the Wus-trau model (Goldenberg, 2006). The model includes a combination of former insolvency proceedings

for consumers as debtors with bankruptcy estate and the insolvency proceedings in the cases with no bankruptcy estate. Those proceedings would not be independent from each other, but there would be a single proceeding that would be flexible and would last shorter. The proceedings of debt relief should be preceded by an attempt to reach an out-of -court agreement. If that doesn't happen, or if, due to the insufficiency of the debtor's bankruptcy estate, a testimonial is provided about the inability to reach that agreement, the debtor can apply for the start of the consumer insolvency proceedings, meaning the proceedings for debt relief, justification of which has to be determined by the court. The possibility of a debt regulating plan within the legal proceedings still remains in force (Goldenberg, 2006).

The consumer insolvency proceedings should be applied when the debtor can cover the expenses of the proceedings and can settle at least 10% of the creditors' claims, whereby the lowest percentage of the settlement of the claims hasn't been determined by a consensus. If the court finds that the consum-ers insolvency proceedings cannot be initiated be-cause of the insufficiency of bankruptcy estate, the debt relief proceedings would be initiated. This can be equalized with a direct transition to the good behavior period. This way, the insolvency proceed-ings is bypassed. The publication of the decision to initiate the proceedings would exclusively follow via the Internet. The creditors are informed about the proceedings and are asked to verify whether their claims were taken into account and to state the reasons for rejection. Already at this stage, the court should decide on the request for rejection. The initiation of the proceedings should lead to the suspension of enforcement that would be extended to all six years of the debt relief proceedings. A trus-tee would be appointed in the proceedings, whose only role would be account management, i.e. the disposal of bankruptcy estate and its distribution to the creditors. At the end of the debt relief pro-ceedings, the debtor is relieved from the remaining debts, and this applies to all claims. According to this model, the consumer insolvency proceedings would be implemented the same way as it is carried out at the moment. The only difference is the articu-lated duration of the good behavior period: in the cases of a 10% settlement, it would last for five years, and in the cases of a 25% settlement it would last for four years. Thus, according to the legal theory, the most important differences between this model and the current Draft are: that the debtors with no bankruptcy estate would be relieved from all the re-maining debts and claims after six years according to the Wustrau model; that the enforcement is not allowed; and that the court should be involved in the proceedings to the point of the decision on the remaining debt relief (Goldenberg, 2006).

3.3.2. "The trustee structure"

German Bar Association (Ger. *Deutscher Anwalt-verein*) has developed the so-called model with a trustee, based on considerations of Grote. In the foreground of this model is the exclusion of "unnec-essary" proceedings from the Insolvency Code. The doctrine states that it implies the opening of a special proceeding for debtors with no bankruptcy estate, with the main goal being the remaining debt relief. There would be no need to open the insolvency pro-ceedings, but the debtor has to be immediately re-directed to the period of good behavior. Therefore, according to the theory, the regulation §286ff. of the Insolvency Code about the good behavior period should be complemented in order to compensate the missing rules on the insolvency proceedings. The application and the determination of creditors' claims should be simplified, whereby the enforce-ment procedure of determining the claims would be retained. The claims should be determined based on the information that debtors state in their lists, and they would not be further investigated. In the cases where the distribution can't be expected, the model gives the court the ability to omit the proce-dure of determination of claims based on their as-sessment. According to the authors of this model, it is necessary to not only retain, but also to give more importance to the attempt of reaching an out-of-court agreement and the debt regulating proceed-ings. A trustee would be appointed the same way as it is appointed at the moment, and the prohibition of enforcement procedure would still be retained in the cases with no means. If the debtor can cover the expenses of the proceedings, the insolvency pro-ceedings would be opened, the distribution would be dropped in the regular proceedings and the con-sumer insolvency proceedings which would lead to omission of § 311ff. and § 304ff. of the Insolvency Code (Goldenberg, 2006).

The model contains several suggestions for reduc-ing the burden of state budgets without the rever-sal of the deferred payment of expenses. In order

to achieve this, debtors with insufficient bankruptcy estate should cover the trustee's compensation expenses. Until the expiration of the good behavior period, the relief of the remaining debts could be made dependent on proceedings cost recovery, which were deferred, or the debtors, excluding the recipients of unemployment benefits (ALG II) and social welfare, could be committed to repaying the deferred expenses in monthly installments during the good behavior period. The theory holds that this model emphasizes a flexible response of insol-vency courts in order to ensure effective and fair solutions for different cases, and on the other hand to reduce the expenses of the proceedings (Golden-berg, 2006).

3.3.3. The structure according to the "Simplified remaining debt proceedings"

A working group started developing this model in August 2005. It was formed of representatives of State Ministries of Social Welfare, the Federal Association for Debt Counseling (Ger. *Bundesarbeitsgemeinschaft Schuldnerberatung* – BAG-SB), Federation of German Consumer Organisations (Ger. *Verbraucherzentrale des Bundesverbandes*) and the Federal Ministry of Family Affairs. The aim of this model is to find a way to provide the economic and social reintegration to debtors with no assets, taking into account the expenses. The model anticipates two different ways for the remaining debt relief. The debtors with bankruptcy estate, which can cover the proceeding expenses and settle the creditors in the 5% amount of claims after the good behavior period, would still enter the consumer insolvency proceedings in the current form, however, with the good behavior period of five years. Debtors with no bankruptcy estate would have at their disposal a "simplified remaining debt relief proceeding". The proceeding may or may not be preceded by an attempt to reach an out-of-court agreement. After the debtor's request for the opening of the proceeding, the court determines whether the debtor has a certain bankruptcy estate, otherwise already in this phase the scope of the claims and the debtor's honesty should be verified. The claims are registered electroni-cally, thus the matrix assembly is avoided. If there weren't rejections of remaining debt relief due to the debtor's dishonesty, there follows a court decision on rejection of the request for opening the proceedings because of the insufficiency of bankruptcy estate and the remaining debt relief is announced and the good behavior period is initiated. During this period, the debtor has to fulfill the obligations that correspond to obligations that are currently valid in the remaining debt relief proceedings. At the same time, the enforcement procedure would not be permitted and the trustees would be excluded. Instead, a court bailiff, who would collect sizable amounts and divide them to the creditors, would be ap-pointed. In order to limit the proceedings expenses, debtors who have incomes higher than the unem-ployment benefits (ALG II) should participate in the costs of publication in the amount of 100 euros. At the end of the good behavior period, the write-off of the remaining debt starts, including the claims of all creditors. This model is not considered particularly innovative because it encompasses elements from the "Wustrau model", the "Heyer's model" and the Draft of the officers from the Federal Ministry of Justice from September 2004, with certain amendments (Goldenberg, 2006).

3.3.4. Structures from judicial circles – "The Heyer Structure"

The origin of the model proposed by Heyer is related to the retention of "trusted" elements of the consumer insolvency proceedings currently in force and the remaining debt relief proceedings, to which, along with the period of good behavior, the out-of-court proceeding in his opinion belongs. Simplifying of the existing proceedings could be achieved e.g. by merging of attempts to reach an out-of-court agreement with the proceedings of court regula-tion of debts or in the case of a complete inability to reach an agreement after proper verification by a responsible authority, by stopping the attempts to reach the out-of-court agreement. After a success-ful insolvency request and a judicial review of the debtor's property relations, the insolvency proceedings should be opened when the debtor can cover the proceeding expenses and settle his creditors in more than 10% of the amount of claims. If the prerequisites for the opening of the proceeding are not fulfilled, due to the insufficiency of bankruptcy estate the insolvency request is denied and after the verification of the debtor's integrity, the debtor

directly enters the good behavior period. Before that, the creditors should be informed about the in-tended rejection by an appropriate decision with an invitation for stating the reasons for the rejection in accordance with §290 of the InsO. In the absence of the denial due to the violation of duties before rejecting the insolvency request and during the good behavior period, the debtor's remaining debts are written off after the good behavior period. The model includes the retaining of the enforcement prohibition in case of implementation of insolven-cy proceedings and the rejection of the insolvency request due to the insufficiency of bankruptcy estate. The registration and verification of the claims should be abolished in order to avoid a demand-ing proceeding which loses its rationale at the lat-est during the remaining debt relief according to §301 of the InsO, and which entails the conversion of claims into the so-called incomplete obligations. Instead, income and assets, if any, should be distrib-uted on the basis of a divisional list. This would re-sult in the limited involvement of trustees, and thus less expense would incur. With his model, according to the doctrine, Heyer, on one hand, tends to unbur-den state budgets, and on the other hand, tends to set free debtors with no assets of their obligations on the way of the remaining debt relief, which is rated positively (Goldenberg, 2006).

3.3.5. Proposals of an ad hoc lawyer working group

At a forum of practitioners of ZAP publishing house (*ZAP-Verlag*) in Hanover, a working group was established in order to develop proposals for amendments and revision of the existing regulations of consumer insolvency law with the remaining debt relief. They developed various proposals for amendments on certain parts of consumer insolvency proceedings and the remaining debt relief proceedings, such as complete omission of the good behavior period. That way the debtor, if there are no grounds for the rejection, would be immediately relieved of the remaining debt after the completed insolvency proceedings and liquidation of assets. Another suggestion is an "optional period of good behavior", i.e. for a debtor with no assets, the good behavior period would be introduced only at the request of a credi-tor who would in that case have to bear the expens-es of minimum fees for the trustee. If the creditor does not file a claim, then the debtor is immediately relieved from the remaining debts, which is sub-ject to some restrictions. In addition to individual proposals, a model was drafted according to which the debtor with no assets undergoes a proceeding consisting of two phases - the opening of the proceedings and the good behavior period. As a further amendment, the model considers the registration of claims only when a certain part of the settlement can really be expected compared with the current regulations. Further on, it considers a substitution of the annual distribution to creditors by a onetime distribution at the end of the good behavior period, if there are only small amounts for the settlement of creditors and the new structuring of reasons for denial, such as the application of § 290, sub-section 1, no. 5 of the InsO during the entire proceedings. According to the theory, the aim of this model is the re-establishment of the functionality of courts, reducing the burden on the budgets and amendments to the consumer insolvency proceedings with the remaining debt relief in order to satisfy the interests of both creditors and debtors (Goldenberg, 2006).

3.3.6. The structure from the circle of creditors

The author of this model is a representative of the collection bureau (Ger. *Inkassowesen*). According to him, a structure without opening the insolvency proceedings would be applied to consumer debtors with no bankruptcy estate. In the case when the debtor can cover the proceeding expenses, a simplified insolvency proceeding would be available to him. If the debtor has no assets, then he files an insolvency request without attempting to reach an out-of-court agreement first, because costs would incur in that process. If the debtor's request for deferring payments is denied, the court decides to temporarily postpone the insolvency proceedings due to the insufficiency of bankruptcy estate. This way the proceedings would be solved until the remaining debt relief. The model anticipates the appointment of a trustee in insolvency proceedings with no bankruptcy estate too. He would be responsible for supervision, i.e. whether the debtor abides by his duties. If requests for denial are submitted during the temporarily postponed proceedings, the proceedings would have to continue, and if necessary, following a decision on the denial would be delayed again. During the proceedings, on an annual

basis, the debtor would have to inform the trustee about the performance of his duties, e.g. in the case the debtor is unemployed, his duties would be to show his effort to obtain employment. The proceedings would be resumed only after the decision on the remaining debt relief. The general opinion of the theory is that the stated (Jäger's) model primarily satisfied the creditor's interests, which is understandable considering the interests he represents (Goldenberg, 2006).

3.3.7. The structure from the circle of insolvency administrators

This is not a complete model of the transformation of the consumer insolvency proceedings and the remaining debt proceedings, but a model of individual proposals of amendments. The aim of lawyer Plute, as an insolvency administrator with experience, was to offer suggestions that would avoid "... meaningless and burdensome working parts of the insolvency proceedings". That could be ensured, e.g. by abolishing investigation and determination of claims in the current form and instead of that, a trustee or an insolvency administrator would confirm the balance which would then be deposited in court in a form of a list. This would lead to the abolition of the mandatory presentation of documentation to creditors before courts. Furthermore, the function § 178, sub-section 3 of the Insolvency Code would be avoided, and it would be exercised exclusively on a creditor's request in the event of denial of remaining debt relief. For the most part, the proceedings would be conducted in electronic form (Goldenberg, 2006).

4. Conclusion

Although the primary goal of the comparative legal research was to analyze the German legal regulation, it was equally important to identify economic elements of the structure of this institute, in order to demonstrate all the questions the legislator tried to answer during the constitution of a certain le-gal structure. That required an analysis of empha-sized issues related to the regulation of consumer bankruptcy, so that the legislator could opt for the solutions that would best respond to the reception request in the Croatian legal system. Therefore, it is necessary to harmonize solutions with the overall legislative corpus on one hand, and take into account the current socio-economic environment on the other hand. The German legislator has enabled a uniformed possibility for all insolvent consumers. After the determination of insolvency, every consumer debtor has to make a sacrifice in the form of ceding his sizable assets to the creditors during the six-year period of good behavior. When the debt discharge is clear and predetermined, such as in German law, the path to reaching the discharge can be standardized with little deviation. Therefore, reasonable standards have to be imposed, and the German experience, with all its imperfections, provides an example of how such a process can be developed. Consequently, there is no doubt that the German model is a model of fairness. In terms of consistency, the German system seems to be the fairest from the perspective of consumers and legitimate source of social education. However, reforms are neces-sary because the mandatory debt repayment plans have caused problems for consumers who cannot achieve them. Thus, although the German legislator in the 1980's clearly indicated that debt discharge, modeled on the liberal American model, is not an option, the current state of insolvency of German consumers as well as the economically irrational legal solutions indicate the need for change. The Draft on Act was an attempt to achieve the stated, with many ambiguities. *De lege ferenda* it is believed, that there is not the so-called "*Pareto optimum*", i.e. a solution that would be ideal and acceptable for all participants in the consumer bankruptcy proceedings. Nevertheless, the legal regulation of consumer bankruptcy in the legal system should rely on the continental legal tradition, provided that the individual institutes are revised, without radical chang-es to the basic principles.

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(Endnotes)

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1 Before the contemporary Insolvency Code from 1994 (entered into force in 1999) the German bankruptcy law was regulated by two laws: the Bankruptcy Act (Ger. Konkursordnung, 1898 Reichsgesetzblatt [RGBI] 612.), which regulated the liquidation proceeding and Composition Act (njem. Vergleichsordnung, 1935 RGBI 321, 356.), which regulated the ability to reach agreements between creditors. They were applied in the regions of the Federal Republic of Germany, i.e. West Germany. Regarding the implementation of the ban-kruptcy reform, taking into account that there wasn't a strong need for a bankruptcy legislation in the socialist German Democratic Republic, i.e. East Germany, and according to the Unification Treaty (Treaty Between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity, Aug. 31, 1990, 1990 BGB1 II 885, 921, 1153), the Governments of East and West Germany agreed to gradually introduce the bankruptcy law of the West Germany in the East Germany (Erlduterun-gen zum Einigungsvertrag (Annotation to the Unification Treaty), reprinted in (1990) BADEN-BADEN 21. Therefore, the bankruptcy legislation is regulated by a special regulation (Ger. Gesamtvollstrectungsordnung, 1990 Gesetzblatt der DDR [GBI] I 32, 285.).

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Prednosti i nedostatci njemačkog modela potrošačkog stečaja: smjernice za hrvatskog zakonodavaca

Sažetak

Pravno transplantiranje, kao pravna pojava, oduvijek je prisutno u pravnoj povijesti, a posebno je dobilo na izražaju u uvjetima stvaranja velikih ekonomskih integracija, kao što je EU. Članstvo Republike Hrvatska u Europskoj uniji ima svoje snažno pravno utemeljenje jer pripada kontinentalnoj školi prava zasnovanoj, prvotno, na recepciji rimskoga prava, a kasnije njemačkoga prava. Akademska javnost RH, uvjerenja je, kako harmonizacija stečajno- pravne regulative s regulativom zemalja EU-a nije sama sebi svrha, već ima snažno ekonomsko opravdanje. U tom kontekstu posebno se ukazuje na brojne nedorečenosti dosadašnje stečajne regulative, a jedna od njih je i nepostojanje *lex specialis* regulative za stečaj potrošača. Kako je zakonodavac pokazao inicijativu za recepcijom modela potrošačkog stečaja (*Polazne osnove za uvođenje instituta Osobnog bankrota, Ministarstvo pravosuđa, Zagreb, 2012., str. 1.-6. te Nacrt Prijedloga iskaza o procjeni učinka propisa za pripremu Nacrta prijedloga Zakona o stečaju potrošača, Ministarstvo pravosuđa, Zagreb, 2012., str. 1-5.* te konačno *Nacrt prijedloga Zakona o stečaju potrošača, Ministarstvo pravosuđa, Zagreb, lipanj, 2014.*) po uzoru na njemačka pravna rješenja, autor u radu analizira opravdanost takvog uređenja.

Ključne riječi: potrošački stečaj, njemački uzor, opravdanost implementacije.