



Subject: Breathing Space: call for evidence

Published by: HM Treasury

Publication Date: 24th October 2017

Closing Date: 16th January 2018

Response Date: 16th January 2018

Response to: BreathingSpaceCFE@hmtreasury.gsi.gov.uk

CCUA Contacts: Rob Thompson, Vice Chair and Chair of the Policy & Reform Committee

Email: robertthompson@brachers.co.uk

Claire Stokes, Association Administrator
Email: claires@ccua.org.uk

Representation: The CCUA Policy & Reform Committee has drawn upon the views of the CCUA membership and corresponded with various other relevant organisations.

Introduction

The Civil Court Users Association (“CCUA”) welcomes the opportunity to contribute to the Treasury’s call for evidence paper.

The CCUA seeks to work with other stakeholders in a constructive and balanced manner, to achieve an efficient and cost effective court service for its members which is also fair and proportionate for all court users.

Our members issue around 85% of all money claims in the County Court in England and Wales and regularly handle a huge volume of consumer debt matters, whether requiring court action or otherwise. Our members include businesses operating within the financial services sector, utilities, legal firms, insolvency practitioners, enforcement agents, plus many others.

Overall summary

We believe that the title of the call for evidence is misleading in only referring to “breathing space.” Breathing space is a concept which is already well known and operated within the creditor sector, so at first glance this paper appears to be several years behind the times. There is no mention in the title that the paper also considers statutory debt management plans, despite this being arguably the more radical of the two proposals. It occurs to us that some potential responses may have been lost, as potential respondents may not have realised the full extent and true nature of the proposals.

Addressing first the concept of breathing space, this is already required by the Financial Service Authority in respect of Consumer Credit Act debt and regulated mortgage contracts, and most recently by the Pre-Action Protocol for Debt Claims. Moreover, the vast majority of the creditor sector already exercises forbearance and works to assist consumers in reaching fair and affordable outcomes. The CCUA would never oppose these approaches and believes in particular that legal action should always be a last resort which should only be used in appropriate circumstances. Nevertheless, it is of considerable concern that an additional breathing space could be duplication without true benefit, creating unnecessary delay and prejudicing the position of creditors and ultimately consumers. Much will depend on exactly how it is envisaged this would operate.

The introduction of a statutory debt management plan could be of benefit, but again this would depend upon the detail. Many current plans are inappropriate, contrary to the interests of both creditor and debtor particularly with regard to the fees charged, unrealistic, fail immediately or soon after implementation, etc. A statutory scheme could improve this. However, at the same time there needs to be careful consideration not to adversely impact on other debt solutions such as insolvency. Also, there needs to be care not to prejudice the position of creditors by forcing them to accept a solution where it is inequitable in the circumstances. In addition, certain sectors, such as secured creditors, would face very high costs of implementation in

circumstances where the Scottish experience suggests there will be very little take up. We shall deal with this further in our answers to the individual questions.

We found the paper confusing to answer, as it seems to ask separate questions regarding the breathing space and the statutory debt repayment plan, but then also seems to combine the concepts and assume that they are inseparable. We found this unrealistic, inflexible and unhelpful, for the reasons set out below. In our view, they should be viewed as entirely separate concepts. We do not believe that they work in combination.

Replies to the Questions

Question 1

In your opinion, how should the government decide who is eligible for a breathing space? In particular:

- **How should the government define serious problem debt in the context of a breathing space?**
- **Should eligibility be determined by a set of defined characteristics, or should there be some discretion to determine eligibility?**
- **If there is some discretion, who should be tasked with exercising it – a regulated debt advisor, or some other person?**
- **Are there any other entry criteria and/or exemptions the government should consider?**
- **Who should be responsible for regulating and enforcing access to a breathing space and how can disputes be resolved?**

We believe that these questions are fundamentally misconceived. In our experience, debt advisors are the first to say that when consumers seek advice from them, the consumer is often in a position of complete confusion regarding their financial affairs. The purpose of initial debt advice is to establish the true circumstances and to find the best way forward for the consumer. This in itself can take some time.

The questions seem to imply that the true nature and extent of the problem is clear from the outset, which is rarely if ever the case. We also need to keep in mind that debt advisors are seriously overworked and this will only add to that workload. We do not seek to speak for them, but we would have thought that adding yet further requirements upon them is not a realistic option without a consequent commitment to provide additional funding.

We would suggest that most creditors already allow breathing space in these situations. This is usually allowed whenever a consumer feels the need to seek debt advice, without any requirement to prove evidence of specific circumstances, characteristics or the existence of “serious problem debt.” Many of these factors will not even be known at the point that debt advice is first sought, let alone able to be proved.

For this reason, the CUA would not seek to object to the basic concept of a statutory 6 week breathing space. However, this acceptance would be conditional that it is in place of existing breathing spaces, or runs concurrently with them. It would not be acceptable for a consumer to take advantage of multiple breathing spaces simply to delay repayment.

Creditors should also not be prejudiced by the timing of a breathing space, where creditors have already been forced to commence some form of action. For example, if legal proceedings have already been commenced and there is no defence to the claim, then it could be detrimental to the interests of both creditor and consumer for the entry of a Judgment to be delayed (e.g, if interest is continuing to accrue). It must be remembered that the entry of Judgment simply confirms liability, whereas forbearance can still be exercised at such a point by refraining from then enforcing it. Similarly, if enforcement action is already underway, then the Judgment debtor should follow the mechanisms available at that point, not simply halt all action for 6 weeks by saying that they are belatedly seeking a breathing space. Litigation is expensive, an opportunity for breathing space would previously have been offered in the pre action process, and this proposal must not be allowed to be used as a mechanism to thwart legitimate legal action at the very point that it begins to finally have an impact.

Fundamentally, any proposals should recognise that timeliness of payment is extremely important to a well-functioning society. Otherwise, a thriving business today can easily become a debtor tomorrow, if payments are not made to them in a timely manner. Therefore, whilst we do not oppose this proposal on the basis set out above, it must be proportionate at all times and not prejudice the creditor's position any more than is strictly necessary.

Question 2

What should be the trigger point for starting a breathing space?

As above, we would suggest that this should be available at any point prior to the commencement of legal or insolvency action, upon a request by a consumer with a genuine intent to seek debt advice.

In particular,

- **Should a breathing space only be available for a person who seeks regulated debt advice?**

Yes.

- **Should individuals have demonstrated they have already taken steps to try to manage their debt?**

Yes.

- **If so, at what point should the six weeks start – for instance: once a breathing space has been requested, when the first advice session has occurred, or once adviser has confirmed a breathing space would be appropriate?**

Once a breathing space has been requested. The consumer should be required to supply some form of confirmation to the creditor that they have made an appointment to see an identifiable debt adviser, such as a reference number which could be checked with the debt adviser in the event of doubt.

The other two suggestions are not realistic, since it could take several weeks before reaching those positions.

Question 3

Should all debts be eligible for a breathing space?

Not where the creditor may need to take action to mitigate their loss, e.g. the urgent return of goods. Secured debts should be excluded.

- **How should multiple debts be treated; is there a priority order of debts which should be included as part of a breathing space arrangement?**

Priority debts should be identified pursuant to the criteria used on the Standard Financial Statement. Satisfactory arrangements should be put in place for these, which may involve larger payments than are made to non-priority creditors, until such time as the priority debts are cleared. Non-priority debts should be paid between all such creditors, on a pro-rata basis.

Should some types of debt be exempt? In particular, where the debt is the late payment of a fine or penalty?

No.

In particular, should debt owed by self-employed/ microbusinesses be included?

No, all business debt should be excluded. These proposals should only relate to consumers.

Question 4

Should all interest, fees and charges be frozen throughout the breathing space period?

No, absolutely not. As discussed above, at the point that a consumer seeks debt advice the position and ultimate solution is likely to be unclear and will vary enormously from case to case. It may or may not be appropriate for interest to be

frozen, but if appropriate then this is something which can be explored and either agreed voluntarily by the creditor or form part of a debt solution which is then put in place. It pre-judges the situation to freeze these items from the outset without consideration of the situation. The very purpose of interest is to provide payment for the sums which have been borrowed whilst they remain unpaid, whereas this would reward non-payment for 6 weeks by effectively applying a discount, in circumstances where that may simply be inappropriate and unnecessary. Further, from a practical point of view, many creditors would struggle to modify their systems to cope with this, especially if interest then had to resume at the end of the 6 week period.

Question 5

What activities must the breathing space participant continue with to remain eligible? For instance:

- **Should they be required to attend advice sessions?**

Yes, if and when reasonably required by their advisor.

- **Should they be required to make any repayments during a six-week breathing space, if their financial situation allows it?**

Yes, only if they are able to do so and providing it does not conflict with advice received from their advisor.

Question 6

Are there circumstances in which a breathing space period could end before six weeks, such as is an appropriate solution is found? Who would be responsible for enforcing this?

Yes, of course. If the consumer ceases to take debt advice or declines to accept the help and advice offered, then they should engage with the creditor to agree repayment terms direct. If a solution is found by the debt advisor, then this should be communicated to the creditors by the debt advisor, or alternatively by the consumer. The period should be viewed as allowing sufficient time up to six weeks to enable a solution to be found, not an assumption that the full six weeks should always be taken.

Question 7

Should breathing space protections only cover debts existing at the outset, or also include new debts arising during the six-week period?

Strictly speaking the consumer should not continue to accrue debt, but in reality there is little that can be done to prevent it and any fresh debt should be included in any solution which is put in place during the breathing space period.

Question 8

Should a breathing space be noted on a person's credit file?

No, providing that interest continues to accrue this would not be a requirement. Noting on a credit file in these circumstances would deter consumers from taking debt advice, which would be counter-productive.

Question 9

How frequently should a debtor be able to access a breathing space, and what criteria should control the frequency of access?

Only once in the lifetime of a given account or debt. If the account or debt has previously been included in a breathing space, that creditor should not be obliged to include it again, although may of course agree to do so voluntarily.

Question 10

What challenges would creditors face in implementing the scheme?

Providing that there are separate schemes for breathing space and the statutory debt repayment plan, and provided any scheme complements rather than duplicates or conflicts with existing breathing space requirements, there should be limited challenges. Debts could be placed on hold whilst the consumer seeks advice. The consumer could then enter any of the range of debt solutions, including the statutory debt repayment plan.

The consultation paper is confusing as it seems to intrinsically link the breathing space and the statutory repayment plan. This is unrealistic and inflexible. The consumer will not know whether the debt repayment plan is appropriate when they first enter the breathing space and it also ignores the fact that an alternative debt solution may then be found to be preferable.

We believe that the two concepts need to be viewed independently and for the avoidance of doubt we have answered all questions on that basis.

Of course, there may be need for a short moratorium on activity if and when a statutory debt repayment plan is considered appropriate and proposals are being drafted. We see the logic in that and would have no objection. However, that is an entirely different concept to a six week breathing space.

Question 11

Who would be responsible for notifying creditors that a customer has entered a breathing space? What updates are required during the breathing space period?

See the answer to question 2. The debt advisor or the consumer would be responsible for notifying creditors. If the consumer notifies, they would have to provide some evidence which could if necessary be verified with the debt advisor, such as a reference number. It is anticipated that in the normal course the debt advisor would notify creditors.

No updates would necessarily be required, except confirmation that the debt advice was no longer being provided or alternatively details of the debt solution being pursued.

Question 12

Would a breathing space scheme impact on business revenue or have any other significant detriment?

See previous answers above. No, as long as interest continues to accrue, no changes to systems are required and it does not duplicate other existing breathing spaces thereby significantly delaying activity.

Question 13

Should any creditor be exempt due to the size of their business?

No.

Question 14

What benefits could creditors see as a result of a statutory breathing space scheme?

It is often beneficial to creditors when consumers seek debt advice. It is an active step which hopefully leads to repayment negotiations or an alternative debt solution.

Question 15

How could the government ensure that a breathing space works with and adds value to existing support structures?

Given that breathing spaces are already required elsewhere and that most creditors view them very positively, there is arguably no need for a statutory requirement at all.

Question 16

What safeguards are needed to prevent the scheme being abused?

As above-

- not allowing multiple breathing spaces,
- not allowing them to be used as delaying tactics
- and safeguarding the position of creditors who have already incurred time and expense by committing to legal, enforcement or insolvency action.

Question 17

Should a breathing space be extended to Wales and Northern Ireland as well as England?

As above, it is questionable whether a statutory breathing space is required at all, given that breathing spaces are largely followed anyway. However, we see no particular objection based on region and generally a consistent approach across jurisdictions is beneficial.

Question 18

How could a statutory debt repayment plan be administered?

We would suggest by approved debt advisors or other approved providers, essentially replacing unregulated debt management plans. This could either be debt advisors, an entity equivalent to the Accountant in Bankruptcy under the DAS scheme, or indeed any other approved entity.

Question 19

What challenges would be faced in administering a statutory repayment plan?

Earning sufficient income either from the payments or from other sources to make the administration of the plan cost effective, especially in the event of default and non-cooperation by the consumer.

Question 20

What protections should apply during the statutory repayment plan?

- **For instance, should it protect debtors from interest and fees and charges or just a selection of the three? If a selection, which of these three should be prioritized?**

We are concerned that currently both consumers and creditors can be exploited by unscrupulous providers of debt management plans. This could be avoided by using approved providers who charge standard approved fees.

The statutory repayment plan should enable payment in full within a reasonable period of time which would be defined in the rules. If this is achievable, then we see no reason why interest, fees and charges should not be frozen whilst the plan is maintained.

If it is not possible to meet these criteria (e.g. it would take too long to clear the debt) then the consumer should instead consider another debt solution such as insolvency.

It should be recognized that certain creditors, such as secured creditors, face a particular logistical challenge. For example where an instalment mortgage is in arrears the statutory debt management plan would only apply to the arrears, which are a typically a small part of the total debt balance. Creditor systems do not generally currently cater for the automated freezing of interest, fees and charges only on arrears. This is one of the reasons for excluding secured debt.

Question 21

For whom and for what debt solutions will a statutory repayment plan be most appropriate?

Smaller total debt amounts which can be cleared within a reasonably short period of time, e.g. no more than 6 years.

Failing this, insolvency should be considered.

Question 22

How will a debt advisor determine if a statutory repayment plan is appropriate?

It would need to meet the criteria, for example sufficient disposable income to clear the debt within the permitted timeframe.

Questions 23

If a statutory repayment plan cannot be agreed, how could the behavior of creditors be managed immediately after the breathing space.

We do not understand this question. If repayment cannot be agreed then the consumer and advisor should consider offering or pursuing other debt solution options, failing which the creditor should be free to pursue the debt.

Question 24

Should the repayment plan apply to all debt?

It should apply to all unsecured debt owed by the consumer at that point, failing which certain creditors could be paid in preference to others, which would be unfair.

Secured debt should not be included.

Question 25

For the included debts, should some debts be prioritized for payment?

Only priority debts, as identified on the Standard Financial Statement.

Question 26

What should happen if one or more creditors disagree with the plan?

We suggest that similarly to IVAs, 75% of creditors by value would need to agree the plan, which would then be binding on all. If rejected, no creditor would be bound.

Question 27

What activities must the statutory debt repayment plan participant continue with to remain eligible? Must they simply meet agreed repayments to remain eligible?

They should maintain payments.

They should notify the administrator immediately there is any material change in their financial circumstances.

A financial review should be undertaken at least every year and upon any material change of circumstances, whereupon the terms may be varied either up or down in line with affordability. However, if reduced down, then it must remain on target to clear the debts within 6 years from the start of the plan. Failing this, another debt solution should be considered instead. (However, short term issues could be accommodated – see answer to question 28).

On any variation which remains on target to clear the debts within 6 years from the start of the plan, we would suggest that the plan will continue unless at least 90% of creditors by value vote for its rejection at that point.

Question 28

How should changes in income be dealt with? Should it be possible to suspend a plan, or have reduced payments for a period of time?

Changes of income – see answer to question 27, material change of circumstances – there should be a review.

Suspension or temporary reduction – we would have no objection providing there were clear rules and the timeframes were short, purely in order to cope with short terms issues.

Question 29

What happens if a plan fails? Should creditors be able to apply any interest, fees or charges that they were prevented from charging during the plan?

Yes – this will incentivize the consumer to successfully complete the plan.

Question 30

Should there be a regime for sanctioning debtors where there is misconduct in relation to a breathing space or statutory repayment plan, as there is for bankruptcy and DROs?

The statutory repayment plan should simply be failed at that point.

Question 31

Should a Statutory debt management plan be extended to Wales and Northern Ireland as well as England?

We are unaware of any reason for objection.

Question 32

For each of (1) a six-week breathing space, and (2) a statutory debt management plan, please describe in detail, and with supporting evidence, the positive impact expected through:

- **Improved access:** how it would encourage more people to seek debt advice earlier?
- **Better support:** how will it improve outcomes for customers who are already in problem debt?
- **Increased repayments:** how will it increase the amount of debt repaid to creditors?

1. Breathing spaces already exist, so it is difficult to see any real benefit beyond additional publicity which we assume may accompany the introduction of a statutory requirement. That may encourage more consumers to seek debt advice.

2. A statutory debt management plan may also encourage more people to seek debt advice, as currently there may be concern regarding some of the providers and the fees they charge. Having a properly structured and regulated plan may improve the amount of plans which successfully include. If so, this will increase the amount of successful outcomes for consumers and the amount of debt repaid to creditors.

Question 33

Once implemented, how could the government determine whether the breathing space and statutory repayment plan have been successful? What metrics would be appropriate to use?

The proportionate of breathing spaces which actually led to repayment terms being agreed or a debt solution being put in place.

The proportion of debt management plans which are agreed, how many successfully conclude and the amount of money recovered under them.

Conclusion

We do not see any real benefit from the breathing space proposals, as breathing spaces already exist.

We do however see potential benefit from a statutory debt repayment plan in the circumstances outlined above.

We suggest that combining these two proposals is misconceived and they should be separated.

There would be no objection to a moratorium whilst a debt repayment plan was being proposed and considered, but that could and should be a much simpler moratorium compared to the breathing space proposals.

16th January 2018