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BUY NOW, PAY LATER (BNPL) ARRANGEMENTS: LEGAL, STRUCTURAL AND REGULATORY CONSIDERATIONS

OCTOBER 2022

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INTRODUCTION

The provision of consumer credit is an age-old phenomenon. However, the modes of extending credit to consumers are rapidly changing given the pace of technology and consumer behaviour.[1] Buy Now, Pay Later (BNPL) arrangements are a new mechanism of advancing consumer credit that allow consumers pay for goods over time while receiving such goods as if payment was made upfront.

In jurisdictions where BNPL has become mainstream, like the United Kingdom and the United States of America for example, BNPL is widely available as a payment option for goods ranging from phones, cars to most other consumer products.
In recent times, BNPL arrangements have witnessed tremendous growth, recording almost 400% global growth between 2019 – 2021, and expected to further increase by over $480 billion between 2021 – 2026.[2]

Although under a BNPL arrangement, credit is functionally extended to the consumer, a BNPL arrangement differs from other consumer financing arrangements. Accordingly, this article seeks to explore the legal, structural and regulatory considerations of BNPL arrangements in Nigeria.

CONSUMER CREDIT REGULATION IN NIGERIA

The different consumer credit arrangements - instalment sales, money lending, hire purchase, credit cards, etc. - can be grouped into two categories, namely:

(i)loan credit; and
(ii)sale credit.

(i) Loan Credit

Loan credit refers to extension or advancement of money to or for someone, on the condition that it would be repaid. Examples of loan credit include direct money lending and credit cards.

Loan credit is the more regulated of the two categories of consumer credit and is regulated by:

a. the licencing regime under which the lending entity carries out financing e.g. banking licence; and

b. the Moneylenders' Laws of the different states of the federation.

Notably, both above-identified regulatory windows bring significant regulation. For example, the Moneylenders' Laws of the various states contain similar provisions and require, among others:

[1] Buy Now Pay Later in Singapore: Regulatory Gaps and Reform – Allen Sng Kiat & Christy Tan Muki
[2] • Buy now, pay later market size 2019-2026 | Statista

a. obtaining a Moneylenders Licence to operate as a money lender,[3] with notable exceptions such as banks, co-operative societies, insurance companies etc;[4]
b. restrictions on the interest chargeable;[5] and
c. disclosure obligations upon demand. [6]

Similarly, the Federal Competition and Consumer Protection Commission recently expressed its intention to regulate digital lending in Nigeria.[5] Essentially, the nature of loan credit arrangement is such that in order to protect borrowers against exploitative tendencies of the lenders, it attracts significant regulation.

(ii)Sale Credit

In contrast, sale credit does not involve the initial extension of money; rather, an initial provision of goods or services with payment for such goods or services to be deferred. Examples of sale credit include instalment sales and hire purchase agreements.

Notably, sale credit is mostly unregulated, save for hire-purchase agreements regulated by the Hire-Purchase Act of 1965. This scarce regulation makes classification of a business arrangement as sale credit very attractive.

BNPL ARRANGEMENTS

BNPL may be defined as an arrangement between a consumer, a financier and a merchant whereby:

a. the consumer buys and receives goods or services from the merchant;

b. the financier pays the merchant for the consumer's purchase; and

c. the consumer is to repay the purchase price over time. [8]

Per the above definition, a myriad of structural possibilities exists, depending on business and legal considerations. Importantly, depending on the structural approach adopted, the BNPL arrangement can constitute either loan credit or sale credit, with attendant regulatory implications.

LEGAL, STRUCTURAL AND REGULATORY CONSIDERATIONS OF BNPL ARRNAGEMENTS

Below are some important considerations in structuring a BNPL arrangement in Nigeria, and their implications on the potential classification of the arrangement:

[3] Section 5 of the Moneylenders Act
[4] Section 2 of the Moneylenders Act
[5] Section 15 of the Moneylenders Act
[6] Section 22 of the Moneylenders Act
[7] https://fccpc.gov.ng/wp-content/uploads/2022/08/LIMITED-INTERIM-REGULATORY_-REGISTRATION-FRAMEWORK-FOR-DIGITAL-LENDING-2022-1.pdf
[8] Supra

(a) Deferred payments

A crucial ingredient of sale credit in general is that credit is extended by the merchant to the consumer by way of deferred payments. The terms of this arrangement are contained in a contract between the consumer and the merchant.

In BNPL arrangements, the existence of a Deferred Payment Agreement (DPA) between the merchant and the consumer is an important indicator that sale credit is being advanced.[9]

(b) Avoidance of an agreement between the financier and consumer

Unlike a merchant, a financier advances money – the textbook definition of loan credit. Therefore, for BNPL arrangements that do not intend to be regulated as loan credit, it is important to adopt a structure that avoids any agreement between the financier and the consumer for advancement of money.

Typically, a BNPL arrangement can achieve this by ensuring that the financier’s contract is with the merchant i.e. the merchant assigns the deferred payments to the financier, in return for upfront payment.[10]

Thereafter, the consumer may then be required to setup an account on the online platform to facilitate amongst others, collection and disclosure of information, communications and payments between the merchant, consumer and financier, which is regulated by the Platform Terms.[11]

Essentially, the important question is: “has the financier extended a loan to the consumer?”. A BNPL arrangement seeking to avoid regulation as loan credit will ensure it adopts a structure that ensures this is answered in the negative.

(c) Immediate transfer of title to consumer

Even within the sale credit categorisation, it may also be advisable for a BNPL arrangement to ensure categorisation as sale credit simpliciter, rather than other types of sale credit such as hire-purchase for example which has considerable legal and regulatory implications.

Notably, the immediate transfer of ownership of the goods to the consumer, rather than a future transfer of such title (as is the case in hire purchase agreements) is a failproof mechanism of ensuring classification as sale credit simpliciter.

[9] Deferred Payment Agreement includes terms such as the number of payment instalments, and may include terms pertaining to consumer refund rights and late payment fees
[10] Usually through a Receivables Purchase Agreement.
[11] Administrative fees may be imposed by the platform operator (which may not necessarily be the financier) in the event of late payment by the consumer.

CONCLUSION

Several factors have been identified as driving the adoption and popularity of BNPL arrangements, some of these include the improvement in sales for merchants, provision of access to credit to the underbanked, and access to cheap/less risky credit to consumers.

Undoubtedly and like most start-ups, BNPL businesses stand to gain a lot from minimal regulation. In BNPL arrangements, this is achievable by paying close attention to the structure – through the contracts that govern the arrangement, to navigate the legal and regulatory terrain and achieve a desirable categorisation.

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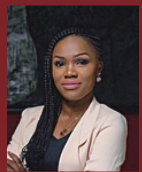
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