Essays

The Bounded-Rationality Model in Italian Over-Indebtedness Regulation

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Abstract

In recent decades, the basic rational-actor model – which also influenced law – has been questioned by cognitive psychology studies, whose results are now finding support from technologies dedicated to neuroscience. Cognitive psychologists propose a different decision-making paradigm, asserting that economic choices are often conditioned by biases and heuristics, on the assumption that the 'real man' is boundedly rational. This model has been grafted into studies on the economic analysis of law, giving birth to behavioural law and economics.

In Italian law, where an over-indebtedness regulatory system has only recently been introduced, few scholars have yet adopted this approach to observe the phenomenon. This work thus focuses on Italian legislation, questioning the desirability, outcomes, and limits of an approach to over-indebtedness inspired by the theory of bounded rationality.

I. Introduction

Research in the contemporary cognitive sciences raises questions of such importance as to erode the very pillars of our thinking, such as free will, responsibility, and individual boundaries. These disciplines open up fascinating new scenarios, depicting human behaviours as automatic responses of the brain, uninfluenced by the will.[1]

Such discoveries may even bring into question a number of legal assumptions[2]

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[1] See M. Gazzaniga, *La mente inventata. Le basi biologiche dell'identità e della coscienza* (Milano: Guerini e Associati, 1999), 125.

[2] Neuroscience has also contributed to this framework, giving rise to complex and profound reflection. For the interaction between Neuroscience and Law, see: J. Greene and J. Cohen, 'For the law, neuroscience changes nothing and everything' 359 *Philosophical Transactions of the Royal Society*, B, 1775 (2004); A. Santuosso ed, *Le neuroscienze e il diritto* (Como-Pavia: Ibis, 2009); A. Bianchi, G. Gulotta and G. Sartori eds, *Manuale di neuroscienze forensi* (Milano: Giuffrè, 2009); L. Arnaudo, 'Diritto cognitivo. Prolegomeni a una ricerca' *Politica del diritto*, 1 (2010); Id, *La ragione sociale. Saggio di economia e diritto cognitivi* (Roma: Luiss University Press, 2012); I. Merzagra Betsos, 'Il colpevole è il cervello: imputabilità, neuroscienze, libero arbitrio: dalla teorizzazione alla realtà' *Rivista Italiana di Medicina Legale*, 1, 175 (2011); E. Picozza et al, *Neurodiritto. Una introduzione* (Torino: Giappichelli, 2011); F.G. Pizzetti, *Neuroscienze forensi e diritti fondamentali. Spunti costituzionali* (Torino: Giappichelli, 2012); L. Palazzani and R. Zannotti eds, *Il diritto nelle neuroscienze. Non "siamo" i nostri cervelli* (Torino: Giappichelli, 2013); A. Farano, 'Percorsi della responsabilità: le neuroscienze cambiano tutto o niente?' *i-lex*, 18, 189-199

in terms of the basic Rational Actor model, which has also influenced the law. According to this paradigm, actions are freely chosen, and people are responsible for every choice they make. A similar assumption underpins notions such as culpable causation, for example. However, modern research suggests that actions are *not* freely chosen, and consequently, taking a radical stance, one might even advance the hypothesis that people should *not* be responsible for their choices, implying that the law would need to explore different solutions beyond traditional culpable causation.

The need to adopt new models and solutions involves not only criminal law – where the impact of such studies seems to have been stronger – but also civil law.

In particular, in recent decades, the basic rational-actor model has been put into question by cognitive psychology, whose results are now finding support thanks to dedicated neuroscience technology.[3] Even in the second half of the twentieth century, cognitive psychology began to explore decision-making processes, previously explained only by economic models,[4] on which the law itself had drawn.[5] These paradigms assume that decision-makers are likely to make good choices, whose outcomes satisfy them. Cognitive psychologists have presented a body of evidence to show that economic choices are often conditioned by biases and heuristics, namely that the decision-maker is led to take mental shortcuts, selecting a merely satisfactory, rather than an optimal, solution. From this perspective, although people do not act in an 'irrational' way, their conduct diverges in a systematic and predictable way from the 'rational choice' of traditional economic analysis. People would appear to have a 'bounded rationality,' making them subject to prejudice and over-simplifications. They thus miscalibrate risks, focusing on immediate information and underestimating future costs, prioritising quick benefits.

In the field of economics, this new way of looking at decision-making processes has led to the adoption of a different methodology. Intersecting with psychology, it marks the birth of behavioural economics[6] and allows for a decision-making

(2013). See for the relationship between neuroscience and civil law L. Tafaro, *Neuromarketing e tutela del consenso*, (Napoli: Edizioni Scientifiche Italiane, 2018), 12.

[3] Neuroscience technology can display the activities of the encephalon and consequently allow scholars to identify more precisely the specific operational functions of its various areas and their functional relationships. Among these technologies, fMRI (Functional Magnetic Resonance Imaging) is used in experiments involving highly complex cognitive tasks, including decision-making.

These technologies have been – and still are – applied to experiments in cognitive psychology, strengthening the results already obtained in this field. Joshua Greene and his team, for instance, used fMRI in the well-known Trolley dilemma in order to identify the neuronal basis for participants' responses, noting the activation of different areas of the brain as the proposed scenario changed.

[4] See R. Caterina, 'Paternalismo e antipaternalismo nel diritto privato' *Rivista di diritto civile*, 787 (2005).

[5] A. Zoppini, 'Le domande che ci propone l'economia comportamentale ovvero il crepuscolo del 'buon padre di famiglia' ', in G. Rojas Elgueta and N. Vardi eds, *Oltre il soggetto razionale* (Roma: Roma Tre Press, 2014), 13-14.

[6] See H.A. Simon, 'A Behavioral Model of Rational Choice' 69 *Quarterly Journal of Economics*, 99-100 (1955); A. Tversky and D. Kahneman, 'Judgment under uncertainty. Heuristics and biases'

model that proves more compatible with information access and the computing capabilities that living things – including humans – really possess.[7] In the space of twenty years, this model has been grafted into studies on the economic analysis of law, shaping it and giving birth to behavioural law and economics,[8] which aims to shed light on bounded rationality, and thus to identify an intervention strategy.[9]

This method has also been adopted in the area of over-indebtedness. It was initially applied by American scholars as an alternative to the traditional approach influenced by previous decision-making models: the *homo oeconomicus* of neoclassical economics and the classic law and economics models.[10]

In Italian law, where over-indebtedness regulation has only recently been introduced, few scholars have sought to analyse the field from a behavioural law and economics[11] approach, while – as we will try to demonstrate – such an approach seems to have had greater resonance in case law.

The Italian legislature has not been wholly insensitive to the suggestions from cognitive psychology, particularly in the consumer credit sector.[12] Conversely, cognitive psychology does not seem to have had the same impact on the first Italian civil insolvency regulation. The consumer model assumed in the previous regulation, based on community law, initially appears to differ from that envisaged in the new one, which is wholly Italian. As we will try to argue, the former regulatory framework seems to assume that the debtor has bounded rationality and problems of self-control; the new one appears to assume that the consumer is a perfectly rational entity, capable of predicting failure and potentially self-limiting.

Such a paradigm emerges from the very first decisions, and appears to be endorsed by the Supreme Court of Cassation.[13] However, in the last three years a

185(4157) *Science*, New Series, 1124-1126 (Sep. 27, 1974).

[7] See H.A. Simon, n 7 above, 99.

[8] See C. Jolls, C.R. Sunstein and R.H. Thaler, 'A Behavioral Approach to Law and Economics' *Stanford Law Review*, 50 (1998); C.R. Sunstein ed, *Behavioral Law and Economics* (Cambridge: Cambridge University Press, 2000).

[9] In this sense, see G. Grisi, 'Gli obblighi informativi quali rimedio dei fallimenti cognitivi', in G. Rojas Elgueta and N. Vardi eds, n 5 above, 59, who clarify that *behavioural law and economics* is not only a method but also a key to understanding reality and a path leading to an intervention strategy.

[10] For an exhaustive treatment, see R. Posner, *Economic Analysis of Law* (Boston: Little, Brown & Company, 1992).

[11] In this direction, see E. Pellecchia, *Dall'insolvenza al sovraindebitamento. Interesse del debitore alla liberazione e ristrutturazione dei debiti* (Torino: Giappichelli, 2012), 21-25, containing several references to behavioural economics. For a critique of the traditional approach, see G. Rojas Elgueta, 'L'esdebitazione del debitore civile: una rilettura del rapporto civil law-common law' *Banca Borsa Titoli di Credito*, 310 (2012). On this topic, see also U. Morera, 'Irrazionalità del contraente investitore e regole di tutela', in G. Rojas Elgueta and N. Vardi eds, n 5 above, 210.

[12] See below, para III.2.

[13] Corte di Cassazione 10 April 2019 no 10095, *Giurisprudenza commerciale*, 240 (2020), with a commentary by F. Pasquariello and M. Ranieli, *L'omologazione del piano del consumatore sovraindebitato*.

different approach has become established.[14] In principle it is isolated, seeking to enhance the connection between consumer credit and over-indebtedness. More specifically, it aims to influence the creditor's behaviour as a means of assessing the worthiness of the insolvent debtor, with a view to accessing the benefits associated with insolvency proceedings. This aim leads us to question the desirability, outcomes, and limits of extending an approach inspired by the theory of bounded rationality, already underlying the regulation of consumer credit, to the law of over-indebtedness. It should be recalled, furthermore, that the two regulations, both of them slow to emerge, appear distinct in terms of both characteristics and *ratio*, although they will certainly converge on several fronts.

In order to do this, we must first explore the traditional approach to over-indebtedness and the influence of the basic rational-actor model. We shall then study the impact of the new human paradigm as theorised by cognitive psychology. Subsequently, we shall examine Italian law, exploring scholarship and case law, aiming to highlight the influence of the 'real' human actor, and also reflecting on the connection with consumer-credit regulation.

II. The Main Approaches to Over-Indebtedness

1. The Traditional Approach: The Debtor as a Perfectly Rational Decision-Maker

We may now move on to analyse the various approaches to over-indebtedness. Starting from the traditional perspective, it is clear that this approach is based on a perfectly-rational-debtor model, in line with the paradigm of *homo oeconomicus* typical of neoclassical economics – and compatible with the rational decision-maker in *law and economics*. In this perspective, we can divide the insolvent into two groups: on one side, the 'dishonest' debtors, and on the other, the 'honest but unfortunate' debtors, whose financial distress is due to supervening events, attributable to bad luck alone.[15] The latter should enjoy the benefits of personal insolvency proceedings, while the former should be excluded; in short, they should bear the consequences of their respective life choices. From this point of view, these proceedings evidently have an ethical value, and (full or partial) discharge of debt seems to be a privilege limited to cases of so-called passive over-

[14] See below, para III.2.

[15] The aforementioned model was present in British law, which has always tended to distinguish between fraudulent and 'unguilty' insolvents. More recently, this model has been envisaged in European Parliament and Council Directive 2019/1023/UE of 20 June 2019 on preventive restructuring frameworks, the discharge of debt and disqualifications, and measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt [2019] OJ L172/18. Although this directive does not directly concern personal insolvency, Recital no 21 stresses the desirability of extending its provisions on discharge to the consumer, excluding dishonest debtors, however (see Recital no 78).

indebtedness.[16]

The economic analysis of law adds a further element to the construction outlined above. Debtors are described as seeking to maximise their own profit, as calculating and potentially opportunistic figures who tend to select the most convenient option for themselves in terms of the relationship between the costs and benefits arising from their choices. Essentially, if a breach of contract were more advantageous for the debtor, he or she could take on a loan in full awareness of the impossibility of honouring the debt and trusting precisely in its future discharge.

By taking this approach, a regulatory system centred on discharge would involve the risk of debtor-side moral hazard, since the awareness of the possibility of obtaining an easy fresh start would work in favour of contracting the debt, even when the party is aware of not being able to honour the debt due to his or her income and financial situation.[17]

In this light, a regulatory system characterised by easy discharge would therefore contribute to exacerbating the problem of over-indebtedness rather than solving it. It would also encourage disorderly use of credit and cause an increase in the number of insolvency proceedings. Furthermore, a regulatory system of this kind would lead to further problems. In particular, lenders would tend to increase interest rates, thus raising the cost as a safeguard against the risk of debtor-side moral hazard.[18] This, however, would make access to credit more difficult. In reality, the *favor* extended to the 'honest but unfortunate' debtor appears to be not so much a benefit as an instrument to neutralise the feared risk of moral hazard.

Examining different European laws, we can observe the tendency of legislators to make discharge conditional on an assessment of the defaulting party's behaviour. For example, Danish bankruptcy law provides for assessment of the causes of over-indebtedness and states that the debtor cannot benefit from the effects attached to the crisis-settlement plan if he or she has acted irresponsibly, namely taking on debts: a) while not realistically being in a position to them pay back; b) assuming a risk disproportionate to his or her financial standing; c) ahead of the crisis settlement proceeding. In Swedish law, a government authority will evaluate the reasonableness of the settlement plan and must reject the application if it emerges

[16] On the distinction between active and passive over-indebtedness, see D. Cerini, *Sovraindebitamento e consumer bankruptcy. Tra punizione e perdono* (Milano: Giuffrè, 2012), 10; S. Cotterli, 'Credito e debito dopo la crisi: strumenti per famiglie e microimprese' *Banca impresa società*, 484 (2016); F. Pasquariello, 'Le procedure di sovraindebitamento alla vigilia di una riforma' *Le nuove leggi civili commentate*, 766 (2018). Active over-indebtedness occurs when the default is due to imprudent and negligent behaviour by the insolvent party; passive over-indebtedness is when the default is simply due to unfortunate events, for example, disease, job loss, or divorce. However, we may observe that the two forms of over-indebtedness cannot always be clearly distinguished, so the specifics of each case must be taken into account.

[17] See W.H. Meckling, 'Financial Markets, Default, and Bankruptcy: The Role of the State' *Law & Contemporary Problems*, 14 (1977).

[18] See T.J. Zywicki, 'An Economic Analysis of the Consumer Bankruptcy Crisis' 99 *Northwestern University Law Review*, 1464 (2005).

that the debt is due to speculative behaviour or a disproportionate risk on the part of the consumer. Moreover, in French law private settlement proceedings require an assessment of the consumer's *bonne foi* (*Code de la consommation*, Art L. 330-1), while in Belgium access to settlement proceedings is permitted only if the debtor has not clearly been the cause of his or her over-indebtedness (Art 1675/2, Law 5 July 1998).

This traditional approach, initially underpinned by ethical issues, seems to be compatible with law and economics analysis, which offers proven tools potentially able to stem the risk of moral hazard and consequently neutralise all the detrimental consequences that uncontrolled discharge could have on the credit market and more generally on the well-being of the community.

2. The Behavioural Law and Economics Approach: The Debtor as a Subject with Bounded Rationality

In this neoclassical view, the debtor seems to be a sort of 'Nietzschean superman'[19] capable of performing complex arithmetical calculations and acting strategically, always selecting the option that will lead to maximum profit.

This model, however, clearly seems to be far removed from the 'real' man; as cognitive psychology suggests, the 'real' man is a bounded rational agent, not oriented towards maximising his profit or conditioned by biases, heuristics and emotional states. Thus, the birth of a new model built around actual human behaviour brought about a reinterpretation of over-indebtedness through the lens of behavioural law and economics[20] in an attempt not only to overcome insolvency but also to prevent it.

Some exploration in this direction had already been carried out by a number of American scholars in the policy debate on bankruptcy reform (Bankruptcy Abuse Prevention and Consumer Protection Act of 2005).[21] This approach acknowledges the 'real debtor' – along the lines of the 'real man' outlined in cognitive psychology, a figure prone to falling into over-indebtedness because of an intrinsic inability to select the appropriate level of debt.[22] It acknowledges the cognitive errors and flawed reasoning that naturally characterise his actions. According to this view, the rise in

[19] In these terms see S. Block-Lieb and E.J. Janger, 'The Myth of the Rational Borrower: Rationality, Behavioralism and the Misguided Reform of Bankruptcy' 84 *Texas Law Review*, 1492 (2006).

[20] See T.H. Jackson, 'The Fresh-Start Policy in Bankruptcy Law' 98 *Harvard Law Review*, 1393 (1985) and the later R. Korobkin and T. Ulen, 'Law and Behavioral Science: removing the Rationality Assumption from Law and Economics' 88 *California Law Review*, 1051 (2000); J. Niemi, I. Ramsay and WC Whitford eds, *Consumer Bankruptcy in Global Perspective*, (Oxford and Portland, Oregon: Hart Publishing, 2003); O. Bar-Gill, 'Seduction by Plastic' 98 *Northwestern University Law Review*, 1273 (2004); S. Block-Lieb and E.J. Janger, n 19 above, 1481; D.G. Baird, 'Discharge, Waiver, and the Behavioral Undercurrents of Debtor-Creditor' 73 *University of Chicago Law Review*, 17 (2006).

[21] See on this point S. Block-Lieb and E.J. Janger, n 19 above, 1481.

[22] ibid.

the number of personal insolvency proceedings should be considered together with the parallel expansion of consumer credit, also affected by the bounded rationality of debtors. Borrowers may be affected by overconfidence and excessive optimism,[23] which can lead them to underestimate the possibility of falling into a state of over-indebtedness despite it being statistically much more likely than is commonly thought.[24] Even the most informed and educated can fall into the trap of underestimating future costs, such as interest charges, short-sightedly focusing on immediate benefits[25]. Above all, there may be problems of self-control, with consumers accruing large amounts of debt through a series of transactions, albeit of modest value in themselves, but adding up to figures that they would not otherwise have borrowed.[26]

In this context, financial services companies, far from being victims, stand to benefit from borrowers' cognitive errors, highlighting the short-term advantages of their loan agreements while concealing the long-term costs[27]. Moreover, creditors can turn the information asymmetries typical of loan agreements along with debtors' bounded rationality to their advantage, resorting to expedients to outsource the costs of insolvency and possible discharge.

The legislature should not focus therefore on moral hazard from the borrower's side but from that of the lenders. Consequently, over-indebtedness should be prevented by prior intervention regarding consumer credit legislation rather than merely by managing the phenomenon after the fact.

III. The Italian Legal Context. Worthy Debtor Assessment in Over-Indebtedness Proceedings

In the light of this clarification, we now examine the Italian over-indebtedness regulatory system, focusing in particular on one of the three proceedings regulated

[23] The risks are actually higher than those generally perceived by debtors, and this bias can lead to a distortion of any cost-benefit analysis while negotiating loan agreements (see O. Bar-Gill, n 20 above, 1378). In fact, over-optimism may lead debtors to fail to consider the risk of some future exogenous shock affecting their ability to repay the debt (O. Bar-Gill, n 20 above, 1400, 1405 and 1407).

[24] See C.R. Sunstein, 'Boundedly Rational Borrowing' 73 *University of Chicago Law Review*, 252 (2006).

[25] This phenomenon is known as *hyperbolic discounting* (see O. Bar-Gill, n 20 above, 1396-1397) or '*myopia*' (see C.R. Sunstein, 'Boundedly Rational Borrowing' n 24 above).

[26] On this point see O. Bar-Gill, n 20 above, 1399; T.A. Sullivan, E. Warren and J.L. Westbrook, *The Fragile Middle Class - Americans in Debt* (New Haven-London: Yale University Press, 2000), 130. These scholars believe that credit card users are likely find themselves in this position since the feeling of loss is less marked in their case.

[27] See O. Bar-Gill, n 20 above, 1376; C.R. Sunstein, 'Boundedly Rational Borrowing' n 24 above, 267-268; A. Elliott, *Not Waving but Drowning: Over-indebtedness by Misjudgment* (London: Centre for the Study of Financial Innovation, 2005), also available at https://tinyurl.com/2p8epbst (last visited 31 December 2021).

by legge no 3 of 27 January 2012,[28] known as the consumer insolvency plan proceeding. As we shall shortly see, these proceedings require an assessment of consumer behaviour that appears to presuppose the basic Rational Actor model.[29] We shall also examine the position of a bounded rational debtor who has borrowed money without being aware of the related risks and has slipped into insolvency. Lastly, we shall reflect on the wisdom of allowing such a person, with problems of self-control, to access full or even merely partial discharge.

1. In Scholarship and Case Law: The Prevalence of the Traditional Approach to Over-Indebtedness and the Basic Irrelevance of Bounded Rationality in Worthy Debtor Assessment

Firstly, we have to reconstruct the figure of the worthy debtor according to legge no 3, and especially Art 12-*bis*, which – in the context of the consumer insolvency plan proceeding – requires a decision on debtor worthiness. The court has to ascertain that the defaulting party has not accrued debts without having a reasonable chance of repaying them and/or has not negligently become over-indebted, for example, by entering into credit agreements inappropriate to his or her means.

Approval of the plan is subject to the outcome of this assessment, which makes the worthiness of the applicant an essential requirement – albeit not the only one – for accessing the benefits that this kind of insolvency proceeding can provide.

This assessment is a requirement of the assets-liquidation process, where Art 14 *terdecies*, para 2, provides that the applicant cannot be discharged when the over-indebtedness is the consequence of entering into credit agreements beyond his or her means and without due care.

These provisions are often considered in conjunction with Art 9, para 3-*bis*, of legge no 3/2012, which seems to confirm the importance assigned to the causes of

[28] Legge 27 January 2012 no 3 and further modification establishes three proceedings: 1) over-indebtedness crisis settlement agreements ('accordo di composizione della crisi'), regulated by Arts 6 to 12, 13 and 14, which are accessed through a plan applied by the debtor and accepted by sixty percent of creditors; 2) the consumer insolvency plan ('piano del consumatore'), regulated by Arts 6 to 8, 12-*bis* and 12-*ter*, 13, 14-*bis*, for consumers who present a plan prepared by the debtor with the assistance of a Crisis Settlement Body (the plan does not require creditors' approval and is validated by the Court); the assets liquidation process ('liquidazione del patrimonio'), regulated by Art 14-*ter* et seq, which implements a compulsory liquidation of all debtor's assets through a simplified procedure (at the end of this proceeding the debtor can apply for discharge).

[29] See on this point E. Pellecchia, 'Chi è il consumatore sovraindebitato? Aperture e chiusure giurisprudenziali' *La nuova giurisprudenza civile commentata*, 1230-1232 (2016); G. Falcone, 'Il trattamento normativo del sovraindebitamento del consumatore' *Giurisprudenza Commerciale*, 132-134 (2015); R. Bocchini, 'Sovraindebitamento del consumatore – La meritevolezza dell'accesso al credito nel sovraindebitamento del consumatore' *Giurisprudenza italiana*, 1569 (2017); R. Di Raimo, 'Debito, sovraindebitamento ed esdebitazione del consumatore: note minime sul nuovo diritto del capitalismo postmoderno' *Rivista di diritto bancario*, 291 (2018); R. Landi, 'Consumatore sovraindebitato e giudizio di meritevolezza' *Il Foro napoletano*, 312 (2018); C. Poli, 'La meritevolezza del debitore-consumatore e l'inadempimento del creditore all'obbligo di valutare il merito creditizio' *Le Corti fiorentine*, 27 (2018); F. Pasquariello, 'Le nuove procedure' n 16 above.

debt within this regulatory framework. That provision states that the settlement plan must be accompanied by a detailed report drawn up by a Crisis Settlement Body, indicating the causes of the indebtedness and the diligence employed by the consumer in voluntarily assuming his or her debts (letter a), as well as an explanation of the reasons for the debtor's inability to satisfy them (letter b).

These rules are meant to act as a filter for those entitled to the benefits provided by this kind of proceeding. From a traditional perspective, they should lead to the exclusion of opportunistic debtors from these benefits, preventing creditors from protecting themselves against the risk of insolvency by increasing the cost of loans or otherwise discharging the risk itself onto the community. An example might be loan securitisation and subsequent introduction on the financial market.[30] The rules also seem to exclude from discharge those who have excessive levels of debt due to negligence not necessarily due to opportunistic behaviour. These people could have avoided their financial distress if only they had acted prudently according to the canons shaped around *homo oeconomicus* delivered by neoclassical economics.

On examining Italian legal scholarship and case law, we can detect the influence of this traditional model of man on the common understanding of the worthy debtor, revealing the image of a perfectly rational agent, capable of self-limitation and becoming aware of the risks associated with new borrowing.

In an attempt to define this figure, some judgments refer to a debtor able to orient his choices according to rational criteria;[31] or else to an agent normally able to understand his choices and to evaluate the consequences of an economic commitment in a fully autonomous manner.[32] According to this view, the debtor appears to be very different from the 'real' man of behavioural economics.

The models mentioned here also seem to have influenced other decisions, which equate the worthy consumer to the prudent individual neither inclined to excessive accumulation of debt nor prone to over-indebtedness and therefore ready to join the circuit of consumption once again.[33] In this light, the decision whether to assume a debt would require careful and cautious reflection. The decision will take account of the economic sacrifice arising from the obligation and the debtor's income and financial situation, evaluating the present circumstances and those

[30] See on this point, R. Natoli, *Il contratto 'adeguato'. La protezione del cliente nei servizi di credito, di investimento e di assicurazione* (Milano: Giuffrè, 2012), 157, explaining that joint securitisation to credit derivatives produces a volatile combination with effects on the credit system. See also G. Rojas Elgueta, 'L'esdebitazione' n 11 above, 310, highlighting the resistance of lenders to the effects of discharge.

[31] See in this regard, Tribunale di Treviso 25 January 2017, available at www.dejure.it.

[32] See Tribunale di Cagliari 11 May 2016, available at https://tinyurl.com/ymys348z, where the judge holds that, although the provision regarding the worthiness of the debtor did not appear to be modelled on a particularly prudent and far sighted person, it would not seem to refer to a naive individual unable to make choices based on rational criteria.

[33] See Tribunale di Torino 30 September 2015; Tribunale di Larino 24 May 2016; Tribunale di Treviso 21 December 2016; Tribunale di Santa Maria Capua Vetere 14 February 2017 available at www.dejure.it; Tribunale di Treviso 25 January 2017 n 31 above; Tribunale di Novara 25 July 2017, available at Ilfallimentarista.it, 30 March 2018.

reasonably and prudently envisaged for the future.[34] In particular, it would be necessary to comply with the 'prudential rule of one third of the income'.[35] This would mean that any loan agreement should not absorb more than one third of the applicant's monthly income, and if the debtor decides to enter into a loan agreement regardless, he or she cannot be considered worthy.

Lastly, some rulings adopted an 'arithmetical' method, seeking to reconstruct the debtor's income situation at the time the obligations were assumed, in order to identify the percentage of income that the debtor should have allocated to repayments.[36] In this 'retrospective'[37] scenario, the consumer could benefit from the plan if the solidity of his assets and the amount of projected income reasonably allowed the assumption of further obligations, yet over-indebtedness occurred all the same, as a consequence of unforeseeable events.[38]

Such decisions, studded with references to calculations, arithmetic, and reasonableness, seem to exclude the 'honest but not unfortunate debtor' from the consumer insolvency plan.

We may note that case law excludes from the consumer insolvency plan proceeding all those who have assumed obligations without the likelihood of being able to honour their debt on account of mere (inherent) bounded rationality, rather than because of some addiction. On the one hand, some courts have approved plans presented by persons with a gambling addiction,[39] while other rulings have rejected proposals from debtors who, in the context of behavioural law and economics, could be considered victims of cognitive error or suffering from problems relating to self-control[40]. In one particular case,[41] for example, the applicant had borrowed thirty-thousand euros to repay prior debts and subsequently accrued a debt burden of one hundred thousand euros using revolving credit cards. According to the court, the characteristics of such cards are not such as to prevent the beneficiary from realising that he was spending money that was not his, which would have to be repaid. In this case, the borrowing was reckless and negligent and was not proportionate to the means available and the personal situation of the applicant, who was therefore considered unworthy.

Similarly, the court[42] dismissed a plan presented by a debtor who had opened

[34] See Tribunale di Treviso 25 January 2017 n 31 above.

[35] See Tribunale di Treviso 21 December 2016 n 33 above; Tribunale di Santa Maria Capua Vetere 14 February 2017 n 33 above; Tribunale di Novara 25 July 2017 n 33 above.

[36] See Tribunale di Ascoli Piceno 4 April 2014, *Il Foro italiano*, I, 318 (2015), and also in Ilfallimentarista.it, 15 May 2014, commented by P. Bosticco, *Risanamento della crisi da sovraindebitamento del consumatore e par condicio creditorum*.

[37] See R. Landi, n 29 above, 312.

[38] See Tribunale di Udine 4 January 2017, available at www.dejure.it.

[39] See Tribunale di Torino 8 June 2016, available at www.dejure.it.

[40] See Tribunale di Cagliari 11 May 2016 n 32 above; Tribunale di Rimini 19 April 2018, available at www.ilcaso.it; Tribunale di Vibo Valentia 30 October 2019, available in www.ilcaso.it.

[41] See Tribunale di Rimini 19 April 2018 n 40 above.

[42] See Tribunale di Vibo Valentia 30 October 2019 n 40 above.

five credit lines from 2016 to 2018 amounting to approximately one hundred-and-seventy thousand euros. The court justified its decision by noting the presence of objectively negligent behaviour. Despite his lack of specific knowledge, the debtor could reasonably have been expected to realise the worsening of his situation and should therefore have refrained from assuming further obligations.

In other words, problems of self-control seem to be relevant in assessing the debtor's worthiness only when they arise from a psychological condition and not as a mere manifestation of (physiological) bounded rationality.

Nonetheless, under legge no 3/2012, 'honest but not unfortunate' debtors can try other ways to get out of over-indebtedness. Since they do not meet the worthiness criterion, they have no access to proceedings reserved for consumers, nor are they eligible for discharge (through the assets-liquidation process). These debtors could try to meet their debts by signing onto over-indebtedness crisis settlement agreements, which are regulated by Arts 6-12 as well as Arts 13-14 of legge no 3/2012. In this case, approval of the plan does not depend on an assessment of the debtor's worthiness but approval by a majority of the creditors.

In addition, Art 8 states that the proposed agreement may impose restrictions on access to the consumer credit market, the use of forms of electronic payment, and access to credit and financial instruments. From the *behavioural law and economics* standpoint such limitations can help stem self-control problems and reduce other forms of flawed reasoning as a way of avoiding further debt.

Turning now to case law, there have been a number of decisions accepting a request to enter into an over-indebtedness crisis-settlement agreement formulated by the applicant when presenting the plan despite a lack of worthiness.[43]

But this is not all. There have also been decisions approving proposals from consumers who have become over-indebted due their particular emotional state and needs.[44] Here, however, the case law seems to have given rise to some ethical[45] questions, as suggested by frequent references to the 'honest but unfortunate debtor'. So, from this perspective, legge no 3/2012 provides the court with a set of 'ethical guidelines', enabling judges to distinguish an 'innocent' and therefore worthy debtor from a 'guilty' one, not entitled to benefit from the consumer insolvency plan, having assumed obligations without due care and diligence.[46] In this context, the 'reasons for indebtedness' – to which legge no 3 of

[43] See Tribunale di Cagliari 11 May 2016 n 32 above.

[44] See in this sense for example Tribunale di Avellino 23 December 2019, available at www.ilcaso.it. The court affirmed that the plan cannot be approved when the loan is not used to satisfy immediate necessities or to pay back old debts but in order to pursue unworthy aims or to benefit some creditors to the detriment of others. Thus, we can infer that if the borrower used the sum to satisfy such immediate necessities or to repay old debts, he should be regarded as worthy.

[45] See Tribunale di Ascoli Piceno 4 April 2014 n 36 above; Tribunale di Pistoia 28 February 2014, *Il Foro italiano*, I, 321 (2015), with a commentary by A.M. Perrino, and *Banca Borsa Titoli di Credito*, 537 (2014), with a commentary by E. Pellecchia.

[46] See in this sense Tribunale di Pistoia 28 February 2014 n 45 above. For an opposite view, see A.M. Perrino, n 45 above, 335.

2016 alludes – were given particular weight when assessing plans submitted by debtors who had borrowed money despite not being able to repay their debts, due to the need to treat a serious illness. For instance, one plan was approved[47] on the assumption that the over-indebtedness arose due to the poor health of the applicant's child. Because of this circumstance, the father, who was already in debt, borrowed a further amount even though there was no reasonable perspective of repayment. One of the creditors opposed approval, asserting that the debtor was not worthy, since he had obtained the last – and most substantial – loan despite being in evident financial distress. Nevertheless, the court affirmed the worthiness of the consumer, noting that the debts had not been contracted to meet 'mere expenses', but precisely in order to support his son's health-related expenses.

Exploring Italian case law, we can observe two main lines of reasoning. The first, a blander approach, gives weight to ethical arguments, tending to approve the plans of debtors acting under emotional pressure and trying to cope under unfortunate circumstances. The latter, stricter, position leads to rejecting plans when the applicant should have been aware of the risk of over-indebtedness. But we can note that in these cases, unfortunate events – such as illness or job loss – were not among the factors contributing to the debt;[48] even if alleged, they had not been proven,[49] or at any rate were not decisive.[50] At times, the insolvency was even ascribable to fraudulent behaviour.[51] However, it seems that the courts applying the more lenient approach have given less consideration to emotional states than to the (worthy) intended use of the loan.

2. A Different Approach to Over-Indebtedness Based on Studies in Cognitive Psychology

A step towards adopting a different approach to over-indebtedness, giving greater consideration to what we could define as the 'real' debtor[52], could lie in a connection with the consumer credit regulations contemplated under Arts 121-126, of decreto legislativo no 385 of 1 September 1993, the Consolidated Law of Banking and Credit Laws (hereinafter Banking Consolidated Law or BCL). This is for two basic reasons.

a) The Connection Between Over-Indebtedness and Credit Consumer Regulation

Firstly, there is a connection between over-indebtedness and consumer credit.

[47] See Tribunale di Pistoia 27 December 2013, available at Ilfallimentarista.it, with a critical comment by G. Rojas Elgueta, 'I presupposti di accesso alla procedura di 'piano del consumatore'.

[48] See Tribunale di Novara 25 July 2017 n 33 above.

[49] See Tribunale di Santa Maria Capua Vetere 14 February 2017 n 33 above.

[50] See for instance Tribunale di Treviso 25 January 2017 n 31 above.

[51] See Tribunale di Larino 24 May 2016 n 33 above.

[52] On the 'real' debtor, see above, para II.2.

In reality, debt is not, in itself, synonymous with insolvency; nevertheless, imprudent use of credit can lead to over-indebtedness. The transition from indebtedness to over-indebtedness does not necessarily depend on the imprudent behaviour of the borrower but can also be ascribed to misconduct by lenders seeking to manipulate consumers. The aggressive persuasiveness of advertising campaigns, the promotion of purchasing in instalments, new financing systems such as revolving credit cards, and refinancing operations are just some examples of how credit providers' behaviour can fuel the phenomenon of over-indebtedness.[53]

Indeed, decreto legislativo no 14 of 12 January 2019 – the Corporate Crisis and Insolvency Code (hereafter CCIC) – which replaces current over-indebtedness regulation, contains some provisions that expressly emphasise credit service provider behaviour in the context of personal insolvency proceedings. In particular, implementing Art 9, para 1, lett. *l)* of the Decree[54], the Italian legislature introduced a procedural sanction preventing creditors from opposing approval of an insolvency plan if its conduct had a causal impact on the applicant's over-indebtedness. More specifically, Art 69, para 2, CCIC, establishes that any creditor who culpably brings about or aggravates the debt situation or violates the principles of Art 124-*bis* BCL may not oppose or challenge approval or assert causes of inadmissibility not due to the fraudulent behaviour of the debtor[55]. Art 68, para 3, CCIC, therefore requires the Crisis Settlement Body to indicate in the report annexed to the application whether the lender has considered the creditworthiness of the consumer, assessed in relation to his or her disposable income, after deducting the amount necessary to maintain a decent standard of living. The same provision can be found in Art 283, para 5, CCIC, regarding the discharge of those who have neither income nor estate (referred to in the Italian text as *incapienti*). Furthermore, concerning the proceeding referred to as 'lesser agreements' (the former Over-Indebtedness Crisis Settlement Agreement), Art 76, para 3, CCIC, provides that the Crisis Settlement Body must indicate whether the creditor had really considered the creditworthiness of the applicant before agreeing to lend.[56]

aa) Consumer Credit Regulation from a Behavioural Law and Economics Perspective. Specifically, Art 124-*bis* of Legislative Decree no 385 of 1 September 1993

[53] See M. Gorgoni, 'Spigolature su luci (poche) e ombre (molte) della nuova disciplina dei contratti di credito ai consumatori' *Responsabilità civile e previdenza*, 760 (2011).

[54] Legge 19 October 2017 no 155.

[55] However, Art 70 CCIC states that each creditor can submit observations within twenty days of the court order to publish the application and the plan that has been deemed admissible. Art 69 CCIC does not prohibit this faculty, so the creditor may offer background information regarding the debtor's worthiness, in the hope of persuading the court to reject the plan.

[56] We may note that Art 124-*bis* BCL is not mentioned in this provision as this rule concerns consumer credit agreements, and consumers are excluded from the 'minor arrangement' proceeding (see Art 74, comma 1, CCIC).

The second reason for a joint reading of the two disciplines cited above is that consumer-credit regulation lends itself well to a behavioural law and economics approach. With this perspective in view, a number of provisions that often appear in discussions surrounding the model of rationality underpinning the law become particularly important.[57] One example is the Banking Consolidation Act relating to the Annual Effective Global Rate in consumer credit,[58] notably to para 1 of Art 124 BCL, which requires credit institutions to provide the information necessary to allow a comparison of the various credit offers available on the market, thus allowing an 'informed and aware' decision. Also of note is para 5, which requires professional operators to provide all necessary explanation, so as to allow the consumer to assess whether the contract and the ancillary services offered are 'suited' to his or her needs and financial situation[59]. Lastly, Art 125-*bis* BCL, which requires the operator to communicate in a 'clear and concise' manner.[60] As for the most recent Consumer Mortgage Credit regulation,[61] para 2 of Art 120-*novies* BCL is of interest as it contains the same rule as that found in Art 124 BCL, as does para 3, which establishes that consumers have the right to a 'reflection period' of at least seven days in order to compare the various offers on the market and make an 'informed' decision.[62]

The aforementioned provisions are sometimes invoked as an example of provisions aimed at remedying market failures. Biases themselves are regarded, from this perspective, as causes of these failures, but there is some doubt that the tools traditionally used to remedy market failures are able to correct cognitive errors. Nor can it be overlooked that, from a different point of view, the very possibility of providing a solution to the problem of market failures is currently being discussed.[63] However, we can observe that consumer-credit legislation seems to denote a certain confidence in the possibility of remedying the aforementioned failures from the perspective of a weak paternalism[64] or libertarian philosophy[65],

[57] See A. Zoppini, n 5 above, 11; A. Gentili, 'Il paradigma dell'economia cognitiva ed il diritto contrattuale', in G. Rojas Elgueta and N. Vardi eds, n 5 above, 99.

[58] See A. Gentili, n 57 above, referring to Art 123 BCL in particular.

[59] ibid.

[60] See A. Zoppini, n 5 above, 19, seeking to demonstrate that, from the legislator's point of view, the consumer should be able to understand, elaborate, and incorporate a very small amount of information.

[61] The reference is to European Parliament and Council Directive 2014/17/EU of 4 February 2014 on credit agreements for consumers relating to residential immovable property [2014] OJ L60/34. This act was implemented by decreto legislativo 21 April 2016 no 72, which introduced Section I *bis* within Title VI of the Banking Consolidated Law.

[62] The aforementioned provision seems to give importance to the '*cooling off period*', on which see n 66 below.

[63] See on this point V. Roppo, 'I paradigmi di comportamento nella disciplina del contratto', in G. Rojas Elgueta and N. Vardi eds, n 5 above, 41-42.

[64] See on this theme C.R. Sunstein and R.H. Thaler, 'Libertarian Paternalism is not an Oxymoron' 70 *University of Chicago Law Review*, 1159 (2003); R.H. Thaler and S. Benartzi, 'Save More Tomorrow: Using Behavioral Economics to Increase Employee Saving' 112 *Journal of Political Economy*, 164 (2004); C.F. Camerer et al, 'Regulation for Conservatives: Behavioral

considered preferable to forms of strong paternalism,[66] concerning which scholarship – including (and especially) in the US – has shown considerable dissent,[67] considering that such paternalism would lead to forms of intervention that would not leave any margin of appreciation to the party, depriving him or her of freedom and removing any self-responsibility.

It appears uncertain which of the two aforementioned aspects – weak or strong paternalism – inspired the rule found in Art 124-*bis* BCL. This provision reproduces almost word for word the text of Art 8 of the Consumer Credit Directive,[68] which requires lenders to assess the creditworthiness of the consumer before concluding the contract. The assessment must be based on information obtained, where appropriate, from the applicant and, where necessary, after consulting the relevant database.

This provision has always been controversial. Some scholars argue that under Art 124-*bis*, the lender has an obligation to inform the consumer[69] only at the outcome of the assessment, or to warn him or her of the risks attaching to default on payment and to over-indebtedness. More specifically, the obligation to

Economics and the Case for "Asymmetric Paternalism" ' 151 *University of Pennsylvania Law Review*, 1211 (2003); C.R. Sunstein, 'Boundedly Rational Borrowing' n 24 above, 249-256, 254; I. Ayres, *Carrots and Sticks: Unlock the Power of Incentives to Get Things Done* (New York: Bantam, 2010).

[65] According to the classification proposed by C.R. Sunstein, 'Boundedly Rational Borrowing' n 24 above, 254-256, we should more properly talk about 'paternalism with liberty'. Indeed, this pre-eminent scholar contrasts paternalism 'with liberty' and strong paternalism, distinguishing further between asymmetrical paternalism, libertarian paternalism, and debiasing through law. In particular, asymmetrical paternalism encompasses policies aimed at correcting cognitive errors of some people, without significantly affecting those who are not prone to making the same errors. We can think for example the 'cooling off period', that is a period of reflection allowed to the person who must take a decision. During the negotiations, for instance, a party could be obliged to hold firm his proposal for a certain period, so as to allow the counterparty to better evaluate whether to conclude the contract. Libertarian paternalism concerns instead reinforces in order to encourage people to choose the most desirable option, without significantly compressing their freedom. Finally, debiasing through law means removing cognitive errors by means of regulation. The latter would be the softest form of paternalism, since the subject would be free to take his decision, once errors have been corrected. See on such policy C. Jolls and C.R. Sunstein, 'Debiasing Through Law' (John M. Olin Program in Law and Economics Working Paper no 225, 2004).

[66] In favour of this form of paternalism see S. Conly, *Against Autonomy. Justifying Coercive Paternalism* (Cambridge: Cambridge University Press, 2012), passim. This scholar believes that coercive paternalism would be justified when necessary to avoid serious prejudice. In this perspective, a strong measure may be acceptable depending on the cost of the intervention, considering its social and psychological consequences. Thus, a paternalistic measure would seem acceptable if it gives more than it takes.

[67] See especially C.R. Sunstein, 'Boundedly Rational Borrowing' n 24 above, 267. In Italian scholarship see U. Morera, 'Irrazionalità del contraente' n 11 above, 208.

[68] European Parliament and Council Directive 2008/48/EC of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC [2008] OJ L133/66.

[69] See G. Piepoli, 'Sovraindebitamento e credito responsabile' *Banca Borsa Titoli di Credito*, 1, 38 (2013), who notes that, although the Credit Consumer Directive does not establish a duty to refuse the contract, the purpose - consumer protection - would be at least to create an obligation to inform the consumer of the result of the creditworthiness assessment.

assess creditworthiness has been read in conjunction with Art 124 BCL and has been made functional to the implementation of the obligations to inform that they contain. This is especially true of the obligation to provide the consumer with adequate explanation in compliance with para 5 of Art 124 BCL,[70] so as to allow him to reach a decision that is not only 'informed' but also 'aware';[71] this is linked to the obligation to behave 'fair[ly] and [in] good faith' prior to entering into an agreement, to use a term typical of the civil law tradition, again with a view to placing the consumer in a position to make a well-considered and unbiased choice in his or her best interests.[72]

From this point of view, the rule appears to have been inspired by weak paternalism[73] insofar as it leaves room for self-responsibility, so the consequences of the choices would still lie with the borrower-consumer.

The interpretative choice of limiting the relevance of the creditworthiness assessment to the pre-contractual stage may have been confirmed in the approval process of the Consumer Credit Directive.[74]

It is widely known that the first proposal for a new Directive, aiming to focus on responsible lending over responsible borrowing, dedicated an entire article, number 9, to the first of the two. Alongside the obligation to consult centralised databases and examine the answers provided by the consumer or the guarantor, to request the constitution of sureties, to verify the data provided by the credit intermediaries and to select the type of credit to offer, the same article introduced a further obligation for the lender to assess the consumer's solvency, as a condition for concluding the contract. Ultimately, a solution marked by strong paternalism was emerging, given that, due to the obligation to refrain from granting

[70] See in this sense G. Carriero, *sub* Art 124, in F. Capriglione ed, *Commentario al testo unico delle leggi in materia bancaria e creditizia* (Padova: CEDAM, 2018), 2152, stating that para 5 of Art 124 BCL lays down true and proper obligations of solidarity, which require the intermediary to pursue the customer's interest.

[71] The aforementioned opinion seems to be confirmed within the amended proposal for a directive, since this clarifies that the creditor should not only implement the obligations to inform, but also provide further explanations so that the consumer can make a decision in full knowledge of the facts (see 'Proposition modifiée de Directive du Parlement Européen et du Conseil relative à l'harmonisation des dispositions législatives, réglementaires et administratives des Etats membres en matière de crédit aux consommateurs abrogeant la directive 87/102/CE et modifiant la directive 93/13/EC').

[72] Here the reference is to E. Pellecchia, *Dall'insolvenza* n 11 above, 88-89, noting that, although the text of Art 124-*bis* is scanty, the creditworthiness assessment takes place in the pre-contractual phase, which is ruled by good faith and fairness. In this perspective, the creditworthiness assessment should be instrumental to an accurate representation of the loan. The lender should elaborate the information gained and warn the consumer about the risks involved in the operation in order to counteract the overconfidence bias.

[73] In this sense E. Pellecchia, *Dall'insolvenza* n 11 above, 90. However, this scholar believes that this policy is preferable in any case.

[74] See on this theme G. Piepoli, n 69 above, 38; G. Falcone, ' "Prestito responsabile" e valutazione del merito creditizio' *Giurisprudenza Commerciale*, 1, 147 (2017). In the literature on over-indebtedness, see E. Pellecchia, *Dall'insolvenza* n 11 above, 67; L. Modica, *Profili giuridici del sovraindebitamento* (Napoli: Jovene Editore, 2012), 227.

the lender credit, the consumer could not have chosen to conclude the contract in any case, despite his poor solvency. From this perspective, the consumer is also protected from himself: Once made aware of the risks, he cannot consider himself free to make any decision, let alone one least suited to his best interests. In the final text, however, the rule relating to an assessment of creditworthiness was moved to the section concerning the lender's obligations to inform, thus giving the impression of seeking to shift the measures aimed at preventing over-indebtedness towards a stance of weak paternalism.[75] The term 'paternalism' is apt since the behaviour of the consumer would in any case be influenced through the information given, while 'weak' refers to the fact that he or she would also be left free to make all the decisions.

Nevertheless, some scholars believe that, despite the definitive text of the directive, the obligation to assess the creditworthiness goes far beyond a mere connection with the obligation to inform the consumer. Rather, it amounts to a duty to reject a credit agreement whenever an assessment reveals the 'uncreditworthiness' of the applicant.[76]

From this perspective, the obligation to assess creditworthiness continues to take on much greater significance, more in line with the spirit of coercive paternalism, given that some cognitive errors, such as the tendency to excessively disregard future costs, may also be found among more informed and educated consumers.

A similar approach is adopted by the EU Consumer Mortgage Credit Directive, probably in response to the crisis of the 2000s. On the other hand, the Consumer Credit Directive was adopted when the crisis – caused in part by the irresponsible behaviour of lenders – had not yet revealed its more serious consequences. Therefore, the changes that characterised the economic, political, and social context would suggest a joint reading of the two regulations, giving more strength to the opinion that the regulatory framework deriving from the implementation of Directive 2008/48/EC leads to a duty to reject credit agreements with borrowers who are uncreditworthy.

[75] See 'Proposition modifiée de Directive du Parlement Européen et du Conseil relative à l'harmonisation des dispositions législatives, réglementaires et administratives des Etats membres en matière de crédit aux consommateurs abrogeant la directive 87/102/CE et modifiant la directive 93/13/EC'.

[76] See in favour of such an obligation G. De Cristofaro, 'La nuova disciplina comunitaria del credito al consumo: la direttiva 2008/48/CE e l'armonizzazione "completa" delle disposizioni nazionali concernenti "taluni aspetti" dei "contratti di credito ai consumatori"' *Rivista di diritto civile*, 274 (2008); S. Larocca, 'L'obbligo di verifica del merito creditizio del consumatore', in V. Rizzo et al eds, *La tutela del consumatore nelle posizioni di debito e credito* (Napoli: Edizioni Scientifiche Italiane, 2010), 233. More recently, from a different perspective, R. Di Raimo, 'Ufficio di diritto privato e carattere delle parti professionali quali criteri ordinanti delle negoziazioni bancaria e finanziaria (e assicurativa)' *Giustizia civile*, 1, 206 (2020). But for the opposite opinion, see D. Maffeis, 'Molteplicità delle forme e pluralità di statuti del credito bancario nel mercato globale e nella società plurale' *Le nuove leggi civili commentate*, 4, 745 (2012), and with a different argumentation G. Piepoli, n 69 above, 59. After a long and complex reflection, the opposite opinion is also expressed by L. Modica, n 74 above, 239-303, 283.

b) The Connection Between Over-Indebtedness and Consumer-Credit Regulations in More Recent Guidelines: The Substantive Relevance of Bounded Rationality for the Purpose of Worthy Debtor Assessment. Critical Remarks

Lastly, we need to clarify whether the provisions examined above are able to justify a link between the conduct of the lender and a decision on consumer behaviour with regard to over-indebtedness procedures, so as to make even the debtor with limited (innate) self-control creditworthy. From this point of view, it is possible to evaluate the usefulness of behavioural law and economics in interpreting the discipline of over-indebtedness.

Some scholars, and case law in particular, seem to recognise that creditor behaviour can influence debtors' worthiness assessment, especially with regard to Art 124-*bis* BCL[77] However, the arguments presented in support of this opinion appear to differ.

In some rulings, the very fact that the creditor has lent a sum to the consumer, given the obligation to assess the creditworthiness of the borrower, has been said to demonstrate that there was, at the time of borrowing, a reasonable chance of repayment, as mentioned in Art 12-*bis*, para 3 of Law no 3 of 2012.[78] The creditor's behaviour would therefore be given importance on a purely probative level, based on the predictability of the over-indebtedness situation. The reasoning would appear to be as follows: if the lender, at the end of the investigation, granted the loan, it means that there were prospects of repayment, because the lender would have had no interest in providing a loan, knowing that it would not have been possible to recover the sums granted. This argument is perhaps somewhat naive – essentially for two reasons. In the first place, the assessment of creditworthiness is a prognostic judgment based on more or less objective circumstances, so that the assessment can be made even after some time, obtaining the same result as if it had been carried out before concluding the contract: therefore it is not necessary to surmise anything in this regard, as the circumstance can easily be proved simply by carrying out the assessment, albeit *ex post*. Secondly, it is well known that creditors are led to protect themselves against the risk of default, for example, through the application of high interest rates or by securitising loans and their re-entry into the financial circuit. Consequently, the fact that the creditor has granted the credit in any case, despite the low creditworthiness of the applicant, does not demonstrate that there were prospects of repayment, as

[77] See R. Di Raimo, 'Debito' n 29 above, 174; R. Bocchini and S. De Matteis, 'Sovraindebitamento: profili civilistici nella legge delega di riforma della crisi d'impresa e dell'insolvenza' *Il Corriere Giuridico*, 5, 662 (2018); F. Pasquariello, 'Le nuove procedure di sovraindebitamento' n 16 above, 767; R. Landi, n. 29 above, 317; S. Cotterli, 'Credito e debito dopo la crisi: strumenti per famiglie e microimprese' *Banca impresa società*, 3, 489 (2016). See, in case law, Tribunale di Napoli 7 November 2017; Tribunale di Napoli 18 May 2018, available at *www.ilcaso.it*; Tribunale di Napoli 21 December 2018, available at www.dejure.it.

[78] See Tribunale di Napoli 18 May 2018 n 77 above.

the lender could have granted the credit and later resorted to the tools mentioned as a safeguard against default.

In other cases, the focus is on the expectation of the debtor-consumer, who would not have the necessary skills to foresee over-indebtedness and would therefore trust in the ability of the lender (in most cases a bank) to assess his or her solvency, implicitly counting on the probability that the lender would refrain from concluding the contract to someone with a low credit rating.[79] The very fact of having obtained the loan, from this point of view, becomes an element to justify the behaviour of the borrower, who could benefit from the plan 'on the basis of the combined provisions' of Arts 12 para 2 of Law no 3/2012 and 124-*bis* BCL;[80] in fact, by requiring the lender to verify the creditworthiness of the consumer, this argument would also imply an obligation to refrain from concluding the contract. More precisely, the consumer could not be held liable for having turned to an entity – that is, the intermediary – a 'holder of an office in private law'[81] ('*titolare di un ufficio di diritto privato*'[82]), and therefore having 'relied on' the ability of the lender to correctly check his potential solvency and on the fact that he is not authorised to grant credit to an unworthy borrower.[83]

In order to affirm the existence of an obligation on the part of the lender not to grant credit to non-solvent borrowers, decisions taken in accordance with this guideline often refer to the regulations on financial intermediation, under which, according to the majority of scholars, the intermediary has the same obligation to abstain. Basically, there is a parallel between traditional lending activity and the activity of the financial intermediary, so the obligation of abstention imposed on the latter is placed analogously on the lender.

In this regard, it should be remembered that cognitive psychology studies found

[79] See Tribunale di Napoli 21 December 2018 n 77 above.

[80] ibid

[81] See, in this regard, Tribunale di Napoli Nord 21 December 2018 n 77 above. In the legal literature, see R. Di Raimo, 'Ufficio' n 76 above, 200, who, examining Art 124-*bis* BCL, notes that the banking sector is becoming increasingly closer to the financial market, so that credit intermediaries too would be holders of an initiative that would have limitations with respect to this purpose; in particular, the intermediary would have to directly pursue the interest of its client (so the former would not simply support the latter in order to pursue his interest for himself) and even maintain market integrity. Taking the opposite stance, see D. Maffeis, n 76 above, 730, who believes that when the bank acts as a lender, it would not be mandatory, so it would not be obliged to pursue the interest of its client nor to take his place in order to value the expediency of the contract. In short, in this context the rule of *caveat emptor* would be enforced. For a different opinion again, see R. Natoli, n 30 above, 155.

[82] See on this figure A. Cicu, *Il diritto di famiglia (teoria generale)* (Roma: Athenaeum, 1914), 120; F. Messineo, *Contributo alla teoria della esecuzione testamentaria. Critica delle teorie, elementi costitutivi e indole dell'esecuzione* (Padova: CEDAM, 1931), 68; A. Candian, 'Del c.d. "ufficio privato" e, in particolare, dell'esecutore testamentario' *Temi*, 379 (1952); F. Carnelutti, *Teoria generale del diritto* (Camerino- Napoli: Edizioni Scientifiche Italiane, 1998), 152. See, for a different point of view, S. Pugliatti, *Esecuzione forzata e diritto sostanziale* (Camerino- Napoli: Edizioni Scientifiche Italiane, 1978), 23; R. Di Raimo, 'Ufficio' n 76 above, 192.

[83] See Tribunale di Napoli 21 December 2018 n 78 above.

very fertile ground in financial intermediation long before encroaching on the credit sector, and it would appear that these studies had an influence on the legislature itself, which would eventually opt for the obligation to abstain, taking into account that information and advice obligations alone would be insufficient to protect the client-investor from concluding business that goes against his interests. An implicit consideration of limited rationality, and in particular of self-control problems, could therefore be said to condition the judgments in question, thus introducing the bounded-rationality model underlying the disciplines of consumer credit and financial intermediation within the legal regime of over-indebtedness procedures.

This reasoning seems to lead in fact to doing away with an assessment of the consumer's creditworthiness in bankruptcy proceedings; if consumers are not capable by nature of curbing their inclination to take on debts, they cannot therefore be expected to answer for this innate tendency.

Some scholars believe that the worthiness assessment will be superseded[84] as it is not envisaged in the provisions that will replace the current legislation.[85] Indeed, when the legislature drafted the Crisis and Insolvency Code, it made no secret of its aim to facilitate access to proceedings reserved for consumers,[86] encouraging – at least hypothetically – their profitable use.[87] Accordingly, the number of worthy consumers should increase, since we could also consider 'worthy' those who have contributed to their own default through negligence, as long as the negligence is not gross.

Nevertheless, there is no denying that the new law continues to require an assessment of the debtor's behaviour. Indeed, Art 69 provides that the consumer cannot have access to the proceeding if he has contributed to the situation of over-indebtedness through gross negligence, bad faith, or fraud. The law therefore excludes from the proceeding those who have exhibited 'culpable'

[84] The reference is to L. Modica, 'Effetti esdebitativi (nella nuova disciplina del sovraindebitamento) e *favor creditoris*' *I Contratti*, 4, 472 (2019); S. De Matteis, 'L'interesse del debitore all'esdebitazione', in R. Bocchini and S. De Matteis, 'Sovraindebitamento: profili civilistici nella legge delega di riforma della crisi d'impresa e dell'insolvenza' *Il Corriere giuridico*, 5, 656 (2018). However, upon examining the new regulation we can note several textual references to worthiness. See in particular, Art 283 CCIC, which refers to the debtor as 'persona fisica meritevole' (worthy person) and states that a court must assess the worthiness of the debtor in order to grant discharge (more precisely, para 7 reads: 'assunte le informazioni ritenute utili, valutata la meritevolezza del debitore e verificata, a tal fine, l'assenza di atti in frode e la mancanza di dolo o colpa grave nella formazione dell'indebitamento, [il giudice] concede con decreto l'esdebitazione'). This provision also refers to fraud, bad faith, and gross negligence, as does Art 69 CCIC with regard to the requirement to access consumer solvency plan proceedings, so it is possible to formulate a uniform definition of worthiness as a judgement on the debtor's behaviour designed to exclude bad faith, fraud, and gross negligence.

[85] The particular reference is to Art 69 CCII. On this point see L. Modica, 'Il piano del consumatore sovraindebitato: tentativi di riforma e prospettiva europea' *Europa e diritto privato*, 3, 617 (2016).

[86] See the explanatory memorandum of decreto legislative 12 January 2019 no 14.

[87] See F. Pasquariello, 'Le nuove procedure' n 16 above, 764, claiming that the worthiness requirement would be too stringent in the context of legge no 3 of 2012.

behaviour,[88] that is – in the meaning used in criminal law[89] – 'blameworthy',[90] both by way of wilful misconduct (in this context, more correctly, bad faith and fraud) and (gross) negligence,[91] in relation both to the time of assumption of each individual debt and the time to follow.

If we accept the position criticised above, which leads to considering the consumer worthy solely because he has obtained the loan, the reference to gross negligence would in fact be neutralised, since the insolvent person would almost always be admitted to the settlement procedure, and the judgment on the debt behavior would be reduced to an assessment of bad faith or fraudulent behaviour. Such a solution would appear to be in contrast with the rationale of the whole over-indebtedness regulatory system, a rationale that the majority of the legal literature and some case law relate to market protection.[92]

The changes that have recently affected this regulation suggest greater attention to the person of the debtor, also by reason of the connection with Consumer Credit regulation, intended (among other things) to protect debtors.[93] Nevertheless, in the opinion of the writer, the interests of the debtor must be balanced in the over-indebtedness regulatory system with those of the creditor class, also taking into account the systemic impact that (full or partial) discharge may entail.[94]

Even within the new regulatory framework, the interest of the creditor class appears to be anything but marginal. The most recent law on over-indebtedness – like the previous one – requires an assessment of the economic feasibility of the plan and its legal admissibility.[95] The cramdown is maintained, which is why, following the opposition eof the creditor, a court can approve the plan only when the creditor can be satisfied by the execution of the plan to an extent no less than by liquidation.[96] People with very low income (in Italian: *incapiente*) face a limitation in

[88] See Tribunale di Napoli 18 May 2018 n 76 above.

[89] See on this topic G. Vassalli, *Colpevolezza*, in *Enciclopedia giuridica* (Roma: Treccani, 1988), VI.

[90] See R. Landi, n. 29 above, 309, who refers to blamewrorthy over-indebtedness (quote: 'rimproverabilità del sovraindebitamento'). See in case law Corte di Cassazione 10 April 2019 no 10095 n 13 above.

[91] See Tribunale di Treviso 25 January 2017 n 31 above.

[92] See, among many, C. Camardi, *Certezza e incertezza nel diritto privato contemporaneo* (Torino: Giappichelli, 2017), 74; L. Modica, 'Effetti esdebitativi' n 84 above, 474.

[93] See in this sense Case C-565/12, *Fesih Kalhan* v *LCL Le Crédit Lyonnais SA*, [2012] ECLI:EU:C:2014:190; more recently, Case C-58/18, *MS* v *BB SA*, [2019] ECLI:EU:C:2019:467; Case C-679/18, *OPR-Finance s.r.o.* v *GK*, [2020] ECLI:EU:C:220:167, all available at www.eur-lex.europa.eu.

[94] See in this sense P. Femia, 'Esdebitazione, responsabilità, estinzione parziale', in E. Llamas Pombo et al eds, *Il consumatore e la riforma del diritto fallimentare. Atti della Giornata di studio,* Terni, 18 maggio 2018 (Napoli: Edizioni Scientifiche Italiane, 2019), 244, who remarks the difference between the traditional approach of civil law and the alternative one, which is referred to as systemic and seems to characterise the Code of Crisis and Insolvency.

[95] Art 70, para 7, CCIC.

[96] Art 70, para 9, CCIC, as provided by Art 12-*bis*, para 4, Law no 3/2012.

addition to the merit requirement;[97] they can expect to access this benefit only once, and this subject is not expected to offer any utility, either directly or indirectly, even in the future.[98] This means that: a) the party must be devoid of assets and income; and b) there must be no possibility that his financial and income situation will improve in the future. If this situation changes – so that significant benefits were to arise in the next four years that would allow the creditors to be satisfied to an extent of not less than ten percent – the *incapiente* would be required to pay.

The interest of the debtor must therefore relate to other instances, so that the opinion that the insolvent person should always be able to benefit from a consumer's insolvency plan or obtain discharge does not appear sustainable; otherwise, one would have to admit that the interests of the creditor class are marginal. Nevertheless, some signals to the contrary emerge in the examined case law. It is true that the legal framework containing the regulation of over-indebtedness, namely the Law on Usury, would suggest that this regulatory system is oriented towards the protection of the debtor, which would lead to favouring any solution giving prevalence to the interest of the latter. However, using the same criterion, one might be led to endorse a different opinion. In fact, the provisions relating to the plan were introduced by legge no 3/2012 with the so-called *decreto crescita*, with the barely veiled aim of keeping the demand for goods high and not of protecting the over-indebted consumer. Nor can it be overlooked that the new regulation has subsequently merged into the Corporate Crisis and Insolvency Code: over-indebtedness proceedings – it is now almost undisputed – are fully included in insolvency proceedings, which serve to protect creditors.

c) The Actual Contribution that Can Be Given by a Behavioural Law and Economics Approach to Italian Over-Indebtedness Regulation

In light of the above considerations, it would appear that the contribution of behavioural law and economics to the Italian discipline of over-indebtedness, although not negligible, should not be overestimated. There is no doubt that a creditor's behaviour – and in particular the breach of Art 124-*bis* BCL – can sometimes affect a decision on worthiness, but it is the opinion of the writer that the screening should be conducted on a case-by-case basis, having regard for the peculiarities of the individual conflict. For example, when the creditor commits an error of assessment or – less probably – fails to check the potential solvency of the debtor, and if the risk of insolvency was not apparent to the consumer but could have been detected by an attentive and qualified professional when the contract was concluded, a breach of Art 124-*bis* BCL may affect the decision on worthiness, given

[97] This provision is expressly invoked by Art 283 CCIC (paras 1 and 5).
[98] See Art 283, para 1, CCIC.

that a careful investigation might have allowed the borrower to better weigh the risks of the loan.

It is also possible that the risk of insolvency is evident even to the less expert eye of the borrower and that the lender has correctly ascertained the likely inability to repay. At this point, we can imagine two further situations: one where the creditor has failed to inform the customer of the negative outcome, and another where the lender has informed the customer of this result and both have decided to enter into the contract anyway. We argue that insolvent consumers may be allowed access to the insolvency procedure only if they acknowledge that they are ill – and, if necessary, treatable[99] – and not victims of 'normal' bounded rationality.

Ultimately, it becomes necessary to ascertain whether the cognitive error is confined to the terrain of the 'normal' or has gone beyond this, leading to a state of illness. The 'honest but not unfortunate' debtor does not always seem, therefore, to be authorised to access the procedure reserved for consumers, even in accordance with the provision intended to replace Law no 3/2012.

This outcome may seem paradoxical. In fact, it was understood that the connection established by the civil code linking the crisis between over-indebtedness and consumer credit may have lent itself in the abstract to a reading of over-indebtedness in terms of behavioural law and economics. It was also observed that the approach characterising Law no 3/2012 left the 'real' debtor in limbo, being able to access debt relief benefits only with the consent of the creditor by means of a crisis settlement agreement. Now, the Crisis and Insolvency Code expressly excludes the consumer from the homologous procedure known as the 'lesser agreement'; thus, self-control problems, enhanced by the discipline of the consumer code, are practically ignored by the legal regulations on over-indebtedness.

Nonetheless, persons we might refer to as 'honest but not unfortunate' debtors who have fallen into default due to their natural inability to plan their own income and expenditure flows find within the legal system some tools for dealing with insolvency while not being able to access the benefits of over-indebtedness proceedings.

According to the current law, without considering the asset liquidation procedure – which may not in fact be an optimal solution for the debtor – the debtor may seek compensation at the individual level by addressing the creditors who have contributed to the default, neutralising their claims and thus reducing exposure. This is because the lender must not have acted contrary to the best interest of the consumer, thus deviating from the proper exercise of the office entrusted to it. The decision regarding the creditor's behaviour is in itself independent of the borrower's behaviour, since the conduct of the latter cannot change the fact that creditors are obliged to exercise their office in a proper manner. This solution has received little attention,[100] but it could prove to be very fruitful insofar as it would

[99] See Tribunale di Torino 8 June 2016 n 39 above.

[100] In current case law there would appear to be only one precedent: Tribunale di Macerata

allow the over-indebtedness crisis to be resolved without participating in a crisis settlement proceeding.

De iure condendo, the legislature could focus on establishing a moratorium on debts instead of discharge, restricting the content of the proposal (which is now free) for some parties, so as to allow full repayment of the debt, albeit lengthening the time, but excluding creditors whose behaviour has contributed to over-indebtedness. One might also envisage making the minor arrangement available to the consumer (again), while still leaving the creditors with the possibility of deciding whether the proposal is acceptable.

IV. Conclusions

Lastly, it would appear that there may be room in the over-indebtedness regulation for those we have described as 'real debtors', analogous to the 'real man' in cognitive psychology. However, this room may become more limited than recent trends in the case law might lead one to believe as protections for 'real debtors' have proven to be capable of effectively eliminating the limitations – necessary as they may be – regarding the debtor's behaviour for the purposes of gaining access to debt relief. Limitations of this kind are required in several jurisdictions, where it seemed appropriate to preclude access to debt relief or, more generally, to procedures with non-debt benefits to those who had knowingly become indebted. Basically, an attempt was made to prevent over-indebtedness through the introduction of measures aimed at neutralising the risk of opportunistic conduct by debtors, who otherwise would be naturally inclined to over-indebtedness in the expectation of a subsequent discharge.

Such an approach has inevitably been limited in the light of the different decision-making paradigm based on the 'real' man, typically prey to bounded rationality. The development of this model has led to no longer focusing on the opportunistic conduct of debtors but on the irresponsible conduct of lenders who have appeared inclined to exploit biases and heuristics that would condition the choices of consumers to their advantage.

The focus has therefore shifted from settlement procedure regulation to credit consumer regulation on the assumption that effective action to combat over-indebtedness can only succeed by making lenders responsible.

This is precisely the lens through which we have examined Italian law, in an attempt to measure the impact of bounded-rationality theories on both over-indebtedness and consumer-credit legislation.

As for the regulation of over-indebtedness procedures, the survey revealed that the influence of traditional decision-making models was prevalent on this

24 May 2018, *Nuova giurisprudenza civile commentata*, 10, 1423 (2018), with a commentary by F. Salerno, 'La violazione dell'obbligo di verifica del merito creditizio: effetti (anche) civilistici'.

front. As regards the consumer-credit regulation, the conclusions are specular: the legislature itselfseems to have considered the theories of bounded rationality, demanding conduct from lenders that can stem the potential problems caused by consumers' cognitive errors.

The over-indebtedness reform seems to have fully established the connection between over-indebtedness procedures and consumer credit regulations, to the extent that the new over-indebtedness legislation contains some provisions that recall rules concerning the obligation to verify creditworthiness in the phase preceding the conclusion of the contract. In the course of these reflections, however, the question arose whether – and to what extent – this connection might affect the interpretation of over-indebtedness procedure legislation. From a radical perspective, it may be possible to consider the debtor worthy of access to the procedure by viewing him as a victim of biases that the lender should have corrected. One might also come to appreciate that, consequently, the debtor will be able to benefit from over-indebtedness procedures; this needs to be stated, although in both the previous legislation and the one about to come into force, various provisions emphasise the liability of the insolvent.

Such an extreme conclusion recalls the naturalistic fallacy, the illusory claim to be able to derive a rule of conduct from the ascertainment of a given reality, that is, a value judgment from a factual judgment.[101]

The assumption criticised here must deal with the logic behind the rules, the human need that they protect, and the practical purpose they intend to pursue.[102] In the case of over-indebtedness, it is not so much a question of protecting insolvent debtors, although these can benefit from the effects of consumer solvency plans or discharge, but rather of favouring a recovery of consumption without unduly sacrificing the interest of the creditor class.

The phenomenon of over-indebtedness and the complexity that characterises it do not allow us to draw up a solution exclusively focused on the relationship between a single debtor and creditor. From a more systemic perspective, the benefits associated with over-indebtedness proceedings do not appear to benefit or protect 'innocent' debtors but seem to constitute a means to reintroduce the insolvent into the consumption circuit, with a consequent increase in the demand for goods: in short, the insolvent person, freed from debts, can consume once more and, in order to do so, have access to credit again.

That said, there is no denying that experiments in cognitive psychology clearly impose a different over-indebtedness 'narrative'. This new narrative should not, however, cause us to move beyond the traditional approach but rather to supplement and enrich it in fruitful dialogue without losing sight of the conflicts of interest that may actually arise. From this perspective, the findings of cognitive

[101] See N. Bobbio, *Il positivismo giuridico. Lezioni di filosofia del diritto* (Torino: Giappichelli, 1979), 209.

[102] See M. Allara, *Le nozioni fondamentali del diritto civile*, I (Torino: Giappichelli, 1958), 111.

psychology studies – nowadays confirmed through the application of technologies dedicated to neuroscience – may contribute to a real improvement in consumer protection, through the measures adopted to prevent the default *ex ante* rather than addressing it *ex post*. However, the legislature and the interpreter should not blindly adhere to the results produced by these important disciplines and thus avoid the risk of homologising their fundamental activities.