UK Finance

Response to HM Treasury consultation: Regulation of Buy-now, Pay-later Draft Legislation

Sent via email to: BuyNowPayLater@hmtreasury.gov.uk

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Introduction

1. UK Finance is the collective voice for the banking and finance industry. Representing around 300 firms of all sizes, we act to enhance competitiveness, support customers and facilitate innovation.
2. We welcome the opportunity to respond to the HM Treasury (HMT) consultation on the regulation of Buy-now, Pay-later (BNPL) draft legislation.
3. Our response reflects the collective comments of our consumer credit members who principally offer unsecured credit on a regulated basis. The response also includes comments from members who provide unregulated BNPL products, noting that whilst such members are in the minority, this includes the market leader for unregulated BNPL products by market share. Where we reference support by the majority of our members, such support does not include providers of unregulated BNPL products.

Executive Summary

4. Our members support the disapplication of outdated Consumer Credit Act 1974 (CCA) requirements to BNPL regulated lending and consideration of a more proportionate regulatory regime focused on achieving good customer outcomes.
5. Support from the majority of our members is conditional upon timely broader CCA reform, which similarly disapplies outdated CCA requirements and enables firms to better support customers to achieve good outcomes.
6. Our members are keen that disruption is minimised for any lenders who are already providing interest free lending in a way that is consistent with the CCA. This enables similar systems to be maintained between all regulated agreements.
7. A fuller review of the CCA is required to ensure there are no unintended consequences brought about by the proposed reforms and in order to ensure that the outcome of the reform for BNPL is effectively delivered.
8. We are keen to ensure that the messaging around the regulation of BNPL is appropriate to ensure there is no scope for claims activity which seeks to apply the new rules retrospectively.
9. We would urge HMT and the Financial Conduct Authority (FCA) to continue to monitor the sector to address any emerging harm, in particular caused by the way that BNPL options are presented by retailers and the way in which BNPL products are provided by larger merchants under the proposed regulatory exemption.

Overarching position

10. UK Finance has consistently advocated for “same activity, same risk, same regulation”. Whilst members who offer BNPL products support the distinction drawn by HMT between BNPL and interest-bearing products and the different regulatory regimes which the consultation proposes, the majority of our members believe that BNPL lending shares consistent features with other forms of lending that are fully regulated by the current outdated Consumer Credit regime. Supporting data was provided in our response to the previous consultation on BNPL, which showed the similarities between BNPL and the use of other credit facilities. All members believe that reform of the CCA regime is long overdue for many of the reasons identified by HMT in this consultation paper.

11. While the majority of our members are keen to see BNPL regulation placed on a similar regulatory playing field to other products it competes with, all of our members also recognise that it may not be appropriate to place BNPL firms within a regime that is so unsuitable for all lending products and which, our members very keenly hope, will itself be swiftly the subject of wholesale reform. For this reason, our members can understand and so are able to support BNPL being placed within a more proportionate regime, properly designed with BNPL products in mind.

12. This change in the majority of our members’ position is a pragmatic approach in support of the introduction of proportional regulation for BNPL products, which is something the broader industry has been calling for in relation to wider regulated lending products. The position of such members, therefore, is conditional upon there being wider CCA reform introduced swiftly, which places them on a similar footing to BNPL.

13. It is essential that a level playing field will be achieved in any wider CCA reform.

14. Whilst our members feel able to provide pragmatic support to the removal of outdated and disproportionate sanctions which exist under the CCA for BNPL under this consultation, they strongly oppose the retention of existing or modified sanctions for providers of other forms of credit. We believe the rationale for disapplying sanctions for BNPL products, based upon these products being shorter term, interest free and lower value, is a position that can be adopted to a broader spread of lending products, which remain fully regulated. This illustrates that these features do not provide a sufficient distinction between their treatment as against other lending products. Our members strongly believe that the CCA sanctions are outdated, disproportionate and require lenders to communicate with customers in a way that does not support good customer outcomes. In addition, our members strongly support the conclusions reached by HMT in para 2.60, which concludes that “robust consumer protections will exist under the proposed regime” without

sanctions applying. These are compelling reasons for supporting the reform of sanctions for all lending products.

15. As part of the wider CCA reform agenda, our members will therefore want to see the interim regulatory gap between BNPL products and other lending products removed by similarly removing unwarranted, technical and disproportionate legal sanctions for all lending products. However, should the outcome of the wider CCA reform consultation conclude that such legal sanctions should remain, either in the existing or modified format, the majority of our members believe that BNPL products must then be brought within a new regime, a position which is opposed by our members who provide BNPL products.

16. The majority of our members also believe that it is imperative that CCA reform is moved forward and to a timely conclusion, in order that the disparate treatment of different lenders is not allowed to remain in place for an unlimited amount of time into the future. Absent that, the majority of our members will continue to call for parity of regulation. **Our response to the specific questions posed in the consultation should be read subject to this overarching qualification**.

17. Although not directly responding to a point in the HMT consultation, we would make the point that, by disapplying the strict requirements of the CCA from BNPL products, HMT provides the FCA with a real opportunity to create a more proportionate and appropriate set of rules that better reflect customer needs. We would hope, therefore, that the FCA will not simply copy out CCA regulations into the Handbook. Our members are keen for the FCA to set the tone for broader CCA reform in the Rules it goes on to create for BNPL providers.

Responses to Questions

Question 1: Do you have any comments on the proposed approach and/or drafting disapplying provisions on pre-contractual information (sections 55 and 55C)?

18. We agree with HMT's reasoning that underpins its decision to disapply pre-contractual provisions. In particular, HMT notes that most of the information required is complex and difficult for consumers to engage with. HMT considers that, in the context of BNPL, the inclusion of some of the information might confuse customers. We believe this to be a risk in general of the way pre-contractual information must be provided to customers.

19. We also strongly support HMT's position in para 2.28, which sets out the other overlapping protections that apply to customers. We note that these equally apply to other forms of lending. We also strongly agree with the conclusion reached that "a more consumer-focused pre-contract and contractual disclosure regime can best be delivered by disapplying sections 55, 55C, 60, 61 and 61A".

20. Members are keen to be given the ability to deliver similarly customer focused information in innovative ways, rather than being hampered by outdated prescribed requirements.

21. In relation to the drafting, please see our comments in relation to Question 2. Whether pre-contractual documentation has been provided can sometimes be the trigger for determining whether other provisions of the CCA apply. To avoid unintended consequences, we would recommend that thorough evaluation of other parts of the CCA is required, and potentially wider exclusions needed.

22. Giving the FCA the latitude to design and implement a disclosure regime, based upon the forward-looking and outcomes focused Consumer Duty, will help to ensure that the BNPL sector is not only presenting information in a consistent manner and to a high standard, but also in a way that consumers will actually engage with/ understand and support good consumer outcomes. This is an aspiration for all providers of consumer credit.

Question 2: Do you have any comments on the proposed approach and/or drafting disapplying provisions on the form and content of agreements (sections 60, 61 and 61A)?

23. Members are broadly supportive of the approach proposed by HMT. As described under Question 1, we strongly agree with HMT's reasoning that underpins its decision to disapply form and content of agreement provisions.

24. To support this move towards a more flexible and innovative framework for firms to present pre-contractual information to customers, we also think that the document service requirements under s.176 and s.176A should be reviewed. Most, but not all, of the provisions to which these sections apply are disapplied for BNPL.

25. We would query whether the disapplication of provisions in relation to the form and content of agreements should be extended to apply to customers' withdrawal rights under s.66A, given the overlap between this and s.61A of the CCA in terms of determining the start of the relevant period for customers to give notice of withdrawal. Just as the consultation notes that the provisions of CONC and the FCA Principles give firms more flexibility on the form and phrasing of their

documents whilst ensuring that they communicate fairly to customers, we think that provisions surrounding customers' notification of withdrawal could be adequately covered by amending the rules under the FCA Handbook.

26. We note HMT's position in relation to not legislating to enable a firm to comply with the CCA regime and that this would need to be determined by the FCA. Our members are keen that disruption is minimised for any lenders who are already providing interest free lending in a way that is consistent with the CCA. This enables similar systems to be maintained between all regulated agreements.

Question 3: Do you have any comments on the proposed approach and/or drafting disapplying provisions on ongoing information requirements (sections 77, 77A and 77B)?

27. Members support HMT's approach in its disapplication of information requirements (and other CCA provisions) to BNPL regulation, provided that the same approach is then applied to the wider consumer lending sector when broader CCA reform is consulted on. We are particularly supportive of HMTs conclusions that it is important that consumers have access to simple and clear information about their account to help them manage their finances effectively, but that applying the provisions in s77, 77A and 77B "is not the best way to achieve that outcome". We would also make the point that it is not only BNPL providers that provide digital accounts that allow customers to keep track of payments. We agree that requiring lenders to provide lengthy and potentially unsuitable prescribed documents via digital mediums is unlikely to maximise consumer understanding and engagement.

28. These echo the issues that lenders experience more generally and underline the need for wider CCA reform as a fast follower to the regulation of BNPL.

Question 4: Do you have any comments on the proposed approach and/or drafting disapplying provisions on varying agreements (section 82)?

29. Members are supportive of the approach proposed by HMT to disapply s82. We note that HMT has not sought to justify this disapplication specifically for BNPL, but has simply noted that "existing contractual law principles will apply where a change is agreed between firm and consumer". We agree that the complexities associated with s82 are unnecessary for the whole lending industry and press for urgent similar wider reform.

Question 5: Do you have any comments on the proposed approach and/or drafting disapplying provisions requiring prescribed information on early repayment (sections 97 and 97A)?

30. Members are supportive of the amendment/ drafting proposed by HMT.

Question 6: Do you have any comments on the proposed approach and/or drafting disapplying provisions relating to arrears, default and termination (sections 76, 86B, 86E, 87, 97 and 103)?

31. Members are supportive of the approach and drafting proposed by HMT. HMT notes that default notices must be sent in paper form, which is inconsistent with products that tend to be taken out and managed digitally. We very much agree with HMT on this and note that BNPL are not the only credit products that are taken out and managed digitally. The majority of lenders' products are managed digitally.

32. HMT also notes that the requirement to send NOSIAs after 2 missed payments is impractical for products that often have only two or three payments. The majority of our members do not agree with this position, as they believe that a borrower in arrears, who only has to make two or three payments, is proportionately more likely to be in a greater degree of arrears than customers who have lower repayments over a longer period. For a fixed sum NOSIA, these continue to need to be sent once the arrears have totalled the last two payments for the remainder of the time the arrears remain outstanding. Accordingly, the majority of our members (excluding providers of BNPL) do not see why BNPL can be distinguished as impractical solely based upon the initial number of repayments.

33. Importantly, our members are not, however, calling for NOSIAs to be applied for BNPL because we entirely agree with HMT that they are unsuitable documents in ALL circumstances. We agree with HMT's conclusions that "the FCA has extensive rules on how firms providing typical regulated credit agreements should engage with and support customers in financial difficulty".

34. We therefore agree that these CCA requirements are not useful in ensuring that consumers in financial difficulty are presented with clear, timely and useful information or in supporting them to find an appropriate solution depending on their circumstances. Consequently, all members support the disapplication of these

provisions, with the majority of our members doing so on the proviso that these are disapplied to other regulated products as a fast follower to BNPL reform.

Question 7: Do the amendments to section 129 (TIME ORDERS) and section 86 (DEATH OF DEBTOR) sufficiently retain the effect of these provisions for BNPL agreements?

35. Our members have no strong views on the continued application of s86 for BNPL products. However, this broader application of the section will need to be considered as part of subsequent CCA reform discussions.

36. On the application of s129 (time orders), our members are supportive of their retention as part of the current CCA safeguards if this is legally possible. As HMT noted, our members do not find these provisions are used in practice. There is scope to review this provision as part of the wider CCA reform that is needed.

37. We are not sure, however, that the manner in which the provisions on Time Orders is provided for clearly works from a legal perspective. Time Orders are currently triggered either where there has been a breach, or where the CCA requires the lender to obtain an enforcement order, or the sending of a default notice or a NOSIA. The legislative drafting which applies these provisions to BNPL agreements does so in circumstances where there is no corresponding legal obligation. That broadens the legal concept of when a Time Order applies. The drafting also does not draft in the carve outs that would apply by virtue of s87(2).

38. Given the complexities in applying them and the fact that they are not currently used by customers, our members wonder whether it would not be simpler to disapply them and consider the same under CCA reform.

Question 8: Are stakeholders aware of any further consequential amendments that may arise from the disapplication of CCA information requirements?

39. Although the removal of the interest free exemption is aimed at BNPL, it impacts more broadly. For example, it is possible that business lending facilities could be impacted or even arrangement over £60,260 if they are repayable without interest and within 12 months. In those cases, if those agreements are to be regulated credit agreements, the regulatory regime applicable to them is determined by the pre-contractual documentation which is sent to customers (see the definition of an excluded agreement in s61A, which is used for the purposes of determining the

application of s62 and s63). To ensure there are no unintended consequences and certain types of newly regulated agreement inadvertently get pulled into documentation regulation by virtue of other provisions of the CCA, we believe a fuller review of the CCA is needed.

40. As the credit agreement itself will become a regulated agreement, there may be cases where the CCA pulls in regulation of a "credit token". Section 85 would require a copy of the executed agreement where credit tokens are reissued. This seems wide enough to capture agreements that may not have complied with the form and content requirements of the CCA. However, as "executed agreement" needs to be signed and needs to embody the terms of the agreement. This could also have unintended consequences for compliance.

41. In relation to the definition of a "regulated deferred payment credit agreement", we note that limb (a) of the s77A definition applies to all forms of lending (including lending to businesses), but that the limb (b) element, which makes third parties who acquire goods/services supplied fall within the definition of a regulated agreement, can be read to suggest that it is limited to supplies of good and services to "consumers". Is the intention to out-scope business lending in this limb?

42. Another aspect that might need to be reviewed is the interplay between the exemption from the Money Laundering Regulations applicable to certain types of lending activities. It is possible that lending caught by (7A) (b) might become CCA regulated, but remain outside AML controls.

Question 9: Do you have any comments on the proposed legislative approach to DMRs, credit broking and the Financial Promotions Order?

Credit broking

43. The majority of our members remain concerned by the carve out of credit brokers who introduce the newly regulated agreements. They do not see that the risks associated with the sale of these products, as compared to other lending products, warrants a different treatment and members strongly support, "same activity, same risk, same regulation". Our members are also concerned that the regulatory position could be confusing for customers, for example in relation to any impact on their FOS rights. Our members agree that regulation imposes costs on retailers and those members who provide BNPL products note their support for the idea to exempt such merchants from existing credit broking requirements, as they see this as being vital to ensure that BNPL remains a viable product for retailers to offer at their checkout. Other members point out that there should not be the ability of

some retailers to avoid those costs as compared to others. The majority of members are keen to see a review of the regime applicable to credit brokers more generally as part of a wider CCA reform, where there will be the ability to design an appropriate and proportionate regulatory regime for all those involved in the sale of credit products.

Financial promotions

44. Our members support the fact that unauthorised merchants will be required to have their promotions approved by an authorised person.

Distance Marking Regulations (DMRs)

45. We note that HMT appears to be intending to press ahead with amendments to the DMRs. We are concerned that these amendments are not needed and introducing them creates confusion over the current legal position. It has always been the case that the DMRs apply to any financial services distance contracts that were entered into by unauthorised persons. It is perfectly possible currently for a loan agreement to be unregulated, but the credit broking activity to be a regulated activity. The application of the DMRs in that situation has never been problematic.

46. The distance marketing regimes apply to the contract for the services provided. If a credit broker is entering into a contract for its services, the distance marketing regime applies to that contract – i.e. to the credit broking services. Where a lender complies with distance marketing requirements, this is in relation to its separate lending services. There is likely to be a need to comply with the distance marketing requirements twice in those cases in any event, irrespective of which regulatory regime applies.

47. HMT is assuming that all merchants that introduce customers to credit via, for example, a link on their website do so by entering into a contract for credit broking services. The industry would not agree with that position. In normal circumstances, there is no contract for broking services with a customer and so the unauthorised credit broker does not have any compliance obligations under either regime. If it did provide the services via a contract, then it is appropriate that it provides disclosures in relation to those services under the DMRs and these should not be exempted.

48. By including these provisions, the legal position will be significantly confused. There is an implication that all credit brokers should have been making legal disclosures that they have not been and this is not correct and not helpful to the industry. The legal position should remain as it is and as it has always operated without any known difficulties. In most cases, this will not result in dual disclosures. For completeness, we would also note that even if there were an obligation on an

unauthorised credit broker to disclose information under the DMRs, that obligation could be met through disclosure of the same information as is required by CONC. The CONC provisions copy out the DMRs requirements (as was historically required under EU law).

Question 10: Do you have comments on the proposed legislation that seeks to implement the TPR?

49. Our members are supportive of the idea of a Temporary Permissions Regime (TPR) to enable the switching on of regulation faster for BNPL, but still giving time for the FCA and for firms to go through a proper authorisations process. However, our members are not clear about how the new authorisation will work for those firms who are already authorised for the relevant activities (e.g. authorised to enter into regulated credit agreements), but which will now be carrying out newly regulated agreements.

50. We note that at para 2.85, HMT sets out what it seems to suggest are newly regulated activities, including entering into a regulated DPC agreement as lender. However, our reading of the legislative amendments being proposed is that the amendments remove an exemption and, as such, these activities will then fall within the existing regulated activity of lending, which our members will already hold. Our members therefore read the requirements to mean that they will not need to make any new applications to the FCA to be able to continue to enter into newly regulated DPC agreements.

51. It would be helpful if this could be set out more clearly in the legislative provisions. We are aware that, in other circumstances, the FCA has imposed restrictions on all permissions (such as in relation to high-cost credit), so that a firm wanting to carry on those activities needed to apply for a removal of the permission restriction. This involves a cumbersome authorisation type process for firms. Given that these newly regulated agreements are interest free agreements, we do not see that it would warrant existing authorised firms needing to go through any form of regulatory process with the FCA and we would welcome HMT setting the tone for this in the legislation itself, rather than this being a process decided by the FCA.

Question 11: What do you expect the impacts to be of this proposed legislation on: providers of agreements that will be brought into regulation, consumers that use them and merchants that offer them as a payment option?

Impact on agreement providers and merchants

52. As with any change in regulation, there is a risk that situations can be exploited by the claims sector. We are concerned that change could give rise to retrospective claims on the basis that what providers were doing before they were brought into regulation, or before regulation was changed, was unfair and there should be no retrospective application. It would be helpful if the legislation could make it clear that any new standards applicable to these activities going forward are not to be relied upon to found any legal claims in the courts, or in FOS, about activity that pre-dated the requirements coming into effect.

53. Additionally, some members have raised concerns that the proposed legislation does not ensure that customers are sufficiently protected when BNPL products are presented to them as a payment option (for instance, by presenting BNPL as their default payment method). We would encourage the FCA to monitor customer outcomes following the implementation of the legislation, and, if necessary, consult on further rules needed to strengthen consumer protection in relation to merchants' presentation of BNPL as a payment option (noting that this was identified as a risk under the Woolard Review).

54. Our members remain concerned about the potential for larger merchants to develop their own large scale unregulated BNPL offerings and that this could be a loophole for these retailers to exploit. We are keen for the FCA and HMT to keep a close eye on this potential development and to be in a position to react rapidly should there be a need to turn on greater regulation in this area.

Question 12: Do you agree with the provisional assessment that, on balance, the government's proposed proportionate approach to reform mitigates the negative impacts on those sharing particular protected characteristics and retain the positive equalities impacts of the products?

55. We have no specific comments on this question.

Question 13: Do you have any further data you can provide on the potential impacts on persons sharing any of the protected characteristics?

56. We have no specific comments on this question.