

Legal instruments



Legal solutions to debt problems

Recommendation Rec(2007)8
and explanatory memorandum



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Recommendation Rec(2007)8
adopted by the Committee of Ministers
of the Council of Europe
on 20 June 2007
and explanatory memorandum

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1. At their 26th Conference held on 7 and 8 April 2005 in Helsinki, the European Ministers of Justice adopted Resolution No. 1 on seeking legal solutions to debt problems in a credit society. In this resolution the ministers expressed their concern about the problems arising in today's credit society due to, *inter alia*, easy access to credit that can, in some cases, result in the over-indebtedness of individuals and families. The ministers invited the Committee of Ministers of the Council of Europe to entrust the European Committee on Legal Co-operation (CDCJ) with the task of preparing an appropriate instrument defining legislative and administrative measures, as well as considering remedies to prevent and solve debt problems.

2. The Group of Specialists on Seeking Legal Solutions to Debt Problems (CJ-S-DEBT) was set up under the authority of the CDCJ and prepared the recommendation on legal solutions to debt problems along with the explanatory report. The recommendation was adopted by the Committee of Ministers on 20 June 2007.

Recommendation Rec(2007)8

of the Committee of Ministers to member states on legal solutions to debt problems

*(Adopted by the Committee of Ministers on 20 June 2007
at the 999bis meeting of the Ministers' Deputies)*

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Acknowledging that member states have entered an era where the use of credit has become an essential part of their economies;

Taking into account that the development of the consumer credit market can be beneficial both for the economic growth of member states and for the well-being of individuals;

Noting that although in the majority of cases credit contracts operate without difficulty, increased lending leads to increased debt problems and, in some cases, to over-indebtedness;

Bearing in mind that over-indebtedness of individuals and families has become an increasingly widespread problem in most member states, which frequently leads to social and health problems and social exclusion of families and may put children's basic needs at risk;

Stressing the responsibility of member states for the effects of their economic and social policies;

Agreeing upon the utmost importance of political, legal and practical measures which the governments of member states should adopt in order to prevent and solve debt problems effectively;

Underlining the need to strike a balance between the legitimate interests of creditors and the basic rights of debtors;

Taking into account Resolution No. 1 on seeking legal solutions to debt problems in a credit society, adopted by the European Ministers of Justice at their 26th Conference (2005);

Recalling Recommendation Rec(2003)17 of the Committee of Ministers to member states on enforcement;

Bearing in mind other work carried out at a European level concerning the settlement of disputes between creditors and debtors,

Recommends that the governments of the member states, when formulating their internal legislation and practice and when seeking legal solutions to debt problems and to over-indebtedness:

1. note that for the purposes of this recommendation over-indebtedness means, but is not limited to, the situation where the debt burden of an individual or a family manifestly and/or on a long-term basis exceeds the repayment capacity;
2. aim to prevent over-indebtedness of individuals and families in particular by:
 - a. collecting information and statistics on debt problems and analysing the situation of over-indebted individuals and families in their countries;
 - b. introducing and developing financial literacy on the rights of consumers in general, and budget management in particular, as part of the national education system;
 - c. effective access to impartial financial, social and legal advice and counselling to those who have problems with and questions about their debts;
 - d. providing the necessary measures and regulations to ensure responsible practices during all phases of the credit relationship including marketing of credit as well as the collection and use of credit data and other financial information;
 - e. safeguarding the rights of the guarantors to information as well as preventing the irresponsible use of guarantees;
3. take appropriate measures to alleviate the effects of the recovery of debt in particular by:
 - a. ensuring an efficient and unbiased enforcement system as well as appropriate legislation, which defines the powers of enforcement agents;
 - b. respecting the debtor's rights and human dignity at all stages of debt collection and debt enforcement procedures without infringing the rights of creditors;

- c. introducing enforcement alleviation procedures, including the protection of the essential assets of the debtor and garnishment of part of his/her revenue, which take into account the need to strike a balance between the protection of at least the basic living needs of the debtor and his/her family and the efficiency of debt recovery;
 - d. ensuring the rights of the guarantors of the debtor at all stages of debt enforcement procedure, including, as far as possible, the right to treatment equal to that accorded to the debtor;
 - e. facilitating the recognition and enforcement in member states of payment judgments and repayment plans emanating from the competent authorities in other member states;
4. introduce mechanisms necessary to facilitate rehabilitation of over-indebted individuals and families and their reintegration into society in particular by:
- a. ensuring that debtors have effective access to impartial advice and to debt adjustment in accordance with the criteria established by national law;
 - b. ensuring that payment plans in debt adjustment are reasonable, in accordance with national practices, both in repayment obligations and in duration;
 - c. ensuring that debt adjustment covers all debts, excluding only those covered by special waivers provided under national law;
 - d. establishing mechanisms for extra-judicial settlements and encouraging such settlements between the debtor and creditor;
 - e. effectively limiting the means of creditors to hinder debt settlements unreasonably;
 - f. encouraging effective financial and social inclusion of over-indebted individuals and families, in particular by promoting their access to the labour market;
 - g. encouraging the active participation of the debtor in debt settlement and, where necessary, counselling and advice following the debt settlement;

- h.* allowing partial or total discharge of the debts of individuals and, where applicable, families in cases of over-indebtedness where other measures have proved to be ineffective, with a view to providing them with a new opportunity for engaging in economic and social activities;
5. facilitate the implementation of this recommendation in particular by:
- a.* setting up policies relating to debt management and to treatment of over-indebted individuals and families and ensuring uniformity of such policies;
 - b.* ensuring effective co-operation between the competent bodies and professionals involved in the prevention of over-indebtedness, the alleviation of the effects of the recovery of debts and the rehabilitation of over-indebted individuals and families;
 - c.* setting up debt advice, counselling and mediation mechanisms, as well as ensuring, or at least encouraging, effective participation of lending institutions and other public and private creditors in implementing national policies for debt management;
 - d.* ensuring appropriate quality standards and impartiality of the services provided by the responsible bodies and professionals as well as effective mechanisms for controlling these standards;
 - e.* providing easy access to information about consumer rights, which should be readily understood by the general public.

Explanatory memorandum

I. Introduction

1. In many European countries, credit purchases have become increasingly popular over the past few decades. Lending drives economic growth and benefits individuals; in fact, the availability of sufficient credit is a central element in a functioning market economy.

2. Nevertheless, in some circumstances the growth in lending can lead to serious financial difficulties for individuals and families. In the member states of the Council of Europe over-indebtedness of individuals and families caused by, for instance, increased marketing of and easy access to credit, over-commitment of the consumers and unforeseen events that have weakened their economic situation (unemployment, sickness, change of family situation, etc.) has become an increasingly widespread phenomenon.

3. Furthermore, the practices of aggressive credit marketing, making use of the latest information technologies, touch all levels of society, especially those who are most vulnerable.

4. The position of young borrowers – a newly emerging market segment – who are particularly susceptible to aggressive credit marketing techniques, is of particular importance. Over-indebtedness of young people can pose a serious and long-lasting threat to the economies of member states and the well-being of society in general.

5. Governments of member states play an important role in preventing and controlling over-indebtedness, not only through specific measures dealing with debt problems but also by ensuring that social and economic policies do not jeopardise the financial situation of individuals and families.

6. Owing to its complex nature, over-indebtedness may lead to social, health and legal problems for individuals and families and may put children's basic needs at risk. Therefore, legal and political solutions to over-indebtedness should be combined with a broader range of social and financial measures implemented in different areas of society, aiming at

combating poverty and financial illiteracy and promoting social inclusion, while paying great attention to human rights and dignity.

7. In a credit society it is impossible to prevent all debt problems at all times, but legal, political and practical measures for limiting, as far as possible, over-indebtedness and its effects should be examined and the best of these measures identified with a view to assisting the member states in their implementation.

8. Currently there is no international legal instrument dealing specifically with over-indebtedness. It is hoped that the present recommendation, setting out minimum legal standards for dealing with debt problems, could form a sound basis for member states wishing to set up a more comprehensive legal instrument on this topic in the future.

9. Nevertheless, at the level of the European Union there are several legal instruments dealing with certain aspects connected to over-indebtedness, such as enforcement of judgments in civil and commercial matters,¹ legal recognition of foreign bankruptcy proceedings,² the legal framework for consumer credit activity,³ information to be supplied to the consumer before a credit agreement is concluded and the principle of responsible lending.⁴

10. Without doubt, such an important subject falls within the realm of the activities of the Council of Europe. Up to now only a few aspects indirectly relating to over-indebtedness have been covered by legal instruments adopted under the aegis of the Council of Europe. These instruments cover, for instance, the protection of personal data,⁵ the effective enforcement of judgments⁶ and the need to strike a balance between the interests of the debtor and those of the creditor. They also protect the essential assets of

1. Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, replaced later by the European Union (EU) Council Regulation (EC) No. 44/2001.

2. European Union Convention on Insolvency Proceedings, and EU Council Regulation (EC) No. 1346/2000.

3. EU Council Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the member states concerning consumer credit.

4. Both contained in the Revised Proposal for the Consumer Credit Directive (COM (2004) 747 final), presented by the European Commission on 28 October 2004.

5. Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108).

6. Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5) requires a sufficiently efficient system for the enforcement of judgments as an integral part of a broader concept of access to justice.

the debtor, provide the possibility of protecting part of his or her income¹ from garnishment and deal with certain aspects of collective insolvency proceedings.²

11. Nevertheless, there is a need to address the problem of over-indebtedness of individuals and families in a comprehensive manner. The Council of Europe is well placed to continue playing an important role in assisting member states to best deal with problems of over-indebtedness through broad intergovernmental co-operation.

12. In this respect, the European Committee for Social Cohesion (CDCS) has set up a “European dialogue platform on ethical and solidarity-based initiatives”;³ which is a constructive forum for producing new ideas and setting up alternative initiatives to combat poverty and social exclusion and factors leading to these phenomena, including over-indebtedness.

13. In addition to the social and educational solutions to debt problems, their legal aspects should also be taken into account. At their 26th Conference (Helsinki, 7-8 April 2005), the European Ministers of Justice carried out a detailed examination of the issue of over-indebtedness in Council of Europe member states and highlighted the need to identify possible legal and practical solutions that the authorities could bring into play when dealing with this problem. The ministers adopted Resolution No. 1 on seeking legal solutions to debt problems in a credit society, whereby they invited the Committee of Ministers of the Council of Europe to entrust the European Committee on Legal Co-operation (CDCJ) with analysing existing legislation and good practices, identifying the difficulties met and preparing an appropriate instrument defining legislative and administrative measures for dealing with the problem of over-indebtedness.

14. As a follow-up to the above resolution an expert, commissioned by the CDCJ, prepared a report on legal solutions to debt problems in credit societies. In this report, existing legislation and good practices were analysed and difficulties in finding solutions to debt problems were identified. The

1. Recommendation Rec(2003)17 of the Committee of Ministers to member states on enforcement, adopted on 9 September 2003.

2. European Convention on Certain International Aspects of Bankruptcy (ETS No. 136), opened for signature in 1990. Although it has not yet entered into force, it did have an important influence on the development of the European Union law.

3. For more information about the platform, please visit: http://www.coe.int/t/dg3/socialpolicies/Platform/Default_en.asp.

report discussed the concept of over-indebtedness, the prevention of over-indebtedness, the alleviation of the payments of debts and the rehabilitation of over-indebted individuals and families; it served as the basis for the structure of this recommendation.

15. Within the framework of its contribution to the implementation of Resolution No. 1 of the 26th Conference of the European Ministers of Justice, the Committee of Ministers adopted, on 11 January 2006, the Terms of Reference of the Group of Specialists on Seeking Legal Solutions to Debt Problems (CJ-S-DEBT), instructing it to prepare, under the authority of the CDCJ, an appropriate instrument defining legislative and administrative measures, as well as to consider remedies to prevent and solve debt problems.

II. Scope of the recommendation

16. A non-exhaustive definition of over-indebtedness is proposed in order to facilitate the implementation of this recommendation. Over-indebtedness should cover at least the situations where the debt burden of an individual or a family continuously and/or manifestly exceeds its payment capacity, resulting in systematic difficulties, and sometimes in failure, in paying the creditors.¹ Member states are encouraged to consider a more precise definition of over-indebtedness to apply within the framework of their legal systems.

17. At the same time, the distinctions between the concepts of over-indebtedness, poverty and consumer insolvency should also be taken into consideration. However, all three phenomena may lead to social and health problems and exclusion of individuals and families from society.

18. There are three principal and complementary ways through which debt problems can and should be dealt with: prevention of over-indebtedness, alleviation of the effects of the recovery of debts and rehabilitation of over-indebted individuals and families.

1. The Report on Legal Solutions to Debt Problems in Credit Societies, prepared by Johanna Niemi-Kiesiläinen and Ann-Sofie Henrikson, provides three statistical methods of defining over-indebtedness: administrative, objective or quantitative, and subjective. However, the authors note that all these methods have significant shortcomings, making it impossible to obtain a complete picture of over-indebtedness.

19. The recommendation aims at identifying possible legal and political measures that can be applied by the states in order to prevent over-indebtedness of individuals and families, to adjust the recovery of debts from the over-indebted in a manner that avoids their social and financial exclusion and to facilitate rehabilitation of over-indebted individuals with due regard to their human dignity.

20. The recommendation also considers the role and co-operation of competent bodies at international, national, regional and local level, such as courts, administrative authorities, non-governmental organisations involved, as well as financial and lending institutions.

III. Commentary on specific provisions

Prevention of over-indebtedness

21. To deal successfully with the problems that over-indebted individuals and families encounter it is necessary to have a regularly updated overview of the extent and characteristics of over-indebtedness in member states. The collection of statistics and other information on debt problems¹ and the analysis of the situation of over-indebted individuals and families is an indispensable prerequisite for obtaining a complete picture and for monitoring the effects of the measures undertaken. That is why authorities are encouraged to collect and use this information systematically in order to keep track of developments and anticipate potential difficulties by taking necessary measures in advance.

22. Introducing financial literacy and budget management as part of national education is important for individuals and families to cope with the financial aspects of their lives in general and can be a very efficient tool to ensure that they have the minimum knowledge necessary in order to make informed choices when considering credit proposals on the market, thus promoting responsible borrowing and preventing over-indebtedness.

1. Member states can obtain guidance from, for example, the European Union EU-SILC programme (Survey on Income and Living Conditions) operated by Eurostat – one of the Directorates-General of the European Commission providing the European Union with a high-quality statistical information service.

23. In order for access to financial, social and legal advice to be effective, it should not only be available free of charge (or at low cost), but practical access to such advice should be easy and the advice should be impartial.¹

24. For objective reasons, lending institutions are best placed to assess the repayment ability of a potential consumer. This is why these institutions should also be encouraged to act responsibly when offering credit, especially to young people. A legal framework should be set up to prevent inconsiderate or even predatory lending, as well as misleading or aggressive advertising,² ensuring that lending institutions establish certain criteria that should be applied before credit is granted. This framework could provide for, *inter alia*, the temporary exclusion from access to credit of over-indebted individuals and families in respect of whom a specific debt-related procedure has been initiated. Furthermore, the responsibility of banks and lending institutions neither starts nor finishes at the point of granting a loan. Marketing of credit and the use of credit data by lending institutions are also activities that have direct influence on credit consumers' behaviour and their well-being. Establishing appropriate regulations, such as codes of conduct for the banks as well as responsible practices during all phases of the credit relationship, could significantly contribute to the prevention of over-indebtedness of individuals and families. Member states should encourage creditors to act in the interests of the general body of creditors and those of the debtor.

25. The guarantor is one of the parties in a credit relationship. When the debtor fails to meet his or her financial obligations it is the guarantor's financial interests that are at stake. It is necessary to ensure that guarantors are informed of the situation concerning the debtor's repayment abilities, especially in the case of a change of circumstances. Mechanisms should be introduced that would protect the guarantors and prevent abuse of the guarantees.

1. The term "impartial" should, at the very least, take into account situations where a conflict of interests may occur, such as when the institution that provides the service acts at the same time as a creditor of the person seeking advice.

2. For details as to the concept of misleading advertising, see European Union Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising.

Alleviation of the effects of the recovery of debts

26. An efficient enforcement system is one of the key elements of effective access to justice. With regard to the credit relationship it is important to stress the right of creditors to have their legitimate financial interests protected, where necessary, through the enforcement of court decisions.¹ However, in the case of over-indebted individuals and families the law should clearly delimit the powers of enforcement agents when enforcing a decision against such individuals and families.

27. When enforcing a decision of a judicial authority or carrying out extra-judicial debt collection, the debtors' rights and human dignity² should be duly safeguarded. Equal dignity of all human beings was confirmed to be one of the common values of the Council of Europe member states³ and should therefore be protected at all stages of debt enforcement without infringing the legitimate interests of creditors.

28. Over-indebtedness may have a strongly adverse impact on the development of children in over-indebted families. It may not only reduce the capacity of adult members of the family to re-engage in an income-generating activity but also, *inter alia*, can prevent or substantially limit the same capacity for their children. Therefore debt recovery procedures should protect the essential assets of the debtor by means of, for instance, garnishment of only a part of income in order to ensure that a fair balance is struck between the basic living needs of the debtor and his or her family and the efficiency of debt repayment.

29. Although the guarantors voluntarily take the risk of having to pay the creditors if the debtor fails to do so, their interests also need a certain degree of protection. At the very least, debt enforcement should avoid leading to the guarantor becoming over-indebted. The right to similar treatment for guarantors, including, as far as possible, the right to treatment similar to that of the debtor, should be taken into consideration at all stages of debt enforcement. Guarantors should have appropriate legal remedies to

1. Guidance can be gained from Recommendation Rec(2003)17 on enforcement.

2. Human dignity constitutes an essential value to be upheld according to the Convention on Human Rights and Biomedicine (ETS No. 164) and its Explanatory Report.

3. See the Final Declaration of the 2nd Summit of the Heads of State and Government of the Council of Europe, held in Strasbourg on 10 and 11 October 1997.

safeguard their position and to protect their interests in debt-related proceedings.¹

30. The rapid development of the international credit market has opened possibilities for obtaining credit in foreign countries. An increased risk of over-indebtedness arising from the possibility of easily obtaining a trans-frontier credit by means of the latest information technologies should be borne in mind.² In any case, it is important that member states facilitate recognition and, where applicable, enforcement of decisions concerning payment judgments and payment plans emanating from competent foreign authorities.

Rehabilitation of over-indebted individuals and families

31. Despite the preventive measures that have already been taken by some member states, some individuals and families still find themselves unable to pay their debts within the foreseeable future. Evidently, it is not possible to eradicate over-indebtedness completely without curbing access to credit. This is especially true because many borrowers become over-indebted for reasons which are not of their own making and which they could not reasonably have predicted. Over-indebted individuals and families should therefore have effective access to impartial advice and debt adjustment procedures, for which clear criteria should be established. The effectiveness of access to such procedures implies not only that they should be free of charge (or low cost) and impartial, but also easily accessible on a practical level.

32. A specific debt adjustment procedure often results in the adoption of a payment plan that is approved with respect to the borrower. A payment plan should contain the amount that the debtor is obliged to pay periodically to his or her creditors, as well as the reasonable time-frame within which these payments should be completed.³ What may be considered “reasonable” may vary from one member state to another; that is why the reference to national practices is included in the recommendation. Any payment plan, approved as the result of a debt adjustment procedure, should ensure that amounts of payment as well as the duration of the plan

1. See the case of *Bäck v. Finland*, European Court of Human Rights, Judgment of 20 July 2004.

2. See the European Union Council Directive 2002/65/EC of 23 September 2002 concerning distance marketing of consumer financial services.

3. See the Report on Legal Solutions to Debt Problems in Credit Societies, op. cit., p. 29.

do not deprive the debtor and/or his or her family of the ability to satisfy their basic needs with due regard to their human dignity.

33. Debt adjustment should cover all debts, excluding only those covered by special waivers provided for under national law.¹

34. In most member states disputes related to credit relationships in general and debt problems in particular are resolved by judicial and extra-judicial bodies with relevant competence. The increasing problem of over-indebtedness in Europe makes it necessary to find alternative solutions, where possible, for solving debt problems. Member states should establish mechanisms encouraging extra-judicial settlements between the debtor and creditor in order to find easier, faster and cheaper solutions and to avoid an increased case load for the courts with a view to keeping court proceedings as a last resort where voluntary debt settlement fails.

35. In certain cases creditors may, willingly or unintentionally, hinder conclusion of debt settlements between debtors and other creditors. The authorities should seek to limit such impediments when they are created unreasonably. What may be considered “unreasonable” may vary from one member state to another. To this end a competent body could be entrusted with the task of imposing a debt settlement when no legitimate reason is provided by the creditor for refusing to respond to the proposed debt settlement, or carrying out other measures that would encourage creditors to accept extra-judicial settlements.²

36. Over-indebtedness may result in exclusion of individuals and families from society, including a loss of motivation to be engaged in income-generating activities, exclusion from social activities, and health problems. This is not only detrimental to the individuals and families concerned, but also to society as a whole as it suffers evident financial loss.³ That is why one

1. According to the report, some states exclude maintenance payments from discharge of debts. Other states exclude taxes and fines (for example criminal and administrative penalties), payable to the state from the discharge. Quite a few states exclude educational loans from the discharge.

2. For example, giving priority to paying the costs of a court procedure out of the available assets over payments to creditors.

3. The financial losses caused to society by over-indebtedness include social security expenses, tax losses due to the over-indebted individuals being unemployed, medical costs, accommodation of those evicted from their homes, low recovery rates by creditors, the loss of members who could potentially contribute to the economy and the overall well-being of society.

of the paramount objectives of rehabilitation should be social and financial inclusion of over-indebted individuals and families.

37. One of the objectives of social and financial inclusion is to encourage over-indebted individuals to take an active part in the search for a way to settle their debts, and to seek professional counselling and advice once the process is under way and, if necessary, when it comes to an end.

38. Total or partial discharge of debts can be a useful solution in cases of over-indebtedness where other measures have proved ineffective. In some cases it may be the result of the successful fulfilment of debt adjustment plans, in other cases discharge of debts can be used as an independent solution. In all cases discharge of debts should be accompanied by measures aimed at preventing repetitive over-indebtedness, bearing in mind the specific reasons which led to the over-indebtedness in each case. When considering total or partial discharge of debts, due regard should be paid to the fact that all debts should be included, with the exception of those covered by special waivers provided for under national law.

Implementation of the recommendation

39. There are a number of strategic policy decisions that the authorities should consider taking with a view to facilitating the implementation of this recommendation. Member states should ensure that all policy decisions relating to debt management and treatment of over-indebted individuals and families are uniform and conform to an established countrywide standard, with a view to guaranteeing their equal treatment.

40. In order to tackle the problem of over-indebtedness in the most effective and efficient manner, it is important to set up competent bodies involved in the prevention of over-indebtedness, the alleviation of the effects of the recovery of debts and the rehabilitation of over-indebted individuals and families, and to ensure effective co-operation between these bodies. Along with the mainstream solutions proposed in the recommendation, alternative debt mediation could be considered.

41. The services of the competent bodies could be financed not only by the public sector, but also by lending institutions, without prejudice to the impartiality of these services. As banks and lending institutions are key actors in a credit market, their participation is essential in setting up and

implementing national policies for debt management, without excluding the participation of other creditors.

42. Public or private professionals¹ with competence in issues of over-indebtedness could significantly contribute to the prevention of over-indebtedness, the alleviation of the effects of the recovery of debts and the rehabilitation of over-indebted individuals and families. It is important, however, to ensure the quality of all services related to over-indebtedness and the impartiality of their providers, including by means of special certification by the relevant state authority.

43. States should promote awareness in relation to financial management. However, information on consumers' rights, if expressed in purely legal language, might be difficult for people with average legal and financial knowledge to understand fully. Therefore such information should not only be easily accessible, but also be presented in user-friendly and easily understandable language.

1. For example, judges, mediators, lawyers, specialised NGOs.

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