

Chapter 17

Consumer credit debt counselling

17.1 Introduction

17.1

G

Q1.1 What is the purpose of the questions and answers in this chapter?

The purpose is to consider the scope of the *regulated activities* specifically relating to consumer credit debt counselling.

Q1.2 What are the regulated activities specifically relating to consumer credit debt counselling?

The *regulated activities* that specifically relate to consumer credit debt counselling are both to be found in article 39E of the *Regulated Activities Order*. They are:

- (1) giving advice to a *borrower* about the liquidation of a debt due under a *credit agreement*; and
- (2) giving advice to a *hirer* about the liquidation of a debt due under a *consumer hire agreement*.

Q1.3 What is the scope of this chapter?

This chapter is not a complete discussion of the *regulated activities* relating to consumer credit. It just concentrates on the things that are specific to *debt counselling*. In particular, it does not discuss the meaning of *borrower*, *credit agreement*, *consumer hire agreement* or *hirer*.

Q1.4 Are there transitional arrangements?

Yes, but they are outside the scope of this chapter.



17.2 The basic elements of debt counselling

17.2

Q2.1 What is the basic definition of debt counselling?

It involves the following elements:

(1) It is advice given to:

(a) a *borrower* about the liquidation of a debt due under a *credit agreement*; or

(b) a *hirer* about the liquidation of a debt due under a *consumer hire agreement*;

(see ■ PERG 17.3 for more about what the advice must be about).

(2) The advice must relate to a particular debt and debtor (see ■ PERG 17.4).

(3) It covers the giving of advice. It does not cover just giving mere information. This is explained in ■ PERG 17.5.

(4) If an exclusion applies, the activity is not a *regulated activity* (see ■ PERG 17.6).

Q2.2 Can you give some examples of what is and is not debt counselling?

Yes. There are examples in ■ PERG 17.7.

Q2.3 What other factors are relevant to whether authorisation is needed?

(1) Whether the activity is carried on by way of business (see ■ PERG 2.3).

(2) Whether an exemption is available (see ■ PERG 2.11).

(3) Whether the *person* can carry on the activity without *authorisation* (see ■ PERG 2.10.12 G to ■ PERG 2.10.16 G).

17.3 What the advice must be about

17.3

Q3.1 What does liquidation of a debt mean?

It has a wide meaning. For example, it would cover the following:

- paying off the debt in full and in time;
- agreeing a rescheduling or a temporary halt to paying off the debt;
- the debtor being released from the debt;
- agreeing a reduced repayment amount (including the creditor agreeing to accept token repayments);
- a third party taking over the debtor's obligation to discharge the debt;
- discharging the debt or making it irrecoverable through personal insolvency procedures such as bankruptcy, a voluntary arrangement or a debt relief order.

Q3.2 What does due mean?

As described in the answer to Q2.1 (What is the basic definition of debt counselling?), *debt counselling* relates to debts that are due under a *credit agreement* or a *consumer hire agreement*. As the regulation of *debt counselling* is a consumer protection measure the "due" should in the FCA's view be interpreted fairly broadly and should not be limited to debts that are immediately payable (for example, where the debtor is in default). Therefore, for instance, it would cover present obligations to make payments in the future.

Debt counselling is not limited to debts that are overdue. It also covers debts that are not overdue.

Q3.3 Does it matter if the advice also covers debts that are not due under a credit agreement or a consumer hire agreement?

No. If advice is given to a debtor about his debts, some of which are not payable under a *credit agreement* or a *consumer hire agreement*, that advice is regulated as long as some of the debts are due under a *credit agreement* or a *consumer hire agreement*. There is nothing in the definition of *debt counselling* or in the policy for regulating it that restricts *debt counselling* to a situation in which all the debts are consumer credit ones. Where advice covers both the consumer credit debt and the other debt, the advice on both types of debt is likely to be *debt counselling* as what is done about non-consumer credit debt is likely to affect consumer credit debt, particularly if the advice does not distinguish between the two types of debt. This is similar to the position for the advisory *regulated activities* in relation to transactions in regulated investments, which cover not only advice on the transaction in the regulated investment itself but also any advice with a view to, or in connection with, that transaction and advice as to any associated or ancillary matter.

For the same reason other kinds of advice that would not otherwise be treated as *debt counselling* will be included if that other kind of advice is given with a view to or in connection with the liquidation of consumer credit debts. See example (11) in the table in the answer to Q7.1 for an example of this.

17.4 Advice must relate to a particular debt and debtor

17.4

Q4.1 Does debt counselling cover advice given to the public in general rather than to a particular debtor?

Debt counselling covers giving advice about "a" debt. This means that the advice must relate to the debts of a particular debtor or debtors. Advice will normally not be covered if it is not given to any particular debtor. So for example, it would not generally cover advice in a newspaper, periodical publication, journal, magazine, publication or a radio or television broadcast. General advice open to everyone on a website is unlikely to be *debt counselling* for the same reason. On the other hand advice given to a particular debtor over the Internet may be regulated. Please see Q5.5 about whether decision trees involve *debt counselling*.

Q4.2 Must advice be given to a borrower?

Yes. *Debt counselling* means giving advice to a *borrower* under a *credit agreement* or a *hirer* under a *consumer hire agreement*. So for example it does not cover advice given to *persons* who receive it as:

- a lender under a *credit agreement* or the owner under a *consumer hire agreement*; or
- an adviser who will only use it to inform advice given by him to others (but see Q4.3); or
- a journalist or broadcaster who will use it only for journalistic purposes.

Q4.3 What about advice that is passed on through an intermediary?

This question covers advice prepared by A which is then passed on to the debtor by B.

If the debtor knows of this arrangement and knows that B does not exercise any judgement but just acts as a conduit, it is likely that A is *debt counselling* and B is not.



17.5 The meaning of advice

17.5

Q5.1 Broadly speaking, what is advice?

Advice means giving an opinion as a guide to action to be taken, in this case the liquidation of debts. It either explicitly or implicitly steers the customer to a particular course of action.

A key question is whether an impartial observer, having due regard to the regulatory regime and *guidance*, context, timing and what passed between the parties, would conclude that advice had been given. One should look at whether what the adviser says could reasonably have been understood by the client as being advice which would help him make up his mind.

The concept of advice is broad enough to include any communication with the debtor which, in the particular context in which it is given, goes beyond the mere provision of information and is objectively likely to influence the debtor's decision whether or not to undertake the course of action in question.

Any course of action does not have to be identified in any detail. For example advice to opt for one of a number of identified possible debt solutions without advising which one of those the client should adopt may, depending on the circumstances, be *debt counselling*.

Q5.2 Does advice include a recommendation?

Yes, a recommendation to carry out a specific course of action to liquidate a relevant debt is likely to be *debt counselling*. However, something falling short of an explicit recommendation can be regulated too. Any element of evaluation, value judgment or persuasion is likely to mean that advice is being given.

Q5.3 Is giving information advice?

In the FCA's view, advice requires an element of opinion on the part of the adviser or something that might be taken by the debtor, expressly or by implication, to suggest or influence a course of action. Information, on the other hand, involves statements of facts or figures.

In general terms, simply giving balanced and neutral information without making any comment or value judgement on its relevance to decisions which a debtor may make is not advice. The provision of purely factual information does not become regulated advice merely because it feeds into the debtor's own decision-making process and is taken into account by him.

Therefore, a neutral and balanced explanation of the implications of entering into different debt solutions need not, itself, involve *debt counselling*.

In the *FCA's* opinion, however, such information is likely take on the nature of advice if the circumstances in which it is provided give it, expressly or by implication, the force of a recommendation.

For example the adviser may provide information on a selected, rather than balanced and neutral, basis that would tend to influence the decision of the debtor. This may arise where the adviser offers to provide information about certain ways of liquidating the debtor's debts that contain features specified by the debtor. The adviser may then exercise discretion as to which course of action to highlight.

A key to the question whether advice is given is whether that information is either accompanied by a comment or value judgment on the relevance of that information to the client's decision, or is itself the product of a process of selection involving a value judgment so that the information will tend to influence the decision of the recipient. In both these scenarios, the information acquires the character of a recommendation.

One factor in deciding whether what was said by an adviser in a particular situation did or did not amount to advice is to look at the inquiry to which the adviser was responding. If a debtor asks for a recommendation, any response is likely to be regarded as advice.

On the other hand, if a debtor makes a purely factual inquiry it may be the case that a reply which simply provides the relevant factual information is no more than that. In this case it is relevant whether the adviser makes it clear that it does not give advice or whether the adviser runs a *debt counselling* business.

Q5.4 PERG says a lot about generic advice in relation to other sorts of regulated advice. Is the idea of generic advice relevant to debt counselling?

Generic advice is a term the *FCA* uses to refer to something that is advice rather than mere information but which is not regulated because, although it relates to investments, it is not about the merits of buying or selling a particular investment.

The concept of generic advice is potentially relevant to *debt counselling*. As explained in the answer to Q1.2 (What are the regulated activities specifically relating to consumer credit debt counselling?) and Q4.1 (Does debt counselling cover advice given to the public in general rather than to a particular debtor?) *debt counselling* relates to the particular debts of a debtor. Advice that does not relate to particular debts in this way is likely to be generic advice.

However, as explained in the answer to Q5.1, advice may be *debt counselling* even though the advice does not identify a course of action with any precision. This narrows the types of advice that will be excluded from being *debt counselling* on the grounds of being generic advice. Another reason for generic advice being less relevant to *debt counselling* is that other types of regulated advice relate to a very specific activity, such as buying or selling investments, while the range of activities covered by *debt counselling* is wide.

See example (5) in the table in Q7.1 for an example of where generic advice is relevant to *debt counselling*.

Q5.5 Does a decision tree involve debt counselling?

Scripted questioning involves using any form of sequenced questions in order to extract information from a *person* with a view to facilitating the selection by that *person* of a method of liquidating his debts under a *credit agreement* or a *consumer hire agreement*. A decision tree is an example of scripted questioning. The process of going through the questions will usually narrow down the range of options that are available. Scripted questions must be prepared in advance of their actual use.

Undertaking the process of scripted questioning gives rise to particular issues concerning *debt counselling*. Whether or not scripted questioning in any particular case is *debt counselling* will depend on all the circumstances. If the process involves identifying one or more particular courses of action then, in the FCA's view, to avoid *debt counselling*, the critical factor is likely to be whether the process is limited to, and likely to be perceived by the debtor as, assisting the debtor to make his own choice of how to liquidate his debts. The questioner will need to avoid making any judgement on the suitability of one or more courses of action for the debtor.

The potential for variation in the form, content and manner of scripted questioning is considerable, but there are two broad types. The first type involves providing questions and answers which are confined to factual matters (for example, the nature and size of the debts). There are various possible scenarios, including the following:

- (1) The questioner may go on to identify several courses of action which match features identified by the scripted questioning; provided these are presented in a balanced and neutral way (for example, they identify all the possible courses of action, without making a recommendation as to a particular one) this need not, of itself, involve *debt counselling*.
- (2) The questioner may go on to advise the debtor on the merits of one particular course of action over another. This would be *debt counselling*.
- (3) The questioner may, before or during the course of the scripted questioning, give information that considered on its own would not involve *debt counselling* and, following the scripted questioning, identify one or more particular courses of action. The factors described in the answer to Q5.6 are relevant to deciding whether there is *debt counselling*.

The second type of scripted questioning involves providing questions and answers incorporating opinion, judgement or recommendations. This will involve advice not just information. There are various possible scenarios, including the following:

- (4) The scripted questioning may not lead to the identification of any particular course of action; in this case, the questioner has provided advice, but it is generic advice and does not amount to *debt counselling*. As explained in the answer to Q5.4 (generic advice) this will be an uncommon scenario.
- (5) The scripted questioning may lead to the identification of one or more particular courses of action. This is likely to be *debt counselling*.

Q5.6 What are the factors mentioned in paragraph (3) of the answer to Q5.5?

The FCA considers that it is necessary to look at the process and outcome of scripted questioning as a whole. Factors that may be relevant in deciding whether the process involves *debt counselling* include the following:

- (1) any representations made by the questioner at the start of the questioning relating to the service he is to provide;
- (2) the context in which the questioning takes place;
- (3) the role played by any questioner who guides a *person* through the scripted questions;
- (4) the outcome of the questioning (how many courses of action are highlighted, how precise they are, whether the questioner will help the debtor to carry out the course of action, whether the questioner identifies any third party who might help the debtor to carry out the course of action and the relationship between the questioner and that third party and so on); and
- (5) whether the scripted questions and answers have been provided by, and are clearly the responsibility of, an unconnected third party (for example, the FCA), and all that the questioner has done is help the debtor understand what the questions or options are and how to determine which option applies to his particular circumstances.

Q5.7 Does the medium used to give advice matter?

The medium used to give advice should make no material difference to whether or not the advice is *debt counselling*. Advice can be provided in many ways including:

- face to face;
- orally to a group;
- by telephone;
- by correspondence (including e-mail and text messaging);
- through the provision of an interactive software system.

However advice given in a publication, broadcast or website raises different issues (see the answer to Q4.1 (Does debt counselling cover advice given to the public in general rather than to a particular debtor?)).



17.6 Exclusions

17.6

Q6.1 What exclusions are available?

There are a number of exclusions that apply to *debt counselling*. The following table lists them and says where further information on them can be found in *PERG*.

Exclusions that apply to debt counselling		
What the exclusion covers	RAO article	Where summarised in <i>PERG</i>
Activities where person has a connection to the agreement	Article 39H	PERG 2.8.7CG (1)
Activities carried on by certain energy suppliers	Article 39I	PERG 2.8.7CG (3)
Activities carried on in relation to a <i>regulated mortgage contract</i> or a <i>home purchase plan</i>	Article 39J	PERG 2.8.7CG (4) and examples (17) and (18) in the table in the answer to Question 7.1.
Activities carried on by members of the legal profession etc.	Article 39K	PERG 2.8.7CG (5)
Information society services	Article 72A	PERG 2.9.18 G
Local authorities	Article 72G	PERG 2.9.23 G to PERG 2.9.24 G
Insolvency practitioners	Article 72H	PERG 2.9.25 G to PERG 2.9.27 G

17.7 Examples

17.7

Q7.1 Please give me some examples of what is and is not debt counselling

Please see the following table. All the examples assume that the advice or information relates to debts under a *credit agreement* or a *consumer hire agreement* or to a group of debts that include such debts.

Examples of what is and is not <i>debt counselling</i>	
Example	Explanation
(1) Adviser: "I recommend you enter into a debt management plan"	This is <i>debt counselling</i> . This is advice which steers the debtor in the direction of a debt solution which the debtor could enter into as a means of liquidating his debts.
(2) Adviser: "I recommend you do not enter into a debt management plan"	This is <i>debt counselling</i> . This is advice which steers the debtor away from a particular debt solution which the debtor could have entered into as a means of liquidating his debts.
(3) Adviser: "I suggest you change (or do not change) from a debt management plan to a debt arrangement scheme"	This is <i>debt counselling</i> . This is advice that steers the debtor in the direction of a different debt solution from the one that he has already entered into as an alternative means of liquidating his debts.
A debt arrangement scheme refers to a debt payment programme under the Scottish debt arrangement scheme (DAS).	
(4) Adviser: "I recommend you do not borrow more than you can comfortably afford"	This is not <i>debt counselling</i> as it is about incurring debts, not liquidating them.
(5) Adviser: "I would recommend that you explore the pros and cons of all the different debt solutions that may be available to you"	This is not <i>debt counselling</i> . It is unregulated generic advice because it does not steer the debtor to any particular course of action in liquidating his debts.
(6) Adviser: "I think that reaching an informal agreement with your creditors about repaying your debts may not be the best option available to you given your circumstances."	This is likely to be <i>debt counselling</i> . It does not recommend a precise course of action but, as described in the answer to Q5.1 (Broadly speaking, what is advice?), this does

I will set out the pros and cons of various other debt solutions that may be more appropriate to your circumstances ? but ultimately the option you choose will be a matter for you.”

(7) The adviser gives an explanation of the way that various types of debt solution work.

(8) The adviser gives a comparison of the features and benefits of one type of debt solution with another and the implications of entering into the two different types of debt solutions.

(9) An adviser advises on uncertain questions about a debt management plan.

(10) A *person* distributes leaflets or illustrations that help debtors to decide how they will liquidate their debts

(11) A *person* explains how to fill in a form for entering into an IVA

not necessarily matter. The adviser is making a value judgement and giving an opinion and is steering the debtor towards certain courses of action and away from others. In particular, the adviser has recommended that the debtor does not deal with his debts by way of an informal agreement.

If this is given in a balanced and neutral way it is likely not to be *debt counselling* as it is just factual information.

Same as the answer to (7).

The element of uncertainty is likely to mean that the advice has a strong element of opinion and hence is likely to be advice, rather than mere information. It is likely to be *debt counselling* as long as it steers the debtor towards a course of action in liquidating his debts.

If the advice is given by a lawyer it is likely to be excluded from *debt counselling* by the exclusion in article 39K of the RAO (Activities carried on by members of the legal profession etc.) referred to in the answer to Q6.1.

This is not *debt counselling* as it is advice given to the general public. See the answer to Q4.1 (Does debt counselling cover advice given to the public in general rather than to a particular debtor?) for more about this.

It is unlikely that a *person* would provide this advice on its own by way of business.

If a *person* provides this help in the course of carrying on some other unregulated activities he will not be *debt counselling* as it should be seen as providing information not advice.

If though he provides this help in the course of a wider *debt counselling* business it will be included as part of that *debt counselling* activity.

(12) A person uses direct marketing and other forms of advertising (for example, on websites promoted on search engines) and cold calling, to gather personal information from debtors, which is then sold on to providers of debt advice.

(13) A person recommends that a debtor obtains advice from a particular *debt counselling firm*, ABC Debt Management.

(13A) A person recommends that a debtor obtains advice from a particular insolvency practitioner or their *firm*.

If the explanation is given by the insolvency practitioner the exclusion in article 72H of the RAO (Insolvency practitioners) is likely to be available (see Q6.1 (What exclusions are available?)).

It is not *debt counselling* as it does not involve advice to debtors about the liquidation of debts due.

However, a person providing such referrals will be *debt counselling* if during the course of communicating with a debtor he makes a recommendation to the debtor as to how he might liquidate his consumer credit debt.

Taken on its own it is not *debt counselling* because the adviser is advising the debtor to obtain advice from another adviser.

However, if ABC Debt Management only offers one debt solution (e.g. a debt management plan), the referral could constitute a recommendation intended implicitly to steer the debtor in the direction of that particular debt solution and, therefore, could be advice (in which case it would be *debt counselling*).

Consequently, whether or not *debt counselling* is involved will depend on the individual circumstances in each case and is likely to involve a consideration of the process as a whole.

Taken on its own it is not *debt counselling* because the adviser is advising the debtor to obtain advice from another adviser.

However, where the insolvency practitioner or their *firm* only offers advice in relation to a particular *debt solution* (e.g. an individual voluntary arrangement or a protected trust deed), the referral could constitute a recommendation intended to implicitly steer the debtor in the direction of that particular *debt solution* and, therefore, could be advice (in which case it would be *debt counselling*).

Consequently, whether or not *debt counselling* is involved will depend on the individual circumstances in each case and is likely to involve a consideration of the process as a whole.

(14) Adviser: "I recommend you prioritise the repayment of your electricity bill over all other debts"

This is likely to constitute *debt counselling* if, having considered all of a debtor's outstanding debts, an adviser advises the debtor to prioritise the repayment of a utility bill (e.g. an electricity bill) over his other outstanding debts (including debts arising under *credit agreements* or *consumer hire agreements*). This constitutes advising on the liquidation of debts due, since there is an implied recommendation that the debtor should postpone repaying his consumer credit related debts until he has repaid another debt or debts.

(15) A person (for example, a money adviser) helps a debtor to draw up a budget, e.g. providing a budget planner to see how much disposable income the client has each month or how long the client's money could last over a particular period.

This is not *debt counselling* if all the adviser does is to provide a debtor with information about his budget and the process is limited to, and likely to be perceived by the debtor as, assisting him to make his own choice as to a course of action he might take in liquidating his consumer credit-related debts.

It may not be advice at all, in that it just puts into a convenient form information that the consumer has himself supplied.

Even if it goes beyond just organising information supplied by the debtor, as long as the adviser gives the information in a balanced and neutral way, the adviser should be seen as providing information rather than advice. The adviser is supplying material that could be used for the purposes of deciding how to liquidate debts but not advising on liquidating them.

(16) An adviser gives budgetary advice

This is *debt counselling* if the adviser goes beyond the services in example (15) and advises the debtor on how to match income and debts. For example, the adviser may advise the debtor to reduce discretionary spending to a set amount each month to enable him to pay off a certain amount of a large credit card bill each month.

It does not matter if the result of the advice is that the debtor should pay off his debts in full, rather than by instalments over a period of time or by entering into some sort of repayment plan, as *debt counselling* is not limited to advice about being released from paying the debt in full or rescheduling.

(17) Mortgage adviser: "I advise you to consolidate your unsecured consumer credit debts into this *regulated mortgage contract*"

This is unlikely to be *debt counselling*.

Leaving aside the exclusions, this would be *debt counselling* as the mortgage adviser is proposing that the debtor should consolidate a number of his consumer credit debts into a single (potentially more manageable) debt with a view to the debtor being better able to liquidate all of his debts.

However, the exclusion in article 39J of the RAO (Activities carried on in relation to a *regulated mortgage contract* or a *home purchase plan*) is likely to apply. So far as applicable to this example, the exclusion works like this:

(a) The advice must relate to a *regulated mortgage contract*.

This condition is satisfied.

Example (18) illustrates the issues that would arise if the adviser did not advise on specific *regulated mortgage contracts*.

(b) Giving the advice must be a *regulated activity*. If the only *regulated activity* involved in giving the advice is *debt adjusting*, that is not enough. Another *regulated activity* must apply too. However, the exclusion can still apply if the advice involves *debt adjusting* in addition to another *regulated activity*.

This condition is met because the adviser is *advising on regulated mortgage contracts*.

Note: Technically this condition (giving the advice must be a *regulated activity*) would not be satisfied if the only *regulated activity* carried on by the adviser is *debt adjusting*, *debt collecting* or *debt administration*. However, this example only mentions *debt adjusting* as, if any of these three *regulated activities* apply, it is likely only to be *debt adjusting*.

(c) When the mortgage lender enters into the mortgage it will be carrying on the *regulated activity* of *entering into a regulated mortgage contract*.

(18) Mortgage adviser: "I advise you to consolidate your unsecured consumer credit debts into a single *regulated mortgage contract*. However, I can't advise you what mortgage contract you should enter into or which mortgage lender you should use."

(19) A person operating a peer-to-peer lending platform advises a debtor on the liquidation of a debt due under a consumer credit agreement entered into with a lender or lenders (via the platform). In this example, the platform operator is carrying on the *regulated activity of operating an electronic system in relation to lending*.

PERG 4.7 explains when *entering into a regulated mortgage contract* applies.

This is *debt counselling*. The exclusion in article 39J of the RAO (Activities carried on in relation to a *regulated mortgage contract* or a *home purchase plan*) does not apply.

The difference between this example and example (17) is that the advice in this example does not relate to a particular *regulated mortgage contract* (or several different *regulated mortgage contracts*). As explained in more detail in PERG 4.6.5 G this means that the adviser is not *advising on regulated mortgage contracts*. The exclusion in article 39J does not apply because the adviser is not carrying on another *regulated activity*, which means that one of the conditions for article 39J to apply is not met.

See example (17) for an explanation of the conditions that must be satisfied if the article 39J exclusion is to apply.

This is *debt counselling* as long as the loan agreement is a *credit agreement*.

The *regulated activity of operating an electronic system in relation to lending* covers agreements that are called article 36H agreements, which covers more than just *credit agreements*. If the consumer credit agreement is an article 36H agreement but not a *credit agreement* the advice will not be *debt counselling*.

