

BREATHING SPACE REGULATIONS

The Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 (the "**Breathing Space Regulations**") came into force on Tuesday 4 May 2021. Broadly, the new regulations provide individuals in the UK experiencing debt problems legal protections against their creditors, and primarily affect most types of personal debts and particularly unsecured debts (although arrears amounts under secured debts such as mortgage loans are also affected).

The government guidance for creditors can be found [here](#).
The full text of the Breathing Space Regulations can be found [here](#).

General

In summary, the Breathing Space Regulations provide for 2 types of breathing space:

- Standard breathing space – Available to anyone with problem debt. Legal protections from creditor action for up to 60 days. The protections include pausing most enforcement action and contact from creditors and freezing most interest and charges on their debts.
- Mental health crisis breathing space – Only available to someone who is receiving mental health crisis treatment. Has stronger protections in comparison to standard breathing space. Lasts as long as the person's mental health crisis treatment, **plus** 30 days (no matter how long the crisis treatment lasts).

Generally, a breathing space can only be accessed by seeking debt advice from a debt adviser. For a standard breathing space, the debt adviser is required to decide whether a breathing space would be appropriate for the debtor, and should consider whether alternative solutions would be more appropriate, for example, assistance with budgeting or other more suitable debt solutions which could be accessed more immediately. For a mental health breathing space, an approved medical professional must certify that the debtor is receiving mental health crisis treatment and such evidence can be used by the debt adviser to start a breathing space.

In order to commence a breathing space, the debt adviser must be satisfied that: (1) the debtor cannot or is unlikely to be able to, repay all or some of their debt; and (2) a breathing space is appropriate for the debtor. The debtor must also satisfy certain conditions, including that they must not

have an IVA, DRO or undischarged bankruptcy against them at the time they apply and must not have had a standard breathing space in the last 12 months of application. If entering a mental health breathing space, the debtor must, in addition to the conditions for a standard breathing space, be receiving mental health crisis treatment. Note that for a mental health breathing space, the debtor may have had a standard breathing space in the last 12 months and there is no limit on the number of times a debtor can enter a mental health breathing space.

Types of debt affected – "qualifying debt"

Most types of personal debts and in particular most types of unsecured debt will qualify for a breathing space, including but not limited to, credit and store cards, personal and buy-now-pay-later loans, pay day loans and mortgage or rent arrears. A breathing space applies to all qualifying debts at the time of entry into the breathing space – however, any new debts or arrears that are incurred during a breathing space are not qualifying debts.

Note in particular that any secured debts, including mortgages, hire purchase agreements or conditional sale agreements are not qualifying debts, other than any arrears that exist as at the date of application for a breathing space. In addition, other types of debt such as debts incurred from fraud, court fines, student loans, child maintenance etc. are not qualifying debts.

Impact on creditors

Once a breathing space is applied, creditors (or anyone acting on behalf of creditors) are subject to restrictions and obligations imposed by the moratorium on collection and enforcement of debts, and creditors are restricted from applying interest and other charges on the qualifying debts subject to a breathing space.

Note that in particular a distinction is drawn versus a payment holiday, and (as highlighted above) the breathing space only applies to debts as at the time of starting the breathing space. As such, although the creditor is restricted from enforcing a breathing space debt or charging interest or fees on it, the debtor remains legally required to pay their debts and liabilities and the debtor should continue to pay any debts and liabilities owed to creditors. In fact, in the case of a standard breathing space, failure by the debtor to continue to pay certain ongoing liabilities (such as mortgage payments, local taxes, water bills etc) could lead to the debt adviser cancelling such standard breathing space.

Therefore, theoretically it is possible under the Breathing Space Regulations for a creditor to start enforcement proceedings in respect of new qualifying debts (including new arrears on pre-existing secured debts) occurring following the start of breathing space. However, as a practical matter, in the case of a standard breathing space (which only lasts 60 days) this is unlikely to occur given the lender would in any event be required to apply other forbearance measures under MCOB and other treating-customers-fairly type principles before moving to repossession. In any event, it is likely that some creditors may choose to take a policy decision against pursuing enforcement during a breathing space in line with their more general administration procedures. In relation to a mental health breathing space which may last indefinitely, although it may be technically possible for a creditor to commence enforcement proceedings it

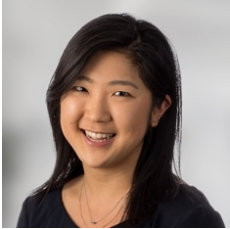
is again likely that most creditors will maintain policies and procedures against this.

Effect on securitisation

Any moratorium on enforcement and charging of interest/fees is likely to have a limited impact on securitisation cashflows given the expectation is that loans subject to a breathing space will not make up more than a small proportion of the pool. In addition, under the Breathing Space Regulations, to the extent a debt is assigned, there is a requirement for the original creditor to: (1) notify the creditor by assignment of any breathing space entered into in respect of the assigned debt; and (2) provide contact details of the creditor by assignment to the debt adviser. Failure to comply with this obligation means that the original creditor would be liable for any losses caused to the debtor or creditor by assignment as a result of this failure.

In typical securitisation structures, the sale of the exposures into the structures is typically achieved by way of an equitable assignment of the interest in the exposures. A securitisation borrower or issuer entity is thus likely to be considered a creditor by assignment and this may raise questions around potential notification by the originator or original creditor to the securitisation entity of the breathing space and provision of the securitisation entity's contact details to the debt adviser, which are to be balanced against the intended outcome of the Breathing Space Regulations and clarity of messaging to the debtor. On transactions where the original creditor, legal title holder and servicer remain the same entity, the practical impact is likely to be minimal and will tend to become more of an internal governance matter as to how creditors seek to cover off the new Breathing Space Regulations on an ongoing basis between their in-house functions. With regards to transactions with third party servicers (as may be more typical in the acquired or third party originated space), the governance of breathing space loans and notification of the relevant entities are likely to be questions that may require some more practical implementation in systems.

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