

christians
against
poverty

CAP

CP20/21

Breathing Space regulations: changes to our Handbook

***CAP's official response to the Financial Conduct
Authority's consultation***

October 2020

always hope.

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| Summary | 3 |
| Questions | 4 |
| About Christians Against Poverty (CAP) | 8 |
| Requests for further information | 8 |

Summary

- Christians Against Poverty (CAP) supports the proposed changes to the consumer credit guidance, but it should be stipulated that a moratorium should be considered by creditors as a sign of actual payment difficulties.
- The Financial Conduct Authority (FCA) should keep the consumer credit rules and guidance under review and determine whether further changes are necessary depending on the practices that creditors adopt once the Regulations come into effect. Particular attention should be paid to ensure that firms are acting in accordance with CONC 6, as intended, once a moratorium period ends, to communications sent to the debtor during the moratorium period and to the number of creditor applications made to court for a review of a moratorium.
- CAP agrees that a moratorium does not meet the Handbook definition of a 'debt solution', but for clarity this should be made explicit in the rules.
- Further guidance is needed to clarify how the term 'advice' in the Handbook and various provisions in CONC 8 align with the Regulations. It is understood that the term 'advice' does not include advice given as to the suitability of a moratorium, but ambiguity remains about the expectations on debt advice firms in this context in relation to CONC 8.6, CONC 8.3.4 and CONC 8.3.7(2).
- CAP agrees that no further changes are required at this stage to the rules or guidance in mortgage conduct of business (MCOB) regulations. It may be necessary to review this again depending on the practices that mortgage lenders adopt once the Regulations come into effect.

Questions

Q1: Do you have any comments on our proposals for the consumer credit guidance?

CAP supports the FCA's proposed changes to the consumer credit guidance. The proposed clarifications appear to be helpful for consumer credit firms to understand the implications of a moratorium and to comply with the FCA's rules. It is imperative that this position is kept under review, as the actual practice of creditors in response to the moratorium will be key in determining whether the intentions of these rules and guidance is upheld. For example, whether reasonable time is actively considered and given where it would be appropriate to support a customer in financial difficulty in making progress towards a debt solution.

Further to the proposed changes in CONC 5D.3.3G (5), it would be beneficial to stipulate that a moratorium should be considered a sign of actual payment difficulty. As such, once the moratorium period ends, creditors should be expected to take a proactive approach in line with the guidance in CONC 5D.3.3G. For those who had not previously shown signs of possible payment difficulty, it could still be valuable to receive information about not-for-profit debt advice agencies and the risks of escalating debt following a breathing space. This would act as an additional prompt for them to take further steps to resolve their financial difficulties if they have not entered a solution following the moratorium period.

Q2: Are there any other consumer credit rules or guidance that we should consider amending?

On review of the expectations for consumer credit firms set out in the Treasury's draft creditor guidance, it is CAP's view that it should be stipulated in the FCA's Handbook that a moratorium is a sign of actual payment difficulties. This clarification would address the following inconsistencies:

- **Additional debts identified by a creditor**
On receipt of notification of a moratorium debt, a creditor must conduct a reasonable search of their records for any additional debt(s) owed by the debtor, and inform the debt advisor if an additional debt is found. If this notification happens more than 45 days after the moratorium started, the debt advisor may not consider it appropriate to add the additional debt into the breathing space for the remaining period. If this is the case, the creditor is free to continue action regarding the debt.

In this scenario it would be contrary to the Treating Customers Fairly rules for the creditor, knowing that the customer is in a moratorium, to continue debt collection for the additional debt. The FCA should clarify that the existence of a moratorium is a sign of actual payment difficulties, and creditors should therefore be applying CONC 6 and 7 business practices and forbearance, and

pausing debt recovery action, whether or not they have received formal notification for the additional debt identified.

- **Payment of ongoing liabilities**

Aside from the suspension of interest, the debtor's legal obligation to pay their debts and liabilities is unaffected by a moratorium.

There is ambiguity as to how suspending active pursuit of a debt for a reasonable period (as per CONC 7.3.11R) interacts with the firm's right to request that a breathing space is cancelled, if contractual payments are missed, (as set out in the Regulations). It would be helpful for the FCA to issue further guidance on this point, to stipulate how the forbearance expected under CONC rules when a debtor is in payment difficulties aligns with a creditor's right under the Regulations to request that a breathing space ends if payments are missed.

In addition, CAP encourages the FCA to keep the following areas under review to determine, depending on the practices that creditors adopt once the Regulations come into effect, whether further consumer credit rules or guidance are necessary:

- Whether firms are giving adequate consideration to additional business practices and forbearance needed following the end of a moratorium period. Existing CONC 6 and 7 rules should be sufficient, but this should be kept under review in case some firms begin escalating debt collection as a matter of course, if no formal solution is in place at the end of a moratorium.
- Whether any communication sent to the debtor causes undue worry; for example, continuation of monthly statements. In CAP's experience, even the simplest pieces of communication from a creditor can cause worry and additional stress for debtors in the early stages of the advice process.
- Whether firms abuse their right to apply to the court for a review of a moratorium without just cause. It is CAP's view that this would bring undue harm for debtors, and constitute unreasonable behaviour under CONC 6 and 7.

Q3: Do you agree that no changes are required to the debt advice rules or guidance in CONC 8?

Definition of debt solution

CAP is in agreement that a moratorium does not meet the Handbook definition of a 'debt solution'. However, it would be preferable, for the sake of clarity, for the Handbook guidance to be amended to make this absolutely clear in the rules. While it would be acceptable to expect firms to interpret the term in this way - and understand a moratorium to be distinct because it does not seek to discharge liability or liquidate debts - there are no disadvantages to stipulating this in the Handbook, and the benefits would be to avoid any potential confusion arising.

Definition of advice

Using 'advice' as a catch-all term, as it is currently in the Handbook, creates significant ambiguity. More clarity is needed within the Handbook about which parts of CONC apply to debt solution advice and which apply to broader advice.

A better approach, consistent with the effect of the Regulations, would be for the FCA to clarify within additional guidance to CONC 8 which parts apply specifically to debt solution advice, and clarify that the broader use of 'advice' does not include advice given as to the suitability of a moratorium (as defined by Regulation 23(7)). This is important to address the following sources of ambiguity within CONC 8:

- **CONC 8.6:** It cannot be assumed that CONC 8.6 rules, which require the advisor to inform the debtor of potential consequences from changes to contractual payments, apply to breathing space advice as this is not within the current definition of 'advice' in the Handbook. As such, with the definition of 'debt solution', even if the FCA does not consider a change to the rules to be necessary, the addition of guidance on the FCA's views as to how CONC 8.6 interacts with the Regulations in the rules would be helpful for debt advice firms to avoid potential confusion arising.
- **CONC 8.3.4:** The intention behind CONC 8.3.4, when setting out a list of required information to be included in any advice offered to debt management clients, was not intended to cover potential clients seeking advice on a moratorium. Interpreting 'advice' to include moratorium advice stretches the definition of the term too far, with unintentional and confusing effects. The definition of 'advice' under Regulation 23(7) is clearly limited to advice as to the suitability, conditions and consequences of a breathing space moratorium for the debtor. To extend CONC 8.3.4 to cover such advice, would require advice on the suitability of a moratorium to include matters which are clearly irrelevant, and only relevant to advice relating to debt solutions. Debt advice firms may well need to provide such advice, depending on the circumstances of the client - however, this is linked to their usual activity of providing debt advice, and not in respect of advising on the suitability of a moratorium. The only relevant provision might be the requirement to ensure such advice is provided in a 'durable medium' - however, this goes further than the requirements of Regulation 23(2) which permits moratorium advice to be given 'in person, over the telephone or by electronic means'.
- **CONC 8.3.7(2):** CONC 8.3.7(2) requires certain investigations to be undertaken before giving 'advice'. If 'advice' included advising on the suitability of a moratorium, it would, on the face of it, require firms to only give moratorium advice after a full investigation of the client's financial position (including income and expenditure), personal circumstances, and foreseeable changes of circumstances. This would be counter to the intention of a moratorium, which is intended to give the debtor space to gather information and take advice on appropriate debt solutions. In addition, where a client is clearly unsuitable for a moratorium (for example, they are currently subject to a Debt Relief Order), it will not be necessary to conduct full investigations in order to properly advise the client that a moratorium is unsuitable. It is the intention of the Regulations to ensure that the moratorium takes effect as soon as possible once a client has come to a debt advice firm for assistance, to suspend creditor action while debt

advice is being prepared. It, therefore, does not make sense to tie advice on the suitability of a moratorium, which may be done at an initial stage of the client's journey with the advice firm, with the full debt advice on debt solutions, which should happen at the end of the moratorium period.

It is noted that the FCA is rightly concerned with the ability of the debt management sector, particularly the not-for-profit debt management sector, to provide adequate capacity to meet the rising demand for debt help - especially with the anticipated effects of the Covid-19 pandemic that the Money and Pensions Service (MaPS) has forecast towards the end of 2021. The not-for-profit debt management sector has limited resources and, therefore, anything the FCA can do to ensure the Handbook rules are as clear and unambiguous as possible on debt management firms' responsibilities under the new Regulations (which will directly affect the resources required) will be very welcome.

Q4: Do you agree that no changes are required to the rules or guidance in MCOB?

We do not consider that further changes to the rules or guidance in MCOB are required at this stage. It may be necessary to review this again depending on the practices that mortgage lenders adopt, once the Regulations come into effect.

About Christians Against Poverty (CAP)

Christians Against Poverty (CAP) is a Christian charity tackling poverty in communities across the UK through free debt help and local community groups. CAP provides award-winning free debt help through local churches. Each church's CAP Debt Centre offers emotional and practical support, while our head office team in Bradford provides bespoke debt advice and a plan to help people get out of debt.

CAP also offers community groups dedicated to tackling poverty at the root. These are run through local churches, and cover topics such as, interview skills, applying for a job and writing a CV, breaking free from dependencies or overcoming a habit, how to budget, making money go further and key life skills.

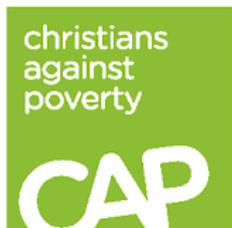
Requests for further information

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