MONEY ADVICE TRUST

BUSINESS DEBTLINE | NATIONAL DEBTLINE | WISER ADVISER

Consultation Response:

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

Response by the Money Advice Trust

Date: November 2024

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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 2023, our National Debtline and Business Debtline advisers provided help to 127,390 people by phone, webchat and our digital advice tool with 2.38 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 2023 we delivered this free training to 800 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.

Public disclosure

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

Executive summary

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.

We are concerned by the proposed approach to CCA sanctions throughout the proposals. The sanctions regime was set up to protect consumers who are vulnerable and have fallen behind with their payments. Removal of sanctions for non-compliance could encourage less-compliant lender behaviour. Elements of the market may not behave in the same way as a a BNPL lender who is operating according to best practice principles.

The power of the sanctions regime is that it promotes good behaviour. We would question how onerous it would be for BNPL providers to comply with a suitably modified regime. We are worried that removing the sanctions regime attached to the information requirements will inadvertently remove their deterrent effect without being clear about the potential consumer harms that may result.

- 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 the post-contractual information requirements on arrears, default and termination 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 mean that consumers with BNPL products will have substantially lower rights and protections than those with other types of consumer credit products. 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.
- However, the FCA has finite resources and is unable to closely supervise all firms in the market at all times. The consumer duty is reactive, and cannot be relied upon to act as protection. The FCA cannot take action to help prevent harm to an individual who is trying to address a particular problem relating to their BNPL agreement.

We very much support prescription of form and content of regulated agreements to ensure a consistency of approach for all firms and consumers. We are concerned that without prescription in the rules, information about one BNPL product could look substantially different to another, whilst key terms are buried or not set out in the same way.

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.

Responses to individual 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)?

We agree that it is important that communications from BNPL lenders should maximise consumer understanding. It is vital that consumers can make informed decisions about BNPL products.

It makes sense that the FCA develops a disclosure regime for BNPL agreements given the particular features of the credit product. We accept that some of the information required under the CCA are not suitable for BNPL and could be confusing.

However, we are not in support of a flexible approach to the form and phrasing of information. We are concerned that consumers should be able to assess the product being offered to see the key terms and to compare these easily with similar products or other CCA regulated lending products.

We are concerned that without prescription in the rules, information about one BNPL product could look substantially different to another, whilst key terms are buried or not set out in the same way.

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)?

As we have said, it makes sense that the FCA develops a specific regime for BNPL agreements given the particular features of the credit product.

However, we would expect the rules on agreements to set out prescribed information that is required to be included by BNPL lenders in their agreements. This should include the key terms of the agreement in a common format. We very much support prescription of form and content of regulated agreements to ensure a consistency of approach for all firms and consumers.

We would be very concerned that such a relaxation of the rules would lead to consumer confusion, make the task of enforcement of compliance harder, make it extremely difficult to take action against lenders for any breach or for consumers to challenge their agreements.

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 to debt collection agencies or sold to debt purchase companies and so on. In addition, there needs to be clear information included on where to seek debt advice and where to complain.

We would also expect to see a requirement to provide access to a copy of the agreement either on paper, or via other methods such as a link to a PDF.

There needs to be evidence that any credit agreement is legally binding and has not been taken out in error or fraudulently. We would also expect the new FCA rules to include provisions on how an electronic form of signature can be obtained and how this will be recorded.

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)?

We agree that a requirement to issue annual statements is unlikely to be suitable given the short duration of BNPL agreements.

We would query whether removing the right to request information about their agreement during the lifetime of the agreement is helpful. We would expect the FCA to make rules that ensure that firms must provide information when requested.

In addition, there have been instances where it has been difficult for consumers to keep track of payments and accounts with providers. Digital accounts must include information on all accounts, send updated information on outstanding balances and the payment dates and send prompts for payment.

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

We do not see the Consumer Rights Act 2015 (CRA) as providing sufficient protection for consumers in the event of a unilateral variation of the agreement by a firm in itself. A remedy under the CRA involves a customer taking court action against a firm for damages or to recover money paid. This is very unlikely to be a suitable remedy for most consumers due to the expense, stress and legal expertise required.

The legislation and FCA rules must ensure that consumers have the right to complain to the Financial Ombudsman Service (FOS) about lender compliance with all relevant law including specifically the CRA for modifying agreements. It must be possible to take cases of this nature to the Financial Ombudsman Service (FOS) as an alternative to taking legal action.

We would very much support the intention for the FCA to consider adding further rules to cover BNPL agreements when these are varied by mutual agreement or in the event of a unilateral variation.

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)?

We are very concerned with the proposal to disapply provisions regarding prescribed information on early repayment. We understand that if a creditor fails to comply with section 97 of the CCA, they are not entitled to enforce the agreement while the default continues.

It must be possible to modify the information required to remove the clauses which relate to rebates and interest and fees where they do not apply to BNPL agreements without removing the CCA sanction provisions.

The paper suggests that the FCA will consider adding provisions on information to CONC. Whilst this will be helpful, the reliance in the paper on the Consumer Duty to ensure firms to *"provide information consumers need, at the right time, and presented in a way they can understand"* does not come with any sanctions for firms who fail to do so, that consumers can rely upon. The point of the sanctions regime is to ensure automatic compliance by lenders with important aspects of the operation of consumer credit agreements and to provide a financial disincentive to poor behaviour. Its removal will not be of benefit to consumers dealing with their individual credit agreement and a lender who is not complying with the rules.

The CCA information requirements have penalties for improper use or the failure to serve the notices at the correct time. The Consumer Duty does not have any element of automatic penalties for any failures by firms to abide by FCA rules and does not have the same effect as CCA protections. There is no element of consumer redress and no court protection for individual consumer credit agreements under the Consumer Duty. The FCA will only be able to consider how firms comply with the Consumer Duty through supervision and enforcement measures. A series of complaints to the FCA might prompt an investigation but at this stage, it will be too late to help the individual consumer with their particular problem.

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)?

We do not agree with the proposal to disapply these provisions. As we have said, the reliance on the Consumer Duty and CONC rules are not sufficient for an individual dealing with a specific credit agreement. Whilst we can appreciate that the nature of BNPL agreements might mean modification is required, we believe valuable consumer protections will be lost if this is adopted.

The paper states at point 2.44: *"The government believes it is vital that consumers in financial difficulty are presented with clear, timely and useful information and are supported to find an appropriate solution depending on their circumstances*". We do not believe that removing these provisions will support the government intention.

The removal of CCA provisions relating to arrears, default and termination will have the effect of removing the associated sanctions for failure to provide the information in the required format and within a set timescale. We do not agree with removing the sanctions in these provisions.

Where a BNPL agreement requires one payment, we can see that notices in relation to notices of sums in arrears might be unnecessary, but many agreements are structured into three or more monthly payments. In these cases, the provisions need to be retained. In particular we can see no reason to disapply S76 "the duty to give notice before taking certain action". We believe there should always be a requirement for a lender to give notice.

One aspect of these changes would be the loss of the requirement to send an FCA designed information sheet under 86A of the CCA.[1] These information sheets include invaluable information on rights and responsibilities and on sources of free debt advice in a prescribed format. These were updated in 2021 to be consumer friendly and in plain language, in conjunction with the consumer and debt advice sector. The wording remains in a prescribed format and firms are not allowed to come up with their own potentially confusing variations.

It is not clear from the proposals whether these information sheets would no longer be required for both arrears and default. We would be very disappointed if this is the case. In our experience, if compulsion is removed, some lenders would fail to provide an equivalent standard of accessible information in plain language or may fail to signpost to any independent help or support.

Question 7: Do the amendments to section 129 and section 86 sufficiently retain the effect of these provisions for BNPL agreements?

We are pleased to see that there is recognition of the consequences of removing the CCA notice provisions on the ability of consumers to apply for a time order. We support the inclusion of new sections in the draft statutory instrument to ensure that consumers with a BNPL agreement are able to apply for a time order when their lender intends to terminate or enforce the agreement.

Although in practice, a time order might not be used often for BNPL agreements, it is important to maintain the recognition that time orders are an important part of consumer rights and protections within the CCA.

We would like to see the notice provisions retained for BNPL as explained above. This would remove the problem that has arisen from removing section 86B on notices of sums in arrears (NOSIA) whereby a consumer would no longer be able to apply for a Time Order at that point.

We have no comments to make in relation to section 86 relating to the "death of the debtor or hirer".

[1] https://www.fca.org.uk/publication/information-sheets/arrears-may-2021-cmyk-a4.pdf
https://www.fca.org.uk/publication/information-sheets/default-may-2021-cmyk-a4.pdf

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

We are not able to identify any further consequential amendments at this time. However, we would state again that we are not in support of the removal of the CCA information requirements for the reasons set out above.

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

We support the proposed changes to the approach to distance marketing as set out in the paper. We also support the policy position on the regulation of credit brokers in domestic premises.

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 precontractual information will no longer apply.

We are concerned by the proposed approach to CCA sanctions throughout the proposals. 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 or post 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 mean that consumers with BNPL products will have substantially lower rights and protections than those with other types of consumer credit products. 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 10: Do you have comments on the proposed legislation that seeks to implement the TPR?

We do not have any specific comments on the proposed legislation to implement the temporary permissions regime. The design of the regime seems reasonable as it follows previous FCA experience of moving firms in an unauthorised sector into regulation. We would expect this regime to be put in place in a manner that is consistent with previous temporary permissions regimes, learning any lessons from previous implementation processes.

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?

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.

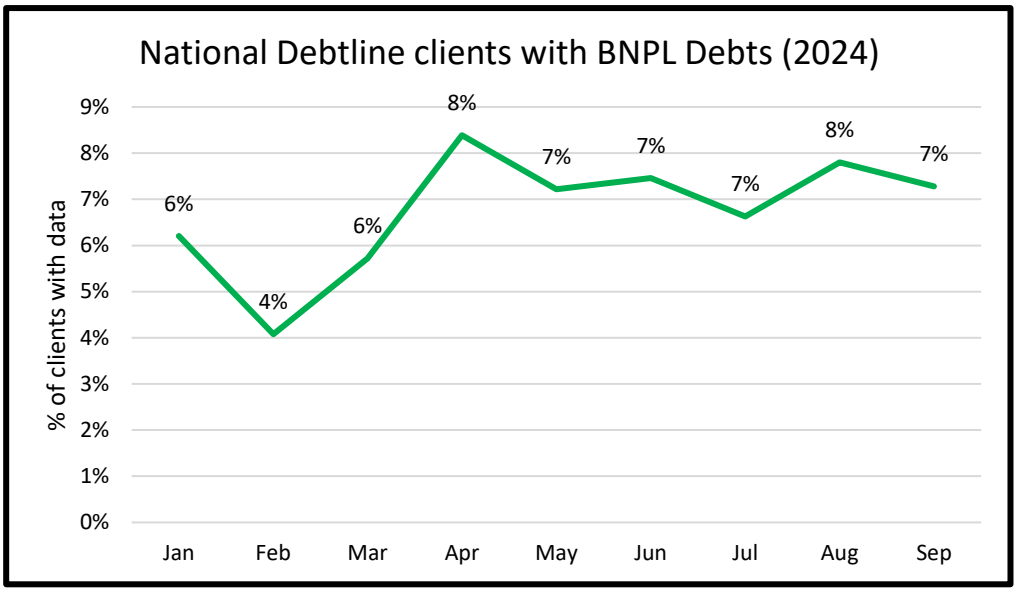
We expect that regulation of BNPL will enhance protections for consumers in relation to the consequences of taking out BNPL products, such as a consistency in approach to the impact on credit files, default charges, and debt collection.

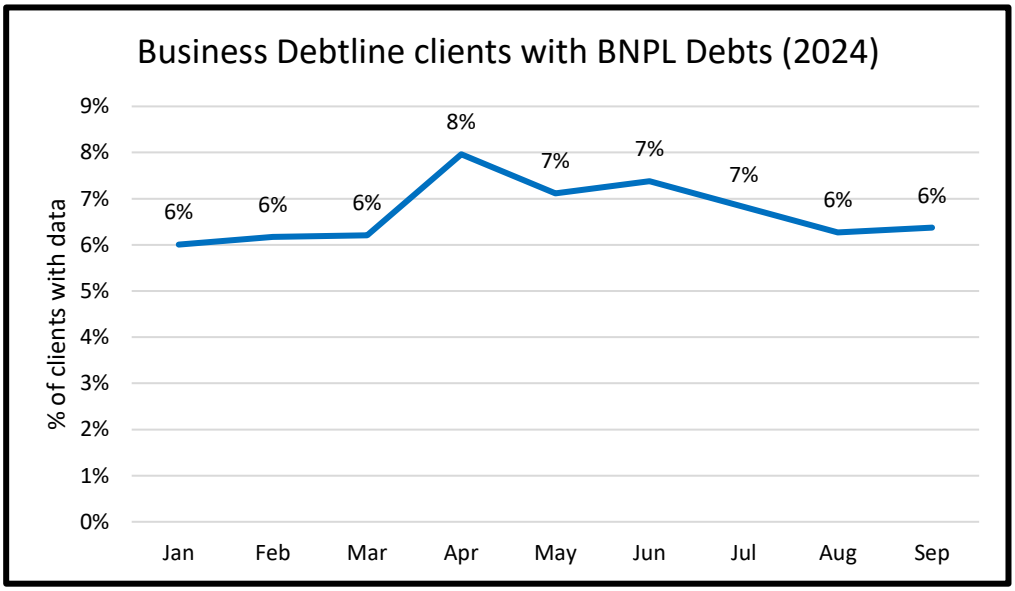
However, we do not agree that the proposal will guarantee equivalent rights and protections for consumers using BNPL products as with other CCA regulated credit. This is because of the proposals to remove the information requirements, protections and sanctions on pre-contractual information and on post contractual rights in relation to arrears, default and termination. We have set out our concerns above.

Anecdotally, we hear from our advisers that clients with BNPL products do not always recognise them as debts- reflecting a potential failure on behalf of BNPL providers to properly communicate the nature of the product and the consequences of non-payment. We would expect regulation to improve this situation.

The average amount of BNPL debt for National Debtline clients has gone up from £380 in 2022 to £556 in 2023 to £732 in 2024, an increase in 93% since 2022.

The percentage of clients with BNPL debts has also grown over time, with 7% of National Debtline clients and 6.5% of Business Debtline clients on average with some form of BNPL account in the year up to September 2024. This compares to December 2021 where 3.4% of National Debtline clients had BNPL debts whilst 1.6% of Business Debtline clients reported that they had BNPL debts in December 2021. These statistics are of concern and demonstrate the need for regulation to ensure BNPL products are only used when suitable and affordable for the individual.





We are very pleased to see the application of section 75 of the CCA to the BNPL regime. We believe that section 75 affords valuable consumer protections. It is also important that Section 75 is looked at more widely, particularly where the direct link between the merchant and finance 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.

We are also pleased to see a mandatory data sharing requirement on firms to ensure that there is accurate and consistent information on credit reference files. We would expect this to be an additional consideration for the FCA in setting up its new credit information body.

It is vital that consumers are able to complain to an independent body, particularly if the intention is to remove CCA protections, rights and sanctions. We are pleased that the intention is to apply Financial Ombudsman Service complaints handling rules to BNPL agreements so that consumers will be able to raise complaints with FOS. This will mean potentially vulnerable consumers will have a free and easy to access complaints mechanism where needed.

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?

The paper provides evidence that has led the government to recognise that:

4.8 *"This evidence suggests that some consumers sharing particular protected characteristics may be at a higher risk of suffering detriment"*.

However, we do not agree that the new proposals **as they stand** will *"help to mitigate the risks of potential consumer detriment crystallising for persons with protected characteristics"*.

As we have set out in our response above, we do not accept that removal of the rights and protections particularly relating to information requirements and sanctions under the CCA will ensure *"that firms are subject to high standards of conduct regulation and by ensuring consumers have access to clear information and protections"*.

We believe that consumers who have protected characteristics and are particularly vulnerable are at risk of suffering disproportionate detriment due to diluted consumer protections.

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.

In addition, people with mental or physical health conditions may find it harder to represent their own interests or to engage in certain processes. This can be the case for a wide range of reasons including, but not limited to, difficulties with comprehension, challenges communicating or utilising certain communications channels, energy levels, the effect of medication and the inaccessibility of certain processes or communication channels. People with health conditions or disabilities are therefore more likely to need to rely on consumer protections and rights set out in the CCA. Any move to diminish this level of consumer protection could disproportionately impact upon these groups.

It is vital that CCA protections, particularly the self-policing sanctions, or the equivalent remain in place given the vulnerability of many using consumer credit products. There is little chance that vulnerable people in debt will be in a position to counterclaim for damages for a breach of statutory duty when taken to court by their lender.

Question 13: 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 specific data on the potential impacts on people with protected characteristics that we can share at this point.

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