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EU Second Consumer Credit Directive: Scope and impact for buy-now pay-later (BNPL) providers

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Among the changes introduced by the Second Consumer Credit Directive ((EU) 2023/2225) (CCD II) is an expansion of the scope of the current consumer credit regime under Directive 2008/48/EC (CCD I). The aim is to increase transparency and improve consumer protection where certain credit products involve high costs or high fees for missed payments. 'Buy now, pay later' (BNPL) products involving third party BNPL providers are now caught within the expanded scope. This article takes a look at the new CCD II scope, and in particular the potential impact for firms' BNPL business models going forward. A second article will consider other key issues likely to impact credit providers who are already subject to CCD I.

Quick recap of the background to CCD II

CCD II is part of the Commission's New Consumer Agenda, which was launched in 2020 to update the EU's overall strategic framework for its consumer policy.

The CCD II proposal was introduced following the Commission's review of the current Consumer Credit Directive (part of its 2020 work programme), which found that it had not kept pace with emerging consumer credit products, consumer behaviour and technological developments. Added to this was the fact that imprecise wording of certain provisions had led to member states adopting diverging provisions, resulting in a highly fragmented regulatory framework across the EU in a number of aspects of consumer credit, impeding the opportunities created by digitalisation, in particular, to develop the cross-border consumer credit market.

Changes to the scope of the EU's consumer credit regime

As mentioned in a previous Engage publication on CCD II, the changes have expanded the scope of European regulation. The key changes include:

1. **Removal of minimum loan amount**: The minimum loan amount of €200 has been removed and the maximum has been increased so that CCD II won't apply to loans for more than €100,000, although note the residential property renovation exception (below).
2. **Residential property renovation**: CCD II will apply to loans for more than €100,000 where they relate to the renovation of residential property.

3. **BNPL**: The current exemption for credit agreements where the credit is granted free of interest and without any other charges and for credit agreements under the terms of which the credit has to be repaid within three months and only insignificant charges are payable has been removed. A narrower BNPL exemption for suppliers of goods or providers of services that offer such products directly to consumers has been introduced. This means that firms will no longer be able to rely on third party BNPL providers for exemption from the CCD II regime. In addition, to fall within the new exemption the deferred payment must be free of charge rather than the current allowance for 'insignificant charges'. Only 'limited' charges for late payments under national law can be applied. The repayment deadline has also been shortened from three months to 50 days, and this is reduced to 14 days for suppliers and providers which aren't SMEs and which sell through online stores.
4. **Deferred debit cards**: There is a new optional exemption for deferred debit cards which are provided by a credit or payment institution and where the credit must be repaid within 40 days. For the exemption to apply, the debit cards must be free of interest and have limited charges relating to the payment service offered.

5. **Opt-out**: Member States may disapply the following provisions where the loan is for less than €200, or granted free of interest and charges, or where the credit must be repaid within three months and only insignificant charges are payable:

    1. *Standard information to be included in advertising*: The requirement to include information relating to the duration of the credit agreement, the cash price and the amount of any advance payment (for deferred payment), and the total amount payable by the consumer and the amount of the instalments.

    2. *Pre-contractual information*: The requirement to provide additional information in the prescribed form of pre-contractual information known as the Standard European Consumer Credit Information form (SECCI) or the European Consumer Credit Information form (ECCI). The layout of the SECCI and the ECCI is different from CCD I, with certain required information having to be stated on a single page and if this is not possible two pages at most with certain information having to appear on the first page. The following pages then have the required additional detail, and this is the part that can be disapplied.
    3. *Content of credit agreement*: Where payments under a credit agreement do not immediately amortise the total amount of credit and are instead used to constitute capital, the requirement to include a statement that the agreement does not provide for a guarantee of repayment of the total loan unless such a guarantee is given expressly.

Impact on BNPL lenders

As outlined above, deferred payment schemes in which consumers are able to pay suppliers directly for goods or services in instalments and free of interest are outside the scope of CCD II. However, this narrower exemption has the effect of bringing many BNPL products that use third party BNPL providers within the regulatory perimeter for the first time.

Newly in-scope firms will have to get to grips with the detailed requirements of CCD II, including in relation to:

- licensing and supervision;
- advertising;
- pre-contractual information;
- creditworthiness assessments; form and content of the credit agreement; and
- various other ongoing information requirements.

CCD II also introduces a number of new conduct of business obligations for creditors and credit intermediaries, as well as new provisions on arrears and forbearance.

This will involve a major regulatory compliance project. Affected firms may also want to consider the feasibility of adapting their current or planned business models to ensure they remain outside the regulatory perimeter.

Regarding licensing and supervision under CCD II, both creditors and credit intermediaries will be subject to an adequate admission process, and to registration and supervision arrangements set up by an independent competent authority (subject to the existing carve-outs for credit institutions and payment and e-money institutions). There is a new option for Member States to decide not to apply the admission and registration requirements to suppliers of goods or providers of services who qualify as micro, small and medium-sized enterprises (SMEs) as defined in Recommendation 2003/361/EC, acting as: (a) credit intermediaries in an ancillary capacity; or (b) creditors in an ancillary capacity, granting credit in the form of deferred payment to purchase goods and services offered by them, if the credit is provided free of interest and with only limited charges payable by the consumer for late payments imposed in accordance with national law. However, this would of course be subject to national implementation measures.

Some BNPL firms may be able to take advantage of a further Member State opt-out in respect of certain requirements on advertising, pre-contractual information and content of the credit agreement, which can be applied where the loan is for less than €200, or granted free of interest and charges, or where the credit must be repaid within three months and only insignificant charges are payable. Again, the availability of this lighter touch regime would be subject to national implementation measures.

Some of the key CCD II provisions now relevant to BNPL providers are outlined below.

Non-discrimination

Conditions for granting credit to consumers must not discriminate against applicants based on their nationality, place of residence or protected characteristics such as sex, race, or political opinion.

Communications to consumers

Any advertising and marketing communications concerning credit agreements must be fair, clear and not misleading. Such communications must not create a false expectation for a consumer regarding the availability, cost of credit or total amount payable.

Provision of mandatory information

Specified information must be provided to consumers before a credit agreement is entered into. This includes the advertising and offering stage of interactions with potential borrowers. For example, a clear warning that ‘Borrowing money costs money’ (or words to that effect) must be included in adverts.

Exploitative practices

Credit providers and intermediaries must not undertake exploitative practices.

1. Bundling and tying: Bundling is the practice of providing a credit agreement in a bundle alongside other products or services, which are also available to the consumer separately. In contrast, tying is a commercial practice in which a provider requires a consumer to buy an unnecessary product or service in order to receive the credit. CCD II prohibits tying, whereas bundling is permitted.
2. Misleading use of default options: Credit providers or intermediaries must not imply the consumer’s consent to enter into a credit agreement or purchase ancillary services through use of default options, such as pre-ticked boxes. Any consent to enter such agreements must be informed and given clearly.
3. Advisory services: Consumers must be informed whether they are receiving or can receive advisory services. Before advisory services are performed for consumers, they must be provided with specified information, such as the product range behind an advisor’s recommendation. Further, CCD II sets out the duties of the providers of advisory services, for example acting in the best interests of the consumer.
4. Unsolicited credit: Credit providers are prohibited from granting credit to consumers without their prior request and explicit agreement.

Creditworthiness assessments

CCD II refines the requirements in CCD I with respect to creditworthiness assessments. In both CCD I and CCD II, creditors are required to carry out a thorough assessment of a consumer’s creditworthiness before entering into the credit agreement. However, in the new CCD, there are specific references to undertaking assessments in the interest of the consumer and to prevent irresponsible lending practices and over-indebtedness.

Financial education

Creditors are required to exercise reasonable forbearance where appropriate before taking enforcement action. The forbearance must take into account the consumer’s individual circumstances, among other factors. For example, the forbearance measures may include the total or partial refinancing of a credit agreement, extending the term or changing the type of credit.

Creditors must refer customers experiencing financial difficulties to debt advisory services.

Conduct of business

Creditors and credit intermediaries must act honestly, fairly, transparently and professionally when carrying out the relevant activities. The process by which such companies compensate their staff must not impede this obligation.

Additionally, creditors and credit intermediaries must ensure that their staff have the necessary knowledge and training required in relation to manufacturing, offering, granting and carrying out credit agreements and performing advisory services.

Next steps

CCDII came into force on 19 November 2023. Member states now have until **20 November 2025** to adopt and publish the laws, regulations and administrative provisions necessary to comply with CCD II, and the implementing measures will have to be applied 12 months from the transposition date, ie **20 November 2026**. This is also the date on which CCD I will be repealed. However, CCD I will continue to apply to any credit agreements concluded between entry into force of CCD II and its date of application until their termination. There is one exception to this in relation to certain provisions of CCD II which will apply to all open-end credit agreements existing on its date of application. If you would like to discuss this development and how we can help, please get in touch with one of the people listed above or your usual Hogan Lovells contact.

The UK perspective

BNPL currently sits outside the scope of the consumer credit regime in the UK. BNPL firms benefit from an exemption which states that the consumer credit regulations do not apply to interest-free agreements repayable in under 12 months and in 12 or fewer instalments. However, the previous government had begun the process of bringing BNPL services within the regulatory perimeter. A consultation on draft legislation to bring BNPL loans within the regulatory perimeter closed in April 2023. The new government has also pledged to regulate in this space, so next steps are awaited.

Authored by Eimear O’Brien, Sebastien Gros, Franck Dupret, Virginia Montgomery, and Ada Nourell.

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