

PAYMENT ARRANGEMENTS - English Summary

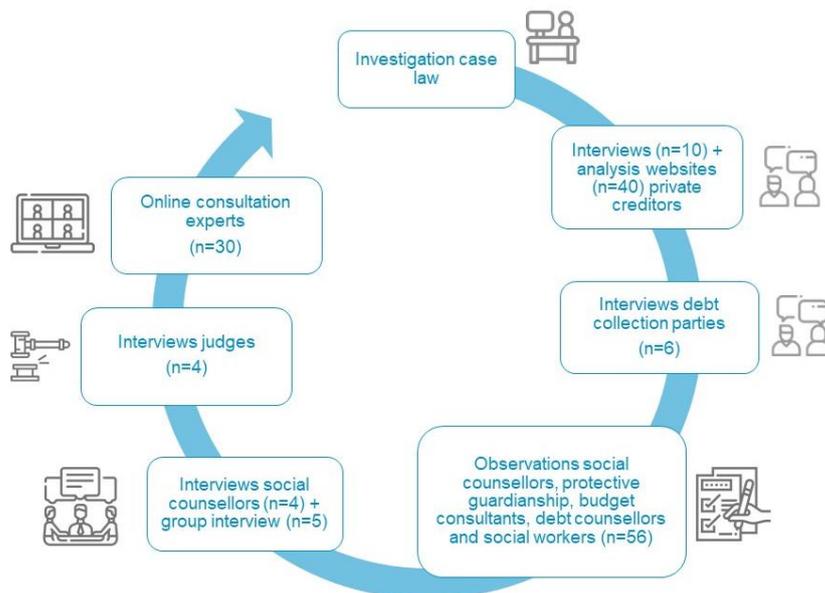
Introduction

In the Netherlands there is national social concern surrounding the issue of tackling debts. For the Dutch Cabinet, this widespread social concern is the reason to construct a 'broad approach of tackling debts' [Brede schuldenaanpak]. In their coalition agreement they state that the process of legal settlement of debts shall be improved. Meaning that creditors must first investigate all the possibilities of a payment arrangement before a case is brought to court. The Scientific Research and Documentation Centre [Wetenschappelijk Onderzoek- en Documentatiecentrum (WODC)] has commissioned the research group for Debt & Collection (Lectoraat Schulden en Incasso) at Utrecht University of Applied Sciences, Panteia and the National Organisation of Social Counsellors [Landelijke Organisatie Sociaal Raadslieden (LOSR)] to conduct research into payment arrangements in the private market (business-to-consumer).

The **aim of this research** is to delineate in what way businesses make use of payment arrangements and to explain how the use of these payment arrangements can be stimulated, before a case is brought to court. In order to achieve this aim, this study provides answers to the following central research question:

In what way and to what extent do the different types of private creditors make (feasible) payment arrangements and what possibilities are there to improve the use of these payment arrangements?

Complementary research methods have been used to answer this question. The reason behind this was to look at the research question from different perspectives. Information was collected from or about those involved and who play a central role in payment arrangements: private creditors, debt collection parties, debtors, judges, and social counsellors. The figure below broadly outlines the research design.



Each chapter focuses on a different perspective. Below are the most important insights from the various chapters. The report concludes with a number of lines of thought. These are listed at the end of this summary.

Legal framework and case law (H2)

Debtor is not entitled to a payment arrangement

In civil law, the main rule is that a debtor is not entitled to a payment arrangement. In art. 6:29 of the Civil Code [Burgerlijk Wetboek], this is worded as follows: *The debtor is not authorised to pay the amount owed in instalments without the consent*

of the creditor. There are a number of statutory exceptions to the main rule that a creditor does not have to agree to a payment arrangement:

1. Arrears in health insurance premiums;
2. Energy and water payment debts;
3. Mortgage payment debts.

Double test of reasonableness

According to the old case law of the Supreme Court, collection costs are subject to a double test of reasonableness: both incurring costs and the level of costs must be reasonable. In 2012, the Extrajudicial Collection Costs Act came into force. This act regulated the level of collection costs at a reasonable level. There is limited case law in which the incurrance of collection costs is not considered reasonable.

Regulation of extrajudicial and judicial collection

In order to incur collection costs, a creditor must send a reminder, providing a period of fourteen days for the debtor to pay. The letter must state what the amount of the intended collection costs will be. One action is therefore sufficient to be able to charge these costs.

In principle, after the collection costs have been charged, a subpoena can be issued immediately. The debtor will then be summoned to appear in court. His position is passive. The judge's order is to determine whether there is an obligation to pay. If there is, the judge will give a verdict. More than 70 percent of the debtors default if they are summoned to appear in court. The debtors that do appear in court are often hoping that the judge will be able to provide a payment arrangement. To their disappointment the judge does not have authority to do so. This is because inability to pay is not a ground for a payment arrangement.

If there is a question of unnecessarily incurring costs, then the judge does have some options to steer the action. For example, in the situation where a payment arrangement was initially agreed upon and where the creditor immediately requests a ruling after one missed payment. The judge can then decide that the costs of the proceedings at the expense of the creditor.

Costs of collection and costs of a payment arrangement

Depending on the collection measures taken by the creditor, costs will be charged to the debtor. The level of the collection costs depends on:

- The level of the principal sum of debt;
- Whether or not the creditor is liable for BTW;
- The stage of the collection process.

During the collection process, there are various moments at which the debtor can try to agree to a payment arrangement with the creditor. A creditor may not charge any costs for a payment arrangement. For example, it is not permitted to charge an amount per installment (in administration costs). In actual fact, the rules that apply to collection costs are mandatory law.

If the debtor agrees to a payment arrangement for the claim after the subpoena with the creditor, including costs of service of the subpoena and the salary of the agents, the subpoena can be removed from the agenda. This saves on court fees. If the settlement is not complied with, a new subpoena can be issued, in which case the previously incurred costs can also be claimed.

The perspective of creditors (H3)

The structure of the collection process affects the extent to which the creditor or debtor initiates a payment arrangement. For instance, the initiative for a payment arrangement with creditors who mainly send letters and e-mails usually lies with the debtor. Whereas creditors who directly call often take the initiative themselves. The awareness that money worries often contribute to people not taking action themselves raises the question to what extent creditors may and can be expected to organise the debt collection process in such a way that they are able to actively seek out the debtor.

Creditors focus collection process mainly on non-debtors

Across the board, a picture emerges of creditors who certainly take the circumstances of the debtor into account, but who nevertheless focus the processes on the 'unwilling' and therefore focus on payment arrangements that resolve the arrears within a foreseeable period of time. The primary focus on the 'unwilling' implies that in many cases the construction of the

collection process does not sufficiently match the precarious situation of the 'unable' and does not offer them sufficient possibilities to achieve a feasible, realistic payment arrangement.

The consideration of a creditor about how pro-active he must be in coming to an agreement and how tailored the measures must be to the debtor in a bulk process seems to depend on three factors:

- Whether or not the debtor has a duty of care;
- The amount: the higher the amount, the more pro-active and the more tailored;
- The impact of the collection measures on the debtor: the greater the impact, the more pro-active and the more tailored the measures are.

Causes of payment arrangement failure

Many payment schedules fail because debtors have too many payment schedules running side by side. The most important causes for the failure of an arrangement are:

- creditors have limited insight into the payment capacity of debtors;
- debtors indicate an amount that is higher than their budget allows;
- debtors agree to an amount that is higher than their budget allows, because the creditor applies a minimum amount and/or maximum term;
- debtors make an appropriate arrangement and then there is a new creditor who is unwilling or unable to wait until the current arrangement has ended.

In addition, creditors often get in each other's way when it comes to collecting claims, and the consequence is that on the one hand they want to offer tailor-made solutions in all sorts of ways, but on the other hand they just want a payment (regardless of the debtor's capabilities).

Technological developments: data analysis increasingly important

An important common denominator in the field of anticipated technological and digital developments in the debt collection process is that creditors will make (more) use of data analysis. Data analysis offers creditors the opportunity to segment debtors. It will then be easier to provide different groups of debtors with their own collection process. However, the question remains: on the basis of which data is a debtor put into a specific group and how much room and interest is there among creditors to transfer debtors to another group after a certain classification.

The question that remains...

An important question remains: *To what extent are all creditors collectively prepared to settle if a debtor simply does not have enough money to pay all creditors in the foreseeable future?*

The perspective of debt collection parties (H4)

Handling of collection agencies and bailiffs strongly determined by agreements with clients

Collection agencies and bailiffs argue that their actions are largely determined by the agreements they have with their clients. The insights from the previous chapter (creditors) therefore apply to debt collection agencies and bailiffs' offices. For debt collection agencies and bailiff's offices, the greater the impact of a non-paying client on the creditor, the less leniency there is usually from the creditor to adopt a pro-active and tailor-made approach.

Technological developments: smaller agencies make less use of data analysis

The (anticipated) technological developments as described in Chapter 3 also apply to the larger collection parties with a portfolio of many large clients. Smaller agencies with smaller clients make less use of data analysis. The larger agencies with larger, institutional clients are more likely to use technological advancements and also do so in practice (also because they can produce more volume).

The debtor's perspective (H5)

Intermediary has a bridging function and can play an important role in the creation of a payment arrangement.

The possibility of making a payment arrangement with creditors is not self-evident for a debtor. The intervention of intermediaries - social counsellors, protective guardianship, budget consultants, debt counsellors and social workers - appears in many cases to lead to a feasible payment arrangement being made (after all). An intermediary can fulfil a bridging

function between creditor and debtor and in these situations plays an important role in arriving at a feasible payment arrangement. It therefore pays off for debtors to seek help. The downside is the realisation that there is a large group that is not looking for help and therefore did not get the arrangement that was possible. However, the use of intermediaries is not a panacea. It is not feasible for intermediaries such as social counsellors, debt counsellors and budget consultants to assist anyone in a vulnerable position.

The perspective of social counsellors (H6)

More tailor made options by creditors, but still many creditors work with minimum amounts

Despite the movement towards more tailor made arrangements, there are still many creditors who ask for minimum amounts and terminate payment arrangements if an instalment is missed.

Creditors getting in each other's way messes up a payment arrangement

Most debtors seeking help from social counsellors are dealing with more than one creditor. As a result, multiple parallel payment arrangements have to be made. Especially when a debtor has a small budget, multiple payment arrangements require creditors to be prepared to consider each other's positions and to be satisfied with the possibilities given to them considering the budget. It is currently still the case that the creditors who push the hardest and put the most pressure on the debtor get the most.

Payment arrangement an especially good instrument in non-problematic debt situation

A payment arrangement as we now know it is a good instrument in a situation where there is a debtor with one or a few creditors. In a situation where there are many creditors and/or where there is a problematic debtor. It is doubtful whether the current system of payment arrangement is appropriate.

The perspective of the judiciary (H7)

The judiciary observes that 70 to 80 percent of debtors are absent after a subpoena. The debtors who do attend the judicial hearing are often misinformed. They expect that the creditor or bailiff will also be present and that the judge will be able to help them with a payment arrangement.

The possibilities for the judge to mediate in a payment arrangement are very limited. An extra hearing has to be scheduled where the creditor is present, which leads to a higher court costs order (extra point liquidation rate). This while the payment arrangement can only take place with the consent of the creditor. The four judges interviewed believe that, prior to the subpoena, the amicable process should be utilised better. Linking the right to a payment arrangement to the right to collection costs can stimulate this. The possibility to leave the costs of proceedings at the expense of the creditor if the amicable procedure is insufficiently utilised gives the judge an extra instrument to steer this process. Opinions differ as to whether it is desirable for the court to be able to impose a payment arrangement by judgment. The question here is whether the judge has sufficient insight into the debtor's financial situation to make a well informed decision.

Examples of compelling good practices (H8)

Those involved are looking for ways to improve payment arrangements

Creditors, bailiffs, debt collection agencies and courts are looking for ways to improve payment arrangements for debtors who need payment arrangements. The efforts vary from paying attention to communication to specific groups such as the illiterate in order to emphasize the urgency of finding a solution from the due date. To the pilot programme of an insurer and the municipality of Amsterdam in an attempt to provide debtors with payment arrangements at a lower cost.

Despite new initiatives and pilot programmes, there is a need for additional good practices

The good practices bring relief and are an improvement and these therefore deserve full attention in order to be used more widely wherever possible. At the same time, there appears to continue to be a need for additional good practices that will help to speed up action by debtors, make it easier to understand what amounts they may be able to forgo and, above all, how to manage the accumulation of more claims put on a debtor. The initiative of bundling the claims of more creditors and payment is tailored to the urgency of the claim is very promising in that regard.

The impact of corona (H9)

Large impact corona crisis expected on debt problems

It is not yet clear how the corona crisis will affect the financial position of households, but in many places in society there is great concern about the impact of the Corona crisis on debt levels. The first indications show an expected major impact. For example, one in ten households has seen their income fall as a result of the outbreak and a quarter are worried about it decreasing in the future. For the time being, the groups most frequently affected by a drop in income are people on lower incomes, flex workers, self-employed persons and young people. If a large and deep recession is indeed looming, a smoothly functioning system of payment arrangements seems even more important in order to prevent households with minor payment problems from becoming so trapped that their situation eventually becomes problematic.

Creditors adjust collection procedures to a limited extent since corona crisis

In general, creditors and collection parties have limited adjustments to their collection procedures. The obligation and pressure on debtor to pay remains. Some creditors have actually adjusted their policy, such as adding extra buffer days to give debtors more room to pay or by offering the possibility of a break in payments. Others have not made any changes or offer a little more tailor made solutions than before.

Conclusion (H10)

Payment arrangements are not always an appropriate solution

One in five households has payment problems. More than half of them are in arrears. In this situation payment arrangements are an appropriate solution to prevent further escalation of payment problems, provided that the agreed upon instalments fit into the debtor's budget. Considering the other half of households, the situation is more complicated. For this group, payment arrangements are a very important means of preventing escalation with regard to specific claims. Think, for example, of preventing a shut off of energy or an eviction. At the same time, the debt burden is often so high that further escalation is often unavoidable if creditors are unwilling to agree to (very) low instalments and a (very) long arrangement period. From the point of view of the debtor, it is therefore crucial that creditors are always prepared to agree on instalments that fit their budget. If creditors do want to agree a payment arrangement but do not take the available budget into account, then a payment arrangement is often primarily a means to buy time and not to prevent escalation in the sense of an increasing debt burden. However, whether a debtor gets a payment arrangement depends on the goodwill of the creditor. In principle, debtors are *not entitled* to a payment arrangement. Collection legislation mainly provides rules for regulating under which circumstances creditors may charge costs and take coercive measures. The legislation gives no weight to the question of whether a debtor is unwilling or unable to pay.

Creditors deal with payment arrangements in very different ways

The fact that debtors are not entitled to a payment arrangement means that it is up to the creditors to determine whether, and if so under what conditions, they enter into an arrangement. The present study shows great diversity in both areas. In order for creditors, who do enter into payment arrangements, to understand what those arrangements yield, it is important to look at the entire debt collection process. After all, a payment arrangement is always part of a larger process. An analysis of debt collection processes, and within them the role of payment arrangements, provides insight into the observation that creditors make very different choices. An analysis of the debt collection processes and the place of payment arrangements within them provides three important insights:

- 1. The structure of the debt collection process is reflected in the course of the payment arrangements.*
- 2. Most debt collection processes, despite the recognition that there exists a group of debtors that is 'unable' to pay, are designed based on the 'unwilling' to pay.*
- 3. The amount of the claim and the impact of the collection on the debtor are reflected in the pro-activity on the part of the creditor and the extent to which tailor made arrangements are offered.*

Overarching insights: 9 important observations

The aim of the study underlying this report is to identify the extent to which the various types of private creditors make (feasible) payment arrangements. In that context, the considerations that creditors may or may not make in order to go to court were also examined, as well as how the judiciary deals with payment arrangements rejected by creditors. The answer to the main question is that a payment arrangement is not self-evident and that creditors apply this solution very differently.

Debtors lack clear and unambiguous practice that shows (based on previous experiences) what they can count on. The Rutte III Cabinet coalition agreement expresses the ambition that the legal settlement of debts should be improved by having creditors first examine the possibilities of a payment arrangement before they go to court. To realise this ambition, the following overarching insights are relevant to consider:

1. In spite of the inability to pay, claims are still (considerably) onerous

Anyone who does not pay, will at some point have to deal with (substantially) rising costs. Debtors who acknowledge that they have to pay an amount and can prove that they do not have the means, will almost inevitably see the outstanding amounts increase.

2. Debtors often adopt a passive attitude in a collection process.

For many debtors, if they are unable to pay an invoice (in full), they will not take action. It is not self-evident for those debtors to transfer part of the amount that can be missed. Nor is it self-evident to actively seek out creditors to let them know that they don't have enough money to pay. Inaction raises questions with creditors about how badly or how important it is for a debtor that payment is not made. Out of shame and stress about their financial situation, people have a tendency to live from day to day and not make contact. Sometimes they may also hope that a claim 'passes' by. In addition, previous negative experiences with one creditor do not invite model behaviour with the next creditor.

3. Creditors have very different demands and apply very different conditions

Many debtors have to deal with several creditors. This can put them in a confusing situation. Where one creditor is not prepared to make a payment arrangement at all, the other wants to offer a generous tailor made solution. Certainly in the case of problematic debts, it is often impossible for debtors, even if all creditors would like to make a payment arrangement, to arrive at a total of arrangements that are attuned to one another. Debtors who have to deal with more than one creditor are not able to oversee what is expected and demanded of them. In addition, they often lack knowledge about what is or is not allowed in a debt collection process. For example, many debtors do not know how much extrajudicial costs a creditor may charge and under what circumstances. Debtors also often do not know that creditors are not allowed to charge costs for payment in instalments in payment arrangements and that they do not have to cooperate to a payment arrangement if the income has already been seized.

4. Creditors often lack insight into the debtor's financial position

A growing group of creditors is looking for opportunities to provide tailor-made solutions. An important obstacle in this respect is that they often have no idea what the debtor's circumstances are. They have no insight into the cause of the financial problems, no insight into the income, no insight into the assets and/or the possibilities to pay the debt by, for example, working (more). The lack of this insight makes it complicated and time-consuming for creditors to reach an appropriate settlement. Certainly if the outstanding amount is low, the costs of mapping out the situation soon exceeds the outstanding amount.

5. Many payment arrangements fail due to too many arrangements running alongside each other

Payment arrangements often fail due to a lack of control over the available budget. In order to achieve a sustainable payment arrangement, this requires that the instalment amounts of the payment arrangement are not only in proportion to the income and fixed costs, but also to the other payment arrangements (and any attachments). Many debtors mention an amount that is too high and does not fit with their monthly budget. In other cases, debtors have learned from previous experience that many creditors apply minimum instalment amounts and take this as a given before they actually know whether the creditor in question also applies such a minimum. A second bottleneck causing many payment arrangements to fail is that many creditors apply minimum amounts or a maximum period within which the claim has to be paid. These conditions do not take into account the debtor's budget. A third bottleneck is that once a payment arrangement has been agreed upon there may be changing circumstances. If there are more creditors, it is impossible for a debtor to predict which creditor will take which collection step and when. Concretely, this may result in a debtor, for example, just having made three payment arrangements with three different creditors with great difficulty when a fourth creditor knocks on the door. An extra complicated, but also very common circumstance is that at some point a creditor will seize the income. In the case of a seizure of income, the debtor can only hope that the amount withheld has been properly calculated. Assuming that the amount is correct, there is no longer any room for the debtor to make a payment arrangement with another creditor in

addition to the seizure of income. In this situation, the debtor has no choice but to ask the new creditor to wait until the amount has been recovered.

By far the majority of creditors do not want to wait for this. As a result, the debtor then agrees to a settlement and fails to comply with the conditions or agrees to a settlement and can only wait until the new creditor also obtains a decree and joins the seizure (with all the additional costs and therefore an extension of the duration of the seizure).

6. There are counterincentives to make appropriate payment arrangements

For many creditors, the incentives to arrive at an appropriate payment arrangement are limited. Of course it is important for creditors to agree on arrangements that are complied with by the debtor. But at the same time, creditors who have started to be more flexible towards the debtor in recent years have noticed that the mutual attitude of creditors is still so diverse that the flexibility they provide is often immediately taken up by another creditor who puts more pressure on the debtor. In that case, the space offered to provide tailor-made solutions is immediately taken up by another creditor and full payment of the whole claim takes longer and the debtor is still stuck in an impossible position. In this context, social debt collection has a meagre net result. The problem here is that creditors lack a level playing field, which means that, in addition to the moral and social conviction that it is important to provide tailor-made solutions for debtors, it is also important to all creditors that they see actual return of these measures. This last point seems to be more relevant the lower the amount and certainly if it is a one-off amount to be paid.

7. If an intermediary is involved, then sometimes there are more possibilities

A small proportion of debtors seek help from third parties such as social counsellors, protective guardianship, budget consultants, debt counsellors and social workers if they hit trouble with their finances. An analysis of the experiences of these intermediaries when they ask creditors for a payment arrangement shows that creditors are quite often prepared to grant a payment arrangement after an initial rejection. This certainly does not always happen. These intermediaries also come up against creditors who do not cooperate in payment arrangements at all or who apply minimum amounts/maximum periods. A significant proportion of the creditors who were willing to make a payment arrangement after the intervention of the intermediary first wanted to know about their payment capacity. Debtors are by no means always able to give creditors a clear insight into their situation. A substantial proportion of debtors have to deal with (a combination of) disadvantages, such as low literacy, a slight mental handicap, and social and health problems. In these circumstances, it can be quite a challenge for a debtor to provide clear insight into his or her payment capacity. At the same time, it is also understandable from the creditors' perspective that they want to have insight into the debtor's situation (certainly in the case of higher amounts). Creditors are usually prepared, if approached by an intermediary, to make a payment arrangement for claims below €1,000. That in itself is a positive signal, but it also has a downside. Namely, the question can also be raised by the creditor whether the group with higher arrears does not see the need for a payment arrangement. The positive conclusion is that it is advantageous for debtors to seek help. The downside is the realisation that there is a (very) large group that is not looking for help and therefore did not get the arrangement that was possible.

8. Debtors fail en masse if the creditor requests a court hearing

After a subpoena, 70 to 80 percent of the debtors are absent at the subsequent court hearing. The judiciary is worried about this. At the same time, there is not much to gain for debtors to come to court. The judges are not only concerned about the large group of debtors who are absent, but also about the way in which the process of going to court is organised. For example, debtors are invited by means of a subpoena that is often not understandable to them. The group that does come to the hearing is then often overwhelmed by the setting in which they end up: a full hall with a lot of debtors and a judge who does not check whether you could pay or not, but a judge who just formally checks whether you have to pay. Many debtors come to the hearing in the hope that they will get a payment arrangement there and are somewhat disappointed when it turns out that no payment arrangement is possible and the claim has increased enormously in a matter of minutes. It is an experience that, when the next opportunity arises, usually doesn't invite you to come again.

9. The position of the judge in payment arrangements is passive

The judiciary is bound by the legal framework provided by Article 6:29 of the Dutch Civil Code: its role in payment arrangements is passive. In that context, the judge can usually only do but grant judgment. Judges are aware of their passive role and do look for any possibilities that they have within the confines of the law. In addition to the aforementioned avenues, they also try to question bailiffs on the procedural attitude of their clients. Judges do not always understand why no payment

arrangement could be made. When asked why no payment arrangement has been made, bailiffs often answer that their client uses procedures such as a minimum amount or maximum duration. This means that the room within the debtor's budget to pay the claim is subordinate to the standard rule of the creditor. In those cases, the judges quickly realise that the end result will be that the height of claim will increase further and further collection will only become more complicated.

Lines of thought (H11)

In order to improve the use of payment schemes, six lines of thought were developed and tested during consultation sessions with experts:

1. **Adjust Article 6:29 of the Dutch Civil Code:** give debtors a legal right to a payment arrangement.
2. **Linking the right to a payment arrangement to the right to collection costs:** if a creditor charges collection costs, then a right to a payment arrangement is automatically created for the debtor.
3. **Emergency stop, fair sharing of repayment capacity:** allow debtors to seek help from several creditors so that creditors each receive a share of the repayment capacity and appropriate arrangements can be made to that end
4. **Increasing the court fees:** by increasing the court fees, creditors incur more costs to litigate and have a greater incentive to reach a payment arrangement.
5. **Provide the possibility to order litigation fees to be payed if legal proceedings are started too fast:** this introduces an incentive for creditors to try to reach a payment arrangement.
6. **Only reach a debt settlement for the principal amount:** this introduces an incentive for creditors to limit extra costs as much as possible and, as a derivative, an incentive to make payment arrangements.