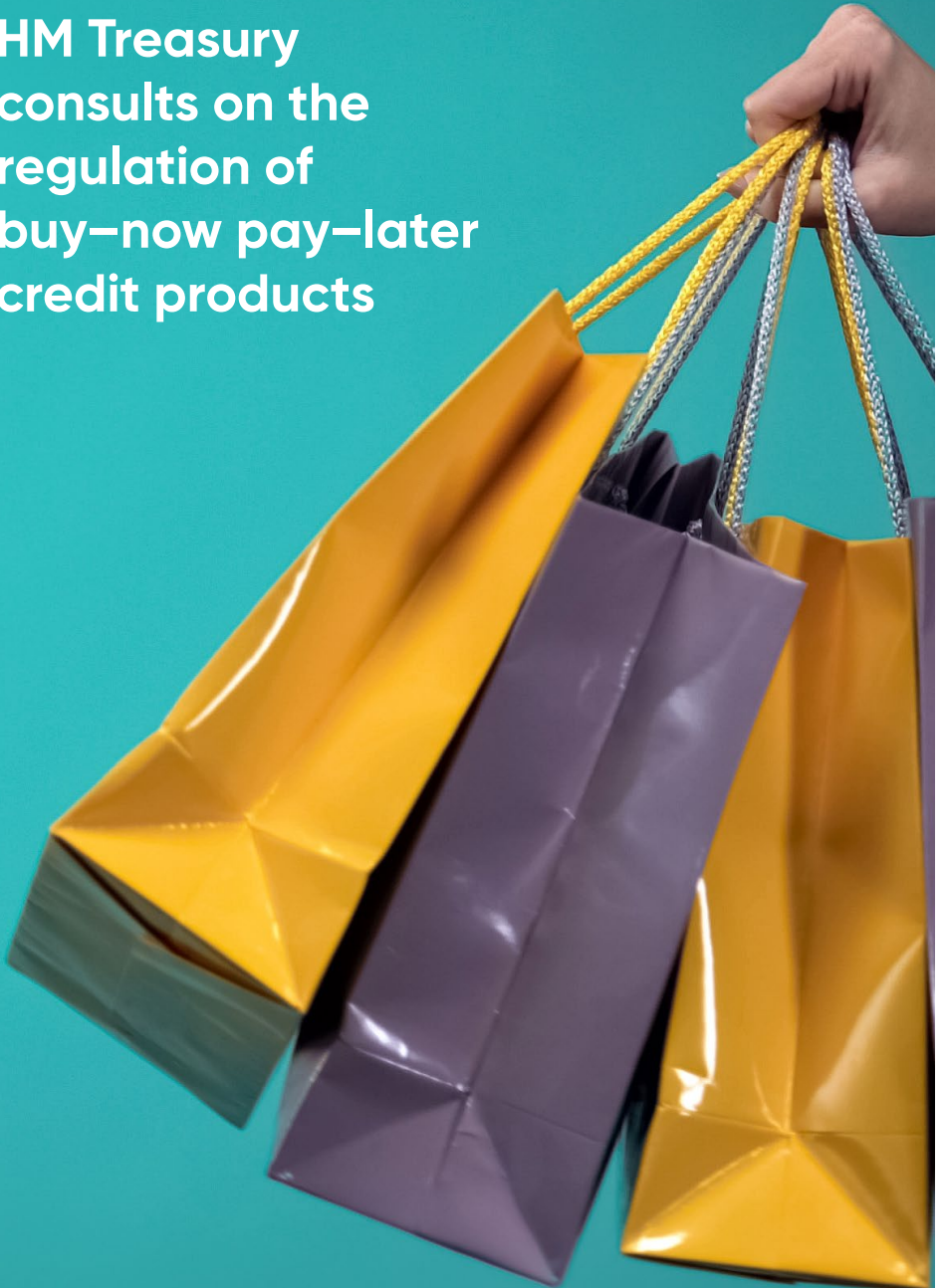


**HM Treasury
consults on the
regulation of
buy–now pay–later
credit products**



On 21 October 2021, HM Treasury published its long-awaited **Consultation Paper** (the 'Consultation Paper') on the regulation of interest-free buy-now pay-later ('BNPL') credit products. The Consultation Paper sets out several policy options in order to achieve a proportionate approach to the regulation of BNPL products.

Background

On 2 February 2021, HM Treasury announced its intention that interest-free BNPL products would be regulated by the FCA. This decision followed a recommendation from Christopher Woolard, the former FCA interim CEO, pursuant to his review into change and innovation in the unsecured credit market (the '[Woolard Review](#)').

In a letter dated 19 January 2021 from Christopher Woolard to John Glen, Economic Secretary to the Treasury, Christopher Woolard raised the issue of unregulated BNPL credit agreements. He explained in the letter that there is a significant risk that without appropriate oversight, the market may develop in a way that is detrimental to consumers and to the wider credit market. The letter identified various potential harms arising from BNPL products, including the following:

- consumers often do not view BNPL products as credit, instead associating it more with payment technologies
- consumers believe that they are protected and assume the product is already regulated
- the BNPL market structure can focus on outcomes for the retailer, rather than the borrower
- there is a lack of proper affordability assessments and the potential to create high levels of indebtedness
- the way in which BNPL offers are presented can make it very difficult for consumers to make an informed decision.

In view of this, Mr Woolard recommended that exempt BNPL credit agreements should urgently be brought within the FCA's regulatory perimeter. This recommendation was supported by the FCA in a letter dated 28 January 2021 from Charles Randell, FCA Chair, to John Glen. In his response of 28 January 2021 to these letters, John Glen outlined that the Government agrees with the recommendation and that legislation would be brought forward as soon as Parliamentary time allowed.

He was particularly concerned about the issues raised on affordability assessments and the potential impact that the lack of visibility of BNPL on credit files may have on other lenders in their ability to make their own affordability assessments. The Consultation Paper is therefore the first step in this process.

In the Consultation Paper, HM Treasury observes that throughout the long history of consumer credit regulation there has always been an exemption in place designed to allow the delayed payment of goods and services, provided that the delay was timed–limited and did not involve the charging of interest.

The exemption ensured that these contracts did not fall within the definition of regulated consumer credit, but also allowed the payment for goods via a certain number of instalments. However, over time, various products and business practices have evolved, designed to operate under this exemption. More recently the market has seen a rapid growth in the use of the exemption in the form of BNPL products used as a payment option by online retailers. This was a key reason for the concerns as to consumer detriment identified by the Woolard Review.

HM Treasury believes that proportionality is important across any regulatory intervention, noting the balance to be struck between ensuring consumers are given appropriate protections, without unduly limiting the availability and cost of useful financial products.

Regulatory Controls for BNPL products

The measures set out in the Consultation Paper are intended to ensure that the scope of the new regulations is defined as closely as possible to target products where there is potential for consumer harm. The Consultation Paper accordingly seeks views on a range of regulatory controls that could be put in place for BNPL credit products.

1. The application of credit broking regulation

Under the existing regulations, where a business introduces a customer to a lender with a view to the customer entering into a regulated credit agreement, the business will be undertaking the regulated activity of ‘credit broking’. Businesses which carry out credit broking are required to be authorised and regulated by the FCA and comply with the relevant rules and requirements. However, merchants that offer the use of BNPL products and other short–term interest–free agreements are not currently ‘credit broking’, because broking such agreements is currently not within the regulatory perimeter. However, if the current exemption is amended so that some or all of the agreements become regulated, then broking such credit agreements would constitute the regulated activity of credit broking. This could require merchants to make significant changes to their business models and potentially could impose considerable burdens upon them. Given the potential regulatory burdens, there is a risk that many merchants would cease to offer BNPL as a payment option, thus limiting consumer choice and conferring an unfair competitive advantage to larger merchants, many of whom are already FCA authorised for credit broking, or have the capacity and means to be so.

Therefore, the Government's current view is that any regulation of BNPL would be accompanied by an exemption, so that the broking of BNPL credit by a merchant would not lead to a requirement that the merchant should be subject to regulation as a credit broker.

Some exceptions may be necessary to any such exemption, for example, in cases where goods or services are sold in customers' own homes.

2. Advertising and financial promotions

Currently, both lenders and the merchants offering the BNPL credit products promote those products to consumers via advertisements and promotions. Whilst there are some existing requirements on BNPL lenders and merchants concerning advertising and promotions, the Government believes that the current consumer protections could be strengthened further by the application of the financial promotions regime to promotions of BNPL products.

The Government is therefore proposing to amend the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, to bring promotions of BNPL agreements within the financial promotions regime. Merchants would therefore need approval from an authorised person for BNPL promotions. It is intended that this would reduce consumer detriment that may arise from the fact that merchants may not be regulated themselves.

3. Pre-contractual information

The Government observes that a significant component of existing consumer credit regulation is the provision of clear pre-contractual information, so that consumers may understand the key features and risks of financial products before they purchase them. Whilst BNPL lenders do provide certain pre-contractual information, this is set out in the form of their choosing, rather than prescribed by regulation. This gives rise to the risk that firms do not give sufficient prominence to important information about the agreement or fail to provide it at all.

Section 55 of the Consumer Credit Act 1974 (the 'Consumer Credit Act') sets out in detail the form and content of pre-contractual information that is mandated for regulated credit agreements. This includes the standard

Consumer Credit Information form. In addition to these statutory requirements, firms must comply with the FCA rules on pre–contract disclosure and adequate explanations. However, the Government’s view is that the full extent of the Consumer Credit Act pre–contractual information, together with the FCA requirements, may not be appropriate for BNPL agreements, given: (a) the lower risks of the product; (b) the fact that the mandated information about the cost of the credit is not well suited to BNPL products, given that they do not charge interest at all; and (c) the customer is likely to enter into a BNPL agreement online and with much more frequency than a traditional credit product, meaning that the customer is unlikely to engage with long and detailed information disclosures. Accordingly, the Government’s proposal is that firms offering BNPL products only need to comply with the FCA rules (set out in CONC 4.2) and not the more detailed rules set out in the Consumer Credit Act.

4. Form and content of credit agreements

The Government believes that the mainstream consumer credit regulations are inappropriate for BNPL agreements, given the particular characteristics of the product (that is, the consumer risks posed and the way in which the product is typically used). Therefore, the Government proposes that bespoke legislation may be necessary on the form and content requirements for BNPL products, in order to suit the features of the product better and the way in which it is used in practice by consumers.

5. Improper Execution

Under consumer credit legislation, a regulated credit agreement is not properly executed unless the document is in the prescribed form, contains the prescribed content and is executed in the prescribed manner. If not correctly executed, the agreement could be rendered unenforceable. These mechanisms provide a strong incentive to lenders to provide the necessary information to a consumer or else risk the agreement becoming unenforceable. The Government believes that these could be a valuable element of a future BNPL regulatory framework and is therefore considering applying similar requirements to BNPL agreements, but seeks views on this, noting that this could be cumbersome in practice, especially for digital BNPL transactions.

6. Creditworthiness assessments and customers in financial difficulties

Creditworthiness assessments help to ensure that consumers do not take on debt that they cannot afford to repay and are an important part of responsible lending practices. A major concern raised by the Woolard Review was that there is no requirement currently to carry out any form of creditworthiness assessment for a new customer entering into a BNPL agreement. Therefore, the Government is anticipating that a proportionate regulation of BNPL would include the application of the FCA's rules on creditworthiness to BNPL agreements. The FCA would then decide whether amendments to its rules would be necessary, in order to tailor them to the requirements of BNPL agreements. Similarly, the Government is intending to include requirements in relation to the treatment by firms of customers in financial difficulties, such as customers in arrears, who may receive notices and other legal documentation.

7. Small agreements

A 'small agreement' is a regulated consumer credit agreement for credit not exceeding £50, other than a hire purchase or conditional sale agreement. Certain parts of the Consumer Credit Act do not apply to small agreements, for example, certain provisions relating to pre-contractual negotiations; the form and content of agreements; statements in relation to fixed-sum credit agreements; provisions relating to sums in arrears and default sums; provisions relating to pre-contractual adequate explanations; and rules relating to creditworthiness assessments. The Woolard Review noted that the average BNPL transaction could be comparatively small – between £65 and £75. However, many transactions are below £50 and therefore, would be classed as a small agreement and would therefore lose many of the regulatory protections. Therefore, the Government is proposing to narrow the scope of section 17 of the Consumer Credit Act, so that the requirements would apply to BNPL agreements under £50.

8. Liability of creditor and access to the Financial Ombudsman Service

The Government is further proposing the following in relation to BNPL transactions:

- Section 75 of the Consumer Credit Act makes a creditor jointly and severally liable in certain circumstances for a supplier’s breach of contract or misrepresentations for goods or services, where credit is between £100 and £30,000. The Government is proposing to apply this to BNPL transactions
- The regulation of BNPL should include the ability for consumers to access the Financial Ombudsman Service for issues relating to the conduct of lenders, thus ensuring greater consumer protection and meeting the Government’s objective of ensuring that consumers have access to appropriate dispute resolution mechanisms.

Next Steps

Responses to the Consultation Paper should be submitted by 6 January 2022. Following the Consultation, the Government will provide a summary of responses and will set out next steps for its work on the regulation of BNPL.

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