The Money Charity Response – HM Treasury Consultation on Regulation of Buy Now Pay Later (December 2021)

The Money Charity is a Financial Wellbeing charity whose vision is to empower people across the UK to build the skills, knowledge, attitudes and behaviours to make the most of their money throughout their lives, helping them achieve their goals and live a happier, more positive life as a result.[1]

We welcome the opportunity to respond to HM Treasury's consultation on the regulation of Buy Now Pay Later, which we think is an important step in the ongoing strengthening of consumer protection in financial services.

In this response, we set out our Key Points, make some overall comments on the issue then answer the questions posed in the Consultation Paper.

[1] See box on back page.

Key Points

1. We welcome Buy Now Pay Later (BNPL) being brought within regulation. We think that the standard FCA rules, FCA Vulnerability Guidance and the relevant sections of the Consumer Credit Act 1974 should apply.

2. We have some concerns about the BNPL business model which with its rapid growth is showing signs of euphoria. We think HMT should check carefully that BNPL is a long-term viable business model on the basis of its free credit offer.

3. While we understand the convenience and attraction of BNPL from the consumer point of view, we think it contradicts to some extent the two key behaviours that have been found empirically to promote financial wellbeing ("not borrowing for everyday expenses" and "a regular savings habit"). These behaviours underpin the long-term financial wellbeing strategy of the Money and Pensions Service. We think that regulating BNPL would be a step in the direction of making sure that the government's approach to consumer credit and financial wellbeing are joined up.

4. We support BNPL credit checks and BNPL being brought within the credit reference agency reporting system.

5. We think that BNPL regulation will have a positive effect on consumer wellbeing, including on consumers with some characteristics protected under the Equality Act. However, HMT and FCA should make sure that algorithmic discrimination on protected characteristics does not take place as an accidental by-product of BNPL regulation.

Overall Comments

The growth of BNPL

We agree with HMT's observation (page 5 of the consultation paper) that BNPL is a rapidly growing form of credit that involves risks to consumers, particularly from accumulating several BNPL debts simultaneously, BNPL being under the radar for credit checks and the possibility of late fees or other penalties for non-payment. During 2020/21, we have featured BNPL in our monthly *The Money Statistics* publication, highlighting its rapid growth during the pandemic. For example, in our April edition we noted that Citizens Advice had found that one in four users of BNPL regretted using BNPL, with the most common reason being that they felt that BNPL encouraged them to spend more than they could afford.[2]

[2] The Money Charity, *The Money Statistics April 2021*, page 4.1

In our response to the Woolard Review, we urged that "all widespread forms of consumer credit and borrowing against pay should be brought within the FCA perimeter and have clear rules applying to them."[3]

Consumer credit and financial wellbeing

In our view, regulation of consumer credit should be informed by research into financial wellbeing. In recent years, studies of financial wellbeing in several relevant territories (UK, Norway, Ireland, Canada, Australia and New Zealand)[4] have thrown new light on the determinants of financial wellbeing, in particular on the balance between behavioural, socio-economic and psychological factors. In the UK, the leading behavioural determinants of financial wellbeing have been found to be "not borrowing for day-to-day expenditure" and "an active savings habit"[5] while "financial confidence" is the psychological factor with a largest positive impact.

These findings underpin the financial wellbeing strategy of the Money and Pensions Service, the Government's leading financial wellbeing agency. Two of MaPS' themes are "A Nation of Savers" and "Credit Counts".[6] The "Nation of Savers" target for 2020-30 is that "two million more struggling and squeezed people should be saving regularly" and the target for "Credit Counts" is that "two million fewer people should be using credit to pay for food and bills".

Another strong finding from the wellbeing research is that the largest single negative determinant of financial wellbeing is unemployment.[7] If someone is living a hand-to-mouth existence using multiple forms of credit (BNPL, credit card, overdraft, payday lending, salary advance etc) then unexpectedly loses their job, they will be plunged immediately into financial crisis. This is confirmed by debt charities such as StepChange and Money Advice Trust who report that the path to unsustainable debt for their clients is often triggered by an adverse life event such as unemployment or illness.[8]

Aligning credit regulation with Government policy on financial wellbeing

The more that people are encouraged to live on credit, the fewer buffers there are against adverse individual and systemic events. We therefore think that it is right for HMT and FCA to adopt a precautionary approach in relation to consumer credit, including BNPL.

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[3] The Money Charity, *Response to the Woolard Review*, page 5. Available at: https://themoneycharity.org.uk/media/The-Money-Charity-Response-Woolard-Review-into-Unsecured-Credit-Dec-20.pdf

[4] See references at the end of this response.

[5] Finney 2018.

[6] https://moneyandpensionsservice.org.uk/uk-strategy-for-financial-wellbeing/

[7] FullRegressionsWB_AllAdults.xls, accompanying Finney 2018.

[8] For example, see: https://www.stepchange.org/Portals/0/assets/pdf/client-data-report-September-2021-StepChange.pdf, page 6.

Credit regulation should be aligned with what is known empirically about financial wellbeing and with the strategy of the Money and Pensions Service. If the "service" aspect of short-term credit is over-emphasised, there is a risk of diminishing rather than increasing financial wellbeing. In our view, the UK needs to ensure that financial wellbeing policy and financial regulation are pulling in the same direction.

We agree with HMT that BNPL should be regulated, with the emphasis being on the needs of vulnerable consumers, the affordability of borrowing and the hazards of the cumulative use of credit. It is also good business practice, we think, for BNPL debts to be visible in the credit system, so that providers can pre-emptively help people not to get into unsustainable debt and avoid a build-up in bad debts.

Answers to consultation questions

Question 1: Do you agree with our analysis of the business models that underpin the BNPL market?

We agree with the description of the model set out in paragraphs 2.9 to 2.12 of the consultation document. We assume that FCA and HMT are checking the viability of the BNPL model. The published financial statements of BNPL companies focus on growth in customer numbers and revenues but downplay the size of profits and losses. We have been told by some industry observers that bad debts are accumulating in BNPL provider balance sheets, though we have not been able to confirm whether this is the case. We note from published sources that leading BNPL providers are not yet profitable.[9] Where listed, BNPL stocks we have looked at[10] do not have p/e ratios, confirming that they are not yet in profit. We think it would be prudent for UK authorities to check that BNPL is a viable long-term business model and not a bubble.

Question 2: Do you have information to provide government with a more granular and up-to-date understanding of the BNPL market?

No.

Question 3: Do you have further analysis or evidence of consumer detriment in the BNPL market?

We have noted early evidence of the regret factor. Citizens Advice reported in April 2021 that many users of BNPL did not realise they were accessing credit and one quarter of

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[9] See for example: https://www.ft.com/content/ddb2e207-2450-4ca8-bad0-871290d80ea7
[10] Leading BNPL providers in the UK market.

users regretted using BNPL because it led to them "spending more than they can afford and paying more than they expected."[11]

Which? has found that one fifth of BNPL users have missed at least one repayment and three-quarters of these report experiencing a challenging life event in the last 12 months.[12]

Our own soundings on BNPL have highlighted the customer journey, with some people reporting that even when they try to pay in full, some merchant websites keep directing them to BNPL options.

Question 4: Do you have analysis that would support us in identifying which specific elements of the BNPL business model pose particular risks?

There are many online sources examining and questioning the BNPL business model, including the Financial Times article[13] cited above, which draws attention to the large losses currently being made by leading providers. Several things make the BNPL market look euphoric:

- Rapid customer and revenue growth during an unusual period of economic history (the Covid pandemic)
- Leading firms being loss-making
- Very high market valuations in relation to revenues and (non-existent) profits
- New entrants piling into the sector
- A leading non-listed provider (Klarna) planning an IPO[14]

We note the comment in paragraph 3.35 of the consultation paper that the Woolard Review found that "for firms that charge late payment fees, the revenue from such fees can make up a significant portion of the firms' overall revenue." Given that the core BNPL product is free credit, this statement should sound a warning bell. We do not think that the profitability of a business model should depend on consumers *not* using the product in the way it is supposed to be used (i.e. incurring late fees when they are supposed to be receiving free credit).

The key questions HMT should be asking (in our view) are:

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[11] https://www.citizensadvice.org.uk/about-us/about-us1/media/press-releases/a-quarter-of-young-people-making-buy-now-pay-later-repayments-havent-been-able-to-pay-for-food-rent-or-bills-as-a-result-citizens-advice-has-found/

[12] https://www.which.co.uk/news/2021/06/buy-now-pay-later-not-just-used-by-fashion-conscious-young-shoppers/

[13] https://www.ft.com/content/ddb2e207-2450-4ca8-bad0-871290d80ea7

[14] https://investmentu.com/klarna-ipo High rates of IPOs and SPACs are a known indicator of financial euphoria as they are a means for company owners to cash out inflated values.

- Is there a path to profitability based on free credit without late fees?
- Are bad debts building up in any part of BNPL providers' balance sheets?
- Are shares likely to be offered to retail investors at realistically justifiable prices?

This consultation into BNPL coincides with FCA work on consumer investment promotions and the two should be considered together, we believe. Should there be weaknesses in the BNPL model that have not yet crystallised, it may be that in the euphoric atmosphere around BNPL (the El Dorado effect) retail investors may be misled into making investments at significantly inflated values.

While it is not HMT's role to protect all investors from losses, it is the proper role for HMT and FCA to make sure there is some degree of reality in the way business models are assessed and promoted.

Question 5: Do you agree with our analysis of the business models that underpin the short-term interest-free credit market?

We are not experts in this product, but the HMT description is accurate as far as we can see. An example that comes to mind is a leading provider of kitchens that offers an interest-free instalment payment option, with the funding provided by a bank specialising in consumer finance and payments spread over several years.

Question 6: Do you have information to provide government with a more granular and up-to-date understanding of the use of short-term interest-free credit?

No.

Question 7: Do you have further analysis or evidence that supports or undermines our understanding that there is limited consumer detriment in the short-term interest-free credit market?

We suggest that HMT consults closely on this with leading consumer advice and debt advice providers such as Citizens Advice, Which?, StepChange and the Money Advice Trust. Their call and survey data should be able to indicate the extent to which this type of debt is playing a role in consumer insolvency.

Question 8: Do you have analysis that would support us in identifying which specific elements of the short-term interest-free credit business model serve to protect the consumer from harm?

As we understand it, STIFC providers conduct credit checks to make sure that borrowers can repay the loans taken on. See for example, the following explanation provided by IKANO bank, a significant provider in the UK:

> "Before lending you money, banks, loan companies and shops want to be confident that you can pay the money back.
>
> To help them make these decisions, they look at the information held by companies called credit reference agencies.
>
> These agencies hold lots of information about most adults in the UK. About which financial products you have now, ones you've had in the past and how well you managed the repayments on those products."[15]

This seems to us an obvious way to manage lending and to protect vulnerable or potentially vulnerable consumers from harm, at the same time as not impeding the availability of credit to people who can afford the loan.

Question 9: Do you agree with the distinction between BNPL and other forms of short-term interest-free credit that has been drawn in this consultation?

We agree with the observations in the consultation paper (paragraph 2.23) and with the comment in paragraph 2.24 that drawing the regulatory boundary on this basis is likely to be difficult. The key thing, we think, is to make sure that credit checks apply to all consumer lending and that there is visibility of multiple BNPL liabilities and other types of debt owed to multiple providers. This is to protect those consumers who may already be vulnerable, or who may be drawn into vulnerability by the easy availability of such credit.

Question 10: Do you have any comments on our analysis of the drivers of risk for consumers in the BNPL market?

As indicated in our opening remarks, there is a risk that the easy availability of consumer credit may undermine financial wellbeing by contradicting to some degree what have been found empirically to be the two key behaviours that promote financial wellbeing: not borrowing for everyday expenditure and establishing a regular savings habit.

As well as this general concern, in relation to BNPL we have several specific concerns:

- The possibility of a borrower taking on too many BNPL loans simultaneously and falling into financial crisis
- The possibility of a vicious circle developing involving BNPL other forms of credit (overdrafts, salary advance, payday lending etc)
- An increase in potential vulnerability. For example, someone with high levels of short-term debt including BNPL will experience a financial crisis as soon as an adverse event such as unemployment, redundancy or illness arises.

[15] https://ikano.co.uk/help-and-advice/credit-file

- There may be confusion in the way BNPL is presented to the consumer. For example, BNPL may be offered at different repayment terms, alongside a "pay now" option (blurring the distinction between credit and normal payment) or alongside what is essentially a loan. BNPL providers with different terms may also sit alongside each other, for example a "no fees, no interest" provider alongside a "late fees" provider. It is important that the options are presented in a way that enables the consumer to understand what product they have actually entered into and all the payment terms applying to their purchase.

Question 11: Do you have any suggestions on how a clear distinction could be drawn between BNPL and short-term interest-free credit?

If it is the case that STIFC is already better managed, provided by regulated lenders and using credit checks, then we are not sure it is necessary to draw such a distinction. It may be more a case of requiring BNPL to adopt the standards already applied by the bigger-ticket consumer lenders.

Question 12: Do you have any comments on the option to draw that distinction by restricting the extension of regulation to interest-free credit agreements where there is a third-party lender involved in the transaction? What impact do you think this would have on short-term interest-free credit providers that would be drawn into regulation?

This sounds like an approach that may be avoidable by restructuring the credit arrangement or finding a legal loophole. If HMT proceeds along these lines, we think it would be necessary to ensure that the definition rests on the substance of the transaction, not on legal technicalities. Further, that FCA be given the power to quickly bring any providers within the regulatory perimeter, should some unforeseen avoidance technique begin to be used.

Question 13: Do you have any comments on the option to draw that distinction by defining a BNPL agreement as one where there is a pre-existing, overarching relationship between the lender and consumer, under which the lender agrees to finance one or more transactions but where any repayments made are toward specific agreements made as part of that relationship?

We do not like the idea of using the criteria "pre-existing" or "overarching" as, for many consumers, their first interaction with BNPL is when they make their first BNPL transaction. Further, BNPL providers who are minded to avoid regulation may find a way to slice up the consumer relationship so that it appears to be made afresh each time. Overall, this does not sound like a promising approach to us.

Question 14: Do you have any views on the need to amend the current exemption for running-account credit, so that it does not allow the unregulated BNPL model to re-emerge?

This is not an area we have any special knowledge about, but we see from the HMT description (paragraphs 2.29 to 2.31 of the consultation document) and the definition in CONC[16] why it is important that this is not used as a BNPL loophole.

Question 15: Do you agree that in any regulatory intervention merchants that offer BNPL as a payment option should not be subject to FCA regulation as credit brokers?

We agree that it would be onerous for SMEs to have to seek authorisation as credit brokers simply because they offer BNPL payment options. We agree that risks can be mitigated by application of the provisions listed in paragraph 3.9 of the consultation document.

Question 16: If merchants offering BNPL are exempted from credit broking regulation, do you have any views on other ways to mitigate any potential risks to consumer detriment arising from merchants?

Under the approach suggested, risk management is delegated to BNPL providers. The merchant simply wants their money, minus the BNPL fee. One aspect merchants could improve is the payment journey – making sure that the first option for consumers is to pay in full, respecting their choice if they choose this option and making sure that the way BNPL is offered enables the consumer to fully understand the payment terms and the differences between different BNPL offers.

Question 17: Do you have any views on whether such an exemption from credit broking should extend to all merchants, or whether there should be limited exceptions (such as for domestic premises suppliers)?

We do not have enough information to comment on this, but we suggest HMT take advice from the larger consumer organisations such as Which? and Citizens Advice.

Question 18: Do you think that the current requirements on BNPL merchants and lenders around advertising and promotion are sufficient?

No.

[16] https://www.handbook.fca.org.uk/handbook/glossary/G1329.html

Question 19: If you think that the requirements need strengthening, would the application of the financial promotions regime be appropriate, or are there any features specific to BNPL products that warrant different requirements?

We agree with the proposal to apply the financial promotions regime. The things to focus on are:

- That the consumer understands that a BNPL agreement is credit and that there may be consequences to missing payments. Accompanying material could warn consumers to be sure that they can afford both the new BNPL payments and any other BNPL agreements they have entered over the same period.
- BNPL should not be presented as the preferred means of payment. The option to pay up front should be presented as the first option, with the consumer's choice being respected.
- It should be clear what the payment terms are and, if different BNPL options are offered, what differences there are between the offers (interest, late fees etc).

Question 20: Do you agree that the approach to pre-contractual information outlined is consistent with a proportionate approach and the government's objectives for BNPL regulation?

We agree with the approach outlined in paragraph 3.25 of the consultation document.

Question 21: Do you agree with the government's assessment that BNPL agreements are likely to need bespoke form and content requirements?

Yes.

Question 22: Do you have any views on what form agreements for BNPL should be required take, and what content they should contain?

In designing these we think it is important that the form and content requirements are consumer tested, using recognised approaches to inclusive design. BNPL is a quick-fire type of credit, so it is important to test that BNPL agreements are understood by consumers. If they are not, then the design should be amended until an effective form is found. For example, it may be that BNPL agreements and accompanying communications should use graphics and colours to achieve their effect, rather than relying solely on text. Any text used should be tested for reading-age to make sure that a large majority of the population can understand what is being communicated.

In our March 2019 response to the FCA consultation on BNPL offers we gave examples of variable and confusing terminology and explanations of BNPL made in language with an excessively high reading age.[17] With the new approach to BNPL proposed by HMT, there is an opportunity to correct these shortcomings.

Question 23: What are your views on applying CCA provisions on improper execution to BNPL agreements? Do you think the consequential sanctions for improper execution should apply to BNPL agreements under any regulatory intervention?

The requirement for a signature makes sense when a person is sitting physically in a shop contemplating a credit agreement but does not fit with the rapid-fire nature of online payments. Online consumers expect to enter their payment details as quickly as possible and complete the deal. The best approach, we think, is to focus on BNPL providers making proper credit checks and to make sure that the nature of the BNPL transaction is clear to the consumer at point of sale.

Question 24: What are your views on the role of creditworthiness assessments as part of a proportionate approach to BNPL regulation?

We agree with paragraphs 3.31 to 3.34 in the consultation document. We think it is essential for creditworthiness checks to be made.

Question 25: Do you have any views on whether there should be specific requirements for creditworthiness assessments for BNPL agreements?

We agree with the application of the FCA rules, with any amendments the FCA finds to be necessary as it monitors the sector.

Question 26: Do you have any views on how BNPL agreements should be reported to consumers' credit files?

We think it is essential that BNPL agreements are reported, so that the cumulative effect of many BNPL transactions, along with other consumer credit, can be assessed. The more widespread BNPL becomes, the more important this will be. We are not experts on the technicalities, but we think that providers and credit reference agencies should work expeditiously with HMT and FCA to find a suitable form of reporting. This should happen sooner rather than later.

Question 27: Do you have any views about how customers in financial difficulty should be treated under BNPL agreements?

Our view is that the standard FCA rules on treating customers fairly should apply, along with the recently adopted FCA Vulnerability Guidance. The Money Charity, along with

[17] https://themoneycharity.org.uk/media/The-Money-Charity-Response-FCA-Consultation-Buy-Now-Pay-Later-Mar-19.pdf

many other charities and consumer groups, has invested considerable time over several years in assisting the development of the Vulnerability Guidance and we think that this should apply equally to BNPL customers. It is likely that a customer in trouble with BNPL will have other credit issues as well, so a holistic approach makes sense. We do not see a case for exempting BNPL from any part of the FCA's standard approach, as forbearance and any other measures needed will automatically scale to the size of the BNPL debt.

Question 28: What are your views on the proportionality of applying CCA provisions on arrears and defaults to BNPL agreements?

We agree with the consultation paper (paragraphs 3.41 to 3.44) that the CCA provisions on arrears and defaults should apply, unless the industry can propose a regime that provides even more consumer protection. For example, we understand that some BNPL providers simply write off small BNPL bad debts as this is cheaper than pursuing them. The primary way of ensuring that bad debts and arrears actions are avoided is by improving the lending criteria at the point the credit is granted. Having a strong system of consumer protection is a means of incentivising care in lending.

Question 29: Do you agree that under any regulatory intervention for BNPL, section 75 of the CCA should apply to agreements?

We like section 75 of the CCA and agree that this should apply to BNPL agreements. We expressed a similar view in our April 2021 response to the Payment Systems Regulator's consultation on Consumer Protection in Interbank Payments.[18] We agree that section 75 is a widely known and practically useful protection, which sets a good standard for all types of payment, especially as we move into an increasingly digital age.

Question 30: What are your views on amending the scope of the exemptions from elements of the CCA for small agreements to include BNPL agreements under £50.

We agree with the consultation paper (paragraph 3.51) that the relevant provisions of the CCA should extend to "small agreements". Because BNPL is expanding so rapidly, there is a developing risk of the cumulative effect of many BNPL agreements taken on simultaneously. So, a single BNPL agreement should not be viewed in isolation but as part of a bigger credit picture. Therefore, the relevant FCA and CCA rules should apply, even if the amount is small.

Question 31: Are you aware of any currently regulated consumer credit products, in particular those which are debtor-creditor-supplier agreements, that are routinely offered with values less than £50?

[18] https://themoneycharity.org.uk/media/The-Money-Charity-Response-PSR-Interbank-Payment-Protection-Apr-21.pdf

No.

Question 32: Do you agree that under a regulatory intervention for BNPL, consumers should be able to bring a complaint to the FOS?

Yes.

Question 33: What impacts do you expect the regulation of BNPL would have on BNPL providers, consumers that use the product, and merchants that offer it as a payment option?

We do not think that regulation will significantly impede the development of the BNPL market overall, as it appears to have strong momentum deriving from known cognitive biases such as instant gratification, present bias etc as well as the large number of consumers who spend most of their income in the month they receive it and have very low savings. However, regulation has the potential to intercept cases of over-lending to people who may not be able to afford repayments, some of whom will be people in vulnerable or potentially vulnerable situations, for example being on a very low income or experiencing mental health challenges. We think it is important that consumers are clear about the fact that BNPL is credit, think through the affordability and be protected from being plied with unaffordable credit in moments of weakness.

Question 34: What impacts would you expect to see on persons with the protected characteristics mentioned above as a result of regulation of BNPL?

From the wellbeing research mentioned in our opening remarks, we know that some protected characteristics are associated negatively with financial wellbeing. For example, in the UK research "having a mild mental health problem" and "being of 'other' ethnicity (not white or Asian)" were statistically significant determinants of lower financial wellbeing.[19] Regulation of BNPL should protect financially vulnerable people with these characteristics from being lured into unaffordable debt and therefore improve their financial wellbeing. In this sense, we think that regulation of BNPL will have a positive effect in terms of the equality impact assessment.

To be clear, we do <u>not</u> support BNPL providers using such categories in their credit assessments. Credit assessment should be based on individual borrowing and repayment records, not on broad social categories. Where BNPL providers use AI in their credit assessments, they should make sure that their AI does not discriminate on social characteristics but sticks to legitimate financial assessment.

[19] Finney 2018.

Question 35: Do you have any views on how the government can mitigate any disproportionate impacts on protected characteristics?

The issue of algorithmic discrimination is gaining greater prominence and we think that government and the FCA should ensure that the industry develops credit checking procedures that are objective and fair to people from all backgrounds. This applies to all forms of credit, not just BNPL.

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The Money Charity is the UK's Financial Wellbeing charity providing education, information, advice and guidance to all.

We believe that everyone achieves Financial Wellbeing by managing money well. We empower people across the UK to build the skills, knowledge, attitudes and behaviours to make the most of their money throughout their lives, helping them achieve their goals and live a happier, more positive life as a result.

We do this by developing and delivering products and services which provide education, information and advice on money matters for those in the workplace, in our communities and in education, as well as through influencing and supporting others to promote Financial Capability and Financial Wellbeing through consultancy, policy, research and media work.

We have a 'can-do' attitude, finding solutions to meet the needs of our clients, partners, funders and stakeholders.

Tel: 0207 062 8933

hello@themoneycharity.org.uk

https://themoneycharity.org.uk/