IN THE UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER
B E T W E E N:

CONSUMER VOICE LIMITED

Applicant

-and-

THE FINANCIAL CONDUCT AUTHORITY

Respondent

STATEMENT OF FACTS AND GROUNDS

All references (e.g. [x/y-z]) are to tabs and page numbers in the application bundle

A. INTRODUCTION

1. The Applicant, Consumer Voice (**CV**), applies to the Upper Tribunal (Tax and Chancery Chamber) (the **Tribunal**) under s.404D of the Financial Services and Markets Act 2000 (**FSMA**) for permission to apply for a review of the rules of two related consumer redress schemes for motor finance commission arrangements which were published by the Respondent (**FCA**) on 30 March 2026 (together the **Scheme**).

2. As far as CV is aware, this is the first ever challenge under s.404D FSMA.

3. CV has strongly and consistently advocated for a fair consumer redress scheme (**CRS**) to remedy the systemic failure of the motor finance industry to comply with the FCA's regulatory requirements in respect of undisclosed commissions paid by car finance lenders to brokers and other incentive arrangements. Those failings caused loss to millions of consumers (a significant number of whom were vulnerable) on a vast, unprecedented scale.

4. However, the Scheme is flawed in its approach to redress. It will significantly undercompensate consumers, resulting in a windfall of at least £4.6 billion (and potentially far more)[1] to the firms which exploited them in the first place. That unfairness is compounded by the fact that the Scheme is also likely to dissuade many consumers from pursuing, in court, the remedies to which they are entitled.[2] The result is a framework that is unfair, exacerbates consumer harm, undermines the

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[1] £4.6 billion is the difference between total redress under the Scheme and the FCA's baseline case plus 8% simple interest. If all consumers were awarded full commission repayment and 8% simple interest, they would in total receive £10.1 billion more than under the published Scheme: see Table 3 in the expert report of Dr Pinar Bagci of Brattle (**Bagci 1**) (the difference between Scenario 3 and Scenario 1) **[9/158]**.

[2] Indeed, the Chief of the FCA has recently issued public statements discouraging consumers from seeking redress outside the Scheme, maintaining that the Scheme is the "*best*" option (see §43 below).

FCA's consumer protection objective, and fails to hold lenders meaningfully to account (and therefore also undermines the FCA's market integrity objective). Whilst CV has concerns about other aspects of the Scheme (as set out in its consultation response), it has chosen to focus on the most egregiously unfair aspects of redress under the Scheme, as set out below. If the Scheme rules specified below are quashed, then CV anticipates that the FCA will have to reconsult on the redress rules, in which event it reserves the right to raise all matters of concern relating to redress.

5. In summary, the rules relating to redress are unlawful on four grounds:

   (1) **Ground 1 (market integrity)**: The FCA misconstrued, mis-assessed and misapplied the integrity objective in s.1D FSMA and failed to promote and give sufficient weight to consumer protection when calibrating redress which infected the exercise of its rule making power and resulted in the FCA calibrating down the quantum of redress (including in the ways challenged under Grounds 2 to 4).

   (2) **Ground 2 (commission repayment)**: The FCA erred in law and/or acted irrationally in determining that the commission repayment remedy should be limited to those cases which "*align closely*" with the facts of Mr Johnson's case as considered by the Supreme Court in Johnson v FirstRand Bank Ltd t/a MotoNovo Finance [2025] 3 WLR 423 **[27/956]**, unlawfully treating it as a benchmark for full commission repayment and declining to extend that remedy to unfair relationship cases which did not closely align with Johnson.

   (3) **Ground 3 (APR adjustment)**: The FCA failed to comply with its duties of sufficient inquiry and conscientious consideration, erred in law and/or acted irrationally in setting the bifurcated % rates in the APR adjustment remedy by fixing flat APR adjustment rates in each period without any adequate evidential foundation for doing so.

   (4) **Ground 4 (compensatory interest)**: The FCA erred in law and/or acted irrationally and/or in breach of its published policy in determining the rate of compensatory interest and removing any mechanism for consumers to demonstrate that a higher rate is appropriate.

6. As a result, the rules specified below should be quashed and the FCA must reconsider its decision-making in relation to redress in accordance with the Tribunal's findings.

7. The operation of the rules which concern redress (and not those relating to the earlier stages of inquiry) should be stayed pending final determination of the challenge. In this way the Scheme can be commenced, including firms making decisions on eligibility, whilst the Tribunal determines this challenge on an expedited basis. This will not prevent the initial roll out of the Scheme and therefore not delay consumers getting the redress to which they are entitled.

B. STANDING

8. CV has "*sufficient interest*" under s.404D(4) FSMA:

(1) The Tribunal is referred to the First Witness Statement of Nikki Stopford (one of CV's co-founders) dated 27 April 2026 (**Stopford 1**).

(2) In making this application, CV is acting in the public interest. The issues raised are of considerable public importance. The Scheme concerns motor finance commission arrangements affecting a very substantial class of consumers over many years, namely an estimated 12.1 million regulated motor finance agreements entered into between 6 April 2007 to 24 October 2024.

(3) CV has a real and genuine interest in the matter being challenged. It is a consumer organisation concerned with consumer rights, redress and access to justice. Its mission is to help consumers understand when companies may have broken the law, whether compensation may be due, and how to claim it. Its work includes: (a) providing free information and advice directly to consumers about claims and routes to compensation; (b) publishing information and analysis on legal rights and compensation issues affecting consumers across a range of sectors; and (c) engaging publicly with other organisations on issues concerning consumer protection and access to justice. Its co-founders were previously executives at the Consumers' Association, the charity which owns *Which?*.

(4) CV has genuine expertise and is well placed to advance arguments about the impact of the Scheme on consumers as a whole. The issue of motor finance commission has been one of the principal issues on which it has worked since its establishment. This work has included: (a) producing detailed consumer-facing guidance and explanatory materials; (b) engaging publicly on the proposed CRS; (c) carrying out consumer and claimant research and analysis; and (d) continuing to analyse the impact of the CRS on consumers.

(5) There is no better-placed public interest challenger to present arguments on behalf of consumers as a whole. The challenge is to a measure of general application rather than a decision taken in an individual case. The direct impact of the measure "*falls on a class whose members are likely to lack the financial and organisational resources required to litigate*" (R (McCourt) v Parole Board [2020] EWHC 2320 (Admin) at [43]). This is particularly so in circumstances where the FCA has recently sought to close down challenges to its decision-making, by: (a) maintaining (in its pre-action letter dated 17 April 2026) that any challenge to the Scheme must be brought within just 28 days of publishing its 584-page Policy Statement **[68/3221]** (in contrast to its predecessor, the Financial

Services Authority (**FSA**), which accepted that a 3 month upper limit applied);[3] (b) maintaining, incorrectly, that *all* firms (cf. consumers) who are subject to the Scheme should be joined as interested parties to any application **[70/3235]**; and (c) as of last Thursday, publicly calling on law firms and claims management firms (through its LinkedIn page) to "*consider their position*" before seeking to exercise any right to review the FCA's decision-making,[4] contrary to the longstanding principle that public authorities should not obstruct or interfere with the due course of justice or the lawful process of the courts.[5]

(6) For these reasons, amongst others, CV was granted permission to intervene by the Court of Appeal in a motor finance related judicial review of the Financial Ombudsman Service (**FOS**) on appeal from the judgment of Kerr J in R (Clydesdale Financial Services Ltd) v FOS [2024] EWHC 3237 (Admin) (**Clydesdale**) (as to which see below). In the Order of Dingemans LJ dated 21 May 2025 regarding CV's application to intervene, it was recorded that: "*The court recognises the expertise of Consumer Voice Limited*".

(7) CV is uniquely well-placed to represent the interests of affected consumers in this first challenge to a CRS and the application made under s.404D FSMA.

C. STATEMENT OF FACTS

(1) The CCA

9. On 6 April 2007, ss.140A – 140B of the Consumer Credit Act 1974 (**CCA**) **[57/3060]** came into effect giving the courts the power to determine whether a relationship between a lender and consumer arising from a credit agreement is unfair to the consumer and, if so, a wide remedial power including "*to require the creditor… to repay (in whole or in part) any sum paid by the debtor*" (s.140B(1)(a)). On the same date, the FOS's consumer credit jurisdiction was also created.

(2) The OFT

10. In March 2010, the Office of Fair Trading (which was responsible for regulating consumer credit at the time) (**OFT**) issued guidance on *Irresponsible Lending* (OFT 1107). This was updated in February 2011 (**LG**) **[14/506]**. In November 2011, the OFT issued guidance on *Credit Brokers and Intermediaries* (OFT 1388) (**CBG**) **[15/586]**.[6]

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[3] See §32.2 of the FSA's Guidance Note No. 10 on *Consumer Redress Schemes* (July 2010, published just after s.404D FSMA was enacted in April 2010) **[66/3209]**.

[4] See FCA Statement dated 23 April 2026 **[44/2721]** and the LinkedIn page publicising this **[44/2723]**.

[5] Raymond v Honey [193] 1 AC 1.

[6] The LG and CBG treated as unfair or improper, inter alia failures: adequately to disclose limitations on a broker's independence; to disclose commissions or other remuneration capable of affecting the impartiality of advice or a service; and to disclose other ties with a creditor where those matters could give rise to a conflict of interest.

(3) The FCA

11. On 1 April 2014, the FSA was abolished and the FCA assumed responsibility from the OFT for regulating consumer credit, including the enforcement of breaches of relevant requirements pre-dating 1 April 2014.

12. The regulatory approach was carried forward into the FCA's principles and rules, including the following provisions on 1 April 2014 in the Principles of Business **[62/3087]** and in Chapters 2 **[63/3090]** and 4 **[64/3130]** of the Consumer Credit Sourcebook (**CONC**):

(1) PRIN 2.1.1R (Principles 6, 7 and 8):[7]

6 Customers' interests	A firm must pay due regard to the interests of its customers and treat them fairly.
7 Communications with clients	A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.
8 Conflicts of interest	A firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client.

(2) CONC 3.3.1R: "*A firm must ensure that a communication or a financial promotion is clear, fair, and not misleading*".[8]

(3) CONC 3.7.3R: "*A firm must, in a financial promotion or a document which is intended for individuals which relates to its credit broking, indicate the extent of its powers and in particular whether it works exclusively with one or more lenders or works independently*".[9]

(4) CONC 3.7.4(2)G: "*A firm should in a financial promotion or in a communication with a customer… indicate to the customer in a prominent way the existence of any financial arrangements with a lender that might impact upon the firm's impartiality in promoting a credit product to a customer*".[10]

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7 Principles 6, 7 and 8 have not been amended since 1 April 2014.

8 CONC 3.3.1R was amended on 2 November 2015 to specify in a new sub-rule (1A): "*A firm must ensure that each communication and each financial promotion: (a) is clearly identifiable as such; (b) is accurate; (c) is balanced and, in particular, does not emphasise any potential benefits or service without also giving a fair and prominent indication of any relevant risks; (b) is sufficient for, and presented in a way that is likely to be understood by, the average member of the group to which it is directed, or by which it is likely to be received; and (e) does not disguise, omit, diminish or obscure important information, statements or warnings*".

9 CONC 3.7.3R has not been amended since 1 April 2014.

10 CONC 3.7.4(2)G was amended on 28 January 2021 to provide that a firm must "indicate to the customer in a prominent way the existence *and nature* of any financial arrangements with a lender that might impact upon the firm's impartiality in promoting *or recommending* a credit product to the customer *or which might, if disclosed by the firm to the customer, affect the customer's transactional decision in relation to the credit product*".

(5) CONC 4.5.2G: "*A lender should only offer to, or enter into with, a firm a commission agreement providing for differential commission rates or providing for payments based on the volume and profitability of business where such payments are justified based on the extra work of the firm involved in that business*".[11]

(6) CONC 4.5.3R: "*A credit broker must disclose to a customer in good time before a credit agreement or a consumer hire agreement is entered into, the existence of any commission or fee or other remuneration payable to the credit broker by the lender or owner or a third party in relation to a credit agreement or a consumer hire agreement, where knowledge of the existence or amount of the commission could actually or potentially: (1) affect the impartiality of the credit broker in recommending a particular product; or (2) have a material impact on the customer's transactional decision*".[12]

(4) Review of the motor finance sector

13. On 18 April 2017, the FCA announced a review of the motor finance sector **[17/740]**. It recorded a concern that "*there may be a lack of transparency, potential conflicts of interest and irresponsible lending in the motor finance industry*" and that it would seek to identify who used those products and assess the sales processes, whether the products caused harm and the due diligence that firms undertook before providing finance (Chapter 7, p.72). As stated by Kerr J in Clydesdale at [53], the FCA has been reviewing the motor finance sector since this date.

14. On 1 March 2019, the FCA published the final findings of its review (the **Final Findings**) **[18/769]**. The Executive Summary identified inter alia at pp 4-5 (emphasis added here and below):

"*Commission arrangements*

- We are concerned that the way commission arrangements are operating in motor finance may be **leading to consumer harm on a potentially significant scale**.
- Some customers are **paying significantly more** for their motor finance because of the way lenders choose to remunerate their brokers.
- In particular, we are concerned about the widespread use of commission models which link the broker commission to the customer interest rate and allow brokers wide discretion to set the interest rate. This gives rise to conflicts of interest and creates strong incentives for the broker to charge a higher interest rate.

…

- [...] We estimate that on a typical motor finance agreement of £10,000, higher broker commission under the Reducing DiC [difference in charges] model **can result in the customer paying around £1,100 more** in interest charges over the four-year term of the agreement.

…

[11] CONC 4.5.2G has not been amended since 1 April 2014.

[12] CONC 4.5.3R was amended on 28 January 2021 to state that disclosure must be made "*prominently*" and cover both "*the existence and nature*" of the commission or fee or other remuneration.

- We consider that change is needed across the market, to address the potential harm we have identified. […]

Sufficient, timely and transparent information

- […] we are not satisfied that firms are complying with regulatory requirements. We will follow up with individual firms.

…

- We have particular concerns in relation to disclosure of commission, especially in respect of DiC and similar commission models where the broker has discretion to adjust the interest rate. There are existing requirements in our Consumer Credit sourcebook (CONC) on disclosure of brokers' status and remuneration, but we did not see clear evidence of compliance with these.
- In particular, brokers must disclose the existence of any commission or other financial arrangement with a lender which could affect the broker's impartiality in promoting a particular product or impact on the customer's decision-making. Such disclosure should be clear and readily comprehensible. In addition, the broker must disclose the amount (or likely amount) upon request.
- […] Our work suggests that some lenders may be unduly reliant on contractual requirements and the provision of standard documentation and procedures, and may not monitor brokers sufficiently closely or act where issues are found. […]"

(5) Ban on DCAs

15. On 15 October 2019, the FCA published a consultation on its proposed ban of discretionary commission arrangements (i.e. "*where the amount received by the broker is linked to the interest rate that the customer pays and which the broker has the power to set or adjust*") (**DCAs**) in the motor finance market **[19/792]**.

16. On 28 July 2020, the FCA confirmed that it would ban DCAs on 28 January 2021.

17. On 28 January 2021, the ban on DCAs (and corresponding amendments to CONC 3.7.4G and 4.5.3R – see above) took effect. The FCA has acknowledged that: "*DCAs were widespread before our ban came into force: between April 2007 and our ban in January 2021, around 61% of all motor finance agreements involved a DCA*".[13]

(6) The diagnostic review of historical motor finance commissions

18. In January 2024, the FOS made the first decisions on DCA complaints, in favour of consumers.

19. On 11 January 2024, the FCA announced that: (1) it was exercising its powers under s.166 FSMA to review historical motor finance commission arrangements and sales; and (2) if it found that there had been widespread misconduct and consumers had lost out, it would identify "*how best to make sure people who are owed compensation receive an appropriate settlement in an orderly, consistent and efficient way*" **[21/887]**.

[13] Consultation Paper 25/27, §2.17 **[30/1095]**.

(7) The Clydesdale decision

20. On 17 December 2024, the Administrative Court dismissed the judicial review claim in Clydesdale **[22/889]**. The FCA was an interested party. Kerr J held that the FOS had not acted unlawfully in determining that the disclosure which had been made to the consumer by the broker in a DCA fell short of the standard required in the FCA's rules at the time (rejecting at [193]-[194] the submission that CONC 4.5.3R merely required disclosure of the *fact* that commission was payable, on the basis that this wrongly "*treats CONC 4.5.3R in isolation, not in harmony with its neighbours (Principles 7 and 8, CONC 3.3.1R and CONC 3.7.4G(2)*"). He also upheld the lawfulness of the redress including interest at a simple rate of 8%.

21. Clydesdale obtained permission to appeal from Kerr J, who considered that there was a "*compelling reason*" for the appeal in that "*[i]f the decision were upheld on different or partially different grounds, the Court of Appeal's reasoning could impact significantly on the outcome of other cases*" **[23/955]**. CV obtained permission to intervene. However, the appeal was withdrawn.

(8) The Johnson decision

22. On 1 August 2025, the Supreme Court handed down its judgment in Johnson **[27/965]**. The case concerned three conjoined appeals relating to the payment of commission by lenders to motor dealers in connection with the provision of finance for the hire purchase of cars, in circumstances where that commission was either not disclosed or only partly disclosed to the hirers of the cars. Whilst the commission structure in Mr Johnson's case involved a DCA, the dealer did not exercise the discretion to increase the interest rate (and accordingly the lowest available rate applied). The FCA intervened in the appeal.

23. The Court held that: (1) the typical features of the transactions under review did not give rise to a fiduciary duty sufficient to create liability for briber under the common law tort or pursuant to the principles of equity, and the claims in equity and the tort of bribery therefore failed; but (2) the relationship between Mr Johnson and his lender was "*unfair*" under s.140A CCA.

24. The analysis in relation to issue (2) was contained in a short section at the end of the judgment at [291]-[338] **[27/1055]**. The Court held that:

    (1) The test of unfairness is highly fact-sensitive. At [297], the Court emphasised that the test "*permits courts to take account of a very broad range of factors*" and that the application of the test in each case will be "*a highly fact-sensitive exercise*". At [318], the Court also cited the following guidance in Plevin v Paragon Personal Finance Ltd [2014] 1 WLR 4222: "*It is not possible to state a precise or universal test for its application, which must depend on the court's judgment of all the relevant facts…*".

(2) The mere fact that there has been no disclosure or only partial disclosure of the commission will not necessarily suffice to make the relationship between lender and customer unfair; it is a factor to be taken into account in the "*overall balancing exercise*" under s.140A ([320]).

(3) On the facts of Mr Johnson's case, there were three further relevant factors:

a. First, the size of the commission paid by the lender to the dealer was significant, amounting to 26% of the advance of credit and 55% of the total charge of credit (comprising interest and fees) ([323]-[329]).

b. Second, it was "*highly material*" that the documents provided to Mr Johnson did not disclose the existence of a commercial tie between the lender and the dealer in which the lender had a right of first refusal, but instead created the false impression that the dealer was offering "*products from a select panel of lenders*" and recommending "*the Consumer Finance product that best meets your individual requirements*" ([330]-[335]).

c. Third, on the other side of the scales was Mr Johnson's failure to read any of the documents provided by the dealer. However, he was commercially unsophisticated and it was questionable the extent to which a lender could reasonably expect a customer to have read and understood the detail of such documents. Further, no prominence was given to the relevant statements in these documents ([336]).

d. The Court held that the relationship between Mr Johnson and FirstRand was unfair under s.140A CCA ([337]) and awarded full repayment of the commission amount (£1,650.95) with an "*appropriate commercial* rate" of interest ([338]). Mr Johnson was awarded £2,493.52, which appears to approximate to a simple interest rate of c.6.3% from 29 July 2017 until the Supreme Court's judgment on 1 August 2025 [**29/1080**].

25. Both before and after the Clydesdale and Johnson decisions, tens of thousands of county court claims were filed by consumers. Whilst these inevitably had varying degrees of success, consumers succeeded in a large proportion of the claims which went to trial (rather than being stayed pending Clydesdale and Johnson), receiving (a) repayment of all undisclosed commission paid to the car dealer or (b) an appropriate APR adjustment correcting the overpayment by the customer as a result of the car dealer having discretion over the APR under DCA arrangements (usually by adjusting the APR to the lowest available rate under the DCA), plus compensatory interest at a commercial rate, and costs (see First Witness Statement of Darren Smith dated 27 April 2026 (**Smith 1**), §20 **[7/95]**). This is referred to below as "*full*" or "*court-like*" redress.

(9) Consultation

(a) Before the consultation

26. In March 2025, the FCA referred to the possibility of a CRS for the first time **[24/957]**.

27. On 5 June 2025, the FCA published *Key Considerations in Implementing a Possible Motor Finance Consumer Redress Scheme* (the **Key Principles Statement**) **[25/959]**. This identified seven guiding principles for designing a CRS: Comprehensiveness, Fairness, Certainty, Simplicity and Cost Effectiveness, Timeliness, Transparency and Market Integrity (the **Key Principles**). On the issue of redress, the FCA stated that any scheme must be fair to consumers but also "*[e]nsure the integrity of the motor finance market, so that it works well for future consumers*".

28. On 3 August 2025 (i.e. 2 days after the judgment in Johnson), the FCA announced that it would consult on an industry-wide redress scheme **[28/1075]**, stating: "*[a]ny redress scheme must be fair to consumers who have lost out and ensure the integrity of the motor finance market*".

(b) The Consultation Paper

29. On 5 October 2025, the FCA published its Consultation Paper (*Motor Finance Consumer Redress Scheme,* CP25/27) (the **Consultation Paper**) **[30/1082]**.

30. The accompanying news release reiterated: "*We believe a compensation scheme is the best way to ensure consumers who have lost out receive compensation in an orderly, consistent and efficient way. It will also help maintain a well-functioning motor finance market for the millions of people that rely on it*".

31. By way of high-level summary, the Consultation Paper identified that:

    (1) There was strong evidence of a widespread and regular failure to adequately disclose commission arrangements and tied arrangements in motor finance agreements (§3.36). Consumers had suffered (or might suffer) the loss of the opportunity to negotiate lower borrowing costs or seek alternatives (§3.36).

    (2) The scheme was "*the best way to provide timely and fair redress to consumers while protecting the integrity of this vital market and providing certainty as quickly as possible for all involved*" (§1.3).

    (3) A relationship would be considered "*unfair*" where it involved inadequate disclosure of: (1) a DCA; (2) a that arrangement (i.e. "*where the commission is equal to or greater than 35% of the total cost of credit and 10% of the loan*" (**HCA**); and/or (3) a tied arrangement (i.e. where there was a tie which "*gave a lender exclusivity or a first right of refusal*") (**TA**) (together the **Relevant Arrangements**) (§§1.21, 4.45).

(4) Where a relationship was found to be unfair, lenders were to calculate redress in accordance with the FCA's "*redress calculation rules*" in Chapter 8 (referred to as "*Stage 3*") (§5.9). Chapter 8 included the following principles and proposals:

(a) Section 404A(4) FSMA required that redress under a scheme must be "*just*" for the type of case in question; and, in deciding what remedy was just, s.404A(5) required the FCA to take into account the nature and extent of the loss or damage (§8.3).

(b) In previous schemes (namely the British Steel Pension Scheme and Arch Cru Investors Scheme), remedies had been based on measurable financial loss. However, the present scheme differed because s.140A CCA gave the courts very wide remedial powers which did not confine them to loss-based remedies (§8.6). This meant that the FCA had to balance different approaches which delivered different amounts of redress: (i) the loss-based approach (limited to measurable financial harm); and (ii) the commission repayment remedy as in Johnson (which was designed to restore fairness and did not depend on precise financial loss) (§8.7).

(c) Remedies: Three types of "*standardised remedy*" were proposed:

(i) First, a commission repayment remedy (**CRR**) in cases which "*align closely with Johnson*" (§8.8). These were defined at §8.47 as:

"… cases where an unfair relationship has been determined and which have **both** of the following features:

- Commission equal to or greater than 50% of the total cost of credit and 22.5% of the loan amount. This applies a 10% buffer below the amounts in *Johnson* to reduce the risk of excluding cases that are substantively similar but fall just below the level of commission in *Johnson* and overextending the remedy to materially different cases.
- A tied arrangement."

(ii) Second, a **hybrid remedy** in "*almost all other cases*" (§8.8, 8.39 – 8.45). This was the average of: (i) the CRR; and (ii) a compensatory "*loss-based*" APR adjustment remedy (**AAR**) constructed by calculating the difference in repayments made by the consumer under the agreement and counterfactual repayments the consumer would have made under an agreement with a lower "*market-adjusted APR*" (§§8.8, 8.21 – 8.32).

(iii) Third, the **AAR** alone in "*very limited circumstances*" where the AAR would produce *greater* redress than the CRR (if relevant) or hybrid remedy (if not) (§§8.8, 8.48 – 8.51). The AAR acted as a "*minimum floor*" across the scheme's remedies.

(d) The FCA accepted that the CRR would result in "*significantly larger average redress payouts*" than the AAR (§8.35) and "*if every eligible case received repayment of commission [under the scheme]… total redress costs could reach* ***£13.2 billion***" (p.83). However, it decided not to extend the CRR to other cases:

> "8.37… *Johnson* does not, in our view, establish that repayment of commission would be the appropriate remedy in every successful unfair relationship claim. Notably, it is hard to predict how a county court judge might rule in cases involving only an undisclosed DCA or an undisclosed DCA plus just one of the features in *Johnson* – a high commission arrangement or a tied arrangement, but not both. In *Johnson*, a DCA was present, but since the broker did not use their discretion to increase the claimant's interest rate, the DCA appears to have played little to no role in the court's decision about unfairness and what remedy to award.
>
> 8.38 Where only a single relevant arrangement is present – such as a high commission arrangement or a tied arrangement, or if the commission itself is not substantial – we consider courts may be more receptive to arguments advocating alternative remedies. In cases where the circumstances are less severe, or there is evidence that the consumer's actions would have remained unchanged with proper disclosure, the court may opt to grant a reduced remedy or no remedy at all. However, it is important to recognise that the commission repayment remedy in *Johnson* will remain an important reference point and is likely to influence the perspectives of county court judges in cases involving not only high commission arrangements and tied arrangements, but also undisclosed DCAs."
>
> […] 8.39 Given the uncertainty about how a court would rule in any individual case, we propose a hybrid remedy that draws on what we consider to be a credible loss-based approach to remedy – the APR adjustment remedy set out above – and the principles reflected in *Johnson* about the commission repayment remedy. We propose that the hybrid remedy is used to calculate redress for all cases, except those that are very similar to Johnson (which would receive the commission repayment) and the minority of cases where more redress would be available under the APR adjustment remedy.
>
> 8.40 We consider this hybrid remedy, which averages the outcome of the commission repayment and APR adjustment remedies, is both just and fair. It is consistent with our statutory objectives to have regard to the nature and extent of the loss or damage in question and provides clarity and certainty for consumers and firms. A universal approach for most cases enhances operational simplicity for firms, provides clarity for consumers, and also supports effective implementation of the scheme.
>
> 8.41 If we applied the commission repayment remedy to all cases, rather than just those that are very similar to *Johnson*, average (mean) redress would be £949. Under the hybrid remedy, average redress would be £695. We have estimated that, under the hybrid remedy, most cases would receive 2 thirds or more of the redress that would have been provided under the commission repayment remedy. They would not, however, have to wait for an uncertain result through the courts and the expense this would incur…
>
> 8.42 In summary, our scheme principles aim to deliver comprehensiveness, fairness and consistency. We want broad consumer participation in our scheme while ensuring redress is grounded in clear evidence of loss. We acknowledge the tension between these goals. If we decided not to include the commission repayment remedy, our aim to deliver a comprehensive scheme might be undermined as many consumers might decide to initiate legal action instead of participating in the scheme; higher perceived court outcomes, which may not account for the costs of going to court, may reduce uptake of the scheme. However, non-evidence-based redress may compromise fairness.

> […] 8.61… we do not consider it reasonable or proportionate to apply the commission repayment remedy to cases that are less closely aligned with the facts of that case. The Supreme Court's decision in Johnson was based on a specific combination of features – a very high commission and a contractual tie. It did not establish that commission-plus-interest should be the default remedy in all motor finance cases where there was an unfair relationship arising from inadequate disclosure of certain commission-related features.
>
> 8.62 Extending the commission repayment remedy to materially different cases would risk overcompensation and would not be grounded in evidence of actual consumer loss, contrary to our statutory duty to take account of this. Our hybrid approach strikes a better balance by recognising the potential, but nonetheless uncertain, influence of *Johnson* on county courts while ensuring that redress remains linked to evidence of harm.
>
> 8.63 We recognise that the commission repayment remedy is a simpler remedy than the hybrid remedy and could, therefore, deliver lower administrative costs if applied across the scheme. […]"

(e) Compensatory interest: Finally, interest would be payable on awards: generally simple interest at **BoE base rate + 1% per annum** (§§8.73-8.77). However, to "*ensure fairness*", the FCA proposed that this rate would be rebuttable *by consumers* and they could seek a higher rate by providing lenders with appropriate contemporaneous evidence of borrowing money at a higher cost (§§8.78-8.81).

32. The Consultation Paper estimated that: 14.2 million agreements (i.e. 44% of agreements made since 2007) would be considered unfair (§1.22);[14] around 85% of consumers would take part in the proposed scheme (§1.29); and eligible customers would receive an average of around **£700** per agreement (§1.30). The total cost of the scheme to lenders (i.e. applying the hybrid remedy in most cases) was estimated to be in the region of £11 billion, comprising **£8.2 billion** in redress and £2.8 billion in costs (§§1.31, 8.13).

33. Annex 2 included a Cost Benefit Analysis (**CBA**) **[30/1218]**. This compared the impact of the FCA's proposals against a "*do-nothing counterfactual*" only (i.e. what would happen in the market without any intervention) (§§6, 196-454). It did not consider the counterfactual of enabling *fuller* redress, for example by assessing the costs and benefits of a scheme providing all consumers with a remedy equivalent to the higher of commission repayment or an APR adjustment.

(c) Accompanying consultation documents

34. The Consultation Paper was accompanied by: (1) a Diagnostic Report (the **Diagnostic Report**) **[31/1442]**; (2) Technical Annex 1 (**TA1**) **[32/1523]**; (3) Technical Annex 2 (**TA2**) **[33/1676]**; (4) Technical Annex 3 (**TA3**) **[34/1715]**; and (5) Technical Annex 4 (**TA4**) **[35/1741]**.

[14] This is estimated to be around 16.8 million agreements when taking into account the updated consultation proposals, per Figure 1, page 12 of the Policy Statement.

(d) The datasets and analytical materials relied upon by the FCA

35. TA1 described the quantitative data which the FCA had gathered, namely: (i) loan level data (**LLD**); (ii) s.166 customer assessment form data / skilled person review and DCA casefile review data; (iii) "Data Drop 1" (**DD1**); (iv) "Data Drop 2" (**DD2**) / non-DCA case file review data; (v) credit reference agency data; (vi) motor finance commission monitoring surveys; (vii) cost of living consumer credit data; (viii) a motor finance lender survey; and (ix) a motor finance broker survey (see TA1, Table 1 and §§1.14-1.15 **[32/1526]**).

36. For the purposes of this challenge, the principal data sources are as follows:

(1) **LLD** was the FCA's central dataset for its analysis of loss. The FCA requested this material in September 2024, building on the sample collected during the 2019 review (§1.8). It comprised a 10% quasi-random sample of agreements from 18 motor finance lenders. Those 18 lenders were not randomly selected but were a self-selecting group because the FCA did not use its powers to compel lenders to participate. The 18 lenders are estimated to cover 61-65% of the regulated motor finance market in 2018-2021. The FCA accepted that LLD had two significant *"limitations*": (a) *"some lenders failed to comply with [the]time request (January 2018 – August 2024) so final sample is time-restricted to January 1 2019 – December 31 2022*";[15] and (b) "*Data may not be representative of the market*" **[32/1528]**.

(2) **DD1** was a separate, high-level dataset collected by the FCA in early 2025. It was constructed to provide agreement-level data from 34 lenders in the motor finance market, covering the period from 6 April 2007 to 25 October 2024. DD1 contained approximately 31 million agreements and the represented lenders accounted for around 89% of the lending market by reference to outstanding loan values in 2023. DD1 was used for the "*redress liability estimates*" and for the FCA's analysis on market impact (TA1, §§1.6, Tables 1-2; see also §§1.31-1.67).

(10) Responses

37. On 12 December 2025, CV submitted a detailed response to the Consultation Paper (the **CV Response**) **[36/1759]** supported by consumer and claimant research on the Scheme (see Stopford 1). The CV Response supported the making of a CRS in principle but objected to certain features of the FCA's proposed design and calibration of redress, emphasising that inter alia:

[15] It appears that the FCA did not request data before January 2018 and did not enforce non-compliance with requests.

(1) a scheme "*...will only succeed if consumers trust it to deliver fair outcomes… For consumers to perceive the scheme as fair, compensation levels must be set at an acceptable level that aligns closely with what a consumer could reasonably expect to achieve through litigation*" (p.10);

(2) the FCA was placing too much weight on Johnson (p.14) and limiting the full remedy to the most extreme cases would unfairly narrow the group eligible for the CRR (pp.34-35);

(3) whilst a rule-based APR adjustment could be a practical way to estimate financial loss, the proposed 17% APR reduction was fundamentally flawed and risked "*embedding a downward bias across the scheme*". CV explained that: (a) the APR adjustment was limited to 2019 – 2021 data (i.e. with LLD only covering the period *after* the FCA had begun publicly challenging the market and many firms had started to moderate their practices); (b) CV's research showed that "*consumers entering earlier* [pre-2019] *agreements were less aware, less confident, and more reliant on dealer guidance*" meaning that harmful pricing effects were greater before 2019; and (c) the FCA had not even attempted to use the available DD1 data to undertake directional validation or triangulation for the earlier years. CV urged the FCA to revisit the APR adjustment so that it reflected the true scale of historic harm (pp.3, 4 & 30-31); and

(4) the proposed rate of BoE base rate +1% would under-compensate consumers, contradicting decades of compensatory interest practice and being contrary to the ruling of the Competition Appeal Tribunal (**CAT**) in Kent v Apple [2025] CAT 67 (p.3). CV urged the FCA to apply an 8% compensatory interest rate.

38. Courmacs Legal Ltd also submitted a response to the Consultation Paper (the **Courmacs Response**) **[53/2928]**.

39. The Courmacs Response was accompanied by an expert report from a highly qualified economist and econometrician Dr Nils Gudat dated 12 December 2025 (**Gudat 1**) **[54/3014]**.

40. Gudat 1 identified a number of issues with the FCA's data. A key issue was that LLD only included data on motor finance agreements made between January 2019 and January 2021 (what he described as the **Temporal Representativeness Issue**).[16] Dr Gudat explained that this was not

[16] Other issues included: the **Lender Representativeness Issue** (i.e. LLD was not a random sample of loans across lenders but instead relied on lenders responding to an FCA data request); the **Control Group Issue** (i.e. the APR-17 modelling relied on a comparison with loans sold under a fixed fee commission structure, implicitly assuming that the APRs on those loans were unaffected by failures of lenders to comply with their legal duties before 2021); and the **Overhang Issue** (i.e. the results of the Difference-in-Difference analysis in the Consultation Paper pointed to an ongoing decline in motor finance APRs relative to personal loan APRs in the post-ban 2021 to 2023 period, pointing to an overhang effect of any inflation of APRs in the motor finance market post-DCA ban).

an appropriate period for estimating consumer harm across the entire period of the proposed scheme between 2007 – 2021, because: (1) the available evidence from the APR-17 modelling itself pointed to harm being *higher* in earlier periods; (2) the data in DD1 (the larger data set containing information on agreements since 2007) showed material variation in the difference in average APRs between DCA and non-DCA loans over time; and (3) known changes in lender behaviour over time made it likely that customer harm *reduced* from around 2015 and, in particular, a material drop off in APR differentials in 2019 and 2020.

(11) The Policy Statement

41. On 30 March 2026, the FCA published a Policy Statement on *Motor Finance Consumer Redress Scheme* (PS26/3) which confirmed that it was going ahead with a CRS (the **Policy Statement**) **[37/1800]**. The Policy Statement emphasised at §1.11: "*This is an opportunity to draw a line under the failings of the past and support a healthy motor finance market for the future. Everyone now needs to get behind it – payouts must not be delayed any longer*".

42. The FCA accepted a number of proposals which were supported by lenders (whose consultation responses have not yet been disclosed), including those relating to limitation, *de minimis*, exclusions and caps. As a consequence, the FCA's estimated redress figure was reduced from £8.2 billion to **£7.5 billion.**

43. The Policy Statement identified inter alia that:

    (1) The FCA was now implementing two schemes: one for agreements between 6 April 2007 and 31 March 2014 (**Scheme 1**) and one for agreements between 1 April 2014 and 1 November 2024 (**Scheme 2**) (§1.16). This was because some respondents had "*questioned*" the FCA's ability to consider agreements before 2014 (i.e. when it assumed responsibility for consumer credit) and would mean that "*if the earlier period is subject to legal challenge, redress for consumers with agreements from April shouldn't be delayed*" (§§1.15, 1.17). In other words, the bifurcation of the Scheme arose because of a concern about anticipated lender challenge rather than any assessment of loss.

    (2) The FCA had "*largely maintained*" the proposed redress calculation framework, with "*targeted refinements*" (§12.2).

    (3) CRR: This was retained but broadened from the Consultation Paper's "*very high commission + tie*" model to a "*very high commission + DCA or tie*" model (with the % thresholds for a very high commission arrangement, i.e. 50% of total cost of credit and 22.5% of the loan amount, remaining the same) (§1.26).

(4) AAR: The FCA moved from a single undifferentiated 17% APR adjustment model across the whole period to a *bifurcated* APR adjustment structure, applying a 21% APR adjustment for Scheme 1 (**APR-21**) but for Scheme 2 the same 17% APR adjustment (**APR-17**) as had been proposed in the Consultation Paper.

(5) Caps: In around 1 in 3 cases receiving the hybrid remedy, redress would be "*capped*" at the lowest of: 90% of commission plus interest; the realised total cost of credit adjusted to reflect a minimal cost of credit offered to only 5% of the market (excluding 0% APR deals); and the unadjusted realised total cost of credit calculated on a simpler basis (§1.32).

(6) Compensatory interest: Simple interest would be based on the annual average BoE base rate +1% (§1.34). However, there was to be a minimum floor of 3% in any year (§11.65). Moreover, and despite having been identified as being necessary to "*ensure fairness*" in the Consultation Paper, the FCA decided that consumers should no longer be allowed to seek a higher amount where they could show greater loss (§11.74).

44. On the same day as the Policy Statement, the FCA's Chief Executive issued media briefings which stated that it was "*really unlikely*" that consumers would get a better outcome by issuing litigation outside the Scheme and that consumers would be unable to use the Scheme if they chose to litigate **[41/2711]** and **[42/2716]**. Such statements, made at the highest level within the FCA, serve to underline the importance of ensuring that the FCA's scheme is correctly calibrated.

(12) The Rules

45. Appendix 1 to the Policy Statement published two instruments issued by the FCA's Board on 26 March 2026, namely: (1) Motor Finance Commission Consumer Redress Scheme (2014 – 2024); and (2) Motor Finance Commission Consumer Redress Scheme (2007 – 2024). These instruments promulgated the rules of the Scheme (the **Rules**) and are addressed below.

D. LEGAL FRAMEWORK

D1. CONSUMER REDRESS SCHEMES

(1) Introduction

46. CRSs under s.404 FSMA are *"market wide*" and "*multi-firm*"[17] redress schemes. As identified by the Court of Appeal in BlueCrest at [76], a s.404 scheme "*is intended to address a market wide or sector wide concern and enables investigatory obligations to be imposed on a collective basis irrespective of any grounds for believing that each and every firm which is subjected to it has been*

[17] FCA v BlueCrest Capital Management (UK) LLP [2025] 1 WLR 746 at [37].

in contravention of any requirement" and "*can be used to protect public confidence in sectors of the market as a whole*".

47. Consistently with the name of such schemes, the Explanatory Notes to the Financial Services Act 2010 (which introduced the current provisions in ss.404-404G FSMA) recognise that CRSs are "*[m]easures to protect consumers*".

48. Chapter 1 the FCA's Consumer Redress Schemes Sourcebook (**CONRED1**) **[65/3162]** contains general guidance on CRSs.

(2) Rule-making powers

49. Section 404 FSMA **[61/3075]** provides as follows:

> "*404. Consumer redress schemes*
>
> (1) This section applies if—
>
> (a) it appears to the FCA that there may have been a widespread or regular failure by relevant firms to comply with requirements applicable to the carrying on by them of any activity;
>
> (b) it appears to it that, as a result, consumers have suffered (or may suffer) loss or damage in respect of which, if they brought legal proceedings, a remedy or relief would be available in the proceedings; an
>
> (c) it considers that it is desirable to make rules for the purpose of securing that redress is made to the consumers in respect of the failure (having regard to other ways in which consumers may obtain redress).
>
> […]
>
> (3) The FCA may make rules requiring each relevant firm (or each relevant firm of a specified description) which has carried on the activity on or after the specified date to establish and operate a consumer redress scheme. …"

50. With regards to the issue of whether it is *desirable* to make rules under s.404(1)(c), CONRED 1.3.21G – 1.3.22G **[65/3170]** identifies that:

> "As a public body, the FCA will also have regard to general administrative law principles such as proportionality and reasonableness... Lastly, the FCA's operational objectives **(particularly its consumer protection objective)**, together with the regulatory principles in section 3B of the Act, will also be relevant. For example, the Act requires the FCA to have regard to the principle that a burden or restriction which is imposed on a person should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction."

51. Section 404A FSMA **[61/3077-3078]** imposes important limits on the design of a CRS:

> "*404A. Rules under s.404: supplementary*
>
> (1) Rules under section 404 may make provision—
>
> […]

(d) … as to the kinds of redress that are, or are not, to be made to consumers in specified descriptions of case and the way in which redress is to be determined in specified descriptions of case;

[…]

(4) The FCA must exercise the power conferred as a result of subsection (1)(d) so as to secure that, in relation to any description of case, the only kinds of redress to be made are those which it considers to be just in relation to that description of case.

(5) In acting under subsection (4), the FCA must have regard (among other things) to the nature and extent of the losses or damage in question. …"

(3) Challenges under s.404D

52. Section 404D FSMA **[61/3080]** creates a bespoke statutory review procedure. Any person may "*apply*" to the Tribunal for a review of "*any rules made under section 404*" (s.404D(1)) and for a quashing order (s.404D(2)(b)). Permission is required (s.404D(3)). An applicant must have "*sufficient interest*" in the matter (s.404D(4)). The "*general rule*" is that the Tribunal "*is to apply the principles applicable on an application for judicial review*" (s.404D(5)).

D2. THE FCA'S OBJECTIVES

53. In advancing its general functions, the FCA must "*so far as is reasonably possible*" act in a way which (a) is compatible with its "*strategic objective*"; and (2) advances "*one or more*" of its "*operational objectives*" (s.1B(1) FSMA) **[58/3066]**. The strategic objective is "*ensuring that the relevant markets function well*" (s.1B(2)). The operational objectives are consumer protection, integrity and competition (s.1B(3)).

54. Section 1C FSMA provides **[59/3069]**:

(1) The consumer protection objective is: securing an appropriate degree of protection for consumers.[18]

(2) In considering what degree of protection for consumers may be appropriate, the FCA must have regard to –

(a) the differing degrees of risk involved in different kinds of investment or other transaction;

(b) the differing degrees of experience and expertise that different consumers may have

(c) the needs that consumers may have for the timely provision of information and advice that is accurate and fit for purpose;

(d) the general principle that consumers should take responsibility for their decisions;

(e) the general principle that those providing regulated financial services should be expected to provide consumers with a level of care that is appropriate having

[18] The definition of consumer is set out in s.1G and is defined broadly to include persons who use, have used, or may use regulated financial services, and persons who have rights or interests deriving from such use.

regard to the degree of risk involved in relation to the investment or other transaction and the capabilities of the consumers in question;

(f) the differing expectations that consumers may have in relation to different kinds of investment or other transaction…"

55. Section 1D FSMA provides **[60/3072]**:

(1) The integrity objective is: protecting and enhancing the integrity of the UK financial system.

(2) The "integrity" of the UK financial system includes –

(a) its soundness, stability and resilience,

(b) its not being used for a purpose connected with financial crime,

(c) its not being affected by contraventions by persons of Article 14 (prohibition of insider dealing and of unlawful disclosure of inside information) or Article 15 (prohibition of market manipulation) of the market abuse regulation,

(d) the orderly operation of the financial markets, and

(e) the transparency of the price formation process in those markets.

E. STATEMENT OF GROUNDS

E1. INTRODUCTION

56. The application challenges the lawfulness of the FCA's rule-making in respect of the calculation of redress.

57. CV does not challenge in this application other aspects of the Scheme, including the decision to make a CRS in principle, the relevant period covered by the Scheme, or the various rules in Chapters 1, 2, 3, 5, 6, 7, 8, 9, 10 and 11 of Schemes 1 and 2 (including provisions relating to eligibility, liability, exclusions and caps). This ensures that the Scheme can proceed even if the implementation of the challenged redress provisions is stayed pending this challenge.

E2. GROUND 1: MARKET INTEGRITY

(1) The rules

58. This ground involves a challenge to the lawfulness of the rules on calculation and payment of redress in **CONRED 5.4** and **6.4**. Whilst the errors rendered unlawful the rule-making *throughout* those two chapters, CV seeks a quashing order limited to the specific rules within those chapters which are set out in Grounds 2 – 4 below.[19]

[19] CONRED 5.4.3R, 5.4.4R, 5.4.8R-5.4.16R, 5.4.34R-5.4.35R, 6.4.3.R, 6.4.4R, 6.4.8R-6.4.16R and 6.4.34R-6.4.35R.

(2) The FCA's approach

59. The FCA has made market integrity and viability central considerations in the design and calibration of the Scheme. For example:

(1) The consultation announcement in August 2025 recorded that "*[a]ny redress scheme must be fair to consumers who have lost out and ensure the integrity of the motor finance market*" **[28/1075]**;

(2) The Consultation Paper itself identified inter alia: "*An industry wide redress scheme is the best way to provide timely and fair redress to consumers while protecting the integrity of this vital market and providing certainty as quickly as possible for all involved*" (§1.3) **[30/1085]** and *"Measuring success: We estimate that the proposed scheme will achieve the following outcomes: 1. Complaints are resolved and fair redress paid in a timely manner, without unnecessary or disproportionate administrative costs to the Financial Ombudsman and firms. 2. Consumers in similar situations receive consistent outcomes. 3. The motor finance market continues to work well due to complaints being handled in an orderly, consistent and efficient way*" (§1.46) **[30/1092]**. When justifying its proposal on compensatory interest, the FCA explained that it "*strikes an appropriate balance between compensating consumers fairly and preventing undue financial strain on firms from the accumulation of interest on redress liabilities that may stretch back many years*" (§ 8.75) [**30/1179]**;

(3) The news release for the Policy Statement in March 2026 identified: "*The scheme will put £7.5 billion back in people's pockets with millions of claims settled in 2026 and the vast majority by the end of 2027. And it will provide firms with certainty and finality to support the long-term availability of competitively priced motor finance*" **[43/2719]**;

(4) The Policy Statement made market integrity a more explicit justification for the final Scheme, including: "*This is an opportunity to draw a line under the failings of the past and support a healthy motor finance market for the future. Everyone now needs to get behind it – payouts must not be delayed any longer*" (§1.11) **[37/1804]** and "*The final scheme is fair to consumers and proportionate for firms. It will put £7.5bn back in people's pockets, with millions of claims paid out this year and the vast majority settled by the end of 2027. And it will provide firms and investors with certainty and finality to support the long-term availability of competitively priced motor finance*" (§1.10) **[37/1804]**; and

(5) The FCA's recent LinkedIn announcement warning persons who may wish to challenge its decision-making to consider their position carefully, explaining "*[w]hat matters to us is*

getting fair compensation for consumers as quickly as possible and supporting a healthy motor finance market for the future" **[44/2723]**.

60. The FCA has approached market integrity by reference to *supply-side* considerations, including: product availability, competition between lenders, the viability and investability of firms, and the avoidance of prolonged uncertainty or disorderly market disruption. For example, and in addition to the extracts referred to above:

(1) Principle 7 of the Key Principles (i.e. those which framed the FCA's entire design of the Scheme) **[25/961]** defined market integrity in the following way:

> "In designing a redress scheme, we would be guided by principles, including… 7. Market integrity support the ongoing, long-term availability of high quality, competitively-priced motor finance."

(2) §1.40 of the Consultation Paper **[30/1091]**:

> "*Market Impact*… We have analysed the impact of firms' redress liabilities and the costs to firms of dealing with complaints under our proposed scheme on market integrity. We conclude there will continue to be good product availability and competition among lenders in the finance market for new and used vehicles…"

(3) §§1.47 – 1.54 of the Policy Statement **[37/1811-1812]**:

> "[... we said that any scheme should provide certainty, giving consumers and firms finality, and support the ongoing, long-term availability of high quality, competitively priced motor finance… Overall, we anticipate continued availability of motor finance and strong competition among lenders. Without a scheme, the impacts on access to motor finance and prices for consumers could be significantly higher with uncertainty continuing for many more years… Success measures… The scheme helps maintain market integrity by reducing protracted litigation."

(4) §11 of the Compatibility Statement at Annex 3 of the Policy Statement **[37/2155]**:

> "We also consider the rules advance our objective to protect and enhance the integrity of the UK financial system. In considering this, we are required to have regard to the matters listed in sections 1D(2)(a)-(e) FSMA. The rules help ensure that a very large number of disputes can be resolved quickly and proportionately, without the significant costs and risks involved in large numbers of court cases and/or complaints to the Financial Ombudsman. This in turn minimises the risk of disorderly or widespread firm failures, which could affect wider market integrity. By giving firms and the wider capital markets as much certainty as possible about the range of liabilities, the rules also aim to enable them to plan and invest for the future. […] we are encouraged that since we announced we would consult on a redress scheme, there has been a generally positive response in equity markets. […]"

61. In contrast to the FCA's emphasis on market integrity, consumer protection was afforded no importance. The concept was referred to only twice in the Policy Statement's chapter on redress, and even then only in relation to *settlement offers* (§§11.76, 11.81) and not redress calculation.

Whilst the Key Principles which guided the FCA's entire approach **[25/959]** identified market integrity as a guiding principle, consumer protection was not mentioned at all.

62. Bagci 1 sets out in greater detail the FCA's treatment of market integrity. Bagci 1 concludes "*it appears that the FCA did not conduct a broad and detailed market integrity analysis*" (§49) **[9/159]**. In particular, it did not undertake an assessment of the effects on market integrity of an alternative CRS offering higher redress to consumers: neither in relation to the impact on lenders' financial positions, nor the impact of differing levels of compensation on rebuilding consumer trust and confidence or influencing the future conduct of lenders.

(3) Submissions

(i) Introduction

63. The FCA's approach involved four public law errors which infected the exercise of its rule-making power under s.404 FSMA and ultimately resulted in the FCA calibrating down the quantum of redress to consumers, including in the ways addressed in Grounds 2 to 4 below.

(ii) Ground 1(a): Misconstruction of s.1D FSMA

64. **First**, the FCA erred in law by misconstruing the integrity objective in s.1D FSMA:

(1) Correctly construed, the integrity objective in s.1D is not limited to supply-side considerations and market impact but encompasses wider and important issues such as consumer confidence, deterrence, transparency, fairness and consistency in the application of regulatory standards. This is consistent with the plain meaning of "*integrity*" in s.1D. It is confirmed by the FCA's own published guidance on *Enhancing Market Integrity* **[16/665]**:

> "We make sure the UK's financial markets are honest and fair, where firms can operate with certainty and confidence.
>
> When markets work well, it benefits firms, individuals and society as a whole.
>
> One of our operational objectives is to protect and enhance the integrity of the UK financial system, and to make sure that markets are effective, efficient and reliable.
>
> High and clear standards build trust in financial services and help firms operate with certainty and confidence [„„]
>
> To be effective and reliable, markets must be supported by resilient infrastructure, with appropriate access and transparency to meet the needs of consumers, corporates and other wholesale clients that use them.
>
> We aim to make sure that:
>
> - Senior management are accountable for their capital markets activities, including principal and agency responsibilities.
> - There is a positive culture of identifying and managing conflicts of interest.
> - There is orderly resolution and return of client assets.

- Firms' business models, activities, controls and other behaviour maintain market trust and don't create or allow market abuse, systemic risk or financial crime.
- Market efficiency, cleanliness and resilience is delivered through transparency, surveillance and the supervision of infrastructures, as well as their main users.
- Firms put consumers' best interests at the heart of their businesses.

We step in early when we suspect potential harm, to protect consumers and market integrity."

(2) The FCA failed to construe the integrity objective in this way, focusing instead on supply-side considerations and market impact (Bagci 1 §§49-50 **[9/159-160]**). It therefore disabled itself from considering the benefits for market integrity (in its true, widest sense) of a scheme delivering greater redress to consumers, which would have increased consumer confidence in the financial services sector, fairness and consistency, and acted as a deterrent against future misconduct by firms, instead creating and/or exacerbating moral hazard and encouraging risk taking by firms (Bagci 1 §§157-165 **[9/211-214]**).

(iii) <u>Ground 1(b): Failure to make inquiries/take into account when assessing market integrity</u>

65. **Second**, the FCA failed to carry out sufficient inquiries to obtain information necessary for its assessment in respect of market integrity (in accordance with <u>Secretary of State for Education and Science v Tameside MBC</u> [1977] A.C. 1014) and/or failed to take into account material considerations in accordance with inter alia the principles identified in <u>R (DSD) v Parole Board</u> [2019] QB 285 at [134]-[164]:

(1) *Failure 1* (other factors): Having failed to construe s.1D correctly, the FCA failed properly to take into account factors which were material to its reliance on market integrity as a basis for moderating redress, including: consumer confidence, deterrence, transparency, fairness and consistency in the application of regulatory standards. In doing so, the FCA placed excessive reliance on the interests of lenders (and it is inferred HM Treasury's growth agenda) while disregarding or minimising the interests of consumers.

(2) *Failure 2* (fuller redress): As a corollary, the FCA failed to take into account the obvious possibility that fuller redress was likely to *advance* market integrity. Once the FCA invoked market integrity as a reason for limiting redress, it was bound to consider whether a scheme more closely approximating full, court-like redress would strengthen consumer confidence in the fairness of the market, reinforce deterrence against future misconduct, and demonstrate that systemic rule-breaking attracts consequences commensurate with the harm caused. Bagci 1 (§§49-50 **[9/159-160]**, 157-165 **[9/211-214]**) explains that a redress scheme is directed naturally to those dimensions of market integrity. Yet, the FCA's treatment of

market integrity focussed predominantly on supply-side concerns and failed to grapple with those countervailing and materially beneficial effects of fuller redress at all. Among other things, the FCA failed to grapple with likely consumer behaviour in response to a CRS offering less than full redress, which is likely to involve increased mistrust of the financial services industry (as well as large numbers of consumers resorting to court, which is a disbenefit even on the FCA's own supply-side conception of market integrity, increasing uncertainty and total costs for lenders) (Bagci 1 §§157-159 **[9/211-212]**; Stopford 1 §§54-60 **[6/82-83]**). Further, "*the FCA has not adequately considered that under-punishment may fail to deter future misconduct*", which itself is likely to result in material adverse economic effects (Bagci 1 §49(d) **[9/160]**; and see also §§160-165 **[9/213]**).

(3) *Failure 3* (evidence of adverse effects): Even on its limited construction of market integrity, the FCA did not have a sufficient evidential basis for concluding that fuller redress would create adverse effects on lender viability, investability, product availability or competitive continuity of a kind or scale capable of justifying reduced consumer compensation. Having conducted a CBA which only used a "do nothing" rather than "do more" counterfactual,[20] the FCA failed to identify and take into account:

(a) The likelihood that, even under more generous redress calibrations, the overwhelming majority of lenders were unlikely to be materially affected in terms of financial resilience. Bagci 1 (at Section V, see especially §81 **[9/180]**) identifies that all captive lenders and almost all bank lenders remain financially resilient even under the higher redress scenarios. Those lenders potentially placed under strain are confined to a small number of independent lenders only (which account for only 0.3% of the total £90 billion loan book considered in the report).

(b) Other material features of market structure bearing on whether fuller redress would produce market disruption. Bagci 1 (at Section VI **[9/181]**) identifies that the new and used vehicle markets are predominantly served by captive and bank lenders, while sub-prime is itself a niche segment. The report concludes that alternative schemes materially closer to full, court-like redress are unlikely significantly to affect lending volumes or higher market-wide APRs in the new and used car segments, and that any contraction in lending volumes is likely to be absorbed by unaffected lenders. Those features of the market (i.e. the prevalence of captive and bank lenders with group support, the limited role of independents in overall lending, and the scope for

[20] The failure to conduct an adequate CBA is a recognised ground for review: see e.g. R (WX) v Northamptonshire County Council [2018] EWHC 2178 at [111].

substitution and reallocation of demand) were all material to whether volume of lending and/or lenders' product pricing would be impaired.

(iv) Ground 1(c): Consumer protection and rights

66. **Third**, and having adopted an unlawful approach to market integrity and the interests of lenders, the FCA failed adequately to consider and promote the rights of consumers and the objective of consumer protection. Its failure operated at three levels.

67. The FCA contravened the principle in Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997:

(1) The FCA was exercising a statutory discretion. Section 404(3) FSMA provides that the FCA "*may*" make rules requiring firms to establish and operate such a scheme, and s.404A(1) confirms that rules under s.404 "*may*" make certain provisions including as to the kinds of redress and the way in which such redress is to be determined. That discretion must be exercised so as to promote, and not frustrate, the purpose for which that statutory discretion[21] (cf. the FCA's regulatory powers generally) is conferred.

(2) Correctly construed, the purpose for which that statutory discretion is conferred is to *protect* consumers through the provision of redress. It is a power to make rules for a *consumer redress* scheme. The relevant Explanatory Notes confirm that such schemes are "*[m]easures to protect consumers*".

(3) By attaching such prominence to market integrity (as narrowly construed) and the interests of lenders, the FCA lost sight of the statutory purpose of a redress scheme under s.404 FSMA and failed to exercise its power so as to further that purpose. It promoted the objective of protecting the existing market over, or at least in contradistinction to, the statutory objectives of consumer protection and providing fair redress.

68. The FCA failed to comply with its published guidance without good reason, contrary to the principle recognised in inter alia R (Hemmati) v SSHD [2019] 3 WLR 1156 at [50]:

(1) CONRED 1.3.22G provides that, when determining whether it is desirable to exercise the power under s.404 FSMA, "*the FCA's operational objectives (particularly its consumer*

[21] In the context of rule-making, see Secretary of State for Work and Pensions v Johnson [2020] EWCA Civ 778 at [105] (the *Padfield* principle "*is more appropriate where a specific exercise of a statutory power such as a rule-making power is challenged because it fails to promote the purpose for which the power was conferred*").

protection objective), together with the regulatory principles in section 3B of the Act, will also be relevant" (emphasis added) **[65/3170]**.

(2) The guidance emphasises the particular importance which must be attached to the consumer protection objective when exercising the power under s.404 FSMA. This chimes with the underlying statutory purpose of the provision.

(3) In adopting its approach to market integrity, the FCA failed to consider and comply with that guidance. When calibrating the proposed terms on redress, the FCA barely referenced consumer protection at all.

69. Finally, and despite the Consultation Paper and Policy Statement spanning hundreds of pages, the FCA (a public body under s.6 of the Human Rights Act 1998) conspicuously failed to consider *at all* the impact of its decision-making on the rights of consumers, including those under Article 6 ECHR, Article 8 ECHR and Article 1 to Protocol 1 of the ECHR. It is well-established that a failure to take into account fundamental rights is a standalone ground for setting aside a decision: see e.g. R v Immigration Officer, ex p. Quaquah [2000] HRLR 325; and R (Richards) v Pembrokeshire County Council [2004] EWCA Civ 1000 at [68]-[70].

E3. GROUND 2: COMMISSION REPAYMENT

(1) The rules

70. This ground involves a challenge to the lawfulness of the rules relating to the CRR including **CONRED 5.4.3R, 5.4.4R, 6.4.3.R** and **6.4.4R** and related provisions in **CONRED 5.4** and **6.4**.

71. The Policy Statement identifies that the CRR represents "*the upper bound of redress outcomes under the scheme*" (§1.30). The Consultation Paper acknowledged that it would result in "*significantly larger average redress payouts*" than the AAR (§8.35).

(2) The FCA's approach

72. The Consultation Paper identified that the CRR would be reserved for cases which "*align closely with Johnson*" (§8.8), namely cases where an unfair relationship had been determined and which had both of the following features: (1) commission equal to or greater than 50% of the total cost of credit and 22.5% of the loan amount (i.e. "*a very high commission*"); and (2) a TA.

73. §§8.34-8.42 and 8.61-8.63 of the Consultation Paper **[30/1169]** set out the rationale for this:

(1) It was necessary to have regard to the "*principles*" in Johnson as a "*key reference point*" (§8.34).

(2) Although courts would need to look at "*the specific facts of each case*", it was highly likely that courts would award the CRR in cases with similar circumstances to Johnson (§8.36).

(3) However, there was "*uncertainty*"/it was "*hard to predict*" how a county court might rule in s.140A cases which did not closely align with Johnson (§§8.37, 8.39). The courts "*may*" be more receptive to arguments of alternative remedies (§8.38), although it was "*important to recognise that the commission repayment remedy in Johnson will remain an important reference point and is likely to influence the perspectives of county court judges in cases involving not only high commission arrangements and tied arrangements, but also undisclosed DCAs*" (§8.39).

(4) "*Given this uncertainty*", the FCA proposed the hybrid remedy (§§8.39, 8.40).

(5) The hybrid remedy was "*just and fair*". It was "*consistent with our statutory objectives to have regard to the nature and extent of the loss or damage in question*" and provided "*clarity and certainty for consumers and firms*" (§8.40).

(6) The FCA did not "*consider it reasonable or proportionate*" to apply the CRR to cases that were "*less closely aligned*" with Johnson, since Johnson: (1) was based "*on a specific combination of features*"; and (2) "*did not establish that commission-plus-interest should be the default remedy in all motor finance cases where there was an unfair relationship arising from inadequate disclosure of certain commission-related features*" (§8.61).

(7) Extending the CRR to different cases would "*risk overcompensation*" and would not be grounded in evidence of actual consumer loss "*contrary to our statutory duty to take account of this*" (§8.62).

(8) Nevertheless, the FCA recognised that "*the commission repayment remedy is a simpler remedy than the hybrid remedy and could, therefore, deliver lower administrative costs if applied across the scheme*" (§8.63).

74. In the Policy Statement, the FCA retained the CRR although expanded it from a "*very high commission + tie*" model to a "*very high commission + DCA or tie*" model (with the % threshold remaining the same) (§1.26).

75. In this way, it can be seen that Johnson is a central feature of the proposed calculation for redress. It has been used as the basis for distinguishing between cases that should receive full commission repayment and cases that should not.

(3) Submissions

(i) Ground 2(a): Unlawful reliance on Johnson

76. **First**, the FCA misdirected itself as to the legal effect of Johnson and/or acted irrationally in treating the decision as the benchmark for full commission repayment:

(1) Johnson was a single, fact-sensitive decision under s.140A CCA which came before the Supreme Court due to the lender's decision to appeal and not as a test case. It is not authority for the proposition that full commission repayment is justified only or principally in cases exhibiting the same combination of features as Mr Johnson's case:

(a) The Supreme Court emphasised that the test of unfairness permits the court to take into account a "*very broad range of factors*" which is "*inevitably… a highly fact-sensitive exercise*".[22]

(b) The FCA's own submissions in Johnson confirmed this. At §69, the FCA submitted that s.140A "*requires a highly-fact sensitive assessment*". At §70, the FCA noted that the test of unfairness "*is fact-sensitive and allows the court to take into account a very broad range of factors*".

(c) The dicta in Johnson at [337] (on which the FCA relies) do not assist the FCA. The Court did not purport to lay down a general formula for remedy in future cases. It explained why, on the facts of *that* case, it would decide the remedy itself rather than remit the question.[23]

(2) No part of Johnson states or implies that a commission rate of 50% or more of the total cost of credit, or 22.5% of the loan amount, together with a TA, is a condition for commission repayment. Those were simply facts of the case. They were not laid down as legal criteria for redress or a basis to extract from Johnson a threshold for "*very high commission*" cases that take such cases out of the wider category of unfair relationships.

(3) Not only was Johnson highly fact-specific but it was not a "DCA case". Whilst the commission structure involved a DCA, the dealer had not in fact exercised the discretion to increase the interest rate and so it was not a factor relevant to the unfair relationship.

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[22] See also Plevin v Paragon Personal Finance Ltd [2014] Bus LR 1257 at [10] *("[i]t is not possible to state a precise or universal test for its application, which must depend on the court's judgment of all the relevant facts*") and Smith v Royal Bank of Scotland plc [2024] 1 All ER 97 at [22] ("*a very broad and holistic assessment*").

[23] The Court recorded that there were "*…no outstanding factual disputes in relation to this issue. This court is fully informed and has had the benefit of very detailed expert submissions on the relevant law and its application to the facts. We consider that we are as well placed as a District Judge would be to decide it*" [337(1)]. It noted that such a remission would be "*contrary to the overriding objective… It would be a disproportionate use of court time and the parties would incur further costs unnecessarily in this individual case of relatively low value*" [337(2)].

(4) The foregoing is fatal to the FCA's approach. A non-DCA decision which expressly disavows any "*precise or universal test*" cannot lawfully be treated as a scheme-wide benchmark for setting the limits of consumer redress. The FCA did not merely treat Johnson as a relevant authority. It was made the threshold for determining between those cases which would receive full commission repayment and those which would not.

(iii) Ground 2(b): Unlawful failure to apply and extend to other consumers

77. **Second**, the FCA acted irrationally in declining to apply and extend the CRR to unfair relationship cases which did not closely align with Johnson, including for the following reasons:

(1) It was clearly *open* to the FCA to do so, as the Supreme Court in Johnson did not purport to confine commission repayment to the facts of that case.

(2) It was unjust not to apply and extend the CRR to other cases:

(a) There is no obvious reason for applying fundamentally different remedial approaches to the same class of individuals, namely those who have been subject to unfair Relevant Arrangements in the motor finance sector (per Lord Hoffman in Matedeen v Pointu [1999] 1 A.C. 98: "*treating like cases alike and unlike cases differently is a general axiom of rational behaviour*").

(b) Although Johnson was fact-sensitive, the FCA recorded that the decision would "*remain an important reference point and is likely to influence the perspectives of county court judges in cases involving not only high commission arrangements and tied arrangements, but also undisclosed DCAs*" (Consultation Paper, §8.39). That was a factor which weighed strongly *in favour* of extending the AAR to other cases.

(c) To the extent that there was any "*uncertainty*" as to how the lower courts would determine redress pending further litigation, such uncertainty should have been resolved *in favour of* consumers and not against them.

(d) This would promote consumer protection and ensure consumer redress.

(e) Even applying the FCA's approach, this would promote *all* of its Key Principles: Comprehensiveness, Fairness, Certainty, Simplicity, Timeliness, Transparency and Market Integrity. Indeed, the Consultation Paper acknowledged at §8.63 that: "*the commission repayment remedy is a simpler remedy than the hybrid remedy and could, therefore, deliver lower administrative costs if applied across the scheme*".

E4. GROUND 3: APR ADJUSTMENT

(1) The rules

78. This ground concerns the lawfulness of the rules relating to the AAR, including in particular **CONRED 5.4.8R – 5.4.16R** and **CONRED 6.4.8R – 6.4.16R** and related provisions in **CONRED 5.4** and **6.4**.

(2) The FCA's approach

79. The Consultation Paper proposed that:

(1) In DCA cases, a single 17% APR adjustment across the whole scheme period would be imposed, such that:

- "Lenders would apply the 17% average APR difference identified in this analysis to the APR the consumer actually paid to produce a 'market-adjusted APR' to use as the basis for the calculation of redress. If deducting 17% from the APR produces a market-adjusted APR lower than the lowest APR at which the broker would have received additional commission under the DCA, that APR should be used as the market-adjusted APR.
- The difference between each payment made under the actual agreement and that which would have been paid under the reduced rate shows how much extra the consumer was overcharged in total.
- Lenders would apply compensatory interest to each overcharge resulting from the higher APR that they paid due to the inadequately disclosed DCA." (§8.25)

(2) The same APR 17% reduction should be used as the loss-based remedy not only in DCA cases, but also in cases involving the other Relevant Arrangements (i.e. including HCAs and TAs) (§8.29) to avoid "*unnecessarily increas[ing] the complexity of the scheme without clear benefit*" (§8.31).

(3) The proposed APR-17% derived from the FCA's "*APR-17*" analysis set out in TA1 and summarised above at §36(1). In summary, the FCA concluded that loans involving reducing DiC or scaled commission models carried borrowing costs around 17% higher than comparable flat-fee agreements, and that this differential could therefore be used as the basis for the standardised loss-based AAR (TA1, §2.49). LLD was limited to agreements originated between January 2019 and January 2021 with a final sample comprising approximately 230,000 agreements.

80. In the Policy Statement, the FCA retained the APR adjustment methodology but modified its application. Rather than applying a single 17% adjustment across the whole period, it adopted a

bifurcated structure: a 21% adjustment for Scheme 1 and a 17% adjustment for Scheme 2. The FCA explained at §§1.27-1.31:

> "For all other [non-Johnson] cases, consumers will receive the average of estimated loss and the commission paid, plus interest (the hybrid remedy). The estimated loss is based on economic analysis that shows there was a difference in the APR on DCA loans compared to those with flat fee arrangements. Following feedback, we have enhanced our analysis, incorporating more agreement data and covering a longer period of 2017-2021. We estimate average loss to be equivalent to an APR adjustment of 17% for this period. This adjustment will be applied to cases from 1 April 2014.
>
> Firms have advised that the availability of pre-2014 data is limited. Collecting such data risks delaying compensation for consumers and certainty for firms with no guarantee it would materially improve any estimate of loss.
>
> Feedback and supporting evidence from respondents indicates that more harmful forms of DCA were more prevalent in earlier years. Our own analysis, set out in Chapter 11, shows that differences between average DCA and non-DCA APRs were also larger during this period, indicating greater financial loss.
>
> We have set the APR adjustment at 21% for Scheme 1 cases. This is a bounded regulatory judgment representing the mid-point between lower and upper bounds of 17% and 26%. We consider 17% to be a conservative estimate that is likely to understate loss in earlier years. An APR adjustment of 26% is the point at which hybrid remedy redress amounts, on average, to commission repayment redress. Commission repayment is reserved for cases closely aligned with Johnson, and represents the upper bound of redress outcomes under the scheme. The difference between APR-17% and APR-21% results in an increase to average redress of £31 per agreement for pre 2014 cases.
>
> In the interests of operational simplicity, we are also using these APR adjustments as proxies for loss in the minority of cases that didn't involve a DCA, but involved high commission or a tie."

(3) Submissions

(i) Ground 3(a): Failure of inquiry and conscientious consideration

81. **First**, the FCA failed to carry out sufficient inquiries to obtain the information necessary for its assessment of loss in accordance with the Tameside duty and/or failed to subject the material arising from the consultation (including Gudat 1) to the level of conscientious consideration required in accordance with the "fourth Sedley principle" in R v Brent London Borough Council, ex p Gunning (1985) 84 LGR 168).[24] In particular, the FCA accepted that the level of consumer harm varied materially across time, but nevertheless fixed flat APR adjustment rates for two periods without any adequate evidential foundation or consideration for doing so:

[24] See also the analysis in R (British Academy of Songwriters, Composers and Authors) v Secretary of State for Business, Innovation and Skills [2015] Bus LR 1435 at [168]. The fourth Sedley principle reflects the broader principles that: (1) a decision must be based on a reasonable or rational view of the evidence it is said to be based upon; and (2) the outcome of the consultation must not be or appear to be predetermined.

(1) The AAR is central to redress under the Scheme, along with the CRR. It was accordingly incumbent on the FCA to ensure that it was sufficiently evidenced-based and calibrated after adequate consideration.

(2) In the Consultation Paper, APR-17 was derived from modelling based substantially on agreements made between January 2019 and January 2021. Yet that figure was initially proposed as the basis for loss-based redress across a far wider period commencing in 2007.

(3) In the Policy Statement, the FCA accepted (as it was bound to do so eventually) that consumer harm had been greater in earlier years and that a single 17% adjustment across Schemes 1 and 2 would not be appropriate. This was obvious from the data and which the FCA could have determined for itself prior to issuing the Consultation Paper.

(4) However, having identified the error in its approach, the FCA made only limited and inadequate additions to LLD. Whilst the enhanced modelling for Scheme 2 extended back to 2017, as set out in the second expert report of Dr Gudat (**Gudat 2**) **[8/97]**: (i) the additional 2017 data appears to have contributed only a relatively modest number of complete observations to the dataset; (ii) the "*limited*" 2018 data was in part constructed by substituting or imputing missing information using observations from later periods (in particular 2019), such that it may not constitute an independent or reliable evidential basis for assessing DCA effects in 2018 itself; and (iii) the inclusion of a voluntary submission from a single additional firm gives rise to an obvious risk of selection bias, since firms have visibility of the FCA's earlier model and therefore an incentive to disclose only data tending to reduce the apparent DCA effect. It appears the FCA accepted this limited, lender selected data without further inquiry as to whether other relevant data-sets existed.

(5) Crucially, the FCA failed to obtain evidence which was material to calculating the actual APR overcharges to consumers in each of the years 2007 to 2021.

    (a) The FCA failed to obtain the pre-2017 data. This data was crying out for further inquiry and conscientious consideration. It was clearly available, albeit that the pre-2014 data was said to be apparently "*limited*". It appears the FCA did not even attempt to obtain relevant data from lenders or question whether it was truly limited. Instead, and consistently with its desire to expedite its consultation process and make a final decision within weeks of its consultation, it adopted APR-21 by what it describes as a "*bounded regulatory judgment*"[25] which avoided having to make those inquiries

[25] Seemingly intended to mean a regulatory judgment made expressly without complete information.

(§1.28). In that way, the FCA purported to calibrate redress for Scheme 1 without obtaining data directly probative of the level of loss in that period.

(b) In addition to failing to make the underlying dataset temporally representative of the periods to which the rates were to be applied, there were other obvious matters requiring further inquiry, namely; (1) whether the lender sample was sufficiently representative of the market as a whole; (2) whether the chosen comparator, namely flat-fee or non-DCA agreements, constituted a proper benchmark for loss; (3) whether the effect of DCA arrangements varied materially by lender, broker, agreement type or year; and (4) whether the FCA's chosen APR adjustments could be reconciled with other material before it, including DD1 and other analysis included in TA1 suggesting materially greater harm.

(6) There is no justification for the FCA's failure to make those inquiries. The data was available and obtainable by the FCA, using its wide information-gathering powers. The FCA has been investigating the motor finance market since April 2017 and has been considering the establishment of a CRS from at least March 2025. Nor is the 'boot straps' logic that there is <u>now</u> simply no time to make such adequate data inquiries a satisfactory answer, given the likelihood of materially inadequate consumer redress.

(7) The modelling underpinning the AAR therefore remains materially incomplete, and the conclusions drawn from it, unstable.

(ii) <u>Ground 3(b): Irrationality in fixing APR-17 and APR-21</u>

82. **Second,** and in any event, the FCA acted irrationally in fixing APR-17 for Scheme 2 and APR-21 for Scheme 1.

83. As to APR-17, the irrationality lies in the FCA's use of a flat adjustment as a proxy for loss across Scheme 2 notwithstanding the following matters (as analysed in Gudat 2 §§3.1-3.9 **[8/108]**):

(1) The limited temporal coverage of LLD.

(2) The evidence, including the FCA's own material, which suggests that APR differentials varied materially over time, including because of changes in lender behaviour as a result of FCA engagement with the sector from 2015 and its investigation of the sector from 2017 onward.

(3) The obvious risk that a rate estimated principally from later years would understate harm in earlier years covered by Scheme 2.

(4) The FCA's own analysis pointing in that direction. Its annualised estimates for 2017-2020 showed materially different APR reductions across those years, ranging from around 24.2% in 2017 to 11.1% in 2020 (Table 11, Updated TA1 **[39/2541]**). That degree of variation was inherently difficult to reconcile with the use of a single flat 17% proxy across the whole of Scheme 2.

(5) Moreover, the broader DD1 material indicated larger raw APR differentials in earlier years and was plainly sufficient to indicate that the relationship between DCA structures and APR inflation was unlikely to have been constant over time. That, again, made it irrational simply to fix a single flat rate without more.

(6) The incomplete and potentially unrepresentative lender sample (given the FCA did not exercise its powers to compel firms to provide information and instead relied on a self-selected sample).

84. As to APR-21, the irrationality is more acute. The FCA expressly accepted that APR-17 likely understated loss in earlier years. Rather than obtaining materially better evidence of the degree of understatement, it adopted APR-21 as a rounded-down "*midpoint*" between 17% and 26% on the basis of a "*bounded regulatory judgment*". That was not a rational basis on which to quantify a loss-based remedy. As to this:

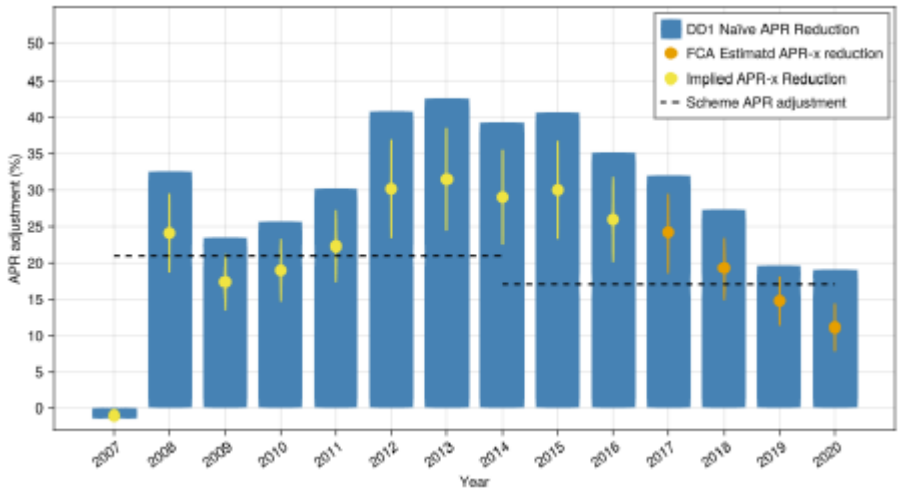
(1) The 26% figure is not an estimate of loss based on the relevant dataset (or, any dataset <u>at all</u>). It is instead rationalised as the point at which hybrid remedy redress would, on average, equate to CRR redress (§1.30) (although the FCA has not explained how the 26% figure was actually arrived at).

(2) In substance, therefore, APR-21 was fixed by averaging: (i) a lower figure (17%) which the FCA accepted was likely to understate loss; and (ii) an upper figure (26%) which served a different function altogether, namely convergence with a different remedy; and then rounding down the average from 21.5% to 21%.

(3) That is not a lawful substitute for an evidence-based assessment of the nature and extent of the losses or damage in question.

85. Nor did the FCA explain why any single flat rate within each scheme could rationally reflect the evident variation in harm across years and market conditions. The available evidence pointed to materially different levels of APR uplift over time, including materially higher uplifts in earlier years. The adoption of two uniform and arbitrary scheme-wide rates therefore created an obvious risk of systemic under-compensation which the FCA did not rationally resolve.

86. The extent of that under-compensation is illustrated in Figure 3 in Gudat 2 **[8/115]** (below) which shows that on average customers' APRs were adjusted upwards by significantly more than APR-21 in 2008 and 2011 to 2014, and by significantly more than APR-17 in 2014 to 2018.



87. If "true" APR adjustments (as estimated in the above table) were to be applied rather than the flat rates of APR-17 and APR-21, the unfairness of the commission cap would be exacerbated, particularly for the loan agreements entered into between 2007 and 2014, as set out in Gudat 2 §§3.8.4 to 3.8.17 and his Figure 5. This would be especially so for the consumers with longer-term loan agreements (who tend to be the most vulnerable). Therefore, should the rules challenged in this application be quashed, CV reserves the right to argue that the commission cap should be removed or amended.

(iii) <u>Ground 3(c): Error of law</u>

88. **Third**, the FCA erred in law and/or misdirected itself as to the task required by s.404A(4)-(5):

(1) The FCA was required under s.404A(4) and (5) FSMA to consider whether the level of interest was "*just*" and, when doing so, to have regard "*to the nature and extent of the losses or damage in question*".

(2) The FCA presented the AAR as a "*loss-based remedy*" intended to compensate consumers for financial harm by comparing the payments actually made under the agreement with those that would have been made under a counterfactual "*market-adjusted*" APR. The fixing of APR-17 and APR-21 was therefore not merely an exercise in broad discretionary scheme design. It was the fixing of the central percentages by which the FCA purported to discharge its obligation to have regard to the nature and extent of financial loss (Consultation Paper, pp 38 and 201-202, 213-214, 216; §§11.2, 11.7, 11.28, 11.50).

(3) To properly "*have regard*" to the nature and extent of losses or damage requires the FCA to take reasonable steps to inform itself of the level of loss and then to examine, in substance, whether the selected percentages were a sound and just proxy for that loss.

(4) The Policy Statement shows, however, that the FCA failed to do this in accordance with s.404A(5). Instead, it treated different considerations logically unconnected to loss as materially determinative. This included the desire to avoid delay to compensation, and to provide certainty and finality to, and minimising financial strain on, firms. In so doing, the FCA failed to have regard to the actual nature and extent of loss.

(5) The FCA therefore misdirected itself as to s.404A(4)-(5). The question was not what flat rates could most conveniently or expeditiously be adopted across Schemes 1 and 2. It was what rates could lawfully be justified as a just proxy for loss, having regard to the nature and extent of the losses or damage in question. That question was not addressed lawfully.

E5. GROUND 4: COMPENSATORY INTEREST

(1) The rules

89. This ground concerns the lawfulness of the rules governing compensatory interest, in particular **CONRED 5.4.34R – 5.4.35R** and **CONRED 6.4.34R – 6.4.35R** together with the related provisions in **CONRED 5.4** and **6.4**.

(2) The FCA's approach

(a) The Consultation Paper

90. The Consultation Paper proposed that redress should include an amount of interest to compensate consumers for being deprived of money as a result of the lender's actions.

91. The FCA proposed that interest should be calculated using a set rate of simple interest based on the annual average of the daily BoE base rate for that year + 1ppt (**BoE base rate + 1%**) and rounded up to the nearest quarter ppt (§8.74). The FCA considered that: (a) this "*strikes an appropriate balance between compensating consumers fairly and preventing undue financial strain on firms from the accumulation of interest on redress liabilities that may stretch back many years*" [**10/334]**; (b) the ability of the courts to award pre-judgment interest at 8% was discretionary and consumers "*must weigh the financial and other costs of litigation against the greater efficiency, reduced costs and accessibility of our proposed scheme*"; and (c) an "*appropriate commercial rate*" was awarded in Johnson (which was unlikely to be as high as 8%) (§§8.75 – 8.76) **[10/334]**.

92. However, this interest rate would be rebuttable by consumers (§§8.78 – 8.79) **[10/335]**:

> "To ensure fairness, we propose that the compensatory interest amount is rebuttable by consumers with specific evidence where they believe that interest at base rate plus 1ppt does not adequately compensate for their loss. This is consistent with the approach we took for the BSPS redress scheme. […] Allowing limited, evidence-based rebuttals by consumers allows for a consistent approach in the majority of cases, while acknowledging there may be differences in opportunity costs experienced by individuals."

93. The FCA acknowledged that the rebuttal mechanism "*may be particularly important for consumers in vulnerable circumstances, who may have experienced greater financial detriment from being deprived of funds*" (§5.16) **[30/1133]**.

(b) The Policy Statement

94. In the Policy Statement (and Rules), the FCA revised its position. Whilst the FCA maintained that BoE base rate + 1% "*typically struck an appropriate balance between compensating consumers fairly and preventing undue financial strain on firms*",[26] this is now subject to a floor of 3% in any year (the **3% floor**) (p.219) **[37/2018]**.[27]

95. In setting the 3% floor, the FCA explained that: (a) the Scheme spanned long periods when base rates had been "*abnormally low*" (sitting below 1% from March 2009 to May 2022) and were "*not closely linked to consumer borrowing costs*"; (b) if consumers needed borrowing because of having overpaid on a motor finance agreement, most would do so via *unsecured* borrowing channels and would have faced higher borrowing costs than BoE base rate + 1% (and "*[i]n reality, it is likely many consumers would borrow at even higher interest rates, given both the level of loss resulting from inadequate disclosure (likely to be significantly less than £10k, for most consumers) and the fact that many consumers, particularly those with weaker credit profiles, would be unlikely to qualify for these specific products*"); and (c) consumers might decide to take their case to court in the hope of achieving a higher rate than BoE base rate +1% (pp 220-221).

96. The FCA concluded (pp.222 – 223):

> "[…] we think 3% reasonably balances consideration of factors including what consumers may obtain in court for motor finance cases (based on the examples presented by both lenders and professional representatives set out above), the costs of borrowing over the scheme period (aligning with the lower end of the interest rates available for consumers borrowing an unsecured £10k personal loan, which as above, is likely to be a conservative estimate of consumer borrowing costs), and the need to strike an appropriate balance between what we think is reasonable for consumers individually and the collective impact of market-wide redress liabilities on the existence of a competitive motor finance market for the future. A significantly lower floor would risk higher numbers of consumers seeking redress via the courts in the hope of securing a better compensatory interest rate."

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[26] The FCA identified that firms had been "*largely supportive*" of this rate (§§11.62).

[27] Rounding up has also been removed (p.219).

97. As for the proposed rebuttal mechanism, the FCA decided to remove this completely.[28] In summary, this was because "*[c]onsumers would find it difficult to challenge and it would have imposed disproportionate operational costs on firms. Consumers now receive a minimum 3% interest in any year*" (p.18) and "*to minimise burden on both consumers and firms*" (§11.2). The FCA also explained at p.224 **[37/2023]**:

> "We recognise stakeholder concerns about the practicality of the rebuttal process and have decided to remove it from the final scheme. This change advances our scheme principles of certainty, simplicity and cost-effectiveness, and timeliness. The original approach would have required consumers to provide historical evidence, which many would find difficult. The need for subjective, individualised assessments of evidence could also lead to delays and inconsistent outcomes across firms. […] We recognise that removing the rebuttal may disadvantage some consumers, arguably particularly those who are vulnerable, who could have shown increased borrowing costs. Consumers can still pursue court action if they believe they are entitled to more, but we recognise the consumers who may have been most likely to benefit from this rebuttal are those likely to be least equipped to take legal action and for whom lower net redress after legal fees would be most impactful. However, a scheme of this scale needs to simplify complex legal and operational issues so that it is practical and can deliver consistent, timely redress. […] we are introducing a floor on compensatory interest, which will ensure most consumers receive higher compensatory interest payments than previously proposed (which we expect would have reduced the number of rebuttals attempted in any event)."

(3) Submissions

(i) Ground 4(a): Error law and irrelevant considerations / failure to take into account relevant considerations in setting the interest rate

98. **First**, the FCA erred in law and took into account irrelevant considerations/failed to take into account relevant considerations when setting the Scheme's interest rate:

(1) The FCA was required under s.404A(4) and (5) FSMA to consider whether the level of interest was "*just*" and, when doing so, to have regard "*to the nature and extent of the losses or damage in question*".

(2) The FCA did not in substance address that statutory question. The Policy Statement makes it clear that the prescribed rate was chosen because it "*struck an appropriate balance*" between the interests of consumers *and firms*, namely between: (1) "*compensating consumers fairly and preventing undue financial strain on firms*" (p.219); (2) "*accuracy, proportionality and operational simplicity*" (p.219); and (3) "*what we think is reasonable for consumers individually and the collective impact of market-wide redress liabilities on the existence of a competitive motor finance market for the future*" (p.223). The question of what

[28] The FCA identified that "*a number of respondents*" had disagreed with a rebuttal process (§11.69).

was "*just*" did not require or permit the FCA to consider issues of market impact/viability or operational simplicity.

(3) Moreover, by applying these counterbalancing factors *against* ensuring "*fair*" and "*reasonable*" awards for customers, the FCA also took into account irrelevant considerations in its assessment of what was "*just*".

(4) Further or alternatively, the FCA failed adequately to take into account and address relevant considerations, namely: (1) the fact that the chosen rate would undercompensate many customers (having accepted that: "*[i]n reality, it is likely many consumers would borrow at even higher interest rates, given both the level of loss resulting from inadequate disclosure (likely to be significantly less than £10k, for most consumers) and the fact that many consumers, particularly those with weaker credit profiles, would be unlikely to qualify for these specific products*"); (2) the fact that 8% interest was awarded in the IRHP and IPP redress schemes; (3) the fact that 8% interest was awarded in Clydesdale (a decision which the FCA consistently relies on to support its reasoning in other contexts); (4) the fact that c.6.3% interest was awarded by the Supreme Court in Johnson; and (5) the approach in Kent v Apple at [1062]-[1078] when awarding 8% interest, in which the CAT had regard to the interest rate that properly reflected the rate of borrowing for private individuals throughout the relevant period, including by reference to BoE data on unsecured loan rates **[56/3051]**.

(ii) Ground 4(b): Error of law and irrationality in removing the rebuttal mechanism

99. **Second**, the FCA's removal of the only internal mechanism by which greater actual loss might be reflected compounded its errors in respect of s.404A(4) FSMA, was irrational and (contrary to the FCA's position) prejudiced vulnerable consumers:

(1) As with its approach to setting the scheme-wide interest rate, the FCA failed to address the correct statutory test in s.404A(4)-(5). The question was whether closing off such a mechanism was "*just*" by reference to nature and extent of consumer loss. It was not whether its inclusion might be "*disproportionate operational costs on firms*", result in "*burden… on firms*" etc.

(2) Alternatively, it was irrational to remove the rebuttal mechanism:

(a) The significance of the change is not merely that a procedural safeguard has been withdrawn. It is that the final Scheme converts the prescribed standard rate into the conclusive measure of compensatory interest. Under the consultation proposal, the standard rate at least operated subject to the possibility that greater actual loss could

be shown and reflected. Under the Scheme, that possibility has been extinguished altogether. The result is that the Scheme no longer contains any mechanism by which the FCA's admitted possibility of under-compensation can be corrected.

(b) The practical effect is that consumers who may have suffered the most acute financial consequences from being deprived of money, and who are least likely to be able to obtain greater redress reflecting their loss through litigation, are required to accept a standardised rate which the FCA has accepted is not reflective of the actual loss sustained.

(c) Closing off the mechanism will (not may) prejudice the interests of vulnerable consumers. In seeking to insulate its position, the FCA has moved from acknowledging that the mechanism "*may be particularly important for consumers in vulnerable circumstances, who may have experienced greater financial detriment from being deprived of funds*" (Consultation Paper, §5.16 **[30/1132]**) to "*may disadvantage some consumers, arguably particularly those who are vulnerable*…" (Policy Statement, p.225). This was wrong (both irrational and erroneous in fact): on any view, the FCA's change of position will disadvantage vulnerable consumers. The FCA has paid no (let alone sufficient) regard to this fact.

(d) The FCA's mitigation that consumers can still pursue litigation outside the scheme is not a credible or coherent justification. Indeed, the FCA recognises that "*the consumers who may have been most likely to benefit from this rebuttal are those likely to be least equipped to take legal action and for whom lower net redress after legal fees would be most impactful*".

(e) As originally recognised by the FCA, the whole purpose of the rebuttal mechanism is "*[t]o ensure fairness*" (Consultation Paper, §8.78 **[30/1180]**). It follows that its removal achieves the opposite effect. Fairness must be the overriding consideration in determining whether a measure is just.

(iii) Ground 4(c): Failure to consider and comply with policy on vulnerable consumers

100. **Third**, the FCA failed to take into account and comply with the FCA's *Guidance on the fair treatment of vulnerable customers* (FG21/1) when setting out its final approach to compensatory interest in the Policy Statement, which provides materially at §1.2: "*[e]nsuring consumers have*

an appropriate degree of protection is central to what the FCA does. This includes protecting vulnerable consumers" **[47/2780]**. There was no good reason for doing so.

F. REMEDIES

101. CV applies for an order quashing the rules set out above under s.404D(2)(b) FSMA.

G. STAY

102. In light of the matters set out above, the Tribunal is invited to stay the operation of the redress provisions in CONRED 5.4 and 6.4 (but not the other provisions, including those for determining eligibility and liability) pending final determination of this application.

H. CONCLUSION

103. In light of the foregoing, the Tribunal is invited to grant permission, to allow the application and to quash the Rules on redress to the extent sought.

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3 Verulam Buildings

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