

BUY NOW, PAY LATER: CONSULTATION NOW, REGULATION SOON NOVEMBER 2024

On 17 October 2024, HM Treasury launched a six-week consultation on draft legislation to bring buy-now pay later (BNPL) products into the scope of regulation by the Financial Conduct Authority (FCA). The draft legislation builds on draft legislation previously published in February 2023 under the previous government (which itself was proposed by the Woolard Review in February 2021).

The consultation closes on 29 November 2024. The legislation is expected to be made in early 2025 with full implementation of the BNPL regime expected twelve months later, in Q1-Q2 2026. A temporary permissions regime (TPR) will apply to unauthorised BNPL firms pending FCA authorisation.

In this briefing, we outline the key elements of the proposed BNPL regulatory regime, and the potential impacts for affected firms and users of BNPL products.

Consultation and draft legislation

HM Treasury has published a draft of the Financial Services and Markets Act 2000 (Regulated Activities etc) (Amendment) Order 2025 (the Order). The Order makes amendments to:

- the Consumer Credit Act 1974 (CCA);
- the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO);
- the Financial Services (Distance Marketing) Regulations 2004 (DMRs); and
- the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (FPO).

The Order also sets out the legislative framework for the TPR.

Key issues

- HM Treasury intends to make the Financial Services and Markets Act 2000 (Regulated Activities etc) (Amendment) Order 2025 in early 2025 and regulation of BNPL will begin 12 months later.
- Firms wishing to offer regulated BNPL products will require FCA authorisation and will need to register for the TPR to allow them to continue to operate while their application is processed.
- Merchants who offer regulated BNPL as a payment option will not be authorised to conduct the regulated activity of credit broking, except for broking done in the home of a customer.
- Other exemptions will apply for merchants who provide credit directly, invoicing, and agreements funding insurance premiums, employers/employee lending and agreements offered by registered social landlords.
- The small agreements exemption under the CCA will not apply to regulated BNPL, in order that all regulated BNPL is treated consistently.
- HM Treasury intends to disapply CCA requirements with respect to regulated BNPL, including in relation to disclosures pre-contract and during the life of the agreement, and provisions on arrears, default, variation and termination.
- BNPL agreements will be covered by s.75 CCA.
- Financial promotions of unregulated BNPL firms will need to be approved by an authorised firm.
- Firms in TPR will be deemed to be authorised, but deemed authorisation will not permit them to approve financial promotions for unregulated third parties.
- Anti avoidance measures will operate to prevent structuring of credit agreements to avoid falling within regulation.
- FCA will consult on rules for the BNPL regime, including disclosures, potential adaptation of the CONC regime (including the introduction of creditworthiness requirements), and complaints handling. Regulated BNPL agreements will also be covered by the Financial Ombudsman Service.

In the accompanying consultation, HM Treasury explains that it intends to take "regulated deferred payment credit agreements" (regulated BNPL) out of scope of the widely used exemption in Article 60F(2) of the RAO. Firms offering regulated BNPL will need to become authorised by the Financial Conduct Authority, with a temporary permissions regime (TPR) to operate to allow unauthorised BNPL firms to continue to provide BNPL products while they await processing of their authorisation application. Key elements of the proposed regime are outlined below.

Current exempt status of BNPL products

BNPL products tend to comprise low-value agreements made with very short durations offered by third-party lenders. Article 60F(2) of the RAO provides an exemption from consumer credit regulation for BNPL and other contracts - collectively known as 'deferred payment credit' - that meet the following conditions:

- the agreement is a borrower-lender supplier agreement for fixed sum credit;
- the number of payments to be made by the borrower is not more than 12;
- those payments are required to be made within a period of 12 months or less; and
- the credit is provided without interest or charges.

Agreements falling within the exemption do not have to comply with the provisions of the CCA, and the firms that offer these products do not have to be FCA-authorized or comply with FCA rules that apply to consumer credit products. These agreements also do not come under the jurisdiction of the Financial Ombudsman Service (FOS). The February 2021 Woolard Review identified some material problems with some BNPL products – in particular, the ease with which the products enabled individuals to acquire unsustainable levels of personal debt.

Scope of the proposed BNPL regime

The draft Order applies to deferred payment credit agreements where they are offered by a third-party lender, (defined as Regulated Deferred Payment Credit Agreements in the draft Order).

The following agreements will still benefit from the exemption in Article 60F(2) of the RAO:

- merchant-provided credit (where the provider of goods/services is also the provider of the credit);
- agreements such as those facilitated by employers to employees, e.g. season ticket loans – and the draft Order will also exempt agreements facilitated by an employer's group company;
- agreements provided by Registered Social Landlords to tenants for, e.g., financing of white goods;
- agreements to finance premiums under contracts of insurance; and
- invoicing.

Credit broking activities that relate to BNPL agreements will be excluded from regulation unless the activity is carried out in the home of a customer.

Disapplication of certain CCA provisions and new FCA rules

Firms offering regulated BNPL will be subject to certain provisions of the CCA. For example, HM Treasury intends that Regulated BNPL agreements will benefit from section 75 CCA, which is a well-known and widely used protection for consumers in circumstances where there is a contractual breach or misrepresentation by the supplier whose product is being financed by the arrangement.

However, HM Treasury intends to disapply a range of other requirements which might otherwise lead to poor customer outcomes in the BNPL context - where for example they are not well suited to the features, duration, or digital offering of BNPL products or the nature of customer engagement with them. Where CCA rules are disapplied, the intention is that new or adapted FCA rules aligned with Principle 12 (the Consumer Duty) will apply.

In previous consultations HM Treasury has acknowledged that some firms that are already authorised and offer BNPL along with other credit products may wish to voluntarily continue to apply CCA requirements in order not to have to make changes to existing systems and processes. However, no provision for this has been made in the Order. It will be for the FCA to decide whether such CCA compliance aligns with the expectations in its new rules.

The FCA will consult on information and disclosure requirements replacing the disapplied CCA provisions. It will also need to consider whether it needs to adapt other aspects of its consumer credit regime for BNPL, for example its provisions on affordability and creditworthiness and on the application of complaints handling rules and references to FOS.

The CCA provisions to be disapplied in relation to Regulated BNPL are outlined in the table below.

CCA Provisions to be disapplied	Provisions that will apply to agreements in scope of BNPL regime
<p>Small agreements – 17</p> <p>Section 17 allows 'small agreements' (credit agreements below £50) to be exempt from some elements of consumer credit regulation. This section will not be disapplied for BNPL, however no Regulated BNPL agreements will fall within the exemption.</p>	<ul style="list-style-type: none"> HMT proposes not to apply the small agreements exemption to Regulated BNPL under £50, to ensure consistency of treatment.
<p>Pre-contract - 55, 55C</p> <p>These provisions set out pre-contractual credit information (PCCI), the form and content of which is prescribed in the Consumer Credit (Disclosure of Information) Regulations 2010.</p>	<ul style="list-style-type: none"> New FCA rules-based regime for PCCI requirements – better designed for reviewing on a digital medium (e.g. smartphone). FCA may also apply/adapt the CONC requirements for lenders to provide borrowers with an 'adequate explanation' of the

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	<p>product (with less prescription than CCA as to form and content).</p> <ul style="list-style-type: none"> • FCA Principle 12. • Consumer Rights Act 2015.
<p>Disclosures during agreement lifecycle - 60, 61, 61A</p> <p>Section 60 requires that an agreement must contain key information mandated by the Consumer Credit (Agreements) Regulations 2010.</p> <p>Section 61 sets out prescribed requirements for signatures by both lender and consumer.</p> <p>Section 61A requires that a lender must provide a copy of the agreement to the consumer.</p>	<ul style="list-style-type: none"> • New FCA rules-based contractual disclosure requirements. • FCA Principle 12. • Consumer Rights Act 2015.
<p>Copies and statements - 77, 77A, 77B</p> <p>These provisions oblige firms to provide annual statements, and ability for the consumer to request information in certain circumstances.</p>	<ul style="list-style-type: none"> • FCA rules and/or CONC application/adaptation. • HM Treasury notes that firms offering BNPL agreements generally provide digital accounts that allow consumers to keep track of their payments. • FCA Principle 12.
<p>Unilateral variation - 82(1)</p> <p>Section 82(1) provides that unilateral variation of agreement by Lender - consumer must be given notice in writing</p>	<ul style="list-style-type: none"> • FCA rules and Principle 12. • Consumer Rights Act 2015.
<p>Mutually agreed variation - 82(2)</p> <p>Section 82(2) sets out requirements on a variation agreed between borrower and lender ('modifying agreements')</p>	<ul style="list-style-type: none"> • Existing contractual law principles will apply where a change is agreed between firm and consumer, for example where a consumer agrees to go on to a repayment plan. • FCA may also consider it appropriate to add further rules to its FCA Handbook to cover BNPL agreements varied by mutual agreement.

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	<ul style="list-style-type: none"> FCA Principle 12.
<p>Arrears - 86B, 86E</p> <p>Section 86B requires firms to send to consumer a Notice of Sums in Areas (NOSIA) at prescribed times when they are falling behind with repayments.</p> <p>Section 86E, requires firms to provide a customer with a Notice of Default Sums (NODS), when a default sum has become payable under the agreement.</p> <p>Form and content of NOSIA and NODS is prescribed in the Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007.</p>	<ul style="list-style-type: none"> FCA rules on engaging with consumers in financial difficulty (in particular CONC 7) – FCA to consider if these rules need adaptation/supplementation for the BNPL context. FCA Principle 12.
<p>Default and Termination 76, 87, 98, 103</p> <p>Form and content of relevant notices is prescribed by the Consumer Credit (Enforcement, Default and Termination Notices) Regulations 1983.</p> <p>Section 76 requires notice to be given, at least 7 days before enforcing a contractual term of a regulated agreement in non-default cases.</p> <p>Section 87 requires that a consumer is provided with a default notice in prescribed form, and in paper form only.</p> <p>Section 98 requires that firms must provide a notice in the prescribed form if they wish to terminate an agreement in non-default cases.</p> <p>Section 103 requires certain information to be provided to a consumer upon the consumer's request after an agreement has been terminated.</p>	<ul style="list-style-type: none"> FCA rules - FCA to consider if these rules need adaptation/supplementation for the BNPL context. FCA Principle 12. The government will also look to consider provisions on default and arrears more holistically as part of CCA reform.

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<p>Early repayment (full/partial) - 97, 97A</p> <p>These provisions set out the information firms must provide to a consumer requesting to make full or partial repayment (with prescribed timing, format and content).</p>	<ul style="list-style-type: none"> • FCA rules. • FCA Principle 12. • CCA Section 94 will continue to apply (right to repay agreement early).
<p>Certain CCA Sanctions for breaches by the lender will fall away due to disapplication of certain provisions:</p> <ul style="list-style-type: none"> • Unenforceability without a court order; • unenforceability during breach; • disentitlement 	<ul style="list-style-type: none"> • The unavailability of certain CCA sanctions will be balanced by the availability of consumer protections from FCA rules: • FCA oversight. • CONC – FCA enforcement for breach of its rules. • Private right of action – consumers will have a private right of action under s138D FSMA against lenders for alleged breaches of CONC. • FOS - FCA will be able to apply the rules in its complaints handling handbook (known as “DISP”) and consumers will be able to take complaints to the FOS. • Consumer Duty (Principle 12) - requires firms to rectify any breaches of rules as soon as they are identified and provide consumers with appropriate redress.

Affordability, creditworthiness and credit reporting

In the Woolard Review, it was noted that "*Most BNPL providers complete a very basic credit assessment, usually through a combination of soft credit searches and previous repayment history. This often focuses on credit risk, rather than affordability. Many providers rely on lending once and seeing if they are repaid as a means of managing their risks, rather than a wider attempt to consider affordability.... Although not a consequence of not being regulated, as providers are not required to report repayment history to Credit Reference Agencies (CRAs), consumers with outstanding payments can seek credit from alternative BNPL providers and equivalent regulated products without their credit history being available for scrutiny.*"

As noted above, one element of the consumer credit regime likely to be applied to regulated BNPL by new or adapted FCA rules is the FCA's

requirements on creditworthiness assessments (including affordability) and additionally BNPL firms will likely need to comply with credit reporting requirements.

In developing new rules for regulated BNPL, the FCA will be able to set appropriate rules on assessing affordability and creditworthiness, reducing the risk that borrowing is unaffordable. Coupled with this, in the final report in its Credit Information Market Study (MS19/1.3), the FCA proposed a mandatory data sharing requirement with designated CRAs for regulated firms. This would make BNPL transactions visible on consumers' credit files.

Together, application of these rules will align with a key principle of the government's approach, namely that consumers should only be lent to if it is affordable. However, compliance with such rules may be challenging for some BNPL firms due to the need to adapt their operational processes and, potentially, their business models.

Financial promotions

The consequence of the proposal that unauthorised merchants offering a BNPL payment option would not be regulated as credit brokers is that a merchant offering a communication which is made to or for the purposes of introducing a consumer to an FCA authorised lender would also be exempt from the financial promotions restriction and, as a result, would not have to have their financial promotions approved by an authorised person. The draft Order amends Article 15(1A) of the FPO to ensure that financial promotions communicated by unauthorised merchants who offer third party lender BNPL agreements will need to be approved by an authorised person, unless an exemption applies.

It should be noted that, while firms in the TPR (discussed further below) would be deemed to be authorised, this would not enable them to approve the financial promotions of merchants or other unauthorised firms.

Distance marketing

The Financial Services (Distance Marketing) Regulations 2004 (DMRs) do not apply to distance contracts offered by an authorised supplier of financial services, which means that the DMRs will not apply to BNPL lenders who enter into newly regulated BNPL agreements, or to domestic premises suppliers who broker those agreements (who will be intermediaries which are authorised persons).

However, as merchants offering a BNPL payment option would not be conducting a regulated activity they would not come within the exemption for authorised supplier of financial services, and would therefore need to provide information to customers in accordance with the DMRs. This would potentially duplicate authorised lenders would have to provide information already supplied to customers by authorised lenders in accordance with FCA rules. To remedy any potential duplication, the draft Order will disapply the DMRs for unauthorised brokers where information is disclosed by authorised lenders in accordance with the FCA's rules on distance marketing for authorised persons.

Anti-avoidance

The draft Order will carry forward the anti-avoidance measure previously contained in the earlier draft of the Order. The provision will prevent a BNPL lender from structuring agreements in such a way that they technically

become the merchant in the transaction they are financing, having purchased the goods from the original supplier.

Temporary Permissions Regime (TPR)

The TPR will be introduced in order that BNPL activity does not have to be suspended pending processing of authorisation applications. Once the draft Order enters into force ('initial commencement date'), the FCA will establish the TPR and will also consult on and make rules relating to newly regulated agreements. Firms must register with the FCA for entry into the TPR. Suppliers of Regulated BNPL on domestic premises will also be able to register for the TPR to operate from 'Regulation Day' until their application is assessed.

Firms in the TPR would be deemed to be authorised by the FCA under part 4A of FSMA. Subject to compliance with FCA rules, these firms would be permitted to carry out the new BNPL-related regulated activities of:

- entering into a regulated deferred payment credit agreement as lender;
- exercising, or having the right to exercise, the lender's rights and duties under a regulated deferred payment credit agreement; and
- credit broking (for domestic premises suppliers that offer newly regulated agreements).

Twelve months after the initial commencement date ('Regulation Day'), the new BNPL regime will take effect. Firms in the TPR will be able to apply for full authorisation from the FCA. It is likely that the FCA will adopt a 'landing slot' approach. Firms in the TPR will be able to continue to operate under their temporary permission until their authorisation application is approved, refused, withdrawn or if they fail to apply within their designated landing slot.

Where firms would otherwise exit the TPR they will be able to retain their temporary permission for the purpose of servicing agreements (i.e. exercising, or having the right to exercise, the lender's rights and duties under a regulated credit agreement). This retained temporary permission would extend for two years, subject to earlier cancellation if the firm can exit earlier.

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