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Consultation Response:

# HM Treasury Regulation of Buy- Now Pay-Later Consultation on draft legislation

Response by the Money Advice Trust

Date: April 2023

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# Introduction

## About the Money Advice Trust

The Money Advice Trust is a charity founded in 1991 to help people across the UK tackle their debts and manage their money with confidence.

The Trust's main activities are giving advice, supporting advisers and improving the UK's money and debt environment.

In 2022, our National Debtline and Business Debtline advisers provided help to 140,980 people by phone, webchat and our digital advice tool with 1.87 million visits to our advice websites. In addition to these frontline services, our Wiseradviser service provides training to free-to-client advice organisations across the UK and in 2022 we delivered this free training to 2,780 organisations.

We use the intelligence and insight gained from these activities to improve the UK's money and debt environment by contributing to policy developments and public debate around these issues.

Find out more at [www.moneyadvicetrust.org](http://www.moneyadvicetrust.org).

## Public disclosure

Please note that we consent to public disclosure of this response.

# Introductory comment

We welcome the opportunity to respond to the HM Treasury consultation on the draft legislation relating to buy-now-pay-later (BNPL) agreements.

We generally agree with the proposals set out in the paper as to the scope of regulation and the draft legislation.

However, we are concerned that the sanction under section 55 (2) of the CCA of unenforceability without a court order for non-compliance with the rules on pre-contractual information will no longer apply. It is not adequate for the proposals to rely upon consumers being able and willing to make a complaint about a firm to FOS. We are not convinced that many consumers would be aware of the pre-contractual information requirements, or be able to argue that these have been breached or in what way.

We believe that these proposals will form a substantial deterioration in rights and protection for individual consumers. This can only be mitigated by the FCA putting in place robust supervision and monitoring processes that will keep these firms under close surveillance. This should result in the FCA taking swift action for non-compliance with the pre-contractual information rules.

The impact of the legislation will need to be monitored closely to ensure that “innovative” new selling techniques do not develop to avoid lenders being bound by the rules. The impact of any new BNPL market models will need to be assessed and addressed promptly to avoid consumer detriment.

We note that there is further clarification of the BNPL regime proposals set out in the paper.

- ✓ We welcome the decision to apply the protections of the CCA to BNPL agreements of less than £50.
- ✓ We also welcome the decision to prescribe the form and content of BNPL agreements under the CCA.
- ✓ We very much support the proposal that the CCA requirements on the treatment of consumers in financial difficulty will apply to BNPL regulated agreements.
- ✓ We also agree with the recognition that Section 75 of the CCA is a “strong and well-known consumer protection measure” and that it should apply to BNPL agreements. However, the existing cash price exemption of £100 needs to be reassessed due to the nature of BNPL agreements often being for less than £50 in total value.
- ✓ The paper is silent as to whether chargeback will be included in the protections afforded for BNPL agreements under Card Scheme Rules. This will add to protections where section 75 does not apply for debit card transactions.

- ✓ It is also important that Section 75 is looked at more widely, particularly where the direct link between the merchant and card provider is broken when payments are made through a third-party agent which invalidates section 75 claims. This is a broader consumer issue which the relationship between BNPL firms, consumers and retailers and suppliers can make complicated. It is hard for any consumer to know what scheme they will be covered by at the point of sale.
- ✓ Finally, we very much agree that BNPL should come under Financial Ombudsman Service jurisdiction so that potentially vulnerable consumers will have a free and easy to access complaints mechanism where needed.

We are concerned that there could still be a substantial delay before the new regulations are put in place. The government and the FCA should act to put the protections proposed in this consultation in place as soon as possible, to reduce harm to vulnerable groups.

# Responses to individual questions

## Policy position on the scope of regulation and draft legislation

**Question 1: Do you have any comments on the proposed approach and/or drafting to bring agreements into regulation that are provided by a third-party lender in article 3(4) of the draft legislation?**

We agree with the proposed approach to bring agreements into regulation that are provided by a third-party lender. This approach avoids the problem identified in the paper of it being disproportionate to apply the regulations to agreements provided by merchants online or at a distance.

As these types of arrangement have been in place for many years, without evidence of particular consumer detriment, it would seem entirely reasonable to concentrate on agreements offered by third-party lenders rather than whether the agreement has been entered into face-to-face or online.

**Question 2: Do you have any comments on the proposed approach taken to bringing agreements into regulation where a lender purchases goods or services from the original supplier in the way set out in new draft paragraph 7A(b) in A60F?**

This approach appears to be eminently sensible, and we hope this will avoid third-party lenders avoiding regulation by structuring their agreements to technically become both the merchant and the credit supplier.

**Question 3: Do you consider that there may be unintended consequences of the government's proposed drafting of the proposed legislation to capture these agreements?**

We are not able to identify any unintended consequences at this point. However, the impact of the legislation will need to be monitored closely to ensure that "innovative" new selling techniques do not develop to avoid lenders being bound by the rules. The impact of any new BNPL market models will need to be assessed and addressed promptly to avoid consumer detriment.

The Treasury and FCA need to be particularly mindful of the risk of business models evolving again to remain outside the regulatory perimeter as drawn and seek to guard against this, as well as being prepared to act swiftly in future if this risk arises.

Question 4: Do you have any comments on the proposed legislative approach and/or the drafting which seeks to ensure that agreements made by third-party lenders that finance premiums under contracts of insurance will continue to be exempt under A60F(2)?

We do not have any comments on the proposals to exempt interest-free payments for insurance contracts. It appears that it is reasonable to exempt such payments to ensure lower income consumers can continue to take out insurance and pay for it through monthly instalments.

Question 5: Do you think it is appropriate for there to be an exemption for interest-free borrower-lender-supplier credit agreements repayable in under 12 months in 12 or fewer instalments, where they are provided by registered social landlords to their tenants to finance the provision of goods and services?

We would very much support an exemption for interest free credit agreements provided by social landlords to finance goods and services such as white goods and service charges. We cannot see any obvious consumer detriment that could result from the continuation of this form of support by registered social landlords to their tenants.

Question 6: Do you have any comments on the proposed drafting which seeks to ensure that agreements that are offered by registered social landlords to their tenants and leaseholders, and where there is a third-party lender involved, will continue to be exempt under A60F(2)?

We do not have any comments on the proposed drafting at this point.

Question 7: Do you have any comments on the proposed drafting which seeks to ensure that agreements (i) where the borrowers are employees and, (ii) which result from an arrangement between their employer and the lender or supplier, will continue to be exempt under A60F(2)?

We can see the reasoning behind the decision to exempt agreements between employers and employees for season tickets, parking arrangements and so on. We do not have any comments on the proposed drafting at this point.

## Regulatory controls that will apply to newly regulated agreements

### Question 8: Do you have any comments on the proposed legislative approach and/or drafting taken to exempting merchants from credit broking regulation?

It sounds reasonable that merchants offering BNPL as a payment option should not be subject to FCA regulation as credit brokers. Such a requirement would seem to have a particular impact on smaller traders who would not have FCA authorisation for credit broking whereas larger firms would potentially already have this authorisation.

### Question 9: Do you have any comments on the proposed legislative approach and/or drafting to regulate merchants as credit brokers when they are a domestic premises supplier?

This approach seems sensible, as any credit transaction that takes place in a consumer's home would attract higher risk of sales pressure, particularly for vulnerable consumers. We therefore support regulating merchants as credit brokers in these circumstances.

### Question 10: Do you have any comments on the proposed legislative approach and/or drafting which seeks to ensure that unauthorised merchants will be required to have their promotions approved by an authorised person?

We are not in a position to comment in any detail on the proposals. However, it does appear to be a particularly complex area which may lead to some potential loopholes in regulatory protections for consumers.

We would suggest that this area should be monitored closely to ensure that all the merchants that are intended to be covered by these promotions rules follow the regulations. In addition, given the complexity of the rules, it is important that the less scrupulous do not find some exemption to use to evade compliance.

### Question 11: Do you have any comments on the proposed legislative approach and/or drafting which seeks to disapply the CCA requirements on pre-contractual information for agreements that are brought into regulation?

We support the application of the FCA financial promotions regime to BNPL products.

We agree that all aspects of promotion of BNPL agreements should fall under the financial promotions regime. This will of course, be subject to whether we agree with the proposed rules to be put forward in a forthcoming FCA consultation.



However, we are concerned that the sanction under section 55 (2) of the CCA of unenforceability without a court order for non-compliance with the rules on pre-contractual information will no longer apply. It is not adequate for the proposals to rely upon consumers being able and willing to make a complaint about a firm to FOS. We are not convinced that many consumers would be aware of the pre-contractual information requirements, or be able to argue that these have been breached or in what way.

The automatic nature of the unenforceability rule is also of vital importance. There is little chance that vulnerable people in debt will be in a position to counterclaim for damages for a breach of statutory duty. We think it also unlikely that many, if any, consumers would be in a position to make a claim for damages under section 138D of FSMA for a loss due to a breach of FCA rules due to the expense of making a claim and the potential for legal costs.

We believe that these proposals will form a substantial deterioration in rights and protection for individual consumers. This can only be mitigated by the FCA putting in place robust supervision and monitoring processes that will keep these firms under close surveillance. This should result in the FCA taking swift enforcement action against firms for non-compliance with the pre-contractual information rules. We worry that the FCA will not be able to put in place a sufficient level of monitoring and enforcement action in this market due to resource restraints. This has certainly been a concern in the past.

**Question 12: Do you have any comments on the proposed legislative approach and/or drafting to disapply the DMRs for unauthorised intermediaries where information is disclosed by lenders in accordance with the FCA's rules on distance marketing for authorised persons?**

It makes sense to not be required to send two different sets of information to consumers, under the FCA rules and the Distance Marketing Regulations. We cannot comment on which would be easier for consumers to understand.

**Question 13: Do you consider that this proposed approach will give firms sufficient flexibility to provide information in accordance with CCA pre-contractual requirements rather than the tailored regime for agreements that will be brought into regulation?**

We are not in a position to comment on the proposed approach, as this is very much a question for affected mainstream lenders themselves.

## Question 14: Do you have any comments on the proposed legislation which seeks to disapply the small agreements provisions for agreements that will be brought into regulation?

We very much agree with these proposals as BNPL is frequently used for agreements below £50, and if the small agreement CCA exemptions were to apply, then many BNPL agreements would not come within scope of regulatory protections at all. This would undermine the point of the legislation.

### Transition to FCA regulation

## Question 15: Do you have any comments on the proposed legislation that seeks to implement the TPR?

We do not have any comments on the proposed legislation to implement the temporary permissions regime.

As you would expect, we would like to see BNPL lending being brought under full regulation as soon as possible. However, we can see that the proposals for such a regime make sense, so that firms are allowed to continue to operate whilst the FCA moves through the process of full authorisation and puts final rules in place. This appears to mirror how the FCA has brought previous markets into regulation.

### Regulatory controls not included in draft legislation

## Question 16: Do you think that the requirements for the content of agreements set out in the Consumer Credit (Agreements) Regulations 2010 are proportionate to apply to agreements that will be brought into regulation?

We agree with the government's view that it is proportionate for the current requirements for the content of agreements under the CCA to apply to newly regulated agreements.

We very much support prescription of form and content of regulated agreements to ensure a consistency of approach for all firms and consumers.

The prescribed wording needs to set out clearly (and in easily understandable terms) what happens if the consumer cannot afford the payments and what charges and fees will apply. It must be clear whether the debt can be passed on or sold for collection to debt collection agencies and so on. In addition, there needs to be clear information included on where to seek debt advice and where to complain.

## Impact Assessment and Equalities Impacts

**Question 17: What do you expect the impact 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?**

As we said in our previous response, we do not have any evidence of the impact we would expect the regulation of BNPL would have on BNPL providers. We would expect to see regulation of BNPL improving practices and behaviour of lenders, allowing a consistency of approach and transparency in advertising, setting out terms and conditions, and outcomes for consumers.

We expect that regulation of BNPL will enhance protections for consumers in relation to the consequences of taking out BNPL products, such as a consistency in approach to the impact on credit files, default charges, and debt collection.

We would expect merchants to continue to benefit from their ability to offer BNPL as a payment option. We would hope that there will be more checks and balances on how the payment option is displayed to the customer and what information and warnings merchants must show to demonstrate their compliance with the new rules.

**Question 18: 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?**

We would agree that the reforms should help to mitigate the negative impacts on consumers using BNPL products.

Increasing protections in the way in which BNPL is advertised, the affordability assessments that must be carried out, the transparency of agreements and clear information on consequences of non-payment should have a positive impact.

However, it has been highlighted that the ease of paying by BNPL can make it worse for people with certain mental health conditions where a greater degree of friction in the process of taking out BNPL agreements would be helpful. Clearly it should not be difficult to get clear and timely information on the product beforehand, and information on debt and mental health help available for people who are struggling should be prominent at all times.

We are concerned that there will be a substantial delay before the new regulations are put in place. The government and the FCA should act to put the protections proposed in this consultation in place as soon as possible, to reduce harm to vulnerable groups.

Question 19: Do you have any further data you can provide on the potential impacts on persons sharing any of the protected characteristics?

We do not have any further data we can share at this time on the potential impacts on consumers with protected characteristics.

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