



BREATHING SPACE: CALL FOR EVIDENCE

Issued 16 January 2018

ICAEW welcomes the opportunity to comment on the *Breathing Space: call for evidence* published by HM Treasury on 24 October 2017 a copy of which is available from this [link](#).

Government has decided to introduce a breathing space regime in advance of feedback from this consultation. Existing legislation already provides for enforcement restriction orders and debt management schemes, but the provisions were not brought into effect. The reasons for this need to be assessed and taken into account. We suggest that any new breathing space regime will need to be kept as simple as possible if it is to offer a meaningful new remedy for individuals with problem debt and be used widely enough to justify a legislative initiative of this kind.

ICAEW is a world-leading professional body established under a Royal Charter to serve the public interest. In pursuit of its vision of a world of strong economies, ICAEW works with governments, regulators and businesses and it leads, connects, supports and regulates more than 147,000 chartered accountant members in over 160 countries. ICAEW members work in all types of private and public organisations, including public practice firms, and are trained to provide clarity and rigour and apply the highest professional, technical and ethical standards.

This response reflects consultation with ICAEW's Insolvency Committee which is a technical committee made up of Insolvency Practitioners working in large, medium and small practices. The Committee represents the views of ICAEW licence holders.

ICAEW is the largest single insolvency regulator in the UK licensing some 700 of the UK's 1,700 insolvency practitioners as a Recognised Professional Body.

Copyright © ICAEW 2018

All rights reserved.

This document may be reproduced without specific permission, in whole or part, free of charge and in any format or medium, subject to the conditions that:

- it is appropriately attributed, replicated accurately and is not used in a misleading context;
- the source of the extract or document is acknowledged and the title and ICAEW reference number are quoted.

Where third-party copyright material has been identified application for permission must be made to the copyright holder.

For more information, please contact: representations@icaew.com

MAJOR POINTS

Breathing space – the need for simplicity and clarity

1. The proposed breathing space regime is likely to be most effective if it is simple for individuals to implement and clear for creditors to understand. We believe that it is feasible to create such a regime along the lines outlined below.
2. There is a risk of abuse and unintended consequences, but if government tries to reduce each risk through detailed conditions or restrictions, the regime may become too complex to be workable. The risks can be controlled to some extent by a few features, in particular:
 - a short breathing space limits the practical impact on creditors
 - preserving underlying rights of creditors means the main impact is delay
 - a public register of individuals using the scheme would deter frivolous use
 - restrictions on repeat use would ensure the scheme is not seen as a permanent solution.
3. Simplicity may mean that some legitimate concerns are not addressed as they could be in a more complicated regime. However, any regime that alters the balance of power between debtors and creditors has winners and losers and if government believes that a breathing space regime is worthwhile, it should ensure that it will work and be used in practice.
4. The [Tribunals, Courts and Enforcement Act 2007](#) already contains provisions for enforcement restriction orders and debt management schemes, but these have not been implemented. The current proposals cover similar territory and the Government should explain why the existing regime has not been implemented and ensure that any new regime is better considered before any legislation or regulation is taken forward.

Debt management plans

5. We believe that the breathing space initiative should be considered separately from proposals for a statutory debt management plan. They address different concerns. We do not think it would be appropriate to link use of a breathing space regime to a particular insolvency procedure; the breathing space regime should allow time for individuals to find the best solution for their particular circumstances.
6. Our members have seen cases where, in their view, individuals end up in procedures (whether IVA, bankruptcy or otherwise) that are not most appropriate. We do not know whether these are isolated examples or symptomatic of a more general weakness in the regime, but government should consider the issue before introducing new procedures - it does not matter how many procedures are available, if there is a substantial risk that an inappropriate one will be selected.
7. The FCA has been responsible for regulating certain non-statutory debt management plans ('DMPs') since 2014 and we believe that it has made progress in controlling previous poor practice in the sector. However, there is no public register of DMPs and we do not have information necessary to assess whether or not individuals entering into them might have been better served through alternative debt procedures.
8. We suggest that the FCA be asked to obtain and make public more information about DMPs arranged by the debt advisors regulated by it.

9. There may be some merit in the idea, but we suggest there should be a further consultation if government is inclined to proceed further. As noted above, the Tribunals and Courts and Enforcement Act 2007 included provisions to introduce a statutory debt management plan which have never been brought into effect. Where relevant, an assessment should be made to ensure that any lessons to be learned from previous attempts to introduce such a plan are taken into account. Any statutory debt plan should be considered separately as it cannot be expected to be straightforward and so to do otherwise could cause unnecessary delays in introducing any breathing space regime. In light of this, we do not comment further here on statutory debt management plan proposals.

Market for advice

10. A breathing space regime of the kind proposed can only serve a limited purpose. In most cases, it will simply be a precursor to a formal remedy such as IVA or bankruptcy. It will give individuals time to seek advice free from some of the stresses that might otherwise arise.
11. It is therefore important that the breathing space initiative takes account of the market for debt advice. In most cases, the amount of debt involved will be relatively low (compared, for instance, to charges of professionals such as lawyers, FCA regulated advisors and insolvency practitioners). Debt relief orders are available for debts under £20,000 but many DMPs, IVAs and bankruptcies involve much lower sums than this. The vast majority of IVAs are (unsurprisingly given the economics) dealt with on a commoditised basis, with limited personal involvement from a licensed Insolvency Practitioner.
12. It is inevitable, therefore, that many relevant individuals will seek advice from government bodies or charities such as Stepchange and it is important that these bodies are adequately funded and have trained and experienced staff to provide the required services in a timely way (mindful that the proposed breathing space is not long).
13. Nevertheless, government should ensure that the market for good advice is as broad as possible and should facilitate the involvement of professionals in the private sector. There is room for improvement in this respect.
14. Insolvency practitioners ('IPs') are regulated by recognised professional bodies ('RPBs') (of which ICAEW is one) and are skilled and experienced in matters of debt management and available insolvency procedures. Even those who rarely act as IP for insolvent individuals are likely to be able to provide useful help to individuals at some level, for instance referring them to bodies mentioned above. The regulatory regime should, therefore, facilitate their involvement as much as possible.
15. The current regime fails to do so. Consumer debt advisors are required to be FCA regulated. This means that IPs may need to obtain FCA authorisation in addition to their licence from an RPB, which involves additional costs and regulatory burdens that may not be justified in commercial terms. There is an exclusion for IPs who provide advice in the expectation of being appointed in a formal insolvency procedure, but this is too narrow to be effective. For instance, it could prevent an IP from providing advice if the IP thinks that the individual will be able to avoid an insolvency or if the IP would not take a resulting insolvency appointment for economic or other practical reasons. The exclusion does not even enable an IP to advise on the suitability of bankruptcy as a solution unless the IP expects to be appointed as trustee – a bizarre situation when only the official receiver or an IP can be appointed. Regulation is therefore needlessly excluding some of the best qualified advisors from helping in this area. There is another exclusion available to members of designated professional bodies (under Part XX of the Financial Services and Markets Act) but it is of limited assistance for those who are not existing clients of the IP or their practice.

16. We urge government and FCA to work with ICAEW to overcome this counter-productive regulatory anomaly.
17. Government should also be mindful that there are 'debt advisors' who are not authorised, even if they should be or who otherwise fail to adhere to appropriate standards. They may give poor advice, for instance advising debtors to enter into IVAs or other insolvency procedures even if those procedures are not in the best interests of the individual concerned. It is important that any new breathing space regime does not create a market for advice that cannot be satisfied by appropriately skilled advisors.

FURTHER COMMENTS ON BREATHING SPACE REGIME

18. We are answering the detailed questions on the breathing space proposal from the starting point that it needs to be simple to work effectively. As a result we have not answered all the questions, as some of them anticipate a more complex regime that we do not believe is called for. Where our comments address a specific question, we have noted that in square brackets below.

Available to all without pre-conditions [Q1]

19. The breathing space should be available to all individuals who believe that they are unable to pay their debts when due, with necessary safeguards against abuse.
20. If more complicated pre-conditions are set, such as defining 'serious problem debt', there is a risk that individuals will not understand the conditions, be deterred from applying or need to take advice.
21. Including elements of discretion necessarily leads to questions of who exercises the discretion and further potential complications that could ultimately lead to an unwieldy regime. The risk of disputes and the need for enforcement can be minimised by minimising the number of requirements.

Easy to start by individuals [Q.2]

22. The breathing space should be easy to start. We suggest that individuals with problematic debt should be able to initiate the process themselves, or authorise others to do so. In practice, it is likely that individuals will want advice before exercising their rights or that advisors will start the process for them, but we do not believe that this should be a pre-condition.
23. Requiring debtors to appoint an advisor might encourage them to seek advice, but it might equally deter them from using the regime, or cause delay. We do not think that it is necessary. Debt advisors may themselves seek out relevant debtors, something that may be of concern if they are not appropriately qualified, as noted further below.
24. We do not believe that there should be a requirement for individuals to seek advice after triggering the breathing space. It would be desirable that they do so, but making it a requirement would mean that issues such as policing and consequences for breach would need to be addressed. We do not think this would be justified by a short breathing space proposed. [Q.5][Q.11]

25. We suggest that individuals should be able to start the breathing space by filing a simple form of notice with the Insolvency Service or relevant Court. The notice should be accompanied by a statement to the effect that the individual is unable to pay their debts when due.
26. A record of all notices should be kept by the Insolvency Service or Court and either made public or, at least, provided to credit rating agencies and other relevant bodies. The breathing space would start immediately on publication. Evidence of this could be provided by individuals to creditors (or would be publicly available). [Q.8][Q.11]
27. Individuals should be made aware of the impact on their credit rating and other implications of starting the breathing space, before it is started. This could, for instance, be a simple warning note in an online application (or notification) process. This could also provide information to debtors on where they can seek advice during the breathing space.
28. There are risks in making the regime easy for debtors to start. In particular, there is a risk that individuals could trigger the breathing space without understanding the full implications. They may also trigger the regime and then take no action, so wasting the opportunity to take advice free of the risks of enforcement and potentially finding themselves in an even worse position when the breathing space ends. However, if the regime is not easy to start, it may not be widely used.

Breathing space should apply to all debts (but not child or other family maintenance obligations)[Q.3][Q.13]

29. The breathing space should apply to all debt, except, we suggest, family maintenance obligations. Those dependent upon maintenance payments are also likely to be in a vulnerable position and it is difficult to see why a regime intended to reduce hardship should favour one class of individuals over another in this context (even if the issue will largely be academic where the debtor has insufficient funds to pay maintenance anyhow). Assuming that the breathing space is only around six weeks, it would not be appropriate to change priorities of creditors in that timeframe (indeed, we question whether it would be appropriate to change priorities at all, outside of a systematic and comprehensive review of the UK insolvency regime).
30. In particular, the regime should apply to debts incurred by individuals whether as consumer or sole proprietor (or partner under an English law general partnership). It is often difficult to distinguish between the two in an insolvency context and an individual may well turn to sources of consumer credit (such as credit cards) to support the individual's business. The distinctions between the two and consequences for the individual are matters that may be resolved if and when an insolvency procedure occurs and a suitably skilled insolvency practitioner is involved.
31. It should also apply to secured debt. While many of the individuals concerned may not be home owners with mortgages, they may own or use assets such as cars on a secured basis. If creditors have rights to re-possess assets such as cars during the breathing space, it will not offer much room to breathe.

Consequences of the breathing space – freeze on obligations and protection from enforcement [Q.4, Q.5]

32. The breathing space should freeze obligations to pay capital sums, interest, fees and other charges. Creditors would also be prohibited from exercising enforcement rights during the breathing space and existing enforcement actions should be stayed. There should be consequences for creditors who ignore the breathing space. Creditors who are regulated (for instance financial institutions regulated by FCA) might be subject to sanction by their regulator. In other cases, criminal sanctions might be applied.
33. Debtors should not be constrained by regulation from paying creditors during the breathing space period (should they have money to do so) – it might prove difficult to police restrictions of this kind. However, we suggest that any payments to any creditors (other than family maintenance) should be at risk of being a preference (and so potentially repayable) and that creditors should be made aware of this (or should be deemed to be aware assuming that there is a public register). Legislation might be required to produce this result.
34. We do not believe that debtors should be required to make payments to creditors during the breathing space. This would require policing, prioritising or apportioning and the implications of breach would need to be considered. While this may involve risk of abuse by debtors, the costs of administering and policing complex requirements of this kind could be disproportionate and these risks might be addressed through the sort of general provisions outlined above. [Q5]

End of the breathing space

35. At the end of the breathing space, creditor rights to enforce would resume. Any petitions or other action taken before start of the breathing space should be capable of reinstatement with minimal formality and updated to reflect any increase in amounts owed during the breathing space.
36. All amounts owed before the breathing space, together with interest, charges and fees that became due during the breathing space would be due.
37. We suggest that people dealing with the relevant individual during the breathing space, would do so at their own risk so that new lenders during the period would not be preferred, given the short period involved. Normal principles would apply if the individual subsequently becomes bankrupt or enters into another insolvency procedure. For this reason it is important that the breathing space register is public and that credit rating agencies are in a position to reflect it in credit ratings of relevant individuals. [Q7]
38. The breathing space would end automatically after the relevant period. In principle, it might be possible for the individual to end it by giving notice to the Insolvency Service or Court, but it is doubtful that there would be much need for that in practice. The breathing space should also end if the individual files under an available insolvency procedure. This should not be a question of 'enforcement'. Rather, the person responsible for the register should automatically note the termination on receipt or publication of notice of the relevant filing. [Q6]
39. The proposal is for a six week breathing space. We suggest that a 60 day (or 8 week) period, or an initial 30 day period, renewable for another 30 days, might be preferable in the interests of consistency with the FCA forbearance regime. In any case, Government should consider how the different regimes and timeframes will interact with each other.

Restriction on frequency of use [Q.10][Q.16]

40. It will be essential to restrict the frequency with which an individual can use the breathing space to avoid unfair prejudice of creditors. We suggest that the regime should not be used more than once in any twenty four month period and it might be appropriate to limit the number of repeat uses.

Apply to Wales and Northern Ireland [Q.17]

41. We are not aware of any reason why the new regime should not also be extended to Wales and Northern Ireland. Whilst respecting principles of devolution, it is obviously unhelpful to have different regimes of this kind apply depending upon residence of an individual in the jurisdictions and might encourage regulatory arbitrage.

Evaluating the impact [Q32]

42. It is not clear to us that the breathing space regime will have a tangible impact in economic terms. It seems that the commitment has already been made to introduce the regime regardless of any impact assessment and that the initiative is political in nature.
43. As outlined in the consultation document, there are already numerous initiatives to encourage or require creditor forbearance, including FCA rules for lenders where an individual is developing a repayment plan. It is not clear to us if government believes the proposed breathing space regime is needed to catch classes of creditor not already within existing forbearance initiatives, or whether it is intended simply to apply a common timeframe for management of all types of creditor.
44. We agree that it is better for individuals with problem debt to seek advice as soon as possible, but government needs to be realistic and understand that, in practice, individuals will often be slow to recognise that they have a problem, let alone seek out advice. There are also aspects of managing debt that involve personal choice and it is important that individuals are provided with information to help them make these choices, irrespective of whether or not they seek advice from third parties.
45. It is possible that linking the breathing space to a requirement to obtain advice might encourage some individuals to seek advice earlier, but only if they know about the regime and know about the requirement to seek advice. That could exclude many. The existing FCA forbearance regime is already linked to obtaining advice and government should consider how effective this has been and how the two regimes would inter-relate.
46. Government should not encourage individuals to seek advice without being confident that there are sufficient numbers of appropriately skilled people (or machines) to provide the resulting advice. There is a risk that making use of the breathing space dependent upon advice will create a demand that cannot be met, or encourage unqualified advisors to offer services and exploit the individuals. The success or failure of the breathing space regime needs to be considered in terms of end result. It is not clear to us that government is assessing this, or will find it easy to do so.

