UK Treasury Launches Consultation on Regulation of 'Buy Now, Pay Later' Financing

Skadden

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On 21 October 2021, the UK Treasury (Treasury) published a consultation paper setting out policy options for the regulation of "buy now, pay later" (BNPL) credit agreements. The consultation follows the publication of the Woolard Review in February 2021, which made several recommendations designed to address shortcomings in the regulation of the UK consumer credit market, particularly in light of recent innovations. (See our 9 February 2021 client alert, "The UK's Woolard Review Proposes Regulations for BNPL Credit Agreements".)

The number of UK consumers using BNPL has grown in recent years. The value of BNPL transactions in the UK more than tripled in 2020, to more than £2.7 billion, and it is expected to grow rapidly in the next few years[1].

Firms that offer BNPL products to merchants currently benefit from an exemption from regulation under the UK consumer credit regime. That allows lenders to offer interest-free credit on an unregulated basis if the agreement: (i) is a borrower-lender-supplier agreement (*i.e.*, is an agreement between the borrower and lender to finance a transaction with a supplier), (ii) is for credit of a fixed sum, (iii) the number of payments does not exceed 12, and (iv) the payments are required to be made within 12 months of commencement of the agreement. This exemption is widely relied on in particular markets such as higher-value consumer goods (furniture, appliances etc.) and invoice financing, which predate the expansion of BNPL.

The Treasury consultation concludes that BNPL providers should no longer benefit from the exemption. However, while the Woolard Review concluded that BNPL agreements present a greater risk to consumer finances than other agreements falling within the exemption, the Treasury acknowledges that there was no evidence of widespread consumer detriment. In fact, BNPL products potentially could enhance consumer choice, flexibility and competition. Accordingly, Treasury proposes limited regulation rather than an outright removal of the exemption.

The amount of pre-contractual information given to consumers is a key theme of the BNPL rules proposed by Treasury. The consultation concludes that the full suite of rules under the Consumer Credit Act (CCA) governing disclosure to borrowers is not appropriate, as consumers enter into BNPL agreements online with much greater frequency than traditional, often higher-value credit products. The Treasury proposes that the UK Financial Conduct Authority (FCA) establish more limited disclosure standards for BNPL products than those applying to other consumer lending under the CCA.

The Treasury consultation paper also addresses creditworthiness assessments for BNPL purchases, an issue stressed by consumer watchdogs. As BNPL products are not currently regulated by the FCA, providers have no obligation to conduct credit assessments of new customers or for individual agreements. The Treasury anticipates that proportionate regulation of BNPL would include the application of the FCA's current rules on creditworthiness to BNPL agreements, noting that concerns have been raised about the unclear or inconsistent use of credit reference agencies by sellers offering BNPL options.

A further notable point is the Treasury's treatment of the 'small agreements' in the CCA, which exempts credit agreements under £50 from the CCA's consumer protections. The average value of BNPL transactions is small, often between £65 and £75, with many

[1] The Woolard Review, para 4.19.

falling below the £50 threshold. A large proportion of BNPL transactions therefore will be classified as 'small agreements' for the purposes of the CCA. Treasury suggests that the scope of the 'small agreements' exemption from the CCA be narrowed so that BNPL transactions below £50 would not be exempt, but it does not address how non-BNPL agreements that currently qualify for this exemption will be affected.

The Treasury consultation suggests that proposed legislation will reflect the benefits of innovation and choice to consumers represented by BNPL options, but will bring many BNPL providers within consumer credit regulation for the first time.

The consultation period will close on 6 January 2022.