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Submitted online: BuyNowPayLater@hmtreasury.gov.uk

Dear Sir / Madam,

Financial Services Consumer Panel response to the Treasury's consultation on Buy-Now Pay Later draft legislation

The Panel welcomes the opportunity to respond to HM Treasury's consultation on draft legislation to bring Buy-Now Pay Later lending into the FCA's remit. The Financial Services Consumer Panel is an independent statutory body. We represent the interests of individual and small business consumers in the development of policy and regulation of financial services in the UK. Our focus is predominately on the work of the FCA, but we are responding to this consultation because the outcome of HM Treasury's consultation will have significant implications for the scope of FCA's future regulatory rules and monitoring activities in the consumer credit sector.

We believe that consumer harm will be prevented by ensuring that BNPL lending is properly regulated but the detail has to be practical, avoid unnecessary complexity and at the same time bring clarity to consumers on the protection afforded to them in the varied landscape of this type of lending.

The Panel does not believe that Short Term Interest Free Credit (STIFC) as provided by merchants, normally at the point of payment, should sit outside this legislation. As argued in our previous response, there is very little friction in the consumer journey to signing up for these loans and they can be very tempting for vulnerable and/or impulsive consumers¹. Indeed, the Panel's own research on early use of credit (which included BNPL) found that borrowers showed a range of emotions when it came to credit choice. Our research found that behaviours such as making an emotional decision to buy a product, seeking products with the lowest amount of friction irrespective of cost, the normalisation of credit,

¹ https://www.fs-cp.org.uk/sites/default/files/final_fscp_response_-_hmt_bnpl_mini_consultation.pdf

optimism bias and not seeing debt as debt, could lead to serious consumer harm. The risk of these behaviours are heightened in BNPL markets and as such increases the risk of consumer harm. ²

As stated in our response to the consultation on the reform to the Consumer Credit Act (CCA)³, we would prefer a much simpler overarching definition of what is credit. By having such a definition, we will not need to have a multitude of different rules for what is essentially the same product or service: deferred payment amounting to a loan.

Additionally, we believe that BNPL lenders could switch to STIFC and similar models of credit if it remains outside the perimeter, with the risk of consumer harm persisting. We would ask HM Treasury to reconsider this point.

The Panel understands that the Government is trying to enable access to convenient and affordable credit for social tenants and leaseholders, but we are unsure that these proposals make sense alongside existing provision for referral to social lenders. The Government needs to re-articulate its overall policy objective in relation to social landlords in the provision of credit (and insurance) and come forward with clearer proposals, including amendments to previous legislation if necessary. We would also mention the risks to tenants and leaseholders in the extension of credit for capital cost of repairs, because of the larger sums involved: there has been some evidence of leaseholders being saddled with large debts, the extent of which they were not fully aware of⁴.

Other points that the Panel would like to make are as follows:

1. We are pleased to see that the proposed legislation includes provision for SMEs but would like the threshold of £25,000 increased to £30,000 to align with the section 75 threshold of the CCA, as a step towards an overhaul of the protections for businesses as proposed in our response to the consultation on CCA reform
2. The Panel supports the regulation of merchants as credit brokers when they are a domestic premises supplier i.e. selling credit in a person's home. We know that under such circumstances, 'pressure selling' can occur, giving rise to alarming situations for consumers, particularly

² https://www.fs-cp.org.uk/sites/default/files/20220707_britain_thinks_word_report_v1.pdf

³ https://www.fs-cp.org.uk/sites/default/files/fscp_response_to_treasurys_consultation_-_reform_of_the_consumer_credit_act_.pdf

⁴ <https://researchbriefings.files.parliament.uk/documents/SN04553/SN04553.pdf>

those who are vulnerable. We are therefore encouraged that this aspect of merchant BNPL lending will be included in the perimeter.

3. Furthermore, we support the proposal that unauthorised merchants would need to have their adverts and promotions approved. The Panel has responded to FCA's consultation on Introducing a Gateway for Firms who Approve Financial Promotions⁵, where the Panel has expressed their views, that where a financial promotion has not met the FCA's rules, the permitted approver should have the responsibility for the losses that the consumer has suffered. The Panel would encourage the FCA to consider this response in addition to the points made here.
4. The Panel welcomes the Government's and FCA's moves to minimise the time between the legislation coming into force and the opening of the TPR. The Government should reflect on whether this can be further reduced as BNPL lenders and merchants have been well aware for some time that regulation is coming and as such, have had ample time to get their operations and products in order.
5. The draft legislation sets out what will happen in the case where a lender decides not to go ahead for full approval after applying for TPR. We believe the situation could be very complicated for the consumer. A consumer could hold some older loan agreements prior to regulation which are outside scope, and some under TPR. Would it be clear to consumers that although the lender has not progressed to full authorisation, they have an enhanced level of protection under TPR depending on when they entered the agreement? We would want to see the wording strengthened here to ensure that consumers are crystal clear about the protection afforded to them in different scenarios.
6. If a provider decides not to become authorised and sells the business to another provider (whether authorised or unauthorised), it must be ensured that the terms and conditions of their original loan are carried forward and any changes should certainly not be to the detriment of the consumer. The legislation needs to clarify what happens if a BNPL lender sells its entire loan portfolio and must ensure that consumers are protected under such scenarios. We would further argue that in the event of such a sale only authorised firms should be permitted to buy these loans.

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[final fca_cp_22_27_introducing_a_gateway_for_firms_who_approve_financial_promotions.pdf \(fs-cp.org.uk\)](https://www.fca.org.uk/publications/consultations/2022/27-introducing-a-gateway-for-firms-who-approve-financial-promotions.pdf)

7. With regard to the reporting of BNPL loans to the CRAs, we agree that this should be done. However, given the different lending cycles in the BNPL market, for example weekly and bi-weekly paid loans, we question how this will be reported by CRAs which are largely set up for reporting on monthly repayments. Moreover, CRAs and lenders will need to be geared up towards understanding-and explaining to consumers how weekly defaults (as opposed to monthly ones) impact a consumer's credit score. These issues need to be rigorously thought through before Regulation Day to avoid unintended consequences for consumers. In the Panel's response to the FCA's MS 19/1.2 Credit Information Market Study Interim Report and Discussion Paper⁶, we also emphasised the need for CRAs to keep BNPL information up-to-date.
8. It is argued that Section 75 of the CCA should be relied upon to set the criteria for the size of debt that falls into this regulation, in terms of consumer recourse if things go wrong. Although the lower limit of no less than £100 (**for a single item**) appears pragmatic it should be acknowledged that many BNPL purchases are for lower amounts. Given the nature of BNPL borrowing, is it right that purchases below £100 are not covered. We would contend that £50 might be a more suitable lower threshold for this type of borrowing, as a step towards abolishing "small agreement exemptions" as per our response to the CCA review. It is acknowledged that this action, as well as the wider move towards regulatory standards could make some BNPL lenders decide to exit the market.
9. We note the point made about the potential disadvantage for groups with protected characteristics, in terms of BNPL borrowing where there is evidence that minority ethnic consumers are likely to be over represented among these borrowers⁷. We believe that this legislation on balance will benefit such groups as it reduces potential harm of reckless borrowing and problem debts further down the line.
10. We would also recommend that the legislation is framed so as to ensure that BNPL lenders do not switch to business models which place them just outside the perimeter. The Anti-Avoidance part of the draft legislation does capture some of this but there needs to be a watching brief on market players in the BNPL market to reduce the chance of perverse behaviour leading to consumer harm.

⁶ https://www.fs-cp.org.uk/sites/default/files/20230224_final_fscp_response_-_cims_interim_report.pdf

⁷ <https://www.stepchange.org/media-centre/press-releases-bnpl-consumer-struggles.aspx>

11. The CCA post-contractual requirements are generally not suited to BNPL lending where repayments are more frequent than monthly. As such, the Panel would recommend that separate guidelines are developed prior to Regulation Day as this matter cannot wait until the CCA is reformed, as consumers could be harmed by not being informed sooner when they are in default.

Finally, we believe that overall, this legislation, combined with the Consumer Duty will ensure that consumers have the information needed to make a sound decision on whether this type of credit is right for them in the short and long term. Consumers will be better protected when things go wrong and the likelihood of this happening has certainly accelerated with the rise in interest rates, higher energy bills and the cost-of-living crisis. Undoubtedly, there is the chance that some consumers will no longer be able to borrow via BNPL as a result of tighter credit checks. However, on balance, we firmly believe that this is the right thing to do in order to protect consumers and prevent problematic debt in the longer term.

Yours sincerely

Helen Charlton
Chair, Financial Services Consumer Panel