

UK Finance response to the HM Treasury consultation – Regulation of Buy-Now Pay-Later

CONFIDENTIAL

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

1. UK Finance (“UKF”) is the collective voice for the banking and finance industry. Representing around 300 firms, we act to enhance competitiveness, support customers, and facilitate innovation.
2. We welcome the opportunity to respond to HM Treasury’s (HMT) consultation paper on the Regulation of Buy-Now Pay-Later (“BNPL”). Our response reflects the collective comments of certain retail banking members who are interested in this consultation, comprising members who principally offer unsecured credit on a regulated basis, together with authorised payment providers and certain payment Schemes. Our response also includes comments from members who provide unregulated BNPL products, noting that whilst such members are in the minority, as we reference membership views within this response, such members include the market leader for unregulated BNPL products by market share.
3. Where we indicate views within this consultation response which are ascribed to our members, they are drawn from these cohorts of responders. Where we indicate that there is consensus, this relates to the views expressed by all those members who have responded across these different cohorts.

Executive Summary

4. The environment in which BNPL, or similar substitutable deferred payment options, can be provided to consumers, is complex, fast evolving, and multifaceted.
5. We agree this is the right time to be considering regulation of BNPL and other short term interest free loan products. The Woolard Review identified that the BNPL market has grown exponentially during the pandemic and noted the value of transactions from the main providers more than tripled in 2020. Research by Bain & Co, as published in October 2021 (<https://www.bain.com/insights/assessing-benefits-and-challenges-bnpl-report-2021/#>) expects transaction volumes to grow 29% annually to account for some 10% of all e-commerce by 2024.
6. There is a consensus amongst UKF members that BNPL products should be brought within the scope of regulation and that the impetus of regulation is helpful to ensure that all providers act in a consistent manner in order to ensure good outcomes for consumers. Some of our members

who provide unregulated BNPL products believe that some of the issues which have been identified as needing to be addressed could and should be done so by providers in advance of regulation on a voluntary basis.

7. HMT has drawn a distinction within the consultation between BNPL products and other short term interest free products. UKF is not representing the views of providers of short-term interest free products in this consultation response. Members have different views on whether the scope of regulation should be extended to short term interest free products, or whether exclusions could apply based on the value or type of debt incurred.
8. HMT has proceeded on the assumption that BNPL loans and some other short term interest free loans benefiting from the A60(F)(2) exemption have product risks that are inherently lower risk to consumers (consultation paragraph 3.1) and as such may warrant proportionate regulatory controls. UKF members have different views on the correctness of this assumption once the broader risks to consumers are considered.
9. This risk distinction is drawn by HMT to avoid the application of outdated, inflexible, and prescriptive requirements of the Consumer Credit Act (1974, as amended) ('CCA') to innovative products which have to date operated outside the scope of regulation. The application of these requirements to BNPL products may therefore be discounted by HMT as counter intuitive. If so, then by extension this should also apply to the continued application of outdated and inflexible requirements for current incumbents. An approach which applies different rules for substitutable products, which are assessed by the majority of our members as carrying the same or similar risks, does not support effective competition. HMT will need to consider whether the risk distinction they have suggested is correct and whether it supports such an approach, but the fundamental issue remains that the CCA is not fit for purpose.
10. There is consensus amongst UKF members on the urgent need for reform of the CCA to ensure proportionate regulation with appropriate and similar outcomes for consumers of substitutable products and. until such time, the majority view of our members is that all current regulations should equally apply to BNPL products.
11. There is a consensus amongst our members on the application to BNPL products of current regulations relating to a number of key areas. These are creditworthiness, the treatment of customers in financial difficulty, the application of Section 75 of the CCA and the jurisdiction of the Financial Ombudsman Service (FOS).
12. This consensus also acknowledges the flaws in the current regime, in particular relating to the need for reform of the FOS, as highlighted in UKF's response to the Regulatory Framework Review¹.
13. The consultation is restricted to analysis of credit implications for unregulated BNPL products, and certain members of the acquiring population within our membership advocate that HMT considers undertaking similar analysis of the application of the Payment Service Regulations (PSRs) to the BNPL model.

¹ <https://www.ukfinance.org.uk/policy-and-guidance/consultation-responses/uk-finance-response-financial-services-future-regulatory-framework-review-phase-ii-consultation>

Overarching comments

Consumer credit

14. We would echo our observations in response to (a) the Woolard Review²; (b) HMT's phase-II consultation on the Future Regulatory Framework Review³; and (c) the BEIS consultation on Reforming Competition and Consumer Policy⁴, that firms undertaking the same activity and posing the same levels of risk can face different levels of regulation, and firms can face the same regulation despite posing different levels of risk. This is particularly problematic for customers, who might reasonably expect, but cannot currently be guaranteed, the same protections when consuming broadly substitutable products and services. Our general position continues to be that regulations should subject the same activities and risks to the same regulation, with the same consumer protection.
15. The basis for proportionate regulatory controls, as advanced by HMT for BNPL and short-term interest free products falling within RAO 60 (F)(2), assumes that because no interest is charged the risks of the products are inherently lower than interest bearing products. This is a view that is principally supported by those in our membership who offer unregulated BNPL products; supporters of this approach advocate for a proportionate regulatory regime to be applied, which recognises the different risks posed. Such members support the view that 'lower risk' is not only based on the fact that interest is not charged, but is also based on other factors, such as how the product is used and the voluntary systems/ controls they already adopt in the management of this lending. For example, based on the Bain & Co report, the average BNPL transaction value is low (£75-£100); the combined open balance across all providers has a weighted average of £200 (compared to £500 on credit card⁵/ overdraft); repayments are structured, and eligibility is assessed per transaction through soft credit reference agency (CRA) searches, which provides a relevant view of a customer's credit file. As further assurance, some BNPL providers will not allow continued use of the product where payments due to them are missed and do not charge late fees, thus mitigating the risk of debt spirals for such lending.
16. However, whilst the voluntary controls that some BNPL providers have said they have implemented might equate to good practice and seek to curtail the harms caused to their customers, the majority of our members disagree with the risk analysis on the basis that they believe the risks are not in fact different and as such require the same regulation. The view is that BNPL and revolving credit (for example credit cards and store cards), whilst operating very different business models, essentially both provide the same functionality for the consumer, an observation made at paragraph 2.30 of the consultation. Credit is provided to facilitate a purchase, with the objective that this is repaid at some point in the future. The repayment may be through pre-determined fixed repayment, in the case of the BNPL model, or by a variable amount decided by the customer over a flexible time period, in the case of a revolving credit facility.
17. Similarities do not end there, with providers of credit cards highlighting the interest free nature of their product, up to 56 days interest free lending where the balance is paid in full, and the fact that only 53.7%⁶ of total outstanding credit card balances attract any interest at all. The average

² <https://www.fca.org.uk/publication/corporate/woolard-review-report.pdf>

³ <https://www.ukfinance.org.uk/policy-and-guidance/consultation-responses/uk-finance-response-financial-services-future-regulatory-framework-review-phase-ii-consultation>

⁴ <https://www.ukfinance.org.uk/system/files/UK%20Finance%20response%20to%20BEIS%20consultation%20on%20reforming%20competition%20and%20consumer%20policy.pdf>

⁵ UK Finance data shows the average balance across (active) credit card accounts is £1594

⁶ UK Finance card spending update September 2021

transaction value on UK issued credit cards at £52⁷ is lower than the current average BNPL transaction value (which could be subject to change, as we note in paragraph 27) and flexible repayment options for credit cards also exists, with some cards offering low lines of credit. Credit card providers similarly implement controls to curtail harms such as ongoing credit risk management practices using firms' own internal data and regular feeds of data from CRAs. On this basis, the majority of our members consider that there is no material difference between the two services, which are directly substitutable, with potentially the same risks to consumers which require the same legal and regulatory protection across providers.

18. Customers with unregulated BNPL products face affordability risks, given their ability to take on multiple transactions, across multiple providers of BNPL products, which can in totality ultimately become unaffordable debt, which will have wider implications for the customer's overall finances. Although the advent of data sharing via CRAs for BNPL products will further manage this risk, the majority of our members see this as simply placing BNPL providers in the same position as lenders of substitutable regulated products but without the further regulatory protections that are provided.
19. The Woolard Review called out a series of other potential harms for BNPL customers, in particular the extent to which customers understand offers, their awareness of the available protections, how payment options/ offers are presented at point of sale, the visibility of late payment fees, defaults and collections practices. Although some BNPL providers may have responsible business practices in place to address these issues, which can potentially secure good customer outcomes, the potential for risk exists without minimum regulatory standards. As such, the majority of our members believe the starting point of HMT that BNPL products are less risky to be an over-simplification and therefore not an accurate reflection of the risks that consumers might be exposed to.
20. While proportionality of regulation is an outcome to be desired in and of itself, it is also vital for promoting competition and our members are supportive of a more dynamic market for regulated products. As noted in paragraph 15, a minority of our members support a proportionate approach to regulation for BNPL products and their view is that such an approach would be helpful, as it would ultimately serve as a "stepping-stone" for wider reform of the CCA. Given the subject of CCA reform is a matter which has been ongoing since the FCA's Call for Input in 2016, the majority view of our members is that existing providers of regulated credit should not be penalised through a divergent regulatory model that imposes on them the continued application of legislation that is no longer fit for purpose, does not support the innovation which consumers desire and which provides a more proportionate regime for providers of competing and substitutable products in parallel. Any such approach would not promote effective competition.
21. There is consensus amongst our members that there is an immediate need for reform of the retained provisions of the CCA, and a clear timetable for such reform is sought. In so far as there is scope to immediately amend the existing provisions through secondary legislation and equally apply a more proportionate regime across all regulated credit, including BNPL (once brought within regulation), this should be advanced, pending primary legislation, which is long overdue. It is important to recognise the pace at which the BNPL market is developing and, if CCA provisions were to be translated into more agile FCA rules/ guidance, regulators would be much better able to quickly respond/ adapt to changes in the market and address instances of consumer harm.

⁷ UK Finance card spending update September 2021

Wider consumer and merchant protection considerations

22. The HMT consultation approaches the subject of regulating BNPL primarily from a consumer credit perspective, understandably so as it is a progression from the Woolard Review. Some members within the acquiring population of our membership would suggest HMT needs to consider BNPL as a holistic product, by considering not only consumer credit protections, but also consumer protections on purchase risk; merchant terms and conditions (including consumer default risk) and even the impact of different pricing models on the end outcome for consumers. This would allow HMT to achieve the objectives set out in 1.17 of the consultation, including:
- a. Consumers should be adequately and fairly protected from detriment and can access dispute resolution regarding the conduct of lenders; and
 - b. Any burden on merchants offering BNPL as a payment option would be proportionate and manageable and should not disadvantage Small and Medium Enterprises over larger merchants.
23. To this end, some members believe the consultation should consider not only what a proportionate application of consumer credit regulation would look like, but also whether there should be a mirroring application of elements of payments regulation. For example, the PSRs not only determine how payment service providers treat consumers, but also set out the rubric for managing relationships with merchants. These conduct of business rules ensure merchants are protected in various aspects, such as non-settlement; changes to terms and conditions; unfair or undisclosed fees; termination notices and access to the FOS. Currently, some BNPL providers sit outside of the regulatory perimeter for the PSRs and are therefore not caught by these requirements.

Business models and revenue streams

24. It is important to provide clear definitions of BNPL as a payment product, as the benefits and detriments for both consumers and merchants will vary according to the underlying business model. This concerns more than simply how the consumer repayments are scheduled, or the rate of interest attached. Key elements of differing BNPL models include:
- a. Who has the relationship with the customer, and with the merchant (fintech, issuer, acquirer); and
 - b. Which payment rail is the settlement made on (card, account to account, faster payment scheme).

For example, a fintech BNPL provider can have a relationship with both a consumer and a merchant, with the ability to settle on card rails, or a network, like a card scheme, could provide the option for instalment payments.

25. When considering business models, HMT should compare the BNPL business model with substitutable forms of credit that can provide deferred settlement. This provides a holistic overview of the 'total costs' to the consumer of the transaction, depending upon their choice of product. HMT should also look at transparency and comparability of BNPL products relative to other payment options available to merchants. This comparison will help inform merchant and consumer impacts. HMT is referred to the Bain & Company research for further analysis on these matters.

CONSULTATION QUESTIONS

Categories of credit agreement using the A60F (2) exemption

Question 1: Do you agree with our analysis of the business models that underpin the BNPL market?

26. Members broadly agree with the analysis of the common model for unregulated BNPL agreements, as set out in paragraph 2.9 of the consultation.

There are multiple providers of BNPL products, some of whom will already be FCA regulated and who may provide products on both a regulated and unregulated basis. UKF understands the following to be constructs of various models:

- Multiple short-term transactions that are repaid in 3 months or less, with no credit limit, that are repaid independently of each other.
 - Multiple short-term transactions that are repaid in 3 months or less, where the customer is potentially assigned a credit limit. All transactions are repaid independently of each other (though not a revolving facility but with fixed repayment dates).
 - Products which behave like traditional Credit Sale or Fixed Term agreements, potentially with flexibility to defer payments over 3+months.
27. Whilst the common model may be reflective of today's market, not all BNPL providers operate the same business model. For example, the frequency of payments due from customers may differ, late fees may be chargeable and there may be variations in post payment protections. The BNPL market has developed rapidly and is likely to continue to innovate and evolve, for example with potential changes around the typical repayment periods, average transaction values and fee charging policies. Consequently, some of the key features of the agreements highlighted in paragraph 2.11 of the consultation may differ over time, or indeed by different BNPL providers, whether they are merchants who offer BNPL products, or third-party providers. For example, whilst individual transactions currently tend to be of low value (£75-£100⁸), there is not a formal restriction in the form of a transactional credit limit and transactional amounts may increase as the product expands to finance other sectors, such as holidays or higher cost retail items, for example furniture, sports equipment etc. BNPL providers nonetheless point out that credit is not in fact limitless.
28. The review of the regulatory requirements for BNPL should therefore adopt a forward-looking view of the market. It should have an appreciation of the potential implications and harm consumers might encounter when electing to make purchases through BNPL, rather than a substitutable product, based upon a broad range of transaction values and repayment terms, rather than existing typical BNPL market and provider features.

Question 2: Do you have information to provide government with a more granular and up-to-date understanding of the BNPL market?

29. UKF does not have this information.

⁸ <https://www.bain.com/insights/assessing-benefits-and-challenges-bnpl-report-2021/>

Question 3: Do you have further analysis or evidence of consumer detriment in the BNPL market?

30. The Woolard review (paragraphs 4.24-4.49) set out potential harms of BNPL products including the following and the majority of our members agree with these findings:
- consumer understanding of BNPL offers, including the assumption of regulatory protections.
 - risks associated with the presentation for BNPL offers (e.g., exploitation of present bias).
 - the presentation of BNPL as a default payment method.
 - the possibility of high levels of indebtedness.
 - the limited affordability framework combined with the lack of CRA reporting.
 - specific risks for vulnerable consumers, including those with mental health problems.
 - late payment fees and defaults and collections practices
31. The positioning of BNPL as an ‘interest free’ product is dependent upon the customer being able to make the BNPL repayments from their own funds on the due date. If the customer is unable to do so and needs to make a payment from another credit product (e.g., overdraft, credit card, or short-term credit), this may in fact result in the customer incurring credit costs. It is therefore important for HMT to consider the potential scale of this scenario, noting that some providers of BNPL products do not permit funding of BNPL transactions from credit cards. A member who is a market leader in the provision of unregulated BNPL products states that less than 10% of its customers repay using a credit card. Analysis from one of our larger credit card members shows that they saw an 8 x increase in the overall usage of BNPL products by their customers over 3 years (between Jan 2019 and Oct 2021), where there is the potential for interest charges to be incurred. Where interest is incurred in this way, the financing of the overall BNPL transaction will not be interest free, although the BNPL function would delay an element of interest cost. BNPL can be seen as similar to the option to have an interest free period on a credit card, where the statement balance goes on to be paid in full.
32. The FCA’s ability to advance its statutory objective to secure an appropriate degree of protection for consumers may be at risk if highly utilised credit products sit outside its regulatory perimeter.

Question 4: Do you have analysis that would support us in identifying which specific elements of the BNPL business model pose particular risks?

33. This is not an area on which UKF has any analysis.
34. In addition to other research referenced in this consultation response, members have highlighted the following research:
- Money.co.uk in August 2020 (<https://www.money.co.uk/guides/generation-debt-trap>).
 - Which? in July 2021 <https://www.which.co.uk/policy/money/7601/buynowpaylater>

Short-term interest-free credit: business model and evidence of consumer detriment

Question 5: Do you agree with our analysis of the business models that underpin the short-term interest-free credit market?

35. Members broadly agree with HMT’s analysis of this market, though we reiterate that UKF is not representing the views of providers of short-term interest free products in this consultation response. Please also refer to our response to Question 9.

Question 6: Do you have information to provide government with a more granular and up-to-date understanding of the use of short-term interest-free credit?

36. This is not an area on which UKF has information.

Question 7: Do you have further analysis or evidence that supports or undermines our understanding that there is limited consumer detriment in the short-term interest-free credit market?

37. This is not an area on which UKF has further analysis/ evidence.

Question 8: Do you have analysis that would support us in identifying which specific elements of the short-term interest-free credit business model serve to protect the consumer from harm?

38. This is not an area on which UKF has analysis.

Differences between BNPL and other short-term interest-free credit

Question 9: Do you agree with the distinction between BNPL and other forms of short-term interest-free credit that has been drawn in this consultation?

39. HMT's analysis in para 2.23 of the consultation purports to distinguish BNPL lending from short term interest free lending and highlights the risk of the former based on the overarching relationship between the customer, the lack of friction in undertaking transactions and the opportunity for multiple transactions to be undertaken.

40. Our members would equally highlight the potential for consumer harm arising through the provision of short-term interest free credit on one off retail transactions and support HMT's analysis in paragraph 2.17 of the consultation. Indeed, some of the examples highlighted, present no discernible difference from the transactions likely to be financed under BNPL agreements. As such, our members do not see the rationale for a different regulatory approach which results in less protection for consumers, both where the credit is provided directly by merchants or through third parties, irrespective of the known detriment that might be prevalent in that market. In particular, it is not clear how consumers might reasonably be expected to distinguish between what may become regulated BNPL and what might remain as unregulated short-term interest-free credit transactions and consequently understand the protections that are afforded to them, such as section 75 and FOS referral rights. Equally, accepting that reporting of data to CRAs is voluntary, providers of other credit products would benefit from knowing the total credit commitments of customers at the CRAs to ensure that their own lending continues to be based on the most complete information, particularly where the transactions are used to finance higher value goods and services.

41. Whilst supporting the common membership view around the need for a consistent regulatory approach, some members do note the challenges of bringing all short-term interest free products within regulation and have therefore sought to distinguish this lending further, as to which see our response to Question 11.

Question 10: Do you have any comments on our analysis of the drivers of risk for consumers in the BNPL market?

42. The majority of our members broadly agree with HMT's analysis as set out in paragraphs 2.23 and 2.24 of the consultation and more expansively referred to in the Woolard Review. These risks not only create risk in the BNPL sector, but also carry across to mainstream lending because of the current lack of visibility of such lending at the CRA's. Industry welcomes the current desire from all parties to ensure that this data is accessible to all parties in a meaningful manner, as to which see response to Question 26.
43. Those in our membership who offer unregulated BNPL have adopted business practices that seek to ensure that customers' transactional risk is underwritten, customers receive timely information of the product offering, receive timely notifications of missed payments, and are denied further credit where affordability concerns are noted and otherwise operate in accordance with good regulatory standards. There is however recognition that not all providers of BNPL products operate on the same basis and as such regulation of the product is supported.
44. A streamlined journey, that enables a customer to access credit without a clear understanding of the risks and implications, is a concern for some members, as this could drive consumer harm. However, it is worth noting that an "attractive and smooth on-line journey" is indeed an aspiration for all credit providers, but we do not agree that it is the smooth journey in and of itself which creates payment difficulties. Provided the customer has the correct information, at the right time, to inform their purchasing decision and an appropriate creditworthiness/ affordability assessment is undertaken, a smooth purchasing journey should not be regarded as an obstacle to regulatory compliance.

Question 11: Do you have any suggestions on how a clear distinction could be drawn between BNPL and short-term interest-free credit?

45. As noted under Question 9, and throughout this response, our members' view is that the 'same activity, same risk, same regulation' principle should apply to the provision of credit, irrespective of the nature of the product or whether this is through a third-party credit provider or direct to the consumer.
46. However, recognising that HMT has signalled that credit which they consider to be lower risk (such as invoice) is to be kept out of scope of the regulation, there is some support for HMT to adopt a proportionate approach to regulation which could consider a lending exposure limit, within which merchants could offer short-term interest-free credit direct to their customers. This could be a maximum amount of credit outstanding to the merchant at any point in time to accommodate a business operation with a continual cycle of granting new credit and repayment of existing facilities.
47. Additionally, HMT might also want to consider drawing a distinction through the use of BNPL and whether it is to fund the purchase of goods or services and the implications of the non-payment as a distinguishing characteristic, in particular whether non-payment by the customer means that the service effectively falls away (i.e., membership lapses or insurance is cancelled). Subscription like services such as gym membership, season travel tickets, TV licenses, insurances, and medical repayment plans which are determined to be credit agreements rather than pure subscription agreements are considered by some of our members to present lower risks and as such there is some support amongst our membership for the continuation of exclusion from regulation of these service arrangements. The service is consumed after or in line with repayments. Repeat use by customers of these services are less likely; consumers are unlikely to duplicate season tickets or insurances, for example, and in general terms

consumption is ongoing so that if the customer fails to make payment the service/product will be discontinued.

Question 12: Do you have any comments on the option to draw that distinction by restricting the extension of regulation to interest-free credit agreements where there is a third-party lender involved in the transaction? What impact do you think this would have on short-term interest-free credit providers that would be drawn into regulation?

48. As noted in response to Question 9, our members do not support the basis of the distinction made between short term interest free credit and BNPL products. It is difficult to see how this would capture the development of those BNPL models as referenced by HMT (consultation paragraph 2.10), where the BNPL provider purchases the goods for onward sale to the consumer (and thereby becomes the merchant), or indeed where significant sized retailers embark on the provision of BNPL loans where their product offering is widespread and as such would facilitate multiple transactions in line with BNPL models and outside the model of short-term interest free loans as envisaged by HMT, as referred to at paragraph 2.17 of the consultation.

Question 13: Do you have any comments on the option to draw that distinction by defining a BNPL agreement as one where there is a pre-existing, overarching relationship between the lender and consumer, under which the lender agrees to finance one or more transactions but where any repayments made are toward specific agreements made as part of that relationship?

49. Our members do not support the distinction between short term interest free credit and BNPL which permits short term interest free loans to continue to benefit from the A60(F)(2) exemption other than as noted in response to Question.11.

Question 14: Do you have any views on the need to amend the current exemption for running-account credit, so that it does not allow the unregulated BNPL model to re-emerge?

50. The regulation should be future proofed against new, but similar, models emerging to those which HMT is seeking to bring into regulation. The exemption could more clearly be defined around the current use cases which fall under the exemption, which have been identified as being lower risk. Alternatively, and given there is no clarity around how those emerging models would attempt to utilise the exemption, HMT could consider introducing broader consumer protections, such as stipulating that the exemption only applies where the credit is provided by certain providers, for example, as part of a payment service provided by an authorised payment institution.

The application of credit broking regulation

Question 15: Do you agree that in any regulatory intervention merchants that offer BNPL as a payment option should not be subject to FCA regulation as credit brokers?

51. There is a divergence of views amongst our members on this question. Whilst a minority of our members support the case for no regulation on the basis that the harms that could arise from merchants will be adequately addressed by the current advertising regime, coupled with strengthening of the financial promotions regime and the direct regulation of BNPL lending, the majority of our members would only support a proportionate regime for merchants if this were to be provided on the basis of a level playing field.

- 52. There is recognition that smaller merchants, who cannot support the regulatory overheads of regulation as credit brokers, might be penalised and excluded from offering credit products. A member who provides unregulated BNPL products has indicated that they would regard at least 80% of the merchants they deal with as SMEs. This concern is not confined to merchants offering BNPL products, but also applies where merchants could introduce regulated credit products. Similar concerns do not apply to the larger retailers/ merchants who also offer BNPL products and who would similarly benefit from the exemption as posed
- 53. Most members have expressed a concern that adopting the approach set out by HMT for merchants, solely in relation to BNPL providers, will mean a significant gap continues to exist between the compliance costs of a BNPL broker and a broker of other regulated credit products. For example, this will exist even where the latter passively introduces customers in an online point of sale, using materials provided by a regulated credit issuer. This is despite the positions and potential customer detriment being broadly analogous upon the BNPL product being brought within equivalent regulation. This could lead to reluctance from SME businesses to engage in regulated broking at all and to opt to offer BNPL products only (rather than offering what may be more suitable alternative credit options to certain of their customers), thus distorting competition in the credit market. This risk is exacerbated in the event that there is no equivalence in the regulation applied to BNPL providers, for example, where less friction in customer journeys, caused by differing requirements, will further incentivise merchants to prefer BNPL
- 54. Additionally, such members are concerned that, absent regulation of all brokers for BNPL transactions, the potential for harms to consumers caused by merchants will not be addressed by the approach suggested by HMT relating to the application of existing advertising regulations (as enhanced through the application of the financial promotions regime) These remedies would address transparency failures only and any broader concerns with the broker would not be directly addressed, such as failure to comply with the FCA's broader principles.
- 55. It is not clear whether HMT in considering the blanket exemption has disregarded application of the Appointed Representative regime to BNPL merchants, as is currently under consultation by the FCA.

Question 16: If merchants offering BNPL are exempted from credit broking regulation, do you have any views on other ways to mitigate any potential risks to consumer detriment arising from merchants?

- 56. Some of our members have expressed a view that consideration should be given on where BNPL appears in the customer journey. For example, some merchants are including BNPL payment options alongside the product advertising, whereas other payment options would only be presented to the customer at the checkout basket. Members have mixed views as to whether, when the payment options are presented to the customer, there should be a hierarchy of payment types.

Question 17: Do you have any views on whether such an exemption from credit broking should extend to all merchants, or whether there should be limited exceptions (such as for domestic premises suppliers)?

- 57. For those members who support a broad exemption the additional protection for 'domestic premises suppliers' would appear to be appropriate to cover any future BNPL model changes.

Advertising and promotions

Question 18: Do you think that the current requirements on BNPL merchants and lenders around advertising and promotion are sufficient?

58. Those members who provide unregulated BNPL products believe the current Guidance from the Advertising Standards Authority (ASA) and Committees of Advertising Practice (CAP) directed at BNPL has evolved significantly and provides a good basis for how these products should be presented. However, they support the extension of the FCA financial promotion regime to BNPL promotions and the further strengthening of such regime.

Question 19: If you think that the requirements need strengthening, would the application of the financial promotions' regime be appropriate, or are there any features specific to BNPL products that warrant different requirements?

59. There is consensus amongst members, that it would be appropriate to apply the financial promotions regime to BNPL and no features which are specific to BNPL have been identified that would warrant different requirements.

Pre-contractual information

Question 20: Do you agree that the approach to pre-contractual information outlined is consistent with a proportionate approach and the government's objectives for BNPL regulation?

60. As a point of principle, consideration of a proportionate approach by HMT to pre-contractual information (PCI) is to be welcomed. HMT notes the inflexible nature of the requirements for information disclosure contained in section 55 of the CCA and their unsuitability for the online journey, and the disengagement risk by the customer. This is an observation that industry applies more broadly than just to unregulated BNPL products and HMT is referred to industry's response to the review of the retained CCA provisions, in particular the comments noted under digital journeys and customer outcomes⁹. Our members recognise that it is vital that consumers are presented with key information, so they understand what the product is and what is expected of them. However, the current requirements are disproportionate for **all** credit providers. Whilst some of our members who provide unregulated BNPL products welcome and support a proportionate approach which relies of FCA rules only for BNPL products, HMT should look to determine if a more proportionate approach to PCI could be achieved for all providers of credit products, which would secure better customer outcomes for all and no commercial disadvantage due to higher compliance requirements.
61. In default of this, the majority of our members remain concerned that a different regulatory approach for BNPL will distort competition with broadly substitutable products. Accordingly, the existing requirements should prevail for BNPL products whilst an urgent review of the PCI requirements is undertaken which seeks to improve the framework overall for the benefit of all consumers and not just those of BNPL providers. There is a risk that CCA required pre-contractual information can lead to a barrier to accessing a product, where any 'perceived simpler' process would be automatically taken by the consumer in preference to the other credit options. This would result in an ongoing commercial relationship being developed with that credit provider to the exclusion of others.

⁹ UK Finance response to FCA DP18/13 as forwarded to HM Treasury on 19 Nov 2018.

62. Absent a consistent regulatory requirement, the different requirements around the provision of the pre-contractual information to customers would also create a different and lesser regulatory overhead for BNPL providers, who will not face the same regulatory requirements and sanctions of potential unenforceability if they fail to comply, which the majority of our members believe distorts competition.

Form and content of the credit agreement

Question 21: Do you agree with the government's assessment that BNPL agreements are likely to need bespoke form and content requirements?

63. Regardless of the type of credit product, a consumer should always be put in a position to understand how the product agreement works before entering it. The model for BNPL providers is quickly evolving and the form and content requirements should ensure that they ensure a consumer is well placed to understand what it is that they are entering into.
64. Whilst our members who provide unregulated BNPL products welcome and support a proportionate approach which relies on FCA rules, as noted throughout this consultation response, it is not clear to the majority of our members why the nature/ risk of BNPL products should drive different regulatory requirements. If there is a view that the current CCA requirements are not fit-for-purpose, this underlines the need to assess their ongoing suitability for other regulated products.

Question 22: Do you have any views on what form agreements for BNPL should be required take, and what content they should contain?

65. Please see responses to Questions 20 and 21.

Improper execution

Question 23: What are your views on applying CCA provisions on improper execution to BNPL agreements? Do you think the consequential sanctions for improper execution should apply to BNPL agreements under any regulatory intervention?

66. Industry views the draconian consequences for non-compliance to be disproportionate to the harms that the regulations are seeking to address and as such a broader approach to the exercise of proportionality would be welcomed, but a divergent regulatory approach across substitutable products risks distorting competition. As such, an approach which provides a more proportionate approach solely to BNPL products is welcomed by our members who provide unregulated BNPL products but is not supported by the majority of our members.

Creditworthiness assessments

Question 24: What are your views on the role of creditworthiness assessments as part of a proportionate approach to BNPL regulation?

67. There is consensus across members in supporting adoption of consistent requirements to assess affordability in a proportionate manner, in line with existing FCA regulatory requirements.

Question 25: Do you have any views on whether there should be specific requirements for creditworthiness assessments for BNPL agreements?

68. The FCA's affordability rules ensure that lending is appropriate, based on the information available at the time a decision is made to lend money, or for example to extend a credit limit. In some cases, these specific rules will require regulated firms to decline such requests.

69. It is assumed that there will currently be some significant variations in terms of how providers of unregulated BNPL products assess creditworthiness, but proportionality of approach is already factored into current FCA rules. There is consensus across members that the same FCA principles and rules should apply going forward, removing the opportunity for distortions of competition as a result of being outside of such rules or subject to alternative bespoke arrangements.

Question 26: Do you have any views on how BNPL agreements should be reported to consumers' credit files?

70. UKF has been working closely with the CRAs to assess how such data should be reported and there is now a clear direction of travel, with the CRAs concluding that the distinct nature of these transactions warrants a bespoke account type to be created. It is now imperative that BNPL customers are appropriately notified of the intention to share data and that there is pace behind the necessary developments in order to ensure that the resultant data provides the necessary reciprocity to support the industry's affordability assessments (under FCA rules and guidance). Once the BNPL data is reported to the CRAs, lenders will be able to start to analyse and interpret how this new data (in conjunction with existing credit data) can be used to support better decisioning.

Arrears, default, and forbearance

Question 27: Do you have any views about how customers in financial difficulty should be treated under BNPL agreements?

71. There is consensus across members in supporting adoption of consistent treatment of customers in or at risk of financial difficulty, in line with existing regulatory requirements. Customers need to be confident that they will be subject to the same standards of practice, whatever forms of credit have been a factor in their specific situation.

CCA requirement on forms for consumers in financial difficulty

Question 28: What are your views on the proportionality of applying CCA provisions on arrears and defaults to BNPL agreements?

72. Members who provide unregulated BNPL products are not supportive on the basis that the CCA implications are disproportionate and there are more appropriate and effective methods of communicating with customers. These are views that industry supports as an assessment of the current requirements

73. However, the majority of members consider that, based on ‘same activity, same risk, same regulation,’ there should not be any divergence in approach which would distort competition. It is not simply enough to justify the different approach for BNPL primarily on the basis that transaction values are low, and lack of contractual interest will not cause the debt to spiral. As noted, at paragraph 17, similar attributes can be present in credit card lending and customers who fall into default with low credit lines and low value arrears are also subject to these requirements, which are not value driven. The opportunity for consumers to consume BNPL products across multiple providers exists and cumulative debt may therefore not be insignificant and may in any event impact the ability to pay other debt.
74. Again, industry notes the requirement for an urgent review by HMT of the retained provisions of the CCA.

Section 75

Question 29: Do you agree that under any regulatory intervention for BNPL, section 75 of the CCA should apply to agreements?

75. UKF understands that some providers of unregulated BNPL products already have post purchase protections that help provide consumer protection and often cover purchases which are below the threshold value for section 75 eligibility.
76. Notwithstanding this, the consensus view of our members is that this should be underpinned by the CCA and the application of section 75, to ensure consistent protections for customers. Again, we would remind HMT of the broader case for reform of section 75, as noted in the industry’s response to the review of the retained provisions of the CCA.

Small agreements

Question 30: What are your views on amending the scope of the exemptions from elements of the CCA for small agreements to include BNPL agreements under £50.

77. Our members support this, on the basis that it avoids customer confusion that would arise where only a subset of their transactions is regulated.

Question 31: Are you aware of any currently regulated consumer credit products, in particular those which are debtor-creditor-supplier agreements, that are routinely offered with values less than £50?

78. UKF does not have an awareness of any such products.

Financial Ombudsman Service and redress

Question 32: Do you agree that under a regulatory intervention for BNPL, consumers should be able to bring a complaint to the FOS

79. There is consensus across members that, even though some providers of BNPL have their own independent adjudicators, a common/ consistent independent adjudicator is required, in FOS. However, it is essential that the reforms which industry is seeking to the FOS, as set out in our work supplementing our response to the Future Regulatory Framework Review¹⁰, are actioned, in particular regarding cases which have wider implications.

Equality impact assessment

Question 33: What impacts do you expect the regulation of BNPL would have on BNPL providers, consumers that use the product, and merchants that offer it as a payment option?

80. No comments.

Question 34: What impacts would you expect to see on persons with the protected characteristics mentioned above as a result of regulation of BNPL?

81. No comments.

Question 35: Do you have any views on how the government can mitigate any disproportionate impacts on protected characteristics?

82. No comments.

¹⁰ <https://www.ukfinance.org.uk/system/files/Review%20of%20statutory%20dispute-resolution%20processes%20in%20the%20banking%20-%20FINAL.pdf>