



## **The Breathing Space Scheme**

### **What is it and what are its implications for Self Storage?**

May 2021

#### **Key Points**

- The breathing space scheme only applies to existing debts, typically being overdue storage fees, it does not apply to ongoing storage fees which continue to be billed during the process.
- The breathing space scheme can only be applied by an FCA authorised debt advice provider. A list of all debts covered by the scheme will be provided by the provider and the scheme will only apply to those debts.
- If you have a customer that has included your debt in the breathing space scheme you need to essentially pause the sell up and debt collection process for that debt until the breathing space period is over. No more late fees or other penalties can be applied to that debt during this time. This does not prevent you invoicing for ongoing storage fees if the customer is still storing with you, and chasing that debt as appropriate.

#### **What is the Breathing Space Scheme**

The “Breathing Space Scheme (officially called The Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020) came into force on 4 May 2021.

Breathing Space is a scheme launched by the Government to help relieve some of the pressure on people with debt problems by giving “breathing space” from their creditors, so they can focus on getting debt advice and setting up a debt solution without worrying about being chased for payment or incurring extra interest, penalties or other charges for a fixed period of time.

Breathing Space is not a payment holiday, but it does prevent creditors from taking certain action against debtors who are unable to pay for as long as the Breathing Space lasts.

There are two types of Breathing Space.: a “standard” breathing space, which lasts for up to 60 days and a “mental health crisis” breathing space, which lasts as long as the debtor is being treated for mental health issues, plus 30 days from the end of the treatment.

During a standard breathing space, a debt adviser must carry out a midway review between day 25 and day 35. This is to make sure they are satisfied the debtor is complying with their obligations. If the debt adviser thinks the debtor has been meeting their obligations and communicating with them, the standard breathing space will continue until the end date. If the debt adviser thinks the debtor has not met all of their obligations (such as keeping up on-going payments), they can cancel

the standard breathing space in respect of some or all the debts. Creditors can ask for a review of a breathing space or specific debts being included in it in certain circumstances.

### **Who can apply for Breathing Space?**

A debtor can't just claim breathing space automatically. An application for breathing space needs to be made to a debt advice provider who is authorised by the Financial Conduct Authority to offer debt counselling, or any local authority that provides debt counselling to its residents.

To obtain standard breathing space, a debtor who can't or is unlikely to repay their debts will need to apply. If an approved mental health professional certifies that a person with problem debt is receiving mental health crisis treatment, an application for a mental health crisis breathing space can be made by the individual or on their behalf by their carer, social worker, mental health nurse or other responsible person.

Although all applications will be considered, they may not be granted in all circumstances.

The debt advice provider must be satisfied that the debtor:

- is an individual or sole trader (not VAT registered) living or usually residing in England and Wales
- owes a qualifying debt to a creditor
- is not an undischarged bankrupt or subject to an individual voluntary arrangement or debt relief order
- in the case of a standard breathing space application only, has not already had a breathing space in the last 12 months
- is not able to meet some or all of their debt when it falls due
- doesn't have other assets that could be sold to clear the debt or could manage their debt with some budgeting assistance or another suitable debt solution such as an individual voluntary arrangement
- would benefit from a debt solution

### **Which debts does it apply to?**

It applies to all "qualifying debts". All personal debts are likely to be qualifying debts with limited exceptions. It includes joint debts even if only one debtor applies. It also includes business debts owed by sole traders who are not registered for VAT and who are not a partner in a business with someone else.

There is a distinction between debt and liability:

- a debt is a sum of money owed by the debtor to the creditor, e.g. arrears
- a liability is an obligation on the debtor to pay money to the creditor, e.g. normal storage charges due periodically under the storage licence..

The breathing space puts a freeze on debts that are in existence at the time the breathing space begins, not on-going liabilities or new debts/arrears incurred during the breathing space.

## **How will you know if breathing space applies to any of your customers?**

The debt advice provider will be responsible for the administration of the breathing space moratoriums, the point of contact for the debtor, the creditor and the Insolvency Service. The Insolvency Service keeps a register of breathing spaces which have been granted.

The debtor must tell the debt adviser about all of the debts they know about and give them the contact details they have for each creditor. If they know about a debt collection agent acting on a creditor's behalf, they might also give the debt adviser those details. The breathing space starts the day after the debtor's details are put onto the breathing space register.

At this point, the debt adviser will notify all creditors the debtor has told them about. If the debt adviser is aware from the debtor that you are owed more than one qualifying debt, then you will receive one notification for each debt.

In terms of timing, if you have opted in to the electronic service with the Insolvency Service, then you will receive a notification electronically, likely on the day before the breathing space starts. Otherwise you will receive the notice by post or by someone leaving notification at your address. Under the breathing space regulations, you are considered to have received notice on the day it was sent by email or left at your address or, if posted, 4 days after posting.

Sometimes, not all debts are identified at the beginning of the breathing space, but are notified or identified later. These additional debts are not treated as breathing space debts until the debt adviser has decided any such other debt is a qualifying debt, updates the register and sends a notification to the creditor. The creditor must then treat the notified debt as a breathing space debt from the date of notification to the end of the breathing space - the fact of late notification does not extend the breathing space period.

## **What to do during a breathing space?**

When you receive a notification, you must search your own records to identify the debt owed to you by the debtor. This needs to happen as soon as possible. If you have only received notification about one debt, but you are owed two debts (for example, the debtor has a storage contract for a unit and a delivery room agreement, or a contract for more than one unit) then you should consider applying the protections set out below to both debts and, in all cases, you should tell the debt adviser about the additional debt. It is the debt adviser who will decide if the additional debt qualifies for the breathing space. If you notified the debt adviser about an additional debt but have not had a notification about the start of a breathing space for it, you should contact the debt adviser dealing with the breathing space to confirm what is happening.

The breathing space regulations say you must make sure you stop all of the following in respect of debts that have been notified to you as breathing space debts from the date of notification until the breathing space comes to an end:

- the debtor having to pay interest, fees, penalties or charges for that debt during the breathing space

- any enforcement or recovery action to recover that debt, by you or any agent you've appointed, against the debtor or anyone who is jointly liable with them for a breathing space debt; and
- contacting the debtor to request repayment of that debt, unless you've got permission from the court.

If you have received a notification about a breathing space debt, you're allowed to see any information on the register about that debtor and the breathing space debt they owe to you. You are not able to see any information held about any other creditor the debtor has or any other breathing space debt owed to another creditor.

### **What happens at the end of the breathing space?**

When a breathing space ends, creditors will be sent a notification. If the debtor has gone into a debt solution, such as a debt relief order, bankruptcy or has made a formal arrangement with their creditor such as an individual voluntary arrangement, then the rules applicable to creditors in accordance with that debt solution will apply. Otherwise creditors can start applying interest, late fees and charges from the date the breathing space ends, as long as it is not backdated or would have accrued during the breathing space. They can also take any action to enforce their debts or start or continue legal proceedings in relation to the debt.

### **WHAT DOES THIS MEAN IN THE CONTEXT OF SELF-STORAGE?**

1. A debt is not a breathing space debt unless the debt adviser has notified you as creditor that it is. If you haven't received notification from the debt adviser that your customer's debt is a breathing space debt, you do not need to apply any of the restrictions and can continue any action to recover the debt, even if your customer tells you they are in a breathing space. It is up to the customer to inform the debt adviser about the debt and for the debt adviser to decide whether to notify you as creditor that the debt is a breathing space debt.
2. The breathing space does not mean a payment holiday. Customers still need to meet their on-going payments of storage fees/delivery services when they fall due. The breathing space restrictions are concerned with debts in place when the breathing space begins, which essentially means accounts which were already in arrears when the breathing space starts and how far the enforcement process had gone when the breathing space began. While you cannot enforce a breathing space debt during a breathing space or charge interest or fees on it, a debtor is still legally required to pay their debts and liabilities. During the breathing space, the debtor should continue to pay any debts and liabilities they owe you. You can continue to accept these payments, including those you get from existing direct debits.
3. Multiple accounts in arrears. Check if you have more than one account with the customer. If you receive a notification for all accounts that are in arrears, then you need to apply the restrictions to all accounts. If you don't receive notifications for all accounts in arrears, notify the debt advisor and clarify which (if more than one) account the restrictions apply to.

4. Interest/late fees. If your licence agreement allows you to charge interest on overdue fees or a late fee that hasn't already been raised as per your licence agreement, you can't charge these during the breathing space or retrospectively (for the breathing space) after the breathing space comes to an end. Any late fee or interest on the overdue account that has been properly accrued prior to the commencement of the breathing space remains part of the debt.
5. Statements of account. Ideally, communications you send customers should not show interest, late fees or charges that accrue during a breathing space on accounts that were overdue at the start of the breathing space and have been notified as breathing space debts. However, if limitations on your IT systems mean that these show on invoices or the account, it does not breach the regulations to show them, as long as you do not require the customer to pay them and you make it clear you are not asking the debtor for payment of the interest/late fees on the specified account(s) for the duration of the breathing space.
6. Repayment plans. If you have agreed a repayment/instalment plan with your customer, the customer should continue to make payments under that agreement as they fall due. Although no enforcement action may be taken during the breathing space moratorium period, any unpaid instalments may be treated as a breach of the repayment plan and allow you to take appropriate steps from that point once the breathing space ends.
7. Overlocking and Lien sales. Creditors are not permitted to take any enforcement action during the breathing space in relation to breathing space debts. The government guidance says that this includes the selling or taking control of the debtor's property or goods. The regulations carve out an exception where a bailiff or enforcement agent has taken control of any goods by removing them and securing them elsewhere before a breathing space started, in which case the goods may be sold during the breathing space and the costs of the sale deducted from the proceeds. However, if the bailiff or enforcement agent accrued fees during the breathing space for storage of those goods, those fees cannot be charged to the debtor either during the breathing space, or after it ends. How this applies to units that have been overlocked by the operator on-site and/or goods that are scheduled for sale prior to the commencement of a breathing space will need to be considered further with insolvency specialists. Arguably, by analogy with the bailiff process, if the customer has been served with a final notification of a lien sale date prior to the start of the breathing space, the sale ought to be able to proceed, but the costs of storage from the start of the breathing space to the date of the sale should not form part of the debt recoverable. The cautious view would be to freeze the lien sales process at the stage reached prior to the start of the breathing space and remove the overlocking so that the customer can sell goods to pay its debts, but this would not seem to preserve the position reached prior to the breathing space. The recommendation in default would be to raise this with the debt adviser if a debt is notified as a breathing space debt, before taking off the overlock. If the overlocking has taken place prior to the commencement of the breathing space then, if the enforcement process is frozen at that point, the operator will not be taking any additional action during the breathing space, but it means the lien sale process will be put back by up to 60 days. In any event, you will need to notify any third party who has been engaged by you to carry out the lien sale process or any part of it to take no further action until you inform them that the breathing space has come to an end.

8. Late letters. The government guidance says that, during a breathing space, you (or any agents you have instructed) must not contact a debtor about any collection or enforcement action for a breathing space debt. This includes asking them to pay or starting or continuing any legal action. This means that the late letter/lien sale process should be put on hold for the breathing space and then re-started from the point at which it was frozen once the breathing space ends.
9. Existing legal proceedings If you as operator have already filed a petition for bankruptcy or started any other action in a court or tribunal relating to a debt that is now in breathing space, you must tell the court or tribunal in writing. You must do this as soon as you receive notification of the breathing space.
10. New arrears after the breathing space has started. Breathing space can only apply to debts in existence at the date when the breathing space starts, even if not identified until later. So, if a customer who has the benefit of breathing space for a debt to you on one account goes into arrears on another account during the breathing space, the restrictions to not apply to the arrears on the second account. If a customer has breathing space for other creditors and was not in arrear with you at the start of breathing space, but their account goes into arrears after the breathing space starts, you do not need to apply any of the restrictions and can continue any action to recover the debt, even if your customer tells you they are in a breathing space.
11. Contact with customer. Although you are not able to contact the customer about any collection or enforcement action for a breathing space debt, you can contact them about on-going liabilities, or if they ask you to talk about a breathing space debt or a debt solution, or to deal with complaints they sent you. It is not intended to stop communication that might be helpful to the debtor. You might want to contact a debtor at the start of a breathing space to tell them they do not need to worry about normal communications you send them. Any communication you send should be minimal and must be carefully drafted to make sure it could not be read like it is about asking them to pay what they owe. If you receive calls from customers worried by letters they receive from you during a breathing space, this may mean that you need to consider whether the letters are appropriately worded, and whether they are consistent with the regulations.
12. Contact with debt adviser. You and the debt adviser may contact each other during the breathing space on anything about the debtor and your debt. This might include things like a breathing space debt and how to deal with it, a debt solution for the debtor, telling them about an additional debt, telling them the debtor is not meeting on-going obligations etc.