

Chapter 17

Consumer credit debt counselling

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*.