

UK Government Confirms Approach to Regulation of Buy-Now-Pay-Later Market

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The UK government has confirmed its plans for the regulation of interest-free buy-now-pay-later (BNPL) arrangements following a consultation launched in October 2021. The proposed rules are set out in the government's [consultation response](#), which was recently published.

In February 2021, the government announced its intention to regulate the BNPL market, in line with the conclusions of the Woolard Review, which highlighted the potential for consumer detriment arising from inappropriate promotion of BNPL, poor consumer understanding, lack of affordability assessments and visibility of these products on credit files, and inconsistent treatment of customers in financial difficulty. The [consultation sought views](#) on the scope of BNPL regulation and the regulatory controls that should apply. (See our client alerts of 9 February 2021, "[The UK's Woolard Review Proposes Regulations for BNPL Credit Agreements](#)", and 29 October 2021, "[UK Treasury Launches Consultation on Regulation of 'Buy Now, Pay Later' Financing](#)".)

The key aspects of the government's plans are as follows.

Scope of Products To Be Regulated

The scope of regulation will be expanded from what was proposed in the consultation to include not only BNPL but also other currently exempt, short-term interest-free credit (STIFC) arrangements, where provided by third-party lenders. Subject to further stakeholder engagement, it may extend to STIFC provided directly by merchants as well.

STIFC had been identified in the consultation as one of the more prominent forms of unregulated interest-free lending, alongside BNPL. BNPL is usually taken out online, the lender is a third party and the consumer has an ongoing relationship with the lender. STIFC, by contrast, is frequently offered in-store, comprises a single, higher-value agreement and the credit provider may be a third-party or the merchant itself. Given the increasing overlap between the two products, the government has opted to regulate both.

What is not captured by the proposed regulations is merchant-provided credit. However, the government is minded to include this where it is provided online or at a distance. This is seen as posing a higher risk of consumer detriment than an in-store transaction, where the greater friction reduces the risk of impromptu purchases that would not otherwise be made, and thus may result in the accumulation of debt across multiple agreements. Before deciding, the government intends to consult further to understand the scale and operation of the merchant-provided STIFC market, which is offered in areas such as dentistry, health care and education.

The government is mindful that lenders should not be able to restructure their arrangements to avoid regulation. Should it decide not to regulate merchant-provided STIFC, it intends to consider the case for including anti-avoidance measures in the legislation.

Exemptions

Certain specific types of arrangements will be exempt on the basis they pose limited risk of consumer harm and that regulating them would adversely impact day-to-day business activities. These are invoicing (*i.e.* an interest-free deferred payment offered directly by the merchant where repayable in a single instalment), interest-free agreements to finance contracts of insurance, charge cards, trade credit and lending between an employer and employee (including third-party lending facilitated by an employer).

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Regulatory Controls

The government has maintained its approach of applying existing consumer credit rules under the Consumer Credit Act 1974 (CCA) to BNPL (and now also STIFC), but modified proportionately given the lower risk of such products compared to interest-bearing credit. Below are the key aspects of the CCA and certain other regimes that will and will not apply to BNPL/STIFC.

What Rules Will Apply to BNPL/STIFC

- **The UK's financial services marketing rules (the "financial promotions regime").** In practice, merchants will need to arrange for a Financial Conduct Authority (FCA)-authorised firm (which could be the lender) to approve any promotions of BNPL/STIFC. That FCA-authorized firm will be responsible for ensuring the promotion is fair, clear and not misleading. This comes at a time when the FCA and government are bolstering the financial promotions regime, including proposing to require authorised firms to obtain specific permission from the FCA to be able to approve financial promotions. This could reduce the number of firms offering the approval of third-party promotions, and may increase costs for merchants offering BNPL/STIFC.
- **Prescribed form and content requirements for the agreement.** This is seen as beneficial because it introduces a degree of friction in the transaction, strengthening consumer protection and understanding. The government will further engage with stakeholders on the detailed requirements.
- **Pre-contractual disclosure requirements.** These will apply under an FCA rules-based regime, with the statutory disclosures under the CCA disapplied, allowing more flexibility to tailor the disclosure requirements to these products and their risk level. The government acknowledges that certain lenders that provide STIFC alongside regulated credit apply a consistent level of CCA disclosure across both sets of products. It therefore intends to consider how the voluntary application of CCA disclosures to BNPL/STIFC products might be treated as compliant with the FCA rules-based regime, notwithstanding the differences between the disclosure regimes.
- **Improper execution provisions under the CCA.** These provide that a credit agreement that does not comply with the prescribed form and content requirements is unenforceable by the lender, unless the lender obtains a court order.
- **Creditworthiness assessments and credit files.** Assessments will need to be carried out pre-contact. BNPL providers have started sharing information on agreements with credit

reference agencies and the government is engaging with the agencies in the development of their approach to reporting BNPL information on credit files.

- **FCA and CCA provisions requiring customers in default or arrears to be treated fairly and with forbearance.** This includes informing indebted customers of their liabilities and available sources of advice, as well as CCA requirements on the provision of information to consumers in financial difficulty.
- **Joint and several liability for the lender for supplier breach of contract or misrepresentation.** CCA provisions making the lender jointly and severally liable will apply in certain circumstances for a supplier's breach of contract or misrepresentation for goods or services where purchased using credit between £100 and £30,000. This will benefit consumers in harmonising expectations in matters such as refunds for undelivered goods, where the liability position currently differs between BNPL and regulated credit, and practices differ among BNPL providers. Large BNPL credit providers in practice offer refunds across all products, even where CCA protections applying to regulated credit do not apply. However, many BNPL agreements are likely to fall below the value threshold.
- **Financial Ombudsman Service (FOS).** BNPL products will be brought within the jurisdiction of the FOS, allowing borrowers to take complaints to the free settlement service.

What Rules Will Not Apply to BNPL/STIFC

- **Credit broking regulation.** Merchants offering BNPL/STIFC as a payment option will be exempt from the requirement to be FCA-authorized as a credit broker, as would ordinarily be the case where introducing customers to a lender.
- **Relief from full regulation for small agreements.** Some CCA protections do not apply to agreements below £50 (*e.g.*, on conducting creditworthiness assessments). However, this will not be the case for BNPL, given the typical low value of agreements. This has the odd result that low-value interest-bearing products will be subject to fewer protections than interest-free BNPL of the same value. The government's justification is that lenders are likely to adopt standardised systems and hence apply uniform protections across all products.

Next Steps

The government will now engage with stakeholders on the proposal to regulate merchant-offered STIFC, with responses invited by 1 August 2022. It intends to set out its decision on

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this, alongside the publication of a second consultation seeking views on the detail of draft legislation, by the end of 2022.

While some BNPL providers are already FCA-authorized because they tend to offer such products alongside regulated credit, smaller BNPL providers offering exclusively unregulated credit will need to undergo the time-consuming and potentially expensive process

of seeking authorization. Likewise, while a number of providers will already have processes in place for their regulated credit that can be extended and adapted to their BNPL products, the new regime will have a more profound impact on those providers that need to scale up their compliance budgets to implement entirely new systems and processes in their operations.