

Regulation to extend to the ‘Buy Now, Pay Later’ sector

Keith Waine, partner in Dillon Eustace’s Financial Regulation Unit, reviews the draft legislation that looks set to bring the fast-growing, and largely unregulated, ‘buy now, pay later’ services segment under Irish financial regulation. Currently many of the services provided by BNPL players such as Sweden’s Klarna, Italy’s Scalapay, and US’ Affirm, (primarily interest-free deferred payments) fall outside the definition of ‘credit’ set out in the Central Bank Act 1997 but new legislation is set to change this and make such services providers subject to a range of new business requirements, he says.

With the pandemic accelerating the shift to online shopping and digital financial services, the use of ‘buy now, pay later’ services (BNPL) has seen rapid growth. The sector is widely predicted to continue to grow quickly in the years ahead and leading players, including Klarna, Scalapay and Humm, are either already established in Ireland or are planning operations here. Internationally, there has been a flurry of big deals in the sector with payments giants Paypal, Square and Stripe looking to get in on the action. Last month Mastercard announced its own BNPL offering.

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To date BNPL services have been largely unregulated. That is set to change with draft legislation, currently at third stage in the Oireachtas, likely to require BNPL firms providing services to Irish consumers to obtain authorisation from the Central Bank of Ireland (CBI) and to comply with consumer protection regulations.

What is BNPL?

BNPL providers offer consumers the opportunity to purchase products/services and to defer payment in full until a later date, typically by simply signing up to the provider’s app and undergoing a rudimentary automated check (rather than a typical credit check). The payment process is



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usually structured as a part payment at the point of sale (online or in-store) with further payments to complete the purchase at a specified date in the future, usually within a few months. The service is generally interest-free with no charges so long as the consumer makes the deferred payments in full and on time. The BNPL provider bears the risk of consumers not making the deferred payments and charges the retailer a fee based on a percentage of the transaction. The attraction for retailers is that the use of BNPL has been shown to substantially increase the value of individual purchases. BNPL services were previously confined to large purchases such as furniture and expensive electronics. Today they are more commonly used to purchase clothing, fashion and other retail goods, with purchase prices as low as €20. Currently unregulated in Ireland BNPL providers will generally escape supervision and regulation in Ireland under current rules. This is because the interest-free deferred payment structure falls outside the definition of ‘credit’ set

out in the Central Bank Act 1997, which is limited to cash loans.

This means that BNPL providers are currently not required to conduct background checks and suitability assessments on customers, nor are they required to abide by consumer protection regulation and the CBI’s Consumer Protection Code. In addition, arrears accrued by BNPL users will not impact on the user’s credit rating.

The current regime allows BNPL payment options to be quick, easy and generally available to all consumers, regardless of credit history. However, the sector is more vulnerable to fraud and does not offer consumers the same protections as those available to users of traditional credit services.

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Changes on the way

On 23 June 2021, the Minister for Finance published the Consumer Protection (Regulation of Retail Credit and Credit Servicing Firms) Bill 2021 (the Bill). The Bill, if enacted in its current form, is likely to bring the BNPL sector within the scope of Irish financial regulation.

The Bill extends the definition of ‘credit’ in the Central Bank Act 1997 to include ‘deferred payments’ and ‘other similar financial accommodation’ as well as cash loans. It also extends the definition

of “retail credit firm” to cover businesses providing direct or indirect credit. The Bill does not abolish certain existing exemptions, including the exemption of “credit granted or made available without payment of interest or any other charge” and it will be interesting to see whether this exemption might allow certain providers to escape regulation. These extended definitions look set to bring BNPL providers within the scope of the regulatory regime for Retail Credit Firms, even where they provide credit indirectly via retailers.

Retail Credit Firms are regulated entities, required to be authorised by the CBI. They are subject to a range of business requirements, including the Consumer Protection Code, the Minimum Competency Code, anti-money laundering legislation, and fitness and probity standards. In particular, Retail Credit Firms are required to assess the suitability of the product for the consumer and the ability of the consumer to repay the debt over the duration of the agreement. They are also required to manage arrears in accordance with prescribed standards.

CBI Authorisation Process

Applicants for authorisation as a Retail Credit Firm must demonstrate that the

firm is able to meet the applicable authorisation requirements and standards, including in relation to governance and management, staffing, credit policy, IT systems, outsourcing and ownership.

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As part of the formal application, the applicant must prepare a detailed business plan and programme of operations.

The Bill contains transitional provisions which allow existing BNPL firms to avail of a temporary authorisation. The transitional provisions will apply where the existing firm applies for authorisation as a Retail Credit Firm within three months of the enactment of the Bill. The temporary authorisation will remain in place until the CBI determines to grant or refuse the firm’s application for authorisation.

What’s next?

The Bill is expected to be enacted before the end of the year. Unregulated firms providing BNPL services to Irish consumers should consider the terms of the Bill and determine whether they need to prepare an application for CBI authorisation. Firms will have only three months from the coming into operation of the legislation within which to make their formal application to the CBI. BNPL providers should also have regard to the European Commission’s recently published proposal for a revised Directive on consumer credit. The revised Directive will remove the current exemptions for interest-free credit and credit for amounts less than €200. BNPL providers will therefore be required to comply with a range of consumer credit requirements, including standardised pre-contractual information, information to be included in credit agreements, fee limits and transparency, cooling off periods, etc. For further information on any of the issues discussed in this publication, please contact Keith Waine or your usual contact in Dillon Eustace.

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