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Introduction

The Civil Court Users Association ("CCUA") welcomes the opportunity to contribute to the Treasury's consultation 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.

Approach

The paper raises many important issues, only some of which are addressed by the questions. We shall therefore respond to the paper section by section where we have points to raise, as well as to the individual questions.

1. Introduction

It is accepted that the proposals are based upon a manifesto commitment, but it is felt that this has directly led to some of the issues raised below. It would have been better to have investigated the requirement or otherwise for the suggested measures before promising to implement them, as well as the best means by which this would be achieved. Promising something before the issues have been fully understood appears to have "put the cart before the horse"

2. Introduction to breathing space

It is noted that the first objective is to provide sufficient protections for individuals to help them enter into a sustainable debt solution, with the second objective being to encourage more individuals to seek debt advice.

We do not feel that the paper adequately explains how these objectives are intended to be achieved.

No cost benefit analysis appears to have been undertaken.

No clear link has been demonstrated to show why giving somebody a breathing space will directly lead to them entering a sustainable debt solution or encourage them to act on the debt advice they receive.

As it is proposed that interest and charges will be written off regardless of whether proactive action is then taken by the debtor, there actually seems little or no incentive to take any such step towards those outcomes.

There is however the possibility of debtors simply seeking the period as a “freebie” or even a whole new market emerging with third parties encouraging debtors to take advantage of the breathing space, even where they have absolutely no intention of taking proactive steps.

There are also concerns about the ability and resourcing of the debt advice sector to cope with this new demand. Any further demands from debt advice organisations for increased funding must recognise that many creditors already provide considerable support for debt advice through both levies and FairShare arrangements.

As is recognised in the paper, those creditors regulated by the Financial Conduct Authority generally offer and operate breathing spaces very effectively. We feel that if this breathing space is to proceed, then there is no point in having different mechanisms for different types of debt, as that will simply be confusing for the debtor. However, whilst FCA regulated creditors will therefore continue to operate correctly as they are already doing, the paper fails to explain how and why non-regulated creditors will step up. What is the penalty if they fail to do so? The proposals therefore seem to impose a less flexible regime on creditors who are already “doing the right thing” whilst failing to incentivise creditors who might not be.

The above are only a selection of some of the high level concerns that our members have. They are broadly supportive of the idea of a breathing space, in fact many already provide them. However, these proposals are simplistic, naive and lacking awareness and detail relating to many potential difficulties.

3. Eligibility for breathing space

3.1 Access debt advice

Again, we have real concern regarding the ability of the debt advice sector to cope with this new demand.

3.2 Assessed as being in problem debt

How is “problem debt” or “significant financial difficulty” to be assessed? This seems very subjective.

There could be the possibility of a debtor moving around debt advisors until they find one willing to accept that their situation is sufficiently serious.

There could also be the possibility of this being used to “sell” a remedy more advantageous to the advisor than the debtor, e.g. a lead generator for individual voluntary arrangements.

This might also lead to an opportunity for new entrants to debt advice with less scrupulous intentions, marketing purely on the basis of the debtor avoiding interest and charges for 2 months, with no real intention to otherwise help them.

3.3 One breathing space a year

This offers much less protection than existing FCA requirements. Circumstances change and this is not flexible enough to cope with that.

It is felt that there should be some idea of the ultimate intended outcome upon entering the breathing space, for example whether that is likely to be repayment arrangement, a formal state of insolvency, etc. If the debt advisor was able to assess the likely or possible outcome(s) in advance and proceed with the initial intention of proceeding towards that, this would give far more comfort that the breathing space is appropriate and likely to be used constructively.

3.4 Rationale

The stated intention may be intended to be flexible, but actually it is considered to be far less flexible than the FCA model and likely to be of considerably less benefit to both debtors and creditors.

Question 1

As above, we feel that the eligibility criteria is vague and uncertain and the process lacks focus, which could cause a number of difficulties. The 12 month limit is inflexible and more could be achieved with clearer criteria and more focused objectives.

Question 2

No, it is again felt that greater clarity and focus in the qualifying criteria would be far more beneficial than a formal mechanism to object. It is highly unlikely that a creditor would wish to object to a meritorious entry to breathing space and in the timescales involved the practical efficacy of objecting would be limited. However precisely because of the limited opportunity to object, there needs to be far greater clarity on the circumstances permitting entry and the objectives.

3.5 Mental health alternative access mechanism

Question 3

We feel that this again lacks detail. Creditors are unlikely to object where there is a mental health crisis, but there needs to be more detail as to how it works. For example, if the debtor has ongoing commitments such as a mortgage, how is it envisaged that they will be able to keep it up to date during the breathing space? A holistic approach is required.

Question 4

Yes.

3.6 Administering breathing space

It is agreed that the Insolvency Service is the correct body, providing sufficiently resourced.

3.7 Roles of debt advice agencies and insolvency service

3.8 Notifying creditors of entry into breathing space

This is going to require accurate and specific information from the debtor regarding who their creditors are and how they are to be contacted, if the protection is to work.

What assurance can be given that creditors will be actively notified in a timely manner that the breathing space has ended?

There will need to be rigorous, ongoing scrutiny of compliance to ensure that creditors are not being prejudiced, particularly if interest is being waived, etc.

It is felt that a central register is unlikely to be of much practical use, whether public or otherwise. Creditors cannot be expected to search a register on the off-chance every time they wish to contact the debtor. Many creditors, such as private landlords, will find that concept particularly alien.

If a creditor has a different address for the debtor, a register will be of no assistance. The only option is for the debtor to supply accurate information relating to any creditor that they wish to be included in the breathing space.

A publicly accessible register would be particularly unwelcome, for many reasons such as data protection, stigma, inappropriate marketing, etc.

Question 5

The Insolvency Service should make as much effort as possible to ensure notification, including email in addition to letters. Institutional creditors will wish to receive additional notifications by data files that can be imported into systems.

Question 6

Even if there was an oversight role, it is difficult to see how any such oversight would have any teeth. FCA regulated firms will be in compliance anyway. How is it proposed that local authorities or builders would be policed, for example? This does not appear to have been thought through.

Question 7

We cannot see any point in a central register at all. The protection will only work if the creditors have been made aware (and even then it is not clear how it would be enforced, as set out above). Any register should only be accessible to the Insolvency Service, and should only serve as an internal resource for them. It should not be public because then individuals could be deterred from entering into a breathing space. It should not be accessible to creditors as firstly it could unnecessarily affect the way that credit applications are dealt with, and secondly, creditors should be entitled to rely on notifications for information about any breathing space, rather than accessing any register for information.

4. Protections of breathing space

No consideration seems to have been given to deterioration of goods, possession claims, retention of title provisions, etc. This proposal could prejudice both debtor and creditor in certain situations.

The prevention of accrual of interest, fees and charges could be extremely difficult for creditors to achieve without substantial, difficult and expensive alterations to systems and processes. In terms of interest it is particularly difficult to adjust systems for short periods and given the length of time involved the sums involved will generally be modest. For example for loans where continuing contractual payments are due, the freeze on interest will only apply to interest on arrears of monthly payments. This raises the prospect of very expensive system development for sums often involving less than £1 pcm. The proposals must be supported by a cost benefit analysis.

As mentioned previously above, there appears to be no incentive for the breathing space to be used constructively, as the proposal that interest, fees and charges will be waived <u>regardless</u> of any positive outcome or otherwise.

Taking these factors into account, we would strongly suggest that interest, fees and charges should continue to accrue, thereby incentivising the debtor to achieve a positive outcome as soon as they are able. This is consistent with the objective of breathing space which is primarily to provide a pause on action to allow advice on sustainable solutions to be obtained, rather than to involve a debt adjustment process in its own right.

We are also concerned that there is scope for substantial confusion on the part of debtors as to what payments are frozen and what must continue. By definition breathing space is likely to be commenced before debtor advisers have established all of the debtor's financial commitments and before full advice is given. Many of those debtors will have a range of financial commitments requiring ongoing contractual payments in addition to arrangements to pay crystallised debts, instalment orders and suspended possession orders. There is a very real risk that consumers will be confused and particularly in the context of priority debts such as rent and mortgage arrears that this will lead to increased arrears, failed direct debits and breached court orders.

The precautionary principle would suggest a simplified breathing space focussed on a bar on new actions is preferable to trying to introduce complex but very short term debt adjustment.

One member also raised concern regarding possible confusion or adverse impact as regarding fixed term credit. These often have interest included within the monthly payments. We doubt it is the intention that this interest should be lost upon entry to the breathing space, but even if that is not the intention then there does appear to be scope for confusion.

Subject to the points above, we do generally agree with the concept that as many types of debts are included as is practically possible and that fresh collections and recovery steps should generally be prevented. In practice under the current proposals we do not consider that it would be practical to include loans with ongoing contractual payments but this would be addressed if there was no freeze on interest and charges, which would enable such loans to be included within breathing space.

4.1 Treatment of debts in breathing space

Again, we generally agree that as many personal debts are included as is practically possible.

4.2 Debts excluded from the scheme's protections

Given the intentions set out in the paper to include as many debts as possible, no justification has been given for excluding student loans or social fund loans.

Conversely the consultation paper notes the real potential for detriment to some debtors if breathing space led to increased priority debts at the end of the breathing space period. The most obvious such debts are rent arrears and mortgage arrears. In respect of mortgage arrears there is already extensive regulation contributing to the lowest repossession rates since UK Finance records began and the former requires very specific and carefully considered policy development not simplistic solutions. The CCUA echoes calls to exclude housing and mortgage debts from breathing space protection.

The logic of the current proposal is debts that would be excluded from insolvency protection should also be excluded from breathing space protection. If so then clearly the enforcement of security (whether mortgage or other assets) and tenancies are excluded from insolvency protection.

Question 8

Yes, but we do not agree that there is any justification for excluding student loans or social fund loans.

Question 9

No. It will be too confusing to the debtor to exclude all FCA regulated debt to allow them to continue under a different breathing space regime, but we have to say that the current FCA approach is far more flexible and therefore generally better than these proposals. However mortgage and rent arrears should be excluded.

4.3 Business debts in breathing space

We are concerned that the proposal to include business debts could impact the ability of businesses to access credit in the first place, particularly small businesses who are likely to be most in need. This could be harmful to the economy.

Question 10

We believe that there should be a proper assessment of the likely impact, particularly as regards the access to credit for small businesses.

Treatment of ongoing liabilities

4.5 Treatment of interest, fees and charges

We have serious concerns regarding this.

As set out above, creditors' systems will struggle to cope to the extent that it may become necessary to exclude more debts from the protection of breathing space as a result.

More importantly however, this suggestion is also likely to defeat the objective of incentivising debtors to continue to engage constructively with debt advice and possibly enter a debt solution. It will actively remove any incentive to do so. They will benefit from a "free" period regardless of whether or not they have any true intentions or take any proactive steps from that point onwards.

It would be far better for interest, fees and charges to continue, thereby incentivising the debtor to seek a proper solution whereupon those charges can then hopefully cease at that point.

As set out above we are also concerned by the scope for confusion for debtors with a mixture of crystallised debts, ongoing contractual commitments and court orders who may not receive adequate advice from debt advisers who are unlikely to have a complete picture of the debtor's circumstances at the beginning of the breathing space period. There is a real danger of debtor's priority debts increasing rather than decreasing during breathing space.

4.8 Court action

We understand the intention here, but again there may well be situations where contact is to the benefit of both debtor and creditor. For example, what happens

where there may be perishable goods, deteriorating assets, or where assets may be in the process of being disposed of? Mitigation of loss can be important and of benefit to both parties.

4.9 Further enforcement action

We agree that new enforcement action should generally not be commenced, subject to our concerns raised above where it may actually be of benefit to the debtor.

However, we do not agree that enforcement action which is currently underway should cease. Under section 4.8 above, the proposals accept that where legal action has been commenced, having to withdraw halfway through would "….place a substantial burden on the courts and could be unfair to creditors, who will have had to pay a court fee." Exactly the same factors apply regarding enforcement, so why is it proposed to be treated differently?

This also risks undermining the authority of the court. Debtors will have had numerous opportunities to engage prior to reaching the enforcement stage. They will have had pre-action engagement, the issue of a claim form, a Judgment ordering to pay, and finally enforcement has been commenced. If court process is able to be stopped in its tracks after such a lengthy process, with so many prior opportunities to engage, that could substantially undermine the credibility of the court.

There are also existing methods available to halt such action if and where appropriate, such as applications to suspend warrants.

Also, there will again be situations where goods may be deteriorating or assets are being disposed of. This proposal could therefore be extremely harmful to both creditor and debtor.

Question 12

As above, collections and recovery action should be permitted in certain situations where there would otherwise be detriment to the position and interests of either creditor, debtor or both.

Once any stage of action is underway it should continue to its conclusion, or existing steps should be taken to halt it if considered appropriate, such as an application to suspend a warrant.

Question 13

The question as to how compliance will be both monitored and enforced is of fundamental importance if there is going to be any purpose or value to this scheme. It is therefore extremely disappointing that this has not been set out in the paper and is instead being raised as a one line question. We have already raised our concerns on this point above. FCA authorised creditors will be complying anyway, so these proposals serve little purpose and add little value as regards them. If the proposals

are to serve any purpose or add any value as regards other creditors not currently covered by FCA requirements, then surely it is for the proposals to explain how? We see this as a significant challenge with such a diverse range of potential creditors.

4.12 Operation of 60 day breathing space

There is concern that the debt advisors may not have sufficient resource to conduct a 30 day check.

What sanction is there if a 30 day check is not done?

It seems highly unlikely that this requirement would actually be followed.

Question 14

60 days is a reasonable length, providing that the debtor is continuing to actively progress towards a solution (which is likely to be a much smaller proportion of participants if interest and charges are waived regardless of outcome).

It seems unlikely that the proposed check will actually take place. It might be better to simply say that the debt advisor must advise the creditors immediately there is non-cooperation at any time within the 60 day period.

4.13 Mental health alternative access mechanism

Question 15

We have no objection in principle, but this requires further thought. As the protection could go on for some time, how will the debtor be meeting their ongoing commitments during this period? This would seem to require a more holistic proposal.

Introduction to statutory debt repayment plan

5.1 Existing debt solutions

If this becomes popular, there may be other impacts on other forms of debt solution.

Could there be the possibility of debtors currently on Debt Management Plans (DMPs) being poached to apply for this scheme? That might potentially be either a good or a bad thing, possibly depending on the exact circumstances of the case.

If this scheme largely takes over from DMPs, will that cause other issues?

Resourcing is a concern. If current DMP providers struggle to make a DMP pay at existing rates, how likely is it that they will make this scheme pay at the proposed rates?

New creditors are likely to enter this space. Will they also be making fair share contributions? Or will the financial services and debt purchase creditors, who already make substantial contributions, effectively be financing debt advice for the benefit of other creditors who are not paying?

There is already considerable concern that debt advisors are sometimes not good at updating creditors or keeping cases up to date, a further deterioration in service would not be welcomed.

5.2 A better solution for some debtors

Again we have concerns, primarily around resourcing. That issue may well determine whether or not returns are actually improved for creditors, as is suggested.

Unlike the breathing space proposals, we do see the benefit of a freeze on interest, fees and charges on a statutory debt repayment plan. It will motivate a debtor to enter a statutory debt repayment plan if the reward for entering that solution is that these items are then frozen.

We will address further issues below.

6.1 Access debt advice

Again, we have concerns regarding resourcing.

6.2 Able to repay debts in full over a reasonable timeframe

Our view is that ten years is too long.

If it takes longer than six years (plus any additional periods which may arise such as payment breaks), then effectively the debtor is insolvent and should be seeking an insolvency remedy.

Six years also ties in with other current measures, such as limitation and the length of time that a County Court judgment is registered at the Credit Reference Agencies.

There needs to be consideration of the practical implications of longer periods. For example-

- A three year loan. Entering a SDRP during the lifetime of the loan could mean that a balance remains due under the loan for up to seven years after the rest of the loan has been paid in full.
- A mortgage may end up registered against a property for up to 10 years after the rest of the mortgage has been paid.

6.3 Creditor objection and the fair and reasonable assessment

Whilst the right to object is important, it is felt that it would be exercised relatively rarely.

It is important that the standard financial statement should be fully concluded. Omissions are frequently tolerated in other areas, which must not happen here if objections are to be minimised.

If a plan is challenged and the debt advisors agrees with the point raised, they should have the ability to immediately amend without having to follow the objection process.

A 14 day timeline is very tight, we would suggest 21 days.

Question 16

Generally yes, but we object to the ten year period. We believe six years to be more appropriate, for the reasons set out above.

Question 17

Yes.

Question 18

21 days would be better, 14 days is a very tight deadline which may prejudice creditors.

There should be no need for an appeal.

7.1 Debts excluded from the protections

Question 19

We see no reason why social fund payments and student loans should effectively be prioritised.

We call for rent arrears, mortgage arrears, end of term mortgage balances and other secured debts to be excluded. We repeat our response at 4.2 above and note:

a) Enforcement against secured assets is excluded from protection in insolvency and other debt solutions.
b) There is a real risk of detriment to debtors if priority housing and mortgage debts increase or are paid off less quickly due to plans.
c) There are specific protections against eviction and powers of suspension available to the Courts which are not available in unsecured debt enforcement.
d) There is significant scope for confusion as to how plans will operate where there are already suspended possession orders granted by Courts with specified payments towards arrears.

e) There is a substantial and generally very effective infrastructure already present to assist debtors in respect of, particularly, FCA regulated secured loans.
f) Secured debts and tenancies almost invariably involve payments by contractual instalments and therefore the protection afforded by plans is minimal whilst at the same time being inherently confusing for debtors.
g) Secured assets, particularly moveable assets such as vehicles, may be a depreciating asset.
h) The expectation is therefore that rent and mortgage arrears will generally be excluded or treated as priority debts under the plan in any event. Given this logic it is simpler for debtors, debt advisers and creditors if they are all simply excluded rather than all participants having to build complex processes and systems for something that is likely to be exceptional, or in practice included due to poor advice from a debt adviser.
i) In relation to mortgages specifically there is a very large and well researched volume of interest only mortgages that are reaching the end of their term without a repayment vehicle in place (generally see FCA TR18/1 and FG13/7). There are significant risks of detriment to debtors where those debts are not repaid at the end of the term and this population of often elderly debtors has increased risk of vulnerability. Extending the term is not a power available to Courts and extensions by lenders are closely regulated. The effect of the current proposal is that extensions of up to 10 years on very large mortgage balances could be granted unilaterally by debt advisers without any proper understanding of the impact on debtors and creditors. For creditors this might mean having to operate an additional 10 year mortgage term for the whole capital advance without the opportunity to charge interest. This is a gross and unwarranted power to intrude on a private, and already heavily regulated, contracts whose consequences could ripple beyond direct impacts on creditors into securitisation investors and other funding sources. There is considerable scope for plans being “mis-sold” to elderly or vulnerable debtors as a means to stay in their homes beyond the end of the mortgage term rather than looking for sustainable solutions . Accordingly mortgage debts generally, rather than simply mortgage arrears need to be excluded.
j) Finally it should be noted that in contrast to unsecured creditors, plans will not generally improve recovery rates for secured creditors, the majority of whom do make a full recovery from the secured asset.

7.2 Treatment of interest, fees and charges within the plan

Question 20

Yes, unlike at the breathing space stage, we see merit in interest, fees and charges being frozen. Unlike at the breathing space stage, a solution would now be in place.

The exception is where the debt included in the plan are missed contractual payments on a loan that is within term. There the debt included in the plan is generally modest compared to the ongoing monthly instalments and the considerable

cost to creditors of system changes to remove interest on missed payments is not justified.

7.3 Treatment of collections and recovery action during the plan

Question 21

Yes, we agree with the proposed protections.

Question 22

We make a very similar point as we have already raised regarding the breathing space proposal. FCA regulated firms will adhere to the rules. Elsewhere, legal proceedings could obviously be stopped. However, quite how other creditors will be monitored and what enforcement action could be taken against them goes to the heart of whether these proposals will have any merit or purpose.

7.4 Prioritisation of the repayment of some debts in the plan

Question 23

Which taxes and benefits would be prioritised and what would be the justification?

We would suggest that water debts should be prioritised in addition to gas and electricity, given the ongoing duty to supply.

Clearly if, contrary to our view, secured debts are capable of being included they need to be treated as priority debts to avoid debtor detriment.

7.6 Flexibilities included within a plan

Question 24

We agree. It would not be sensible for a plan to break due to a small change of circumstance, after all the work that has gone into it.

7.7 Annual reviews of the plan

Most importantly, if a debtor is failing to comply with the plan then the plan should swiftly be ended.

7.8 Temporary break in payments

Question 25

There should be the means to prevent successive or recurring breaks in payment which effectively frustrate the plan. If and when that occurs, clearly a plan is no longer an appropriate remedy.

7.9 Requirements for continuing to be eligible for the plan

Question 26

Yes, but the time frames total 90 days, which is too long.

8.0 Administration of breathing space and statutory debt repayment plan

8.1. Funding

8.2 Breathing space

We have serious concerns that the debt advice sector will be unable to cope without additional funding.

Currently, updates to creditors can already be poor.

8.3 Statutory debt repayment plan

Finding a correct funding model is vitally important.

We have concerns that the system will not cope on the basis of the current proposals.

There is also concern that the fees deducted from the payments could increase substantially following implementation. What assurances are there that this will not happen? Could any increase perhaps be limited by the amount of annual increase?

Will existing fair share contributions be used towards this service or ring-fenced for other services?

Will participants also be asked to contribute to fair share?

There is concern that some creditors already contribute financially to debt advice yet are not receiving a particularly good service in return. Might this become worse under these proposals?

It should be remembered that debt advisors also have to finance other areas of their work, including early advice which may subsequently lead to a plan. That all needs to be paid for.

It is felt that for administrative reasons, having a single payer is a good idea, as long as the person who undertook all of the work in setting up the plan does not lose out.

Question 27

As above, there are serious concerns regarding funding and we would need to see full detailed proposals as to how debt advice could work effectively with this in place, not just in terms of these plans, but also covering their other work.

Question 28

As above, having a single payer would probably be best, as long as the original debt advisor is adequately rewarded.

8.5 Credit Referencing

Question 29

It should show that they are in a plan, in a correct and consistent basis within the current rules. The fact that they are in a plan is both a negative in that they have debt problems, but also a positive in that they have taken steps to address them. It should align with current reporting on that basis.

A further consultation is clearly required when the detailed proposals are available.

8.6 Territorial scope of the scheme

Question 30

Yes. Although if a well-designed and adequately funded scheme could be established, is there any reason why it shouldn't be implemented throughout the UK for consistency? There are clearly significant costs for creditors in operating multiple inconsistent schemes.

29th January 2018