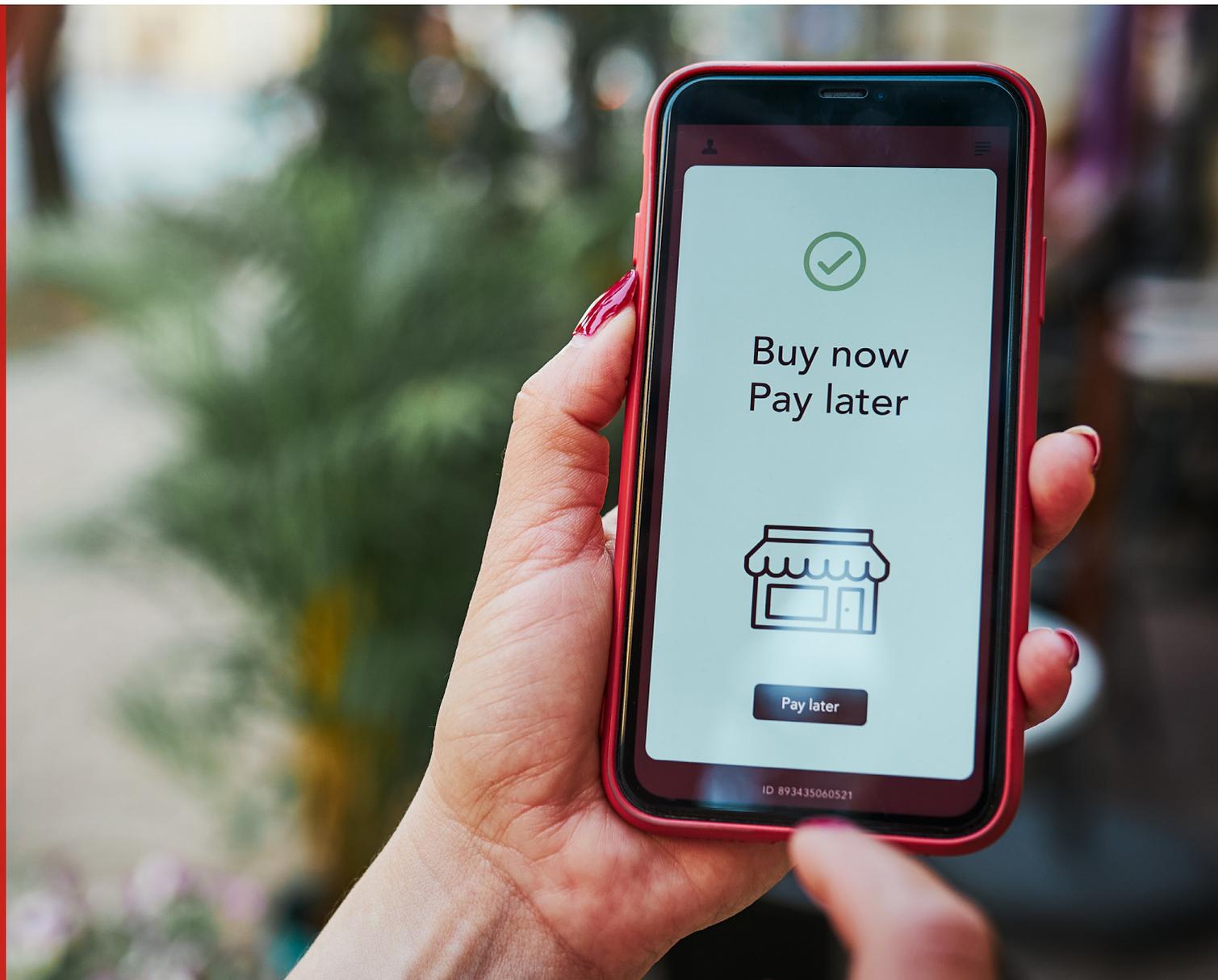


# Regulation Around the World

Buy now pay later

Publication | December 2022



# Buy now pay later

Buy now pay later (BNPL) is a sort of short term financing that allows consumers to make purchases and pay for them at a later date. There are a different models for BNPL products. Generally these are categorised into split pay, pay later, long term financing at 0% annual percentage rate, longer-term financing with subsidized interest or fee. Distribution channels for BNPL include merchant checkout, merchant platforms, multi-lender networks, bank credit cards and white label providers (customised store credit cards). The arrangements for BNPL have become increasingly popular with both merchants and customers. Such widespread adoption has led to increasing regulatory scrutiny although in some jurisdictions self-regulation through industry codes have been the preferred route. Regulators are concerned that consumers may not fully understand the implications of entering into a BNPL scheme.



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## Key risks include:

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### Global

Many new players are entering the payments market with Bigtech players leveraging in particular their existing digital platforms. BIS has issued an Occasional Paper on BigTech regulation.

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### United Kingdom

The UK Government is proposing to extend the scope of regulation to capture those BNPL firms that are not currently regulated. The FCA has also warned BNPL firms about misleading adverts.

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### United States

The CFPB has recently been looking at BNPL and has issued a report which makes it clear that the agency plans to increase the regulation of the BNPL industry. The FTC has also issued a clear reminder that basic consumer protection ground rules of the FTC Act apply.

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### Canada

While BNPL lenders usually do not choose to establish themselves as a federally regulated financial institution they do have to carry on business in accordance with provincial regulatory requirements. Having issued a pilot study on BNPL services in Canada the FCAC is currently monitoring the evolution of the BNPL market in Canada.

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### Europe

BNPL services generally fall outside the scope of the Consumer Credit Directive. The European Commission has issued a proposal for a revised Consumer Credit Directive which is currently being finalised. The draft Directive as proposed by the Commission brings within scope BNPL schemes but some BNPL schemes may fall within an "optional partial derogation" proposed by the Council.

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### Netherlands

The Consumer Credit Directive has been implemented in the Netherlands and BNPL services generally fall outside the scope of regulation. The Netherlands supports the new Consumer Credit Directive.

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### France

BNPL schemes are excluded from the consumer credit regime when specific conditions are met. However, French banking rules still apply and BNPL is considered to be credit, therefore bringing it within scope of the French banking monopoly rules.

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### Germany

BNPL services and their offer have to be carefully construed as they may trigger licence requirements. It has to be ensured that use is made of existing exemptions.

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### Luxembourg

Like other Member States Luxembourg has implemented the Consumer Credit Directive via a Consumer Code which provides for an exemption from consumer credit regulation where the total amount of the credit is less than EUR 200 or more than EUR 75,000. Depending on the business model, consideration may also have to be given as to whether a financial services, lending licence or payment services licence is required.

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### Italy

The Bank of Italy has issued a communication on BNPL schemes to draw the attention of consumers on the prevalent forms of BNPL in the Italian market.

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### Australia

BNPL products in Australia are not currently regulated under consumer credit laws and instead many providers of BNPL products adhere to an industry code of conduct. However, the Australian government has recently issued a consultation/options paper intended to close any regulatory 'gaps' in the market. In the meantime BNPL products also fall within scope of the Australian Securities & Investments Commission design and distribution obligations.

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### Hong Kong

The HKMA has published a webpage stating that BNPL products are not much different from unsecured personal loans and as such consumers need to be mindful of the risks. The HKMA has also issued a circular to authorised institutions on BNPL products.

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### Singapore

MAS is closely monitoring the BNPL sector. Currently, MAS is of the view that effective industry self-regulation, through an industry code, should adequately mitigate the risks in the BNPL sector.

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### Shanghai

Whilst China does not directly regulate BNPL products it has started to strictly regulate digital finance platforms, some of which provide interest-free short term financing similar to the BNPL model.

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### South Africa

From a regulatory perspective, BNPL models fall outside the ambit of the National Credit Act, 2005 – legislation designed to protect the consumer in the credit market.

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### United Arab Emirates (DIFC)

Some BNPL operators are carrying on business in the UAE through a system of contracts where their DIFC entity acts as a non-regulated entity that only provides the technology aspect for a UAE 'onshore' entity.

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# Global

Globally buy now pay later (BNPL) is becoming an increasingly important part of the payments market. In a speech<sup>1</sup> published on the website of the Bank for International Settlements (BIS) the payments market is described as a “symbiosis between the private and public sector”. In this way central banks provide the public with access to money and also operate their own financial market infrastructures therefore serving as the backbone for the entire payments infrastructure. The private sector operates mainly at the interface to the customer with commercial banks maintaining customer accounts and managing the customer experience. The private sector “drives the momentum that allows innovation to unfold”.

Many new players are entering the payments market with Bigtech players leveraging in particular their existing digital platforms. As a result, payments are becoming increasingly embedded in fully digital transaction value chains. There is a possibility that banks may in the future be sidelined as interchangeable settlement agents. At the moment, Bigtechs rely on cooperation with banks for the settlement of payments although this may change particularly if “platform money” in the form of stablecoins are used.

Recently the topic of Bigtech regulation was the subject of a BIS Occasional Paper.<sup>2</sup> The paper noted a number of themes arising from Bigtechs including that their business model favours the continuous expansion of the size and variety of financial and non-financial services that they offer to the public and also that the direct provision of financial services is usually conducted through regulated legal entities. The potential risks that Bigtechs present to financial stability originate not only from the direct provision of financial services in combination with commercial activities, but also from their extensive linkage with traditional financial institutions.

At present these risks are only partially addressed by the existing regulatory framework in the sense that current requirements focus on the legal entities that perform regulated activities rather than on the Bigtech group as a whole. The Occasional Paper puts forward the possibility of defining a new framework for addressing the specific risks that originate from the business model of Bigtechs that perform significant financial activities (big tech financial group or BTFG). This could take the form of a consistent set of entity-based rules spanning different but related domains (governance, conduct of business, operational resilience, financial solvency).

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<sup>1</sup> Speech by Mr Burkhard Balz, Member of the Executive Board of the Deutsche Bundesbank, at the Payments Association (PA) EU “Payments tomorrow” – Annual Conference 2022, Madrid, October 14, 2022.

<sup>2</sup> BIS Occasional Paper No 20 Bigtech regulation: in search of a new framework

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# United Kingdom

## Introduction

BNPL covers a wide range of credit agreements, generally used by consumers to spread the cost of purchases. The February 2021 Woolard Review which looked at change and innovation in the unsecured credit market found that the use of BNPL products in the UK nearly quadrupled in 2020 to £2.7bn. Following the publication of the Woolard Review the UK Government announced its intention to regulate BNPL. The UK Government issued a consultation on BNPL in October 2021 and followed up with a response document in June 2022. We discuss this further below.

## Current position

While there are some BNPL arrangements that are regulated in the UK, others are not.

Unsecured consumer credit is regulated in the UK under the framework provided by the Consumer Credit Act 1974 (CCA) and the Financial Services and Markets Act 2000 (FSMA). Broadly, a consumer credit agreement is one under which an individual is granted credit (defined as a cash loan or other 'financial accommodation'). The scope of regulation, that is exactly which types of agreement are regulated and which are not, is set out in detail in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the RAO). Firms which offer regulated credit agreements must be authorised to do so by the Financial Conduct Authority (FCA), and must comply with relevant FCA rules as well as requirements in the CCA.

The regulation of consumer credit has certain differences when compared to the majority of other regulated financial services products. For example, for most regulated products HM Treasury defines which activities are subject to regulation and delegates responsibility for this regulation to the FCA. The FCA then develops rules. For consumer credit the CCA imposes statutory obligations on firms and gives protections to consumers in addition to FCA rules. HM Treasury is responsible for these statutory elements of the regulatory regime, whilst the FCA is responsible for making conduct rules in its consumer credit sourcebook (CONC) under its rulemaking process.

The RAO provides for some exemptions from regulation so that not all forms of credit are regulated. In particular, this includes an exemption for interest-free credit. This exemption is set out in article 60F(2) of the RAO and is sometimes referred to as the 'A60F(2) exemption'. A range of financial arrangements fall into this exemption. For example, simply providing an invoice that permits the customer to pay for goods and services beyond the due date, to a formal agreement to pay for items in instalments.

Chapter 3 of the CONC contains the requirements that apply to financial promotions of credit agreements. Currently not all BNPL products are under the financial promotions remit. For example, merchants' marketing and advertising to customers to enter a BNPL agreement, which is offered by an FCA authorised lender, do not need to seek approval of the promotion from an FCA authorised person.

## The future

As mentioned above the UK Government issued a response document to its earlier consultation on BNPL in June 2022. The key points from the response document included:

- The scope of regulation should capture BNPL and other currently exempt agreements (which it referred to as short-term interest-free credit (STIFC)) when they are provided by third-party lenders.
- The UK Government was minded to extend this scope to also capture STIFC provided directly by merchants where it is offered online or at a distance, but further stakeholder engagement is necessary to fully understand the scale of the merchant-offered STIFC market.
- The UK Government will allow exemptions for specific agreements where there is limited risk of potential consumer detriment, and where regulation would otherwise adversely impact day-to-day business activities.

- All advertising and promotions of BNPL and regulated STIFC agreements will fall within the financial promotions regime. This includes financial promotions by merchants offering BNPL and STIFC as payment options. Where a merchant is not authorised by the FCA it will need an authorised firm to approve any financial promotions of the BNPL or STIFC product.
- The UK Government's approach to regulatory controls for agreements that will be brought into regulation will tailor the application of the CCA to these products, and the elements of lending practice most linked to potential consumer detriment.

The UK Government also stated when it issued its response document that it would issue a second consultation seeking views on draft legislation by the end of 2022. Alongside this, it would set out its final position on regulating STIFC. It would lay secondary legislation by mid-2023, after which the FCA would consult on its rules for the sector.

At the time of writing the UK Government had not produced its second consultation.

However, on July 20, 2022, the UK Government published the Financial Services and Markets Bill. The Bill runs to over 300 pages and seeks to deal with the revocation of EU retained financial services law, the provision of new regulatory powers and new provisions concerning the accountability of the UK regulators. On September 9, 2022, the House of Commons published an Amendment Paper for the Bill moving that a new clause be added that would bring the non-interest-bearing elements of BNPL lending and similar services under the regulatory ambit of the FCA, as proposed by the UK Government. At the time of writing the Bill is making its way through Parliament.

### Misleading adverts

Although the FCA does not yet regulate all BNPL products it has been proactively addressing concerns about potential harms to consumers.

For example, on August 16, 2022, the FCA published a press release warning BNPL firms about misleading adverts. The FCA reminded firms that offer BNPL products that although some agreements are unregulated, the financial promotions of all BNPL products must comply with the financial promotion rules. Authorised firms selling unregulated or exempt BNPL products must comply with the relevant rules unless an exemption applies. This includes that their BNPL financial promotions must be clear, fair and not misleading.

The warning was issued as the FCA is concerned that consumers could be misled if BNPL financial promotions do not comply with the rules and has seen financial adverts on websites and social media which may breach them. For example, adverts emphasising the benefits of BNPL products without fair and prominent warnings of any risks to customers such as: the risk of taking on debt that customers cannot afford to repay; the consequences of missed payments; any other adverse consequences such as the impact on the customer's credit file; and information about when charges become payable.

Although the FCA does not yet regulate BNPL products it has been proactively addressing concerns about potential harms to customers. For example, the FCA has also held a round table with BNPL providers to discuss upcoming regulation (see above). Additionally, earlier this year, the FCA worked with BNPL firms to secure changes to potentially unfair and unclear terms in BNPL contracts using powers under the Consumer Rights Act 2015.

The FCA has confirmed it will use criminal and regulatory enforcement powers if it sees adverts that do not comply with its financial promotion rules. So far this year, FCA action against firms that have breached its rules has led to 4,226 promotions being changed or withdrawn.

The FCA has also issued a Dear CEO letter to BNPL providers setting out its concerns. The FCA expects the boards of BNPL providers to consider the issues raised in the letter and approve the action taken in response.

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# United States

## Introduction

In the United States, the BNPL market has seen exponential growth that has been driven by increases in online and mobile app shopping during the COVID-19 pandemic. Such growth has attracted scrutiny from financial services regulators who have concerns regarding the lack of specific rules and potential risks to consumers.

## Current regulation

In the United States, BNPL providers are subject to some federal and state oversight and regulation. Laws applicable to BNPL programs also vary by business model. The Consumer Financial Protection Bureau (**CFPB**) has enforcement authority over providers of credit, and it has authority to supervise any non-depository covered persons, such as a BNPL provider, in certain circumstances. The Federal Trade Commission (**FTC**) shares enforcement authority with the CFPB. Some states consider BNPL to be consumer credit and require state licensing or registration, as well as compliance with state consumer credit laws, while other states do not require licensing or registration for BNPL products with no interest or finance charges. For example, the California Department of Financial Protection and Innovation, the state's financial services regulator, has been a leader in the oversight of BNPL products, concluding five enforcement actions with BNPL providers since late 2019 that clarify the regulator's position that BNPL products are consumer loans and that the companies that offer them must comply with California's state lending rules. A potential problem therefore for BNPL providers is that they may encounter inconsistent regulatory and enforcement strategies and approaches from federal and state regulators.

## CFPB activity

The CFPB has recently been looking at BNPL.

On December 16, 2021, the agency issued a market monitoring inquiry seeking to gain insight into BNPL by issuing a series of orders to five firms operating in the United States that offer BNPL products. Following this on January 24, 2022, the CFPB invited public comment to help the agency "understand how people interact with these providers, and how the providers' business models impact the broader e-commerce and consumer credit marketplaces."

On September 15, 2022, the CFPB issued a report offering key insights on the BNPL industry and made it clear that the agency plans to increase the regulation of the BNPL industry, especially in those areas where there is risk of consumer harm<sup>3</sup>. For the purposes of the report, the CFPB defined BNPL as the "pay-in-four" or "split pay" product: a four instalment, no interest consumer loan, typically with a down payment of 25 percent and the remaining three instalments due in two-week intervals. The report excluded other forms of short-term purchase financing, such as point-of-sale instalment loans and post-purchase credit card instalment plans.

The report identified a number of risks associated with BNPL products with its analysis of typical BNPL product features "demonstrates that some market participants' offerings appear to be structured to evade certain federal consumer lending requirements". For example, the CFPB found that:

- Most BNPL lenders do not currently provide the standard cost-of-credit disclosures or periodic statements required by the Truth in Lending / Regulation Z.
- Most BNPL lenders surveyed were not following Regulation Z's credit dispute resolution provisions.

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<sup>3</sup> For further information please refer to the Norton Rose Fulbright client alert 'All signs point to increased US regulation by Buy now, Pay Later'

- Some BNPL providers were making removing auto-pay challenging or impossible.
- BNPL product structures and business strategies may contribute to consumer over extension which can manifest itself through loan stacking and sustained usage.

Shortly after the CFPB published its report the FTC issued a blog post<sup>4</sup> listing three principles which it suggests should guide the business practices of businesses offering BNPL payment options as a retailer or BNPL provider, as well as for those entities that play a role in the BNPL ecosystem as a marketer, collector etc:

- Claims, including claims about fees associated with BNPL products, must be true for the typical consumer.
- Do not underestimate the importance of considering the transaction from a consumer's perspective.
- The presence of multiple actors in the transaction, such as the retailer that sells the goods, does not shield a BNPL company from liability.

In short the FTC issued a clear reminder that basic consumer protection ground rules of the FTC Act apply. The main message for businesses that play a role in BNPL payment plans is to avoid deceptive or unfair tactics in what they say to consumers, how they convey material information, and how they treat consumers throughout the lifecycle of the transaction.

## The future

In remarks that coincided with the report, CFPB Director Rohit Chopra covered some of the additional steps that CFPB staff would be taking in respect of BNPL products.

These include:

- CFPB staff to identify potential interpretative guidance or rules to issue with the goal of ensuring that BNPL providers adhere to many of the baseline protections that Congress has already established for credit cards.
- CFPB staff to "identify the data surveillance practices that BNPL providers engage in that may need to be curtailed." In particular, the CFPB will be examining some of the types of demographic, transactional and behavioural data that is collected for uses outside of the BNPL credit transaction, including for the purpose of sponsored ad placements, sharing with merchants and developing user-specific discounting practices.
- CFPB staff will continue to formulate options on how the industry and consumer reporting companies can develop appropriate and accurate credit reporting practices.
- CFPB will take steps to ensure that BNPL providers are subjected to appropriate supervisory examinations.

On November 16, 2022, the U.S. Department of the Treasury, in consultation with the White House Competition Council, announced support and encouragement for the CFPB's inquiries into BNPL providers, in a report finding that the fintech industry requires additional oversight to close gaps, prevent abuses, and protect consumers.

<sup>4</sup> For further information please refer to the blog posting on Regulation Tomorrow entitled 'Buy Now, Pay Later (but take note of the immediate application of the FTC Act)'

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# Canada

## Introduction

In Canada, BNPL grew in popularity during the COVID-19 pandemic alongside a broader e-commerce boom. BNPL is becoming an increasingly common payment option for retailers and other merchants across Canada as it enables their customers to purchase goods and services instantly and defer or spread out payments. However, there are increasing regulatory concerns that it may encourage debt and overspending, particularly among younger and more vulnerable consumers.

## Regulatory Position

In Canada, following increased concerns surrounding the rapid growth of BNPL and its associated risks, including over-indebtedness and delinquencies, calls for regulatory intervention and scrutiny into BNPL have gained momentum. In some provinces, existing consumer protection regulations already provide some protection for BNPL users, such as requirements for BNPL providers to obtain licenses in order to offer such products to consumers and restrictions on advertisements.

## Review

In November 2021, the Financial Consumer Agency of Canada (**FCAC**) issued its findings in connection with a pilot study on BNPL services in Canada. The pilot study involved a survey of 1,034 Canadians aged 18 years or older. Approximately 34% of respondents indicated that they were familiar with BNPL services and 8% indicated that they had used at least one BNPL service during the survey reference period. Of those surveyed who had used BNPL services, 39% noted that they had used the service as they “couldn’t afford the entire purchase right away” and 41% noted that that they had used the service “more than once”.

The FCAC’s pilot study highlights that BNPL services are an important and sometimes necessary function for some consumers, particularly those consumers who are experiencing short-term financial constraints or who wish to avoid high interest rates associated with credit cards. However, the pilot study also pointed out the negative consequences on consumers resulting from over-borrowing and over-indebtedness, which disproportionately impact financially vulnerable Canadians. The pilot study also sheds light on the impact that missed payments can have on a consumer’s overall financial well-being and the need for greater consumer education regarding the key features of BNPL services, the impact of these services on users’ credit scores, and BNPL dispute resolution processes.

## The Future

Although the study concluded that there are potential risks associated with BNPL services, the data collected suggested that a majority of BNPL users had a positive experience with the service. Following the pilot study, the FCAC confirmed that it would continue to monitor the evolution of the domestic BNPL market by conducting targeted follow-up research. Additionally, the FCAC indicated that it would engage with provincial and territorial financial oversight authorities to support the sharing of insights and expertise as well as the harmonization of approaches to oversight.

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# European Union

## Introduction

At the moment, the regulation of consumer credit is covered by the Consumer Credit Directive (CCD) that Member States had to transpose into their national laws by June 11, 2010.

BNPL usually does not require interest rate payments and therefore it may fall within the scope of the current CCD exclusions that relate to 'credit agreements where the credit is granted free of interest and without any other charges and credit agreements under the terms of which the credit has to be repaid within three months and only insignificant charges are payable' (Article 2(2)(f)). Moreover, many small-amount BNPL loans (i.e. smaller than EUR 200) may also fall out of the scope of the current CCD (which covers only loans between EUR 200 to EUR 75,000).

## New proposals

On July 1, 2021, the European Commission (Commission) issued, as part of its New Consumer Agenda, a proposal for a Directive on consumer credit repealing and replacing the CDD. The Commission also published the Annexes to the draft Directive, an impact assessment report, an executive summary of the report and a factsheet.

The impact assessment report noted that in respect of BNPL many consumers seem not to realise that the product is credit. It added that interest free credit agreements can entail risks for consumers in the sense that although they may appear as having low or no costs linked to them (they are often presented as '0% interest rate' offers), the underlying business model for offering such loans is often based on high fees for late or missed payments, aspects frequently ignored by consumers. It added that the risk lies in the fact that consumers were often poorly informed about the conditions of the credit, which were also often very strict, and that they promoted quick decisions taking advantage of behavioural biases (such as present bias because the benefit of deferred payments were presented but not potential future implications).

In light of this the draft Directive brings within scope BNPL schemes by bringing within scope credit agreements where the credit is granted free of interest and without any other charges, and credit agreements under the terms of which the credit has to be repaid within three months and only insignificant charges are payable.

In June 2022, the Council of the EU agreed its general approach to the draft Directive which provided the Council Presidency with a mandate for further discussions with the European Parliament. In July 2022, the European Parliament's Committee for Internal Market and Consumer Protection adopted its report on the proposed Directive.

The revisions that the Council put forward included that, under certain conditions, deferred payments as well as deferred debit cards be excluded from scope. Whilst BNPL services could fit within this definition the Council specifically stated that BNPL were included within the scope of the draft Directive. However, the Council also suggested that the following types of product, to which BNPL may fall into, could benefit from an "optional partial derogation": credit loans of less than EUR 2000; credit in the form of an overdraft facility; credit agreement free of interest and any other charges; and contracts with a maximum period of three months and negligible costs. For these types of credit Member States would be able to opt for a regime that reduces pre-contractual information requirements and disclosure requirements and removes a provisions on early repayment. A further amendment that may also assist BNPL providers relates to pre-contractual information. Notwithstanding the possibility of the optional partial derogation, the Commission's proposal suggested creditors had to send pre-contractual information to the consumer "at least one day before" the conclusion of the agreement. The Council suggested providing the information "in good time", providing more flexibility.

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# The Netherlands

In September 2022, the European Parliament agreed its position on the draft Directive. In its press release the European Parliament stated, among other things, that “it should be up to countries to decide whether they apply the consumer credit rules to some loans, such as small loans up to EUR 200, interest-free loans and loans to be repaid within three months and with minor changes”.

On December 2, 2022 the European Parliament and the Council reached provisional political agreement on the draft Directive. At the time of writing the European Parliament and the Council needed to formally adopt the political agreement and publish an updated version of the draft Directive.

## Introduction

It has been reported in the press that the BNPL industry in the Netherlands has recorded strong growth in the Netherlands.

## Current regulation

In the Netherlands the CCD has been implemented. The implementation act (**Act**) entered into force on May 25, 2021. The Act introduced a new chapter on consumer credit agreements into the Dutch Civil Code and amended the Financial Markets Supervision Act and the Consumer Credit Act. The Degree on Conduct of Business Supervision of Financial Undertakings (Wet op het financieel toezicht, **Wft**) was also amended.

As mentioned in the section concerning Europe, BNPL services fall outside the scope of the CCD. In Dutch law the exception is set out in Article 1:20(1)(e) of the Wft which provides that offering credit that must be repaid within a period of three months and for which only insignificant costs are charged does not fall under the scope of the Wft. BNPL providers in the Netherlands use this exception.

The Netherlands supports the Commission’s proposal for a new Consumer Credit Directive.

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# France

## Introduction

The BNPL market in France is growing and has seen more investment from firms in the sector where players are seeking to boost innovation and drive adoption among French consumers. Like many other jurisdictions the growth of the BNPL market has been driven by the COVID-19 pandemic and with consumers seeking higher purchasing power and the ability to split their purchases into interest free instalments.

## Regulatory regime

In France BNPL schemes are excluded from the consumer credit regime when specific conditions are met. However, French banking rules still apply and BNPL is considered to be credit, therefore bringing it within scope of the French banking monopoly rules. French regulation also requires specific licences to offer payment in more than 4 instalments. In light of this, BNPL providers have sought licences as a 'Payment institution' and 'Financing company'. It is also worth noting that at present French authorities are looking at financial inclusion. BNPL is a form of credit, and with all credit comes risk and indebtedness.

## New Directive

Whilst the EU's current consumer credit regulatory framework stems from the CDD, on June 9, 2022 the Council agreed to revise the Directive in order to modernize and enhance protection at the European level for consumers taking out such credit. The European Commission's legislative proposal significantly broadens the scope of products that will need to comply with stricter credit rules, including BNPL products.

It has been proposed that pre-contractual information forms will have to be merged to allow consumers to compare credit offers more efficiently, key information to be presented on the first page – giving consumers these details upfront and improving readability and ease of understanding. Other changes aim to improve legal certainty, including clarifications on the creditworthiness assessment, the definition of a maximum time limit to exercise the right of withdrawal, clarifications on the admission procedures, and penalties, etc.

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# Germany

## Introduction

The BNPL market has existed in Germany since the early 1970s and remains popular.

## Regulation

Germany is a highly regulated jurisdiction. BNPL services and their offer have to be carefully construed as they may trigger licence requirements. It has to be ensured that use is made of existing exemptions. From a regulatory perspective three basic models are broadly used being those based on: (i) credit business, such activity is viewed as the granting of money loans and as such a banking licence is required even if no other regulated activity such as deposit taking is conducted; (ii) factoring as a type of financial service with a merchant offering consumers instalment payments with the deferred purchase price claims being assigned to the BNPL provider. The ongoing purchasing of receivables is considered to be factoring and triggers a licensing requirement for the BNPL provider under the German Banking Act (**Kreditwesengesetz – KWG**) the German Payment Services Supervision Act (**ZAG**). However, the sales financing by the merchant does not qualify as credit business and will not trigger a licensing requirement; and (iii) the authorisation of payment services or electronic money services may also be the basis for certain BNPL services. Under the German Payment Services Supervision Act such institutions may provide credit subject to it not exceeding 12 months.

## Recent developments

In terms of recent developments, the German Federal Financial Supervisory Authority (**BaFin**) has issued guidance for consumers (last updated in September 2022) reminding that for amounts lower than EUR 200 consumer protection provisions do not apply and that debt could accumulate quickly given that the psychological barrier to use such payment types is low. Also, costs may be disproportionately high. BaFin also reminded firms that depending on their business model, offering credit-based payment methods may trigger authorisation requirements under the KWG.

# Luxembourg

## Introduction

Like other countries BNPL is not a directly regulated financial service in Luxembourg. However, like other Member States BNPL may be regulated as consumer credit. The CCD has been implemented in Luxembourg. Provisions on consumer credit were introduced in the Consumer Code by the Luxembourg law of April 8, 2011. However, the provisions of the Consumer Code regarding consumer credit agreements do not apply to credit agreements where the total amount of the credit is less than EUR 200 or more than EUR 75,000.

## Licence

In addition, depending on the business model, consideration may also have to be given as to whether a financial services, lending licence or payment services licence is required. Lending on a professional basis usually requires a banking licence in accordance with the Financial Sector Law. Luxembourg banks are authorised and supervised by the Commission de Surveillance du Secteur Financier (CSSF) and are subject to EU regulations and national legislation. Entities that provide lending services that do not qualify as banks may fall under the scope of the Financial Sector Law, which requires an entity to be licensed as a professional performing lending operations. The authorisation of payment services or electronic money services may also be the basis for certain BNPL services. Under Articles 6 and 24-2 of the Law of 10 November 2009 on payment services, on the activity of electronic money institution and settlement finality in payment and securities settlement systems, as amended, no persons established in Luxembourg may provide payment services or issue electronic money without holding a written authorisation as a payment institution or electronic money institution by the CSSF.

## E-commerce regulation

Finally, BNPL provided on an internet platform/market place shall also comply with e-commerce consumer protection which is of public order (e.g. regulation on distance selling, incl. withdrawal period and mandatory prior information). It goes without saying that the regulation on personal data protection must also be respected.

# Italy

## Introduction

On October 28, 2022, the Bank of Italy (BoI) issued a communication (Communication) on BNPL schemes to draw the attention of consumers on the prevalent forms of BNPL in the Italian market, the related potential risks and the means of protection afforded to customers by banking transparency regulations.

Currently, Italy has not implemented an overarching regulation for BNPL and, therefore, the applicable rules and the relative protections depend on how the transaction is implemented in practice with the result that the assessment is carried out on a case-by-case basis.

## Forms of BNPL

According to the Communication, under the traditional BNPL scheme: (i) three parties are involved: the consumer (i.e. the purchaser of goods and services), the seller and a third party, who, on the basis of an agreement with the seller, allows the consumer to defer payment, even by instalments; (ii) amounts are usually relatively small and can be offered either online or in physical stores; (iii) no interest or charges are envisaged to be paid by the consumer (though penalties are due in the event of late or non-payment); (iv) simplified or no creditworthiness assessment is conducted.

Often, such deferred payment is granted directly to the consumer by a bank or financial intermediary, which intervenes in the transaction by virtue of an agreement with the seller. It being understood that the inclusion of a bank or a financial intermediary in the scheme is not strictly necessary (as the scheme benefits from an exemption from the consumers' credit license requirements).

A variation to this traditional BNPL scheme may contain elements mentioned under points (ii) and (iii) above, namely, if relevant sums amount to at least EUR 200 and a fee is paid by the consumer. The presence of these elements would qualify the activity as consumer credit thus triggering the application of banking transparency regulation (aimed at ensuring an adequate level of clients' protection).

The Communication further illustrates an additional BNPL model, which, in the absence of interest or other charges on the client, combines: (a) a payment delay granted to the consumer directly by the seller at the time of sale, immediately followed by (b) a transfer of such payment delay (which the Bol qualifies in terms of "receivable transfer") from the seller to a bank or financial intermediary. Usually, the possibility for the seller to execute such transfer is already foreseen in the contract between seller and consumer.

Contrary to the traditional scheme qualifying as consumer credit (either when implemented directly by a bank or a financial intermediary or because the variation of certain key elements occurred), in the context of this additional form of BNPL model, banking transparency regulation and Bol's supervision do not apply.

### **Potential risks**

The absence of a comprehensive regulation of BNPL may pose a number of risks to consumers.

The ease of access to BNPL products and the fact that BNPL is usually relied upon to purchase goods and services for small amounts could encourage purchases that are not fully conscious and, therefore, potentially not sustainable for the client, exposing him/her to a risk of over-indebtedness.

As for the overall clarity of the contractual relationship, where BNPL is built as a combination of payment deferral and subsequent credit transfer, the client may not be in a position to clearly identify its counter-party (particularly with regard to the payment aspect of the sale of goods or services). Besides, the sellers' role as intermediary in the transaction may result in the consumer being misled into believing that the safeguards typically available in a bank-client relationship apply.

Finally, uncertainty on the qualification of a BNPL initiative may generally affect the profitability of the business and market participants may need to rely on a specific assessment thus reducing flexibility in their operational arrangements.

### **The means of customer protections: a way forward**

At present, the fragmentation of the regulatory landscape may be perceived as detrimental to clients. Indeed, while some models of BNPL are highly regulated, others are not. In certain cases, for comparable business models, companies may end up being subject to banking transparency regulation and Bol's supervision or be fully exempted.

However, the increasing diffusion of BNPL initiatives are pushing regulators to seek a clear and stable reply. A good opportunity may be the current review of the European Directive on consumer credit, as the proposed renewed Directive may include all or part of BNPL within its scope of application. This would also create a level playing field across Europe, and lower compliance costs for BNPL operators and merchants alike.

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# Australia

## Introduction

Australia's BNPL industry continues to grow and evolve. While these arrangements are working for most consumers, some are incurring missed payment fees and report being financially stressed. BNPL products in Australia are not currently regulated under consumer credit laws and instead many providers of BNPL products adhere to an industry code of conduct (the Australian Finance Industry Association (AFIA) BNPL Code of Practice).

## AFIA BNPL Code

The AFIA BNPL Code of Practice (the **Code**) came into effect on March 1, 2021. AFIA BNPL members have made nine key commitments to customers:

1. Focus on customers. By the firm (a) providing high quality products and services that are inclusive and accessible (b) ensuring that staff treat customers with sensitivity, understanding and best industry practice, especially when it comes to the factors that are or could contribute to the customer being financially vulnerable (c) having safeguards in place to ensure the product or service is suitable for the customer, including age restrictions (18+) and being responsive to feedback and complaints.
2. Fair, honest and ethical in all dealings. By the firm (a) not allowing their platforms to be used to purchase goods or services that have legal and regulatory restrictions on finance being provided for them, e.g. gambling and illegal weapons (b) taking steps to ensure that there is no unlawful unsolicited marketing or selling of BNPL products or services.
3. Keeping the customer informed about product or service. By the firm (a) being transparent about instalments, features and fees involved with the customer's BNPL payments (b) having an inclusive and accessible digital platform that will provide accurate resources and information before and throughout the customer's BNPL contract.
4. Making sure the BNPL product or service is suitable for the customer. This is to be achieved via the following (a) by the firm assessing the customer's suitability for the desired BNPL product or service. This is done by assessing the customer's vulnerability and their ability to make the scheduled repayments, using a range of data points. For existing customers, this includes taking their repayment history into account (looking at whether they have made payments on time) (b) if the customer is behind on their repayments, the firm will not provide the customer with any additional BNPL products or services (c) for amounts over either \$2,000 or \$3,000 (depending on whether the customer is a new or existing customer), the firm will use data sourced either from the customer or a third-party (d) for BNPL amounts over \$15,000, the firm will need to use both the customer's data and third-party-sourced data when making a decision (e) in terms of what is meant by data, for example, the firm may need to look at a customer's bank statement to verify their income (f) in terms of third party sourced data, for example, the firm may need to conduct a credit check on a customer.
5. Undertake an ongoing review of the suitability of BNPL products or services. By (a) monitoring how existing customers are using the firm's BNPL products and services. This will allow the firm to better understand vulnerable or unsuitable customers as well as enhance the suitability of its products and services (b) using a variety of data, feedback and complaint resolutions in its monitoring.
6. Dealing fairly with complaints. By (a) providing an accessible and transparent complaint process that complies with the Australian Securities and Investment Commission's internal dispute resolution standards (b) acknowledging all complaints within 1 business day, or as soon as practicable, and providing a written response within 10 business days from the date of the complaint (c) being a member of the Australian Financial Complaints Authority (AFCA) so that a customer may lodge a complaint with them, if the customer is dissatisfied with the response (d) being able to escalate

the complaint to the BNPL Code Compliance Committee should the customer not be satisfied with the AFCA's response.

7. Offering financial hardship assistance. By (a) ensuring the customer can submit a Hardship Request that is fair and accessible (b) the firm responding to the customer's Hardship Request within 21 days of receiving it and clearly communicating the options available to assist with the situation (c) the firm freezing any late fees while the firm is considering the customer's Hardship Request, and where it finds it cannot grant the customer hardship assistance, it will give the customer fair and justified reasons.
8. Comply with legal and industry obligations. By (a) the firm maintaining good practice, respecting customers' privacy and not permitting their personal or financial information to be shared with other finance providers unless used for the purpose of credit reporting or the firm receives the customer's express consent (b) the firm will comply with relevant unfair contract laws.
9. Support and promote the Code. By (a) the firm promoting the Code on its website and other digital platforms (b) the firm regularly training staff so that they understand the various aspects of the Code and how to comply with it.

Recently, the AFIA has launched an independent review of the Code at a time when the Australian government has repeatedly signalled that it intends to bring the BNPL sector under consumer credit laws. A report on the review's findings is due March 1, 2023.

Interestingly, where a signatory does not comply with the Code, this does not presently attract any penalties nor is it enforceable by the Australian regulator. On November 21, 2022, the Australian government issued a consultation/ options paper on regulating BNPL products in Australia. This paper, which was long expected, is intended to close any regulatory "gaps" in the market to protect consumer interests.

Three (3) potential regulatory approaches/options are presented under the options paper. Under the first two (2) options, the Australian government intends to further strengthen the Code and make parts of the Code enforceable by ASIC (our local Australian regulator). On the third option, BNPL products would essentially be treated the same as credit cards. Depending on the option chosen, BNPL providers may also be required to hold an Australian credit licence to continue to offer BNPL products. Whether or not this eventuates will likely depend on stakeholder comments on the Australian government's consultation/ options paper which will close on December 23, 2022.

### Design and distribution obligations

In addition to the Code, BNPL products fall within scope of the Australian Securities & Investments Commission (ASIC) design and distribution obligations located in Part 7.8A of the Corporations Act 2001. These obligations require the industry to design fit-for-purpose products that meet consumer needs, and ensure that their products are reaching the right consumers.

As far as ASIC is concerned the design and distribution obligations, which commenced in October last year, are a 'gamechanger' for the regulation of financial product design and distribution. They mark a very deliberate move away from a consumer protection framework which relied heavily on disclosure as a harm mitigation, with the onus on the reader to comprehend and assess its risk. Given that a year has now passed since their introduction, ASIC has shifted its focus from "facilitating implementation" to "active supervision and enforcement".

Currently, ASIC has a number of projects relating to the design and distribution obligations. This includes continued monitoring of developments in the BNPL industry, including new entrants. It is also undertaking reviews of other alternative credit products and services such as wage advance.

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# Hong Kong

ASIC is also reviewing the product governance arrangements of a number of BNPL providers, including a review of how their target market determinations were developed, and the data and metrics that inform their review triggers. The regulator will continue to collect data from providers to test whether their target market determinations are and remain appropriate. ASIC will assess triggers to ensure they reflect product performance. Such triggers could include whether there is a particular cohort of consumers who are incurring repeated missed payment fees and for whom the product may not be appropriate.

ASIC expects to conclude the project and finalise its findings next year. It will be making a public statement on the outcomes of this review.

Further information regarding BNPL in Australia can be found in our briefing note 'Buy now, pay later, regulate soon.'

## Introduction

On September 2, 2022, the Hong Kong Monetary Authority (HKMA) issued a new webpage on its website reporting that a number of BNPL products had recently emerged in Hong Kong. Currently, BNPL products are still at the initial stage of development in Hong Kong with most being offered by fintech firms although some local banks have started launching instalment payment products that are marketed as BNPL.

The HKMA stated on its webpage that in practice, BNPL products were not much different from unsecured personal loans and as such consumers needed to be mindful of the related risks of borrowing. In particular, the HKMA drew attention to some online shopping platforms which were placing BNPL alongside other payment methods such as credit cards and therefore the regulator was concerned that consumers may perceive BNPL as just another payment option. With such packaging, some consumers may unintentionally spend beyond their means.

## Circular

The webpage also announced that the HKMA had issued a circular to authorised institutions on BNPL products. The circular required authorised institutions to implement seven consumer protection measures where either or both criteria concerning product features and naming/promotional approach are met.

In terms of product features the HKMA stated that the measures in the circular apply to BNPL products (i.e. payment by instalments for the purchase of goods or services) having features similar to instalment payment plans with typically shorter repayment periods with a fee or charge if repayment does not occur on time or other similar innovative consumer credit products that may emerge in the future, even if they may not be called BNPL.

In terms of a naming/promotional approach, the HKMA stated that if authorised institutions chose to use a term very similar to “(Action word) Now, Pay Later” in the name and/or market or promote any credit product in such a way those products would be deemed as BNPL products irrespective of the actual features of the product.

The circular also drew attention to consumer protection measures stating that authorised institutions should follow all consumer protection measures as set out in the Code of Banking Practice and Treat Customers Fairly Charter where applicable, taking into account the nature of the BNPL product. In addition, other relevant guidance issued by the HKMA would be relevant, such as the HKMA’s circular of September 4, 2020 on “Enhanced Disclosure Measures in respect of Digital Platforms for the Application of Unsecured Loan and Credit Card Products”. Furthermore, authorised institutions were expected to comply with other applicable legal and regulatory requirements, including the Personal Data (Privacy) Ordinance (PDPO) and any relevant codes of practice issued by the Privacy Commissioner for Personal Data on compliance with the PDPO.

### Seven consumer protection measures

The seven consumer protection measures referred to in the circular can be summarised as:

1. Authorised institutions must include the educational message of “To borrow or not to borrow? Borrow only if you can repay!” in the advertising and promotional materials for BNPL products, a requirement currently in place for other loan products for retail customers and SMEs.
2. Authorised institutions should not create an impression that BNPL does not entail borrowing. Authorised institutions must clearly and prominently disclose in the marketing and promotional materials of BNPL products that they are “credit products”.

3. When engaging or partnering with e-commerce platforms, authorised institutions should assess the potential implication on impulsive borrowing if the BNPL products are set as the default or preferred choice of payment methods.
4. Authorised institutions must ensure that the relevant fees and interest charges are disclosed in a clear manner in the advertising and promotional materials of BNPL products, and the relevant fees and interest charges should be taken into account in the calculation of Annualised Percentage Rate for customers’ reference. Where a BNPL product is promoted as “interest-free”, any other fees or charges applicable should be included in the same piece of advertising material.
5. Authorised institutions are required to specify in the Key Facts Statement of a BNPL product that, if the borrower is overdue in repayment, it may adversely affect the credit records of the customer, and may even affect access to credit in the future.
6. Authorised institutions should ensure that the customer is duly informed about whether and how the chargeback mechanism is applicable to the BNPL product.
7. During the approval process for any applications for BNPL products, authorised institutions must assess the applicant’s credit status and take into account the applicant’s ability to repay.

The circular also warned authorised institutions that they remained accountable for the actions of any third parties they engage or partner with when launching BNPL products. As a result, banks are expected to put in place proper mechanisms and controls to assess and manage the potential issues and relevant risks (e.g. consumer protection issues, complaints handling, reputation risks, etc.) arising from such engagements or partnerships. This includes observing the requirements in the circular.

Authorised institutions are required to implement the consumer protection measures by no later than the end of this year.

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# Singapore

## Introduction

In Singapore BNPL transactions amounted to \$440m last year. This is up from \$114m in 2020. However, BNPL transactions were very small when compared to other means of consumer payment. For example, they were much less than 1% of total credit card and debit card payments last year.

At present the Monetary Authority of Singapore (**MAS**) is closely monitoring the BNPL sector. It is also studying the experience of other countries where BNPL schemes have taken off more strongly. MAS has also worked with the media highlighting the pitfalls of taking on excessive credit, including the considerations that consumers should bear in mind before entering into a BNPL scheme. Furthermore BNPL providers in Singapore have to set a minimum account opening age requirement of at least 18 years old.

## Industry self-regulation

Currently, MAS is of the view that effective industry self-regulation, through an industry code, should adequately mitigate the risks in the BNPL sector. Such an industry code, produced by a working group of industry players and the Singapore FinTech Association under the guidance of MAS, was launched on October 20, 2022.

The purpose of the code is to mitigate the risk of consumer over-indebtedness, and establish minimum safeguards to ensure that consumer interests are well-protected when using BNPL schemes.

In order to crystallise best practice the code includes coverage of: creditworthiness safeguards, fair, transparent fees and clear disclosures, ethical marketing practices, voluntary exceptions, financial hardship assistance and external information sharing.

In terms of creditworthiness assessments, the code provides that each BNPL provider will permit customers to accumulate no more than SGD 2,000 in outstanding payments at any given time, unless they complete an additional credit assessment which considers, among other things, customer income information and customer credit information shared across all BNPL firms. Should a customer fail to meet their payment obligations, the BNPL provider will suspend the customer's access and use of its services. The BNPL provider will also review and monitor on an ongoing basis how a customer is using its services; for example, a customer's repeated failure to pay bills on time may lead to the BNPL provider deciding that its BNPL services are not suitable for the customer.

As for fees and disclosures, BNPL providers will cap all fees, including late fees and other charges. Fees and interest, if any, will not be compounded. All fees and fee-related structures will also be communicated in a manner that is clear and transparent to consumers. Consumers are also entitled to make full repayment with BNPL providers at any time, without early repayment fees. BNPL providers will each ensure that consumers have access to account statements consolidating the total outstanding balance of purchases made through the respective BNPL provider.

BNPL providers will also ensure that advertisements of products and services comply with applicable legislation and relevant advertising codes and that their advertising and promotional materials will be clear and not misleading or deceptive.

BNPL providers will allow consumers to voluntarily exclude themselves from BNPL services and promotional materials once this has been communicated in writing. Providers will retain a list of the consumers who have voluntarily excluded themselves from their services. BNPL providers will also not allow any further transactions when consumers are facing financial hardship and will commit not to initiate bankruptcy proceedings against their customers.

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## Shanghai

Information relating to a customer's outstanding BNPL balance, missed payments, delinquencies and personal identifying information will be shared on an ongoing basis with an independent service provider for credit risk assessment purposes only. Such information will subsequently be made available only to this service provider and other BNPL providers who are compliant with the code. They will commit to using the information only for credit risk assessment purposes, and are certified with the Info-Communications Media Development Authority Data Protection Trustmark.

To ensure compliance with the code, BNPL providers will be required to undergo an audit and accreditation process which will allow them to display an accredited trust mark showing customers that they are compliant with the code. The establishment of a credit information sharing bureau, the accreditation process and awarding the trust mark is expected to be completed in late 2023.

In China the BNPL market is growing despite the difficult global economic conditions. Unlike many other markets around the globe, the Chinese market is very familiar with cashless payments, e-commerce and online shopping given its zero-COVID 19 policy which has urged consumers to avoid offline transactions.

However, as in other jurisdictions there are concerns that BNPL may encourage spending which can sometimes be excessive. Some outstanding BNPL balances may have to be declared as non-performing loans when the borrower defaults or is late in making a payment. Significant levels of non-performing credit may impact financial stability.

Whilst China does not directly regulate BNPL products it has started to strictly regulate digital finance platforms, some of which provide interest-free short term financing similar to the BNPL model.

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# South Africa

A significant portion of the South African public is dependent on consumer credit, making it unsurprising that the BNPL model is one that is fast gaining momentum in the country. BNPL products have increased significantly over the last four to eight quarters in South Africa, as noted by Research and Markets<sup>5</sup>.

The BNPL model can be seen as an extension of the "lay-buy" system, in that it allows for the purchase of goods in instances where a customer may not have the necessary cash at hand. The "lay-buy" system allows for goods to be purchased against an initial down payment, with agreed monthly interest free repayments for the remainder of the purchase price. The customer collects the goods only once the full purchase price has been paid.

Taking the lay-buy to the next level, BNPL also affords the customer interest free instalments (usually over a six week period), but with the added benefit of being able to collect the goods immediately upon first payment.

From a regulatory perspective, BNPL models fall outside the ambit of the National Credit Act, 2005 (NCA) - legislation designed to protect the consumer in the credit market. Subject to prescribed conditions, the NCA applies to every credit agreement between parties dealing at arm's length and concluded, or having an effect within, South Africa. BNPL agreements are typically regarded as 'incidental' credit, in the sense that the parties do not intend to enter into a credit agreement. While payment is deferred/instalment based, the fact that no interest is charged, means that BNPL providers do not need to register as credit providers under the NCA, and as a result the NCA has limited application to BNPL models.

From a commercial perspective, BNPL models benefit merchants, consumers and BNPL providers - the merchants increase their sales, consumers generally buy more as they don't have to factor in the cost of credit or the necessity for cash on hand, and the BNPL providers benefit from merchant commissions and default penalties (assuming the customer does not meet their repayment obligations within the stipulated timeframe).

At the forefront of the South African BNPL movement, are Payflex and Float.

Various other local providers are present in the BNPL sector, including TymeBank's "MoreTyme" offering.

The increased interest in BNPL models has also attracted foreign providers, looking to establish a presence in South Africa. These include the acquisition of Payflex by Australia-based global BNPL firm Zip, and the acquisition by Mauritian financial services provider Weaver Fintech, of an 85% stake in Cape Town-based fintech startup, PayJustNow.

As the credit demand among small to medium sized entities grows in South Africa, particularly in light of the current economic climate, Research and Markets notes that it expects more firms to enter the BNPL segment in South Africa, in the short to medium term.

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<sup>5</sup> South Africa Buy Now Pay Later Business and Investment Opportunities - 75+ KPIs on Buy Now Pay Later Trends by End-Use Sectors, Operational KPIs, Market Share, Retail Product Dynamics, and Consumer Demographics - Q3 2022 Update (researchandmarkets.com)

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# United Arab Emirates (DIFC)

## Introduction

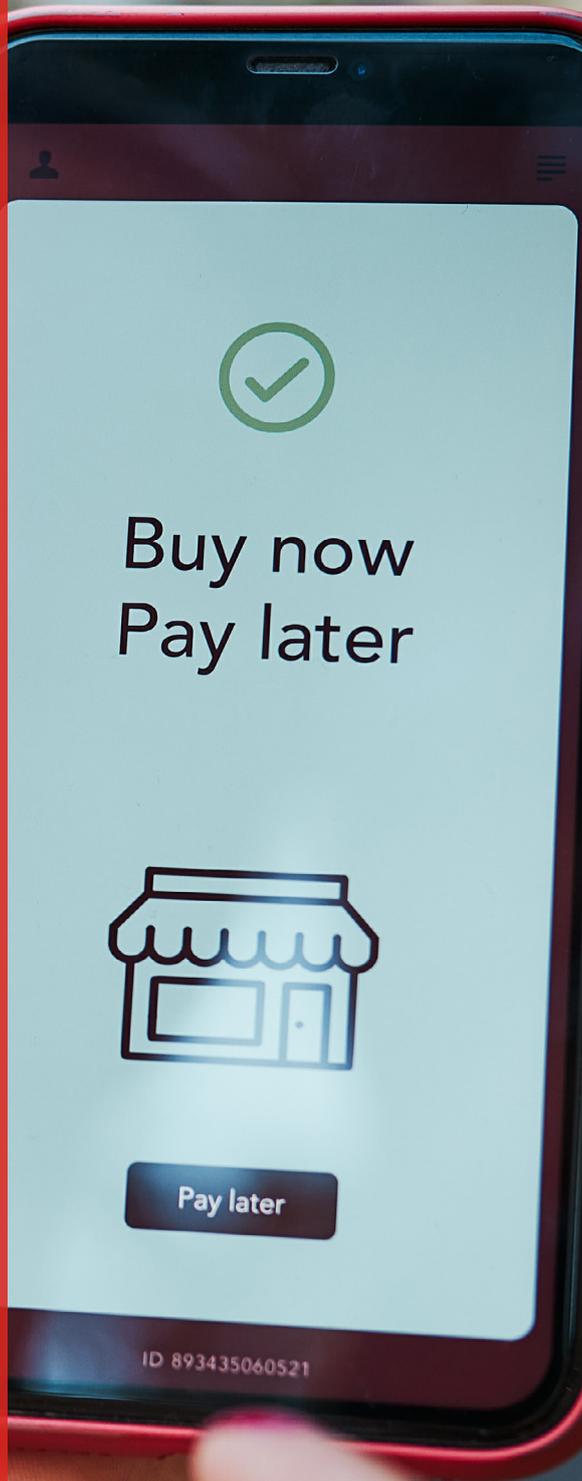
In Dubai the BNPL industry is evolving with fintech firms leading the way. The fintech firms that are involved with BNPL tend to be unregulated and have a presence outside the DIFC in other free zones which are not financial free zones and can therefore be considered, to a certain extent, as part of the 'onshore' UAE regime. Some BNPL operators are carrying on business in the UAE through a system of contracts where their DIFC entity acts as a non-regulated entity that only provides the technology aspect for a UAE 'onshore' entity. It is likely that these UAE onshore entities may have agreements with locally licensed financial institutions such as banks to provide certain regulated financial services for them.

## Current position

At the time of writing there had been no recent regulatory announcements concerning BNPL from the Dubai Financial Services Authority (**DFSA**).

The current regulatory position is that carrying on a business of providing credit in or from the DIFC requires a licence from the DFSA. DFSA-regulated firms are not allowed to provide credit to retail clients when carrying out their business in or from the DIFC. The one exception to this rule is where the client is another business, and the credit is provided for the purposes of that business. A firm wishing to provide BNPL services in or from the DIFC needs a licence from the DFSA and will be restricted as to the retail clients to whom they may provide the service.

In the Middle East generally, BNPL platforms are becoming more popular although many are in the early stages of development. Islamic law forbids the charging of interest on loans. BNPL platforms skirt round this on the basis that they typically profit through merchant charges and late fees rather than interest payments.



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