

REGULATORY DEVELOPMENTS IN THE BUY-NOW-PAY-LATER SPACE

HMT CONSULTATION ON PROPOSED DRAFT LEGISLATION FOR BNPL PRODUCTS

On 14 February 2023, HM Treasury published a [consultation](#) on [draft legislation](#) to bring buy-now-pay-later (**BNPL**) products within the scope of the UK regulatory regime. This follows a policy announcement from February 2021 to bring BNPL products into scope of regulation. The consultation closes for comments on 11 April 2023 and the government plans to lay legislation before parliament when there is time (it says, hopefully in 2023).

At the moment, BNPL products provided to "consumers" are generally unregulated by virtue of an exemption in article 60F(2) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the **RAO**). Article 60F(2) exempts from regulation interest-free agreements repayable in under 12 months and in 12 or fewer instalments. This covers BNPL, as well as other types of short-term credit provided without interest or other significant charge (**STIFC** – which the government generally uses to refer to more traditional forms of credit offered on larger purchases, often with merchants acting as lender or broker).

Scope of proposed new regulation

The proposal will narrow the exemption at Article 60F RAO such that agreements currently subject to the exemption but provided by third party lenders will no longer be exempt. However, it is not proposed to regulate lending or credit broking for these types of agreements by merchants themselves and the Financial Services (Distance Marketing) Regulations 2004 would also not apply to merchants broking newly regulated BNPL products. However, by way of exception, domestic premises suppliers (i.e. where representatives of the seller visit customers in their home) would be regulated where they offer newly regulated BNPL products.

There is an anti-avoidance mechanism in new Article 60F(7A)(b) to capture models where the BNPL lender purchases goods from the merchants at the

Key issues

- BNPL products have been growing in market size, many as unregulated credit agreements
- As a result of the Woolard Review of 2021, the FCA announced they would look to transition unregulated BNPL credit to the regulated space
- The FCA is now consulting on their draft legislation: third party finance providers would be caught by the regulated perimeter, however retailers and employers would be permitted to offer unregulated credit directly
- It is not yet certain when the proposed rules will come into force and for how long the transitional period will last

point where the loan is taken out, but a few specific exemptions are retained at Article 60F(7B), including for

- financing of insurance premiums falling within Article 60F(2)
- employer-employee lending (e.g. season ticket loan)
- credit provided by registered social landlords to their tenants to finance the provision of goods and services

There is no exemption for agreements of a small quantum, previously agreements of less than £50 were previously exempt from the requirements of the CCA due to an exemption for small quantum agreements.

The same definition of "consumer" as for existing consumer credit legislation is proposed – i.e. lending to individuals and 'relevant recipients of credit' (which includes sole traders, unincorporated associations and partnerships of fewer than four people) would be captured, irrespective of whether they are acting for business purposes.

Financial promotions

Where merchants advertise BNPL products provided by third party lender partners, article 5 of the proposed legislation (which amends the Financial Promotions Order) proposes that those merchants will be required to obtain approval for those financial promotions. The policy intention here is that third-party lender partners will provide pre-approved materials to merchants as part of the overarching commercial arrangements between the lender and merchant.

Pre-contractual requirements and other conduct of business rules

The government does not intend to apply the pre-contractual requirements under the Consumer Credit Act 1974 (**CCA**) on the basis this would be disproportionate and inflexible. Accordingly, the draft legislation disapplies section 55 CCA for these agreements. Instead, it is proposed that the Financial Conduct Authority (**FCA**) would have rule-making powers to specify such requirements. This means that if pre-contractual requirements are not complied with, agreements would not become unenforceable (as is the case for breach of section 55 CCA) but instead, borrowers may have a claim for damages under section 138D FSMA if they have suffered loss due to the breach of rules.

The government indicates firms would have flexibility to provide information in a CCA-comparable format if they wish, and provided this complies with FCA rules.

However, certain other elements of the consumer credit regulatory framework are proposed to apply to newly regulated agreements, including FCA rules on creditworthiness assessments, requirements for content of agreements under the Consumer Credit (Agreements) Regulations 2010, FCA rules on arrears, default and forbearance, and section 75 CCA protections (under which a creditor may be held jointly and severally liable for contract breaches or misrepresentation by a supplier). The Financial Ombudsman Service will also have jurisdiction over newly regulated agreements.

Transitional provisions

The government intends to provide for an implementation period before the new rules come into force on "regulation day", to allow firms time to adjust. The consultation does not specify how long this period will be; Regulation 1(3)

of the draft statutory instrument includes a placeholder referring to [*x calendar months*] before the Order comes into force.

The consultation proposes a temporary permissions regime (**TPR**) for unregulated firms currently providing products that will become regulated. Firms will need to register for the TPR once legislation is made and before "regulation day", and will be invited to apply for full authorisation in due course. Firms in the TPR will need to comply with regulatory pre-contractual disclosures and other FCA rules for agreements made on or after regulation day.

Only agreements made on or after "regulation day" will be regulated, as per proposed new Article 60F(7A) RAO. If firms leave the TPR without full authorisation they will be able to service the agreements they made whilst in the TPR for up to 2 years – as per regulation 9 of the draft legislation.

Impact for lenders

Lenders will need to consider the scope of their ongoing activities with regards what will now soon become regulated credit, and consider the types and scope of permissions that they may need to apply for – including but not limited to permissions for origination, administration and/or debt collection.

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