

By email

21 November 2024

Dear Sir/Madam,

**Regulation of Buy-Now, Pay-Later: consultation on draft legislation (October 2024)**

The FCA Smaller Business Practitioner Panel was established by the Financial Services and Markets Act (as amended) to represent the interests of regulated firms and to provide input to the Financial Conduct Authority (FCA). The Panel provides advice to the FCA on its policies and strategic development of financial services regulation, representing the interest of practitioners of small and medium sized firms.

The Panel agrees with the concerns raised by the Woolard review, in particular the lack of affordability assessments, the limited visibility of BNPL debts with credit reference agencies and the resulting potential to create high levels of indebtedness. We also agree with the five key principles laid out by the government for its approach.

We have provided specific comments on a number of questions in the consultation.

*Q1: 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 mandatory requirements on the form of information mean it could be difficult for consumers to engage with information on their phone, which is a common method for taking out a BNPL agreement. Mobile or smart phones are the most popular devices for accessing the internet in general and it is common to enter other credit agreements, especially those for smaller amounts, via a smartphone. For example, short-term loan providers typically receive over 90% of their applications via smartphone. While we agree with the proposals to disapply the relevant provisions for BNPL, there remains a requirement for relevant pre-sale information to be presented to consumers so they may make an informed decision in line with FCA principle 12. Without detail on how the FCA intends to ensure this requirement is met, it is difficult to comment on the proposed approach. We also suggest thought be given to amendments for the requirements within the wider credit market, to ensure a "level playing field" between forms of unsecured credit, given the move to digital formats.

*Q2: 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)?*

With respect to 61A, it is appropriate that a lender, BNPL or otherwise, should be required to provide information about the agreement to their customers along with their rights. This is made more important given some of the other proposals, for example the application of section 75.

*Q3: Do you have any comments on the proposed approach and/or drafting disapplying provisions on ongoing information requirements (sections 77, 77A and 77B)?*

With regards to the recognition that annual statements under section 77A are not appropriate in the context of a BNPL agreement, given the short duration of the product, we note that other short term credit products are available and as such consideration should also be given to the requirements for these products so as to maintain a fair market.

*Q4: Do you have any comments on the proposed approach and/or drafting disapplying provisions on varying agreements (section 82)?*

With regards to modifying agreements, the amendment of a credit agreement is an important step that should be reported to credit reference agencies. It is important that consumers undertake any changes in an informed manner. As such we would suggest that, if the Government is minded to disapply section 82, then the FCA must ensure firms provide adequate information to consumers in line with the Consumer Duty requirements.

*Q5: 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 supportive of the proposal to disapply sections 97 and 97A, however it is important that consumers can reach providers through a range of channels, including telephony, should they have questions across any of the areas above.

*Q6: 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 note the statement in 2.45 that issuing default notices in paper form is inconsistent with products that tend to be taken out and managed digitally. However, this assertion is made in relation to BNPL and can be equally applied to most consumer unsecured lending products, for example high-cost loans, credit cards, and lines of credit - as such, a carve out for BNPL may cause market distortion. There are also other short-term products where the logic for the disapplying of rules around Notices of Sums in Arrears (NOSIAs) could similarly be argued - again, the proposals put the onus on the FCA to establish the rules for firms engaging with consumers in arrears, default and termination. Without more information on how the FCA plans to do this, it is impossible to ascertain whether the required engagement will be sufficient.

*Q10: Do you have comments on the proposed legislation that seeks to implement the TPR?*

We are pleased to see a relatively short period of 12 months between commencement date and regulation day.

*Q11: 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 expect there to be an increase in costs for providers being brought into regulation, largely due to added compliance costs, section 75 liability and the right of referral to FOS. There is also likely to be a reduction in the proportion of consumers being given credit as rules around affordability are implemented, with data suggesting 3 out of 4 applicants to high-cost credit are declined due to affordability. It is likely there may be some reduction in supply, meaning some consumers may have to go without, or rely on other sources. We would suggest the FCA considers the requirements for signposting, especially of declines.

*Q12: 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?*

We believe the proposals are proportionate. Any form of credit will appeal, and potentially be offered, to a selection of people. The fact that a certain type of people use a certain type of credit does not in itself indicate an issue with bias. Again, thoughtful implementation by the FCA will be required in bringing regulation to bear.

Finally, with reference to the proposal to enable BNPL customers to refer complaints to the FOS, our concern is that this would be likely to increase costs for suppliers. The risk of a £650 case fee on a purchase that may well be less than £100 could incentivise firms to settle a complaint even when there is no case to answer. This dynamic has been seen in other markets with low agreement values, for example short-term lending, and there may be a case to consider the

appropriateness of the fee level for smaller claims. We look forward to reviewing the FCA consultation on this proposal in due course.

We would be happy to discuss any of these points further.

Yours faithfully,

[signed]

Andy Mielczarek  
*Chair, FCA Smaller Business Practitioner Panel*