

# MoneySavingExpert

## Response to HM Treasury consultation on draft legislation: Regulation of Buy Now, Pay Later

MoneySavingExpert (MSE) welcomes the opportunity to respond to HM Treasury's (HMT) consultation on draft legislation for the regulation of Buy Now, Pay Later (BNPL).

We have long argued that this market needs to be regulated. BNPL can be – and regularly is – a useful tool for consumers when making spending decisions. When we've asked MSE users about it, a lot are happy with their experiences, and find it a helpful way to organise their borrowing. But the continuing lack of protection through regulation is a huge concern, so we are pleased to see plans to finally address this – though progress so far has been much too slow.

The BNPL market is growing at speed, and more people are now using these services as a direct result of the cost of living crisis. We need to see this legislation go through Parliament as soon as possible, alongside other regulatory action.

In January 2022, MSE responded to the Treasury's initial consultation on the regulation of BNPL. We made a series of recommendations around the government's approach to regulation, including the following:

- Advertising and promotion of BNPL must make it clear that this is debt.
- Pre-contractual information given to consumers before they use BNPL must make it clear what the consequences are if they can't keep up with repayments.
- BNPL payment journeys must be designed in a way that gives consumers enough information, in an effective way, to enable them to make informed spending, or borrowing, decisions.
- Like when using a credit card, section 75 of the Consumer Credit Act (CCA) must also apply to BNPL transactions.
- Internal complaints processes need to be improved, and BNPL users must also have access to redress via the Financial Ombudsman Service (FOS).

We were happy to see our key asks – those involving section 75; FOS access; increased protections around advertising, promotion and pre-contractual information; plus, measures to protect customers in financial difficulty – look to have largely been considered and provisionally 'met', though these changes must be very carefully implemented and supervised to ensure successful regulation of the BNPL market and thorough consumer protection.

The government has laid out some further, specific questions in this second consultation on draft legislation. We have responded with our thoughts and recommendations on the following pages.

### **Scope of regulation and anti-avoidance**

**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(3) of the draft legislation?**

**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?**

The Treasury must remain wary of potential unintended consequences arising from the scope and boundaries of regulation it has opted for, and the way legislation has been drafted, particularly around regulatory exemptions. For example, the possibility that BNPL providers might choose to adopt a running-account model and utilise the A60F(3) exemption in order to circumvent regulation, while still offering products that present similar risks of potential harm to consumers as BNPL (in its unregulated state).

MSE is conscious of this potential consequence and other concerns flagged by HMT and stakeholders, such as the risk that third-party BNPL lenders might avoid regulation by structuring agreements so that they technically become the merchant in the transaction they're financing, having purchased the goods from the original supplier.

We are encouraged to see the government has incorporated an anti-avoidance mechanism into the draft legislation to mitigate this particular behaviour being carried out by providers. There must be strong, proactive monitoring processes in place to ensure providers are not seeking out loopholes – including, but not limited to those mentioned here – to avoid being subject to regulation. The Treasury must remain extremely vigilant to these and other risks, and be proactive if the need for further intervention becomes apparent.

### **Advertising and promotions**

**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?**

As laid out in our response to the Treasury's previous consultation on BNPL regulation, under the current system, we have seen many cases where advertising and promotion presents BNPL as a way to improve a person's lifestyle, without making it clear that it is a form of debt. We recommended that advertising should be properly regulated so that consumers are informed about BNPL as a payment and borrowing option and are able to make considered decisions about when, and whether, to use it.

We were therefore pleased that the government has set out its intention to apply the financial promotions regime to unauthorised merchants offering BNPL as a payment option – alongside BNPL providers themselves. We support the Treasury's proposal that unauthorised merchants will be required to obtain approval for promotion of agreements which will be brought into regulation from an authorised person (which could, but does not have to, be their BNPL lender partner).

As with all aspects of upcoming regulation, HMT and the FCA must ensure robust monitoring and supervision processes are in place to enable successful regulation and prevent consumer detriment arising from the marketing and targeting of BNPL options.

### Pre-contractual requirements

#### **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?**

Responding to the Treasury's earlier consultation, MSE highlighted how the pre-contractual information given by BNPL providers often isn't effective enough. Crucially, evidence from our users demonstrates how some consumers have passed through pre-contractual screens and entered into BNPL agreements without knowing they are taking on debt or fully understanding the terms. This exposes consumers to potential harmful consequences such as missing repayments, late fees and referral to debt collectors.

Under current government proposals, firms will be required to comply with FCA rules on pre-contractual disclosure of information – rather than pre-contractual provisions within the CCA.

Any method of regulation should ensure that the pre-contractual information given to consumers effectively communicates that BNPL is a form of debt, as well as any consumer responsibilities, and the potential negative consequences if responsibilities are not met. It's also important that products are communicated in a way which is appropriate and meaningful for the consumer.

We broadly welcome an approach which enables flexibility, so that customers will be told the information they *really* need and in a way they will *really* comprehend. But importantly, while the adaptability of regulatory rules over the more prescriptive CCA legislation could bring benefits – for example, being more responsive to new types of products in an innovative market – consumer detriment could arise if providers are allowed complete freedom to present this information in any way they like.

Further clarity is needed on what FCA rules on the pre-contractual disclosure of information for BNPL agreements will look like in practice. MSE is also wary of potential negative consequences stemming from the proposal that associated CCA sanctions, such as the unenforceability of contracts, wouldn't apply to a breach of these rules. We would encourage HMT to reflect on this as a risk for consumer outcomes.

MSE awaits the regulator's consultation on its proposed rules for BNPL regulation, expected later this year, and will consider this topic in more detail in our response to this.

### Small agreements

#### **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?**

What constitutes a significant amount of money vastly differs depending on consumers' personal circumstances. For someone with low financial resilience, for example, losing an amount of money up to £50 could cause notable financial and emotional detriment. MSE is therefore supportive of the move to disapply the small agreements provisions for agreements that will be brought into BNPL regulation.

Relatedly, in its CCA reform consultation, the Treasury is exploring whether section 17 provisions which enable exemptions from specific elements of the CCA and the FCA's Consumer Credit Sourcebook (CONC) should continue to exist. MSE sees that it may be sensible and fairer for

consumers for there to be no minimum threshold which reduces protections for ‘small agreements’, for both interest-free and interest-bearing credit.

We encourage HMT to consider how CCA reform might achieve this and also, more broadly, make requirements suitable for current and future types of ‘small’ credit agreements, including those made within the BNPL market.

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It has more than 8.6 million people opted-in to receive the weekly MSE’s Money Tips email, and 10.4 million unique monthly site users who visit 19.9 million times a month, including the MSE Forum, which has more than two million registered users. In September 2012, it joined the MoneySupermarket.com Group PLC.

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