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Consultation Response:

FCA Breathing space regulations: changes to our handbook

Response by the Money Advice Trust

Date: January 2021

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Introduction

About the Money Advice Trust

The Money Advice Trust is a charity founded in 1991 to help people across the UK tackle their debts and manage their money with confidence.

The Trust's main activities are giving advice, supporting advisers and improving the UK's money and debt environment.

In 2019, our National Debtline and Business Debtline advisers provided help to more than 199,400 people by phone and webchat, with 1.97 million visits to our advice websites.

In addition to these frontline services, our Wiseradviser service provides training to free-to-client advice organisations across the UK and in 2019 we delivered this free training to over 981 organisations.

We use the intelligence and insight gained from these activities to improve the UK's money and debt environment by contributing to policy developments and public debate around these issues.

Find out more at www.moneyadvicetrust.org

Public disclosure

Please note that we consent to public disclosure of this response.

Introductory comment

We welcome the opportunity to comment on the proposed changes to the FCA handbook as a result of the breathing space regulations.

- ✓ We are in broad agreement with the proposed changes to the rules as relating to persistent debt and overdrafts.
- ✓ We would appreciate further clarity within the guidance as to the status of notices under the Consumer Credit Act 1974.
- ✓ We would welcome clarity by way of guidance as to whether entering a consumer into breathing space constitutes “*advice*” under CONC 8.3.2 R. We would like to see a definitive statement that entering into breathing space does not constitute “*advice*”.
- ✓ The paper states that the FCA does not have powers to supervise compliance or enforce against the breathing space regulations. We are concerned that this leaves the onus on debt advisers to raise systemic non-compliance with breathing space applications by individual firms. Whilst it is reassuring to know that “*systematic non-compliance with the Regulations is likely to be of interest*” to the FCA, this does not help resolve the stress and anxiety for individual consumers whose creditors fail to cooperate.
- ✓ We would like to see a specific mechanism put in place for advisers to report breathing space breaches, and a commitment from the FCA to take action promptly and decisively in such cases.

Responses to individual questions

Question 1: Do you have any comments on our proposals for the consumer credit guidance?

We would agree that it makes sense that firms should be treated as complying with the persistent debt rules if they have implemented breathing space protections.

It also makes sense for firms to put a hold on interventions under the repeat overdraft use rules whilst complying with breathing space protections.

It would be confusing for consumers to receive communications urging them to seek debt advice and to deal with their debts, when they have already done so by applying for breathing space.

Question 2: Are there any other consumer credit rules or guidance that we should consider amending?

We would appreciate further clarity within the guidance as to the status of notices under the Consumer Credit Act 1974. It would appear that these will be sent out as required under the Act, as the FCA has no power to suspend these notices due to breathing space. This is unfortunate as the notices are likely to be confusing for consumers and cause unnecessary stress and anxiety. It would be useful for this to be made very plain in guidance.

We recognise that there is an overlap between the requirements to suspend recovery of a debt for a “*reasonable period*” under CONC 7.3.11R with the requirements of breathing space. It makes sense to allow firms to take into account the breathing space moratorium when assessing a reasonable period for someone to seek debt advice and develop a repayment plan. However, we would very much like to see guidance making it clear that firms should be flexible where a consumer comes out of the 60 day breathing space but is on track to enter a debt option and requires a bit more time.

The paper states that the FCA does not have powers to supervise compliance or enforce against the breathing space regulations.

“1.17 We do not have powers under the Regulations to supervise compliance or enforce against the Regulations. However, systematic non-compliance with the Regulations is likely to be of interest to us as it may call into question whether a firm is meeting the specific rules in CONC, the suitability requirements set out in our Threshold Conditions or breaching one of the principles, such as Principle 6, treating customers fairly.”

We are concerned that this leaves the onus on debt advisers to raise systemic non-compliance with breathing space applications by individual firms. We envisage cases where firms systematically ignore the breathing space regulations or make frivolous or spurious requests for review to debt advisers and ultimately the courts.

Whilst it is reassuring to know that “*systematic non-compliance with the Regulations is likely to be of interest*” to the FCA, this does not help resolve the stress and anxiety for individual consumers whose creditors fail to cooperate. We are very familiar with the process for reporting bad behaviour of individual firms to the FCA. It can be a very lengthy process before the FCA decides to take action against a business practice or an individual firm. This does not provide redress to any individual consumer who has been affected adversely by a firm’s behaviour or non-compliance. We would like to see a specific mechanism put in place for advisers to report breathing space breaches, and a commitment from the FCA to take action promptly and decisively in such cases.

We note that it has been decided that credit reporting for individual credit agreements affected by breathing space will continue as normal. In the absence of specific reporting flags or other mechanisms, it is vital that the FCA monitors how breathing space affects credit reference agency reporting in practice. As the FCA regulates credit reporting agencies, it needs to assess whether consumers are treated fairly by their creditors and how the credit reporting system is impacted as a consequence of breathing space.

Question 3: Do you agree that no changes are required to the debt advice rules or guidance in CONC 8?

We note that the FCA has decided that the debt advice rules under CONC 8 are sufficient and that no changes are necessary in relation to the rules on the definition of a debt solution, advice in a durable medium and warnings of changes to contractual payments.

However, we would like the FCA to take a further look at CONC 8.3.2 R. This is set out below.

“8.3.2.R

A firm must ensure that:

(1) all advice given and action taken by the firm or its agent or its appointed representative:

- (a) has regard to the best interests of the customer;
- (b) is appropriate to the individual circumstances of the customer; and
- (c) is based on a sufficiently full assessment of the financial circumstances of the customer;

(2) customers receive sufficient information about the available options identified as suitable for the customers' needs; and

(3) it explains the reasons why the firm considers the available options suitable and other options unsuitable.”

We would welcome clarity by way of guidance as to whether entering a consumer into breathing space constitutes “advice” under this rule. We would like to see a definitive statement that breathing space does not constitute “advice” as in some, if not all, circumstances, the decision to enter breathing space will be taken in order to allow further time to carry out “a sufficiently full assessment of the financial circumstances of the customer”. Subsequently, this enables the adviser to provide “sufficient information about the available options identified as suitable” and so on.

If breathing space itself is treated as offering advice, then much of the detailed debt advice process would need to be carried out before the protections of breathing space could be sought. This would potentially undermine the policy intention of the breathing space regulations. Regulation 24 of the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 considers eligibility for a breathing space moratorium.

“(5) For the purpose of paragraph (4)(b), when considering whether a breathing space moratorium is appropriate the debt advice provider—

(a) must consider whether—

- (i) the debtor has sufficient funds or income to discharge or liquidate their debt as it falls due,
- (ii) it would benefit the debtor to enter into a debt solution,
- (iii) the debtor may be eligible to enter into a debt solution during a moratorium or as soon as reasonably practicable after the moratorium ends, and
- (iv) the moratorium period is necessary in order for the debt advice provider to assess which debt solution would be appropriate for the debtor, to advise the

debtor on which debt solution would be appropriate or for a debt solution to be put in place,”

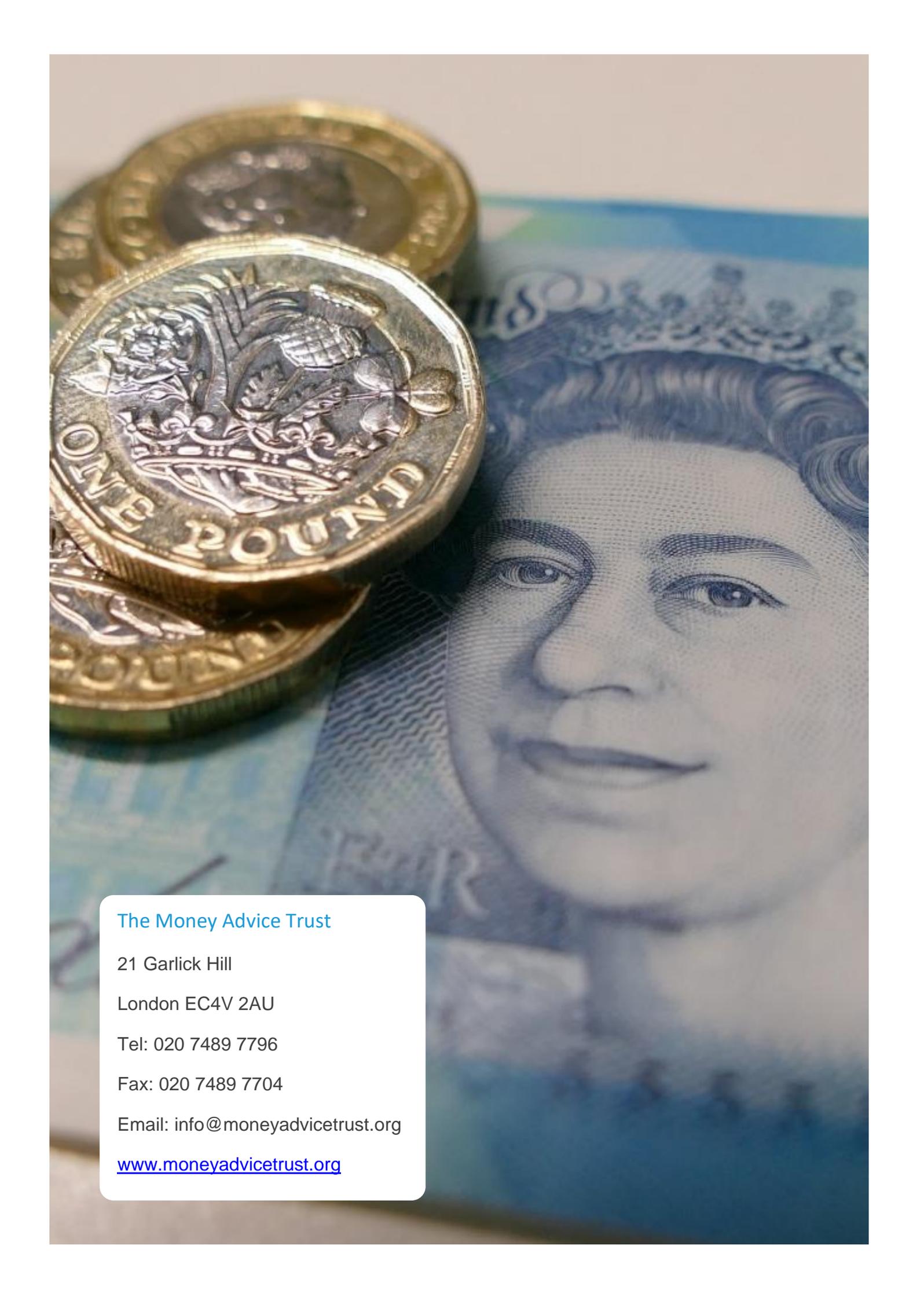
This regulation suggests that the breathing space moratorium can be seen as a precursor to the full advice process taking place. We would like to see further clarity on this point in guidance.

Question 4: Do you agree that no changes are required to the rules or guidance in MCOB?

We note that the FCA has concluded that firms will understand the intended meaning of arrears despite the different definition of arrears used in the breathing space regulations and the FCA Handbook. We would only suggest that this is kept under review in case problems arise in the practical application of the regulations by firms in the future.

For more information on our response, please contact:

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