

BETWEEN:

MERCEDES-BENZ FINANCIAL SERVICES UK LIMITED

Applicant

– and –

THE FINANCIAL CONDUCT AUTHORITY

Respondent

GROUPS OF CHALLENGE ON BEHALF OF
MERCEDES-BENZ FINANCIAL SERVICES UK LIMITED

A. INTRODUCTION

1. On 30 March 2026 the Financial Conduct Authority (the ‘**FCA**’) published Policy Statement [PS26/3](#), “*Motor Finance Redress Scheme*” (‘**PS26/3**’). With effect from 31 March 2026, the FCA thereby implemented two consumer redress schemes to compensate motor finance customers said to have been treated unfairly during the period 2007-2024 (together, the ‘**Schemes**’):
 - (a) ‘**Scheme 1**’ covers motor finance credit agreements entered into between 6 April 2007 and 31 March 2014;
 - (b) ‘**Scheme 2**’ covers motor finance agreements entered into between 1 April 2014 and 1 November 2024.
2. The Schemes are respectively governed by the rules of CONRED 6 and 5 in the Handbook, made by the FCA pursuant to s.404 of the Financial Services and Markets Act 2000 (‘**FSMA**’).
3. As further described below Mercedes-Benz Financial Services UK Limited (‘**MBFS**’) is one of the largest ‘captive’ motor finance lenders in the United Kingdom. These Grounds outline the basis upon which it considers the Schemes’ rules to have been

made unlawfully and/or irrationally thereby entitling it to a quashing order under s.404D(2)(b) FSMA:

- (a) Scheme 1 is wholly *ultra vires*, the rules of CONRED 6 not securing redress for “consumers” within the meaning of s.404E FSMA.
- (b) In designing the Schemes, the FCA failed to have any (or any proper) regard to material differences in the business model and operation of “captive” versus “third-party” lenders in the market. In consequence, the rules of Schemes 1 and 2 are unlawful and/or irrational in that:
 - (i) they materially misapply the provisions of the Limitation Act 1980 (‘LA’);
 - (ii) they are based upon unevidenced assumptions of “loss and damage” for the purposes of s.404(1)(b) FSMA; and
 - (iii) the application of the APR adjustment calculation under the hybrid remedy risks unjustifiably and significantly overcompensating customers of captive lenders.

4. MBFS further seeks an interim order from the Tribunal suspending the operation of both Schemes pending resolution of these proceedings.

5. Accordingly, these Grounds are arranged across the following sections:

- B. BACKGROUND: CAPTIVE LENDER MODEL (p.2)
- C. GROUND 1: SCHEME 1 ULTRA VIRES (p.5)
- D. GROUND 2: LIMITATION (p.8)
- E. GROUND 3: LOSS OR DAMAGE (p.14)
- F. GROUND 4: REMEDY (p.19)
- G. APPLICATION FOR INTERIM SUSPENSION (p.22)

B. BACKGROUND: CAPTIVE LENDER MODEL

(i) About MBFS

6. MBFS was incorporated in February 1990 and sits as a wholly-owned subsidiary within the larger Mercedes-Benz (‘MB’) group of companies with its ultimate parent company being Mercedes-Benz AG (the ‘Manufacturer’). Mercedes-Benz UK Limited (‘MBUK’) is also a wholly-owned subsidiary of the Manufacturer. MBFS provides credit and, to a lesser extent, leasing facilities to individuals, small business and corporate customers

in the United Kingdom. It does so exclusively to support the commercial interests of the Manufacturer.

7. Since its incorporation, MBFS has written [REDACTED] contracts at an approximate value of [REDACTED]. In 2025, it entered into a total of around [REDACTED] agreements with a combined value of [REDACTED]. MBFS's current market share in the UK motor finance market for new cars is approximately [REDACTED].
8. Although used vehicles produced by the Manufacturer can be acquired from many retailers across the UK, MBFS's services have only ever been available through franchised MB retailers (the 'Retailers').¹ There are presently [REDACTED] such Retailers for passenger cars, operating across [REDACTED] individual sites in UK;² over the period [REDACTED] the number of Retailers remained relatively constant. Each Retailer site is a branded MB dealership, approved and monitored centrally by MBUK. The Retailers are subject to close oversight and monitoring, in particular by reference to customer satisfaction metrics rather than, for example, APR or volume targets.
9. There are a number of important features about the way in which MBFS operated throughout the period covered by the Schemes, as distinct from third-party lenders:
 - (a) **Restricted availability:** As set out above, MBFS finance has only ever been available through a restricted number of approved, franchised Retailers operating from specific branded sites. It has never operated via third-party dealers or brokers or offered finance for the purchase of new third-party marques.
 - (b) **Subvention:** Throughout the period covered by the Schemes, MB made widespread use of subvention, i.e. the subsidy of finance deals for customers. In particular, by reduced APRs and/or deposit contributions. Subvention was (and is) a tool used to increase vehicle affordability for customers and, in turn, boost sales volumes of MB vehicles. In the new car market, it was deployed as a centralised pricing mechanism, set and funded by MBUK, rather than as a feature of individual customer negotiations. Over the period of the Schemes just under [REDACTED] of MB's new car sales included some kind of subvention. In the used market, subvention was also used, albeit less commonly.

1

[REDACTED]

2

[REDACTED]

(c) **Centralised terms:** [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Thus, during sales campaign periods, finance contracts were written at [REDACTED]. In the used market, [REDACTED]
[REDACTED]
[REDACTED].

10. The above features collectively reflect MBFS’s core objective: to facilitate and promote the MB brand and the acquisition of MB vehicles in the UK. Unlike third-party lenders, beyond supporting the wider interests of the MB group, [REDACTED]
[REDACTED] There was no widespread or regular failure by MBFS to comply with the requirements applicable to it in financing the acquisition of MB vehicles.

(ii) Relevance to the Schemes

11. MBFS does not represent any wider interest in this litigation. Nonetheless it understands that captive lenders in the market over the period of the Schemes operated in a broadly similar way in furtherance of comparable commercial objectives. Certainly, the captive model was and remains a distinct offering within the market for consumers, as compared to that of third-party lenders.

12. The above matters thus serve to illustrate the very real differences that existed between third-party and captive lenders in the motor finance market over the period covered by the Schemes. That being so, the FCA’s introduction of “an industry-wide scheme”³ is necessarily rife with difficulty. Despite the value and scope of the Schemes far outstripping any prior consumer redress scheme,⁴ the FCA has failed to have any proper

³ PS26/3, ¶1.1.

⁴ For example, the [Arch Cru Consumer Redress Scheme](#) (CONRED 2) related to investments in a single set of funds with estimated total redress due of £31.47m. Likewise, the [British Steel Consumer Redress Scheme](#) (CONRED 4) concerned individuals enrolled in one employee pension scheme which, by July 2024, had paid £106m to 1,870 former scheme members.

regard to the detailed operation of the market. It has instead placed overmuch emphasis on speed and operational simplicity.

13. The result is that the rules of the Schemes treat the market as a monolithic bloc which, at its core, had certain features which operated in a manner harmful to consumers. The FCA has thereby introduced the Schemes without any proper regard to (i) the extent to which those harms were universal across all firms and segments of the market, and (ii) if not, how and when such harms posed the greatest risk.
14. Put another way, the Schemes fail to take any account of the complexity and segmentation of the market over the 17-year period. The FCA has itself noted that between 2007-2024: approximately 32.5m motor finance agreements were written;⁵ by 57 or more firms operating in the market;⁶ and via innumerable intermediaries. Despite having both noted that captive lenders represent the largest segment of the market both by volume and value⁷ and undertaken an analysis of their particular characteristics,⁸ the FCA afforded no proper weight to the captive/third-party distinction. It instead proceeded on the narrow assumption that the distinction was relevant only to a borrower's likely knowledge of 'tied arrangements'.⁹ The import of this failure for the final shape of the Schemes is elaborated upon further in respect of Grounds 2 to 4, below.

C. GROUND 1: SCHEME 1 ULTRA VIRES

15. The FCA may enact a consumer redress scheme only if "*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*", as a result of which "*consumers have suffered (or may suffer) loss or damage*" which they could recover in legal proceedings. Where those conditions are met, the FCA may, if it considers it desirable, "*make rules for the purpose of securing that redress is made to the consumers in respect of the failure...*": s.404(1)(a)-(c).

⁵ Consultation Paper [CP25/27](#) ('**CP25/27**'), ¶1.3.

⁶ FCA-commissioned report: [Market impact assessment on cost of capital and investment in the motor finance market](#) (6 October 2025), p.5.

⁷ *Ibid.*

⁸ E.g. [Technical Annex 2](#) to CP25/27, ¶159 *et seq.*

⁹ PS26/3, ¶15.68.

16. In this context, the phrase “*relevant firms*” means “*authorised persons*”: s.404(2)(a). “*Consumers*” includes those who have “*used, or may have contemplated using, any of the services within subsection (2)*”: s.404E(1)(a). Insofar as relevant, the services so defined are those “*provided by... authorised persons in carrying on regulated activities*”: s.404E(2)(a).
17. Thus, in order for the FCA to engage its statutory power to establish a consumer redress scheme, it must be satisfied that entry into the motor finance agreements in question constituted a “*regulated activity*” carried on at the material time by an “*authorised person*”.
18. In turn, in this context the terms “*regulated activity*” and “*authorised person*” have the following statutory meanings. A “*regulated activity*” is one “*of a specified kind which is carried on by way of business*” and “*relates to an investment of a specified kind*”: s.22(1) FSMA. Activities are specified for that purpose by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (**‘RAO’**): s.22(5) FSMA and art. 4 RAO. An “*authorised person*” is one who either “*has a Part 4A permission to carry on one or more regulated activities*”, or who “*is otherwise authorised by a provision of, or made under, [FSMA]*”: s.31(1)-(2) FSMA. The concept of an “*authorised person*” is, therefore, tethered to that of a “*regulated activity*”.
19. Here, the agreements within Scheme 1 were neither made by “*relevant firms*” nor entered into by “*consumers*” as defined. Thus, the FCA had no statutory basis upon which to make rules seeking to secure redress by way of a consumer redress scheme under s.404. In particular:
 - (a) Art. 60B RAO relates to regulated credit agreements. It was introduced into the RAO by way of amendment on 1 April 2014 to reflect the transfer of the regulation of consumer credit from the Office of Fair Trading (**‘OFT’**) to the FCA.¹⁰ It specifies two activities relating to regulated credit agreements: “*entering into a regulated credit agreement as lender*” and “*to exercise, or have the right to exercise, the lender’s rights and duties under a regulated credit agreement*”: art. 60B(1)-(2).

¹⁰ Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No. 2) Order 2013 (SI 2013/1881) (the **‘2013 Amendment Order’**), art. 6; Explanatory Memorandum, ¶7.

- (b) By virtue of an amendment made on 20 March 2016,¹¹ a “*regulated credit agreement*” includes certain agreements made prior to 1 April 2014: art. 60B(3). However, in conjunction with the implementation of the EU Mortgage Credit Directive (2014/17/EU), the amendment served merely to clarify that agreements made before 1 April 2014 nonetheless fell within the art. 60B(2) regulated activity (having/exercising a lender’s rights). It did not retrospectively make the act of entering into those agreements a regulated activity for the purposes of art. 60B(1) RAO.
- (c) Thus, as made clear by ¶7.4 of the Explanatory Memorandum to the statutory instrument implementing the 2016 amendments: “*the regulatory status of consumer credit agreements... entered into before April 2014 is determined primarily by reference to the regulatory status of such agreements under the regime for the regulation of consumer credit before the transfer of regulatory oversight to the FCA in April 2014...*”
- (d) Accordingly, since article 60B RAO did not exist in law prior to 1 April 2014, no firm can have been carrying on such a regulated activity. Nor, in turn, can they have been providing such services for the purposes of s.404E(1)-(2) FSMA.
- (e) Likewise, firms entering into such agreements prior to 1 April 2014 were not “*authorised persons*” within the meaning of section 31 FSMA. The concept of an “*authorised person*” simply did not exist in relation to consumer credit lending prior to 1 April 2014. Lenders were, instead, “licensed” for that purpose by the OFT.¹² The distinction between the former licensing regime and the current authorisation regime is shown by the “interim permissions” regime put in place to transfer firms from one to the other over the period 2013-16. See ***Firm A v The Financial Conduct Authority*** [2016] UKUT 18 (TCC), [7]-[9].¹³
- (f) Thus, Scheme 1, which exclusively covers agreements originated prior to 1 April 2014, relates neither to “*relevant firms*” nor to “*consumers*”.

¹¹ Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2016 (SI 2016/392), art. 2(10)(a).

¹² Consumer Credit Act 1974, s.21(1) (repealed from 1 April 2014).

¹³ See also ¶7.6 of the Explanatory Memorandum to 2013 Amendment Order.

20. The FCA has therefore acted outside the scope of its statutory remit under s.404 FSMA in bringing Scheme 1 forward. The position is confirmed by 2010 guidance on s.404 produced by the Financial Services Authority (the ‘**2010 Guidance**’): “**a consumer redress scheme cannot apply to services that were provided before the activity in question became regulated by the [FCA]...**”¹⁴ Indeed, in justifying the division between the Schemes as being to isolate any legal challenge in respect of pre-1 April 2014 agreements, the FCA has tacitly accepted its vulnerability on this point: PS26/3, ¶1.17.
21. Although the issue could be resolved by application to HM Treasury under s.404G to amend the definition of “consumer”, the FCA has refused to do so. It has instead asserted its “*power to introduce a scheme which covers the entire period of 2007-2024.*” Since it effectively amounts to an assertion of entitlement to act unlawfully, there can be no rational basis for such refusal to apply to HM Treasury. See PS26/3, ¶2.28 (p.36).

D. GROUND 2: LIMITATION

22. As considered further below in relation to Ground 3, it is a pre-requisite to the Schemes that the FCA is reasonably satisfied that loss or damage has been suffered by consumers in respect of which a remedy or relief would be available in legal proceedings: s.404(1)(b). Necessarily, if a claim is time-barred that would not be the case. Thus, a “*consumer redress scheme cannot extend normal limitation periods.*”¹⁵
23. Limitation is a hard-edged question of law: either the rules governing the Schemes have properly applied the law relating to limitation or they have not. There is no scope to deviate from the strict legal position, as the FCA itself acknowledges.¹⁶

(i) The FCA’s approach

24. The rules governing both Scheme 1 and Scheme 2 treat limitation as a condition of entry into the Schemes. Thus, a “*scheme case*” is one in relation to which:

¹⁴ [Guidance Note GN 10](#), “Consumer Redress Schemes”, ¶9.4 (original emphasis).

¹⁵ 2010 Guidance, ¶16.4 (original emphasis).

¹⁶ “*In accordance with our powers... we can only include in the scope of the scheme cases where the limitation for bringing a legal claim has not expired before the scheme rules are made*”: PS26/3, ¶4.24 (p.70).

the lender determines, after having regard to the rules and guidance in CON-RED... that if the consumer brought a claim falling within the subject matter of the scheme against the lender under section 140A of the CCA:

(i) the limitation period (in England and Wales, and Northern Ireland) would not have expired before the rules creating the scheme were made; or

(ii) the claim would not be precluded by a period of prescription (in Scotland).¹⁷

25. MBFS restricts its challenge to the law of limitation as it applies in England and Wales. That being so, the approach taken by the rules offering guidance as to whether or not the limitation period will have expired¹⁸ provide, in summary, as follows:

- (a) The primary limitation period for an unfair relationship ('UR') claim brought under s.140A of the Consumer Credit Act 1974 ('CCA') seeking a monetary remedy is 6 years from the end of the credit relationship;
- (b) Under s.32(1)(b) LA, if "any fact relevant to a claimant's right of action has been deliberately concealed" the running of time is delayed "until the claimant has discovered the concealment or could with reasonable diligence" have done so;
- (c) Where there has been "inadequate disclosure" of any "relevant arrangement", facts relevant to a claimant's cause of action¹⁹ are "likely to have been deliberately concealed, and the claimant is likely to be able to show that they could not with reasonable diligence have discovered them, to the extent that" certain information "was not clearly and prominently provided" as required by the rules of the Schemes;²⁰
- (d) It is "unlikely" that "the bare fact, or possibility, of commission being payable... will be sufficient for the defendant to argue either that there has not been any deliberate concealment... or that the claimant could with reasonable diligence have discovered all such relevant facts";

¹⁷ CONRED 5.1.17R(1)(g) / 6.1.17R(1)(g).

¹⁸ CONRED 5.1.21G / 6.1.21G.

¹⁹ Having regard to CONRED 5.3.10R(1) / 6.3.10R(1).

²⁰ In particular, CONRED 5.3.10R(2)-(4) / 6.3.10R(2)-(4).

- (e) However, a firm is likely to be able to establish discovery with reasonable diligence in respect of a case that “*relates solely to a high commission arrangement*” and where there was “*clear and prominent disclosure... of the bare fact of, or possibility of, commission being payable... but not of the amount...*”; and
- (f) Amongst other matters,²¹ the issue of “*clear and prominent*” disclosure is likely to turn on whether information “*was presented, in relation to other information provided at the same time, in such a way that it... was likely to have drawn the attention of the average customer to whom it was directed.*”²²
26. The analysis and reasoning underlying the relevant rules is set out in PS26/3 under the heading “*Civil limitation*”. The starting presumption was that s.32(1)(b) LA will apply to extend time for cases brought outside the ordinary 6-year period. Thus, “*it is for firms to demonstrate that the limitation period will not have been extended*”: ¶4.24 (p.69). Despite the fact that “*in civil proceedings, the burden of demonstrating deliberate concealment... would fall on the consumer*” the FCA justified its reversal of the burden on the basis that, having regard to “*evidence of market-wide non-disclosure*” and mindful of “*the substantial practical difficulties for consumers to evidence the matters pertinent to a section 32(1)(b) LA analysis as part of a scheme*”, a reversal of the burden was “*the best way to operationalise limitation assessment while also maintaining clarity, consistency and certainty*”: ¶4.24 (p.73).
27. Further, although the FCA acknowledged that s.32 LA and s.140A CCA “*are not the same*”, that “*does not mean that there will be significant divergence of the facts which are relevant to the application of those tests... the same fact pattern may well satisfy both tests.*” As a result “*clear and prominent*” disclosure remains a relevant metric for adequate disclosure under s.140A CCA, as well as both deliberate concealment and reasonable diligence under s.32(1)(b): ¶4.24 (p.71).
28. It may also be noted that, in considering the application of the LA to the Schemes, the FCA appears to have had no regard to the Supreme Court’s recent decision in **Zedra Trust Company (Jersey) Limited v THG Plc** [2026] 2 WLR 479. The Court in **Zedra** concluded, in relation to ss.994-96 of the Companies Act 2006, that no limitation period applied. Therefore, that the proper approach was to consider, on equitable principles, whether such a claim was “stale”. Crucially, however, at [117] the Court disapproved

²¹ See CONRED 5.3.11G and 6.3.11G.

²² CONRED 5.3.10R(2) & 6.3.10R(2).

(albeit without formally overruling it) the Court of Appeal's decision in **Rahman v Sterling Credit Limited** [2011] 1 WLR 497, from which derives the limitation analysis under ss.140A-C CCA now applied by the Schemes' rules.²³ Of itself, the FCA's apparent failure to consider **Zedra** might be said to constitute an error of approach.

(ii) The FCA's errors

29. The approach taken to limitation by the Schemes' rules derive from two interpretive errors in relation to s.32(1)(b) LA. They: (i) wrongly conflate the distinct statutory questions of deliberate concealment and reasonable diligence with the UR assessment under s.140A CCA; and (ii) impermissibly reverse the burden of proof under s.32(1)(b) LA. The rules therefore proceed upon error of law and, accordingly, are liable to be quashed.²⁴

Conflation of deliberate concealment, reasonable diligence & unfairness

30. This error of interpretation is evident from two particular provisions, both in materially identical terms: CONRED 5.1.21G(5) and 6.1.21G(5).

31. By way of illustration, the rule in respect of Scheme 2 in CONRED 5 is as follows:

Subject to (7), the fact or facts relevant to a claimant's right of action are likely to have been deliberately concealed, and the claimant is likely to be able to show that they could not with reasonable diligence have discovered them, to the extent that the information in CONRED 5.3.10R(1)(a) to (c), as applicable, was not clearly and prominently provided in the manner described in CONRED 5.3.10R(2) to (4).

32. CONRED 5.3.10R(1)(a)-(c), cross-referenced therein, defines the circumstances in which there will have "been adequate disclosure of a relevant arrangement" such that there will have been no UR. For each relevant arrangement, it requires there to have been "clear and prominent" disclosure of:

²³ By virtue of the first-instance decision of Mr George Leggatt QC (as he then was) in **Patel v Patel** [2009] CTLCLC 249.

²⁴ See **R (o.a.o. Finch) v Surrey County Council** [2024] Env LR 3, [55].

- (a) **DCAs:** “*the fact that commission was payable*” and “*sufficient information about the discretionary commission arrangement for the customer to understand that the credit broker was permitted to select the interest rate provided for under the motor finance agreement in a way that affected the amount of commission that would be received by the credit broker.*”²⁵
- (b) **High commission arrangements:** “*the fact and amount of the commission payable to the credit broker in respect of the customer’s agreement*” either in “*monetary terms*” or by explanation of the method of calculation.²⁶
- (c) **Tied arrangements:** “*the fact of the tied arrangement and sufficient information about the arrangement for the customer to understand that the credit broker*” would either “*introduce customers exclusively*” to the lender or give the lender a right of first refusal.²⁷

33. Thus, the approach taken by the FCA in the Schemes’ rules means that:

- (a) No distinction is made between the two-stage enquiry required by s.32(1)(b) LA: (i) whether there has been deliberate concealment, and (ii) whether the facts could have been discovered with reasonable diligence. The same test of “*clear and prominent disclosure*” applies at both stages, with the result that if a firm is unable to rebut the presumption of deliberate concealment it will also be unable to show the consumer could with reasonable diligence have discovered the fact(s) in question. Thus, the statutory test is rendered meaningless.
- (b) At least so far as DCA and tied arrangements are concerned, no distinction is drawn between “inadequate disclosure” for the purposes of liability and “deliberate concealment” for the purposes of limitation. The result is to denude the word “*deliberately*” in s.32(1)(b) LA of any effect. However, as confirmed on high authority, it imports an element of intentionality; mere negligence and recklessness do not suffice: **Potter v Canada Square Operations Limited** [2023] AC 679, [108]. Plainly the same cannot be said for disclosure which is, in the language of the Schemes’ rules, merely “*inadequate*” for the purposes of an assessment under s.140A CCA.

²⁵ CONRED 5.3.10R(1)(a) / 6.3.10R(1)(a).

²⁶ CONRED 5.3.10R(1)(b) / 6.2.10R(1)(b).

²⁷ CONRED 5.3.10R(1)(c) / 5.3.10R(1)(c).

- (c) In consequence, any limitation defence is rendered otiose since a firm will only be able to rely upon it if it can also establish disclosure sufficient to show there was no wrongdoing in the first place.
34. For the avoidance of doubt, the Supreme Court's comment in ***Johnson v FirstRand Bank Limited (London Branch)*** [2025] 3 WLR 423, at [333], that the "*omission of a key fact was a suppression of the truth*" does not support the approach taken by the Schemes' rules. Any such suggestion would place far more weight upon those words than they can possibly bear. Read in context, it is clear that they were limited to the facts of ***Johnson***, where the relevant documentation was found to have been "*clearly intended to create a false impression*" as to the broker's offering. There is nothing to suggest that, in making the comment, the Court intended it as a general statement of principle for the purposes of s.140A CCA, still less for the purposes of s.32(1)(b) LA.

The burden of proof

35. It is well-established that, where s.32 LA is invoked, it is for the claimant to show both that (i) there was deliberate concealment, and (ii) he/she could not, with reasonable diligence, have discovered the relevant matters earlier: ***Cave v Robinson Jarvis & Rolf*** [2003] 1 AC 384, [60].
36. However, the rules of both Scheme 1 and Scheme 2 proceed on the express basis that there will have been deliberate concealment which could not have been discovered with reasonable diligence unless the lender can show otherwise. Thus, a case is presumed to be in time unless and until a firm determines otherwise. By contrast, the approach under the LA is that, where the relevant limitation period has expired, a claimant's right to a remedy is barred unless he is able to invoke a relevant exception: ***R (McIntyre) v Gentoo Group Limited*** [2010] EWHC 5 (Admin), [62].
37. The reversal of the burden of proof under s.32(1)(b) is not a matter of mere procedural convenience as suggested by the FCA in PS26/3. It means that certain cases will be brought within the Schemes and ultimately awarded redress in circumstances where any loss or damage as might have been suffered by the consumer would not be remediable in court proceedings. In other words, in respect of those cases, the statutory threshold for a consumer redress scheme under s.404(1)(b) will not be satisfied.

38. The position is compounded by the very restrictive approach in the rules as to what will suffice to disapply s.32(1)(b), as addressed above. In the ordinary course, a claimant who invokes s.32(1)(b) LA in court proceedings is likely to be cross-examined about what they could, with reasonable diligence, have discovered when, and a wide range of factors might properly be explored. By contrast, the Schemes' rules not only proceed from the erroneous assumption that claims will not be time-barred, they then only allow firms to rebut that assumption on a far narrower basis than would be considered in litigation.
39. Proceeding on the assumption that the unfairness arises because consumers were deprived of an opportunity to shop around to achieve a lower cost of finance,²⁸ the FCA's approach to limitation is more difficult still in the context of the captive lender model. Standard finance terms were widely used as part of national sales campaigns, such that a consumer would know what APR they would pay. Moreover, the franchised dealer model and widespread use of subvention meant that shopping around would not produce any better result in terms of cost of finance for a particular vehicle.
40. In those circumstances, it is difficult to see what fact relevant to a consumer's claim could be said to have been "*deliberately concealed*" from him/her. Nonetheless, save in the narrow circumstances set out above, the rules of the Schemes require a captive lender to conclude there had been deliberate concealment for the purposes of s.32(1)(b) LA. The Schemes' rules in this regard proceed on the erroneous basis that the captive model led to a "*widespread or regular failure*" of any material disclosure to the consumer.

E. GROUND 3: LOSS OR DAMAGE

(i) The statutory threshold

41. The FCA may make rules for the purpose of securing redress to consumers only if satisfied that there may have been a "*widespread or regular failure*" by firms to comply with applicable requirements in consequence of which "*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*": s.404(1)(b) FSMA. The provision requires the FCA to be reasonably satisfied as to three matters: (1) "*loss or*

²⁸ E.g. CP25/27, ¶1.5.

damage” has been suffered; (2) it is “as a result” of the failure(s) identified; and (3) “a remedy or relief would be available” in legal proceedings.

42. Thus, s.404 is concerned with legal liability “rather than a subjective assessment by the [FCA] of the reasonableness of a firm’s actions”. Moreover, it is not entitled “**to impose higher requirements on firms retrospectively**. The requirements to be applied... will be those in force at the time of the relevant act or omission, not current or later requirements.”²⁹

(ii) The FCA’s approach

43. The FCA’s analysis for both Schemes 1 and 2 is as follows:

- (a) Its starting point is that inadequate disclosure of any single relevant arrangement deprives the consumer of an opportunity to shop around: CP25/27, ¶3.25. No particular statistical or other evidence was cited in support of this view at consultation stage and, it appears, no further analysis was undertaken in advance of publication of the Schemes’ rules.
- (b) In addition to hypothetical lost opportunities, the FCA expressly relies upon non-financial matters as relevant to the assessment under s.404(1)(b), including the consumer receiving an “*unsuitable product*” and an overarching “*erosion of trust*”: Technical Annex 1 to CP25/27, ¶2.10.
- (c) In respect of DCAs it relied upon an analysis of approximately 230,000 agreements entered into “*between January 2019 and January 2021*”³⁰ which showed that “*APRs on loans with two types of DCAs... were typically 20-24% higher than comparable flat-fee loans*”: CP25/27, ¶3.28. That finding was repeated in PS26/3 (p.28) along with a further assertion that DCAs in earlier years “*were both more prevalent and, on average, more harmful*” (p.29). The latter assertion justifies the higher percentage (21%) which applies to the hybrid remedy for Scheme 1 cases (2007-14).

²⁹ 2010 Guidance, ¶¶7.4 & 7.9 (original emphasis).

³⁰ Approximately 32.5 million agreements were entered into between April 2007 and October 2024: CP25/27, ¶1.3. This therefore represents a sample size of less than 1% of the agreements entered into 2007-2024, and covers just over one-tenth of the 17-year period encompassed by the Schemes.

- (d) In respect of high commission arrangements, the FCA has throughout accepted the limitations in its analysis. In implementing the Schemes' rules, however, it acknowledged that such evidence as it had "*does not imply that commission at or around the levels observed in our dataset was harmful, nor does it establish a causal relationship.*" Thus, taken at its highest, the FCA concluded only that "*the evidence suggests that consumers may ultimately have borne at least some of the cost of commission through credit charges they paid.*" Accordingly, "*it appears that consumers, in general, have suffered, or may suffer, loss or damage as a result of failures to adequately disclose high commission arrangements across the entire period...*" See PS26/3, pp.30-31.
- (e) As to tied arrangements, the analysis is weaker still. The FCA relied almost entirely on what it describes as "*the principle that transparency of such ties is critical to fairness.*" As such, it asserted that "*it is reasonable to expect that consumers may have suffered loss from inadequate disclosure of tied arrangements*": CP25/26, ¶3.33. It therefore acknowledged that the data was too limited to support any "*robust conclusions about empirical evidence of loss*": CP25/26, ¶3.34. Ultimately, the FCA proceeded on the somewhat surprising assertion that while such evidence would have been "*helpful*", it was "*not a necessary precondition to conclude that undisclosed tied arrangements could lead to loss or damage*": PS26/3, p.32. It therefore fell back upon general assertions.

(iii) The FCA's errors

44. The FCA's conclusions on loss or damage in respect of high commission and tied arrangements rely heavily on counterfactuals as to what a consumer might have done had the relevant arrangement been disclosed. However, such conclusions are both wrong in law and irrational.
45. They are wrong in law since they proceed upon an erroneous analysis of ss.140A-B CCA. Namely, that, assuming there has been some act or omission sufficient to give rise to an UR, "*loss or damage*" will, or is at least likely to, follow. Such assumption is incorrect: even if a remedy is awarded by the court under s.140B(1), it need not necessarily reflect or compensate for any financial loss. As explained in **Smith v Royal Bank of Scotland plc** [2024] AC 955, at [25], s.140B offers:

...the broadest possible remedial discretion in deciding what order, if any, to make... [It] gives the court an extensive menu of options from which to select but says nothing at all about how this selection should be made. On the face of the legislation the court's discretion is entirely unfettered. It is, I think, clear that the court is not in these circumstances required to engage in the kind of strict analysis of causation, loss and so forth that would be required, for example, in deciding what remedy to award in a claim founded on the law of contract and tort.

46. Indeed, in cases where the unfairness is caused by the deprivation of the opportunity to make a choice, such orders will rarely remedy any identifiable loss or damage suffered by the borrower. By analogy, as noted in ***Plevin v Paragon Personal Finance Limited*** [2014] 1 WLR 4222, at [18]: “Of course, had [Mrs Plevin] shopped around, she would not necessarily have got better terms... The fact that she was left in ignorance in my opinion made the relationship unfair.”
47. By contrast the terms of s.404(1)(b) FSMA are clear. There must be “loss or damage”, and it must be that loss or damage in respect of which relief would be granted by a court.
48. Moreover, the FCA’s conclusions are irrational in that they have no, or no proper, evidential foundation.³¹ Having conducted empirical research which is either inconclusive or positively undermines any assumption of loss or damage, any rational decision-maker would conclude that the statutory threshold is not satisfied. By contrast, the FCA’s approach was to disregard the results of its research and instead to proceed upon its own unexplained view. In other words, since the data did not match its desired conclusion – that non-disclosure of each of the relevant arrangements was causative of loss or damage – the FCA irrationally disregarded the data.
49. In any event, in considering actionable loss and damage, the FCA wrongly took no account of the fundamental and relevant differences between captive and third-party lenders. As described above in relation to MBFS, captive lenders’ primary commercial objective is to support the sale of vehicles for the manufacturer. To that end, the captive market makes extensive use of subvention and standardised advertised pricing structures, including promotional rates and other offers. These features were noted by the

³¹ See *De Smith’s Judicial Review* (9th ed.), ¶16-039.

FCA in Technical Annex 2 to CP25/27.³² Nonetheless, it apparently afforded them no weight in assessing whether the s.404(1)(b) threshold was satisfied.

50. For example:

(a) The rules governing the Schemes include a carve-out from each of the categories of “*relevant arrangement*” for agreements written at 0% APR.³³ The FCA’s justification for doing so was that, in those circumstances, “*a consumer would not have been interested in shopping around to obtain a lower APR...*” That also appears (at least partly) to be because a 0% APR operates as “*a rebuttal of the presumption of loss or damage*”.³⁴ However, so far as the consumer was concerned, the use of subvention by captive lenders, i.e. where agreements were written on a subsidised rate, had precisely the same effect. Whether the lender was offering a 0% APR or subsidising the cost of the finance, the consumer was securing a deal that could not realistically have been bettered by a third-party lender on a secured loan.

(b) Allied to subvention, was the use by captive lenders of nationwide fixed-rate campaigns for particular vehicles as described above. By way of illustration, on MBFS’s model, [REDACTED]. There could be no doubt as to the finance terms upon which the vehicle was offered for sale. Moreover, [REDACTED]. Thus, where such campaigns were in operation, there was no question of “*shopping around*” and/or any consequential “*loss or damage*”.

51. The above errors apply equally across each of the three “*relevant arrangements*” identified in the Schemes’ rules. Captive lenders’ use of subvention and/or fixed national terms will have had particular relevance to DCA since, in those circumstances, the existence or otherwise of a DCA will have had no implication for the cost of finance. Indeed, in those circumstances (which applied in respect of just under [REDACTED] of new MB sales during the period of the Schemes) there would be no rational basis for inferring that there existed a UR that could give rise to a loss.

³² At ¶¶60.

³³ CONRED 5.2.19R(2) / 6.2.19R(2).

³⁴ PS26/3, ¶¶5.55-5.59.

F. GROUND 4: REMEDY

52. This ground of challenge is closely allied to that above relating to the FCA's approach to loss/damage. In short, the 'hybrid' redress methodology disproportionately and unfairly overcompensates customers of captive lenders. There is no reasoned basis for this. Instead, it appears to be the consequence of the FCA's failure, properly or at all, to consider the potential impact of the distinction between captive and third-party lending models. To that extent, the hybrid methodology is irrational and must be revisited.

(i) *The FCA's approach*

53. The Schemes' rules provide that "*the hybrid remedy*" is to be paid in any scheme case where the lender has determined "*there was an unfair relationship... and the consumer has suffered loss or damage as a result*", unless there is a "*very high commission arrangement*" in which case a different "*commission repayment remedy*" applies.³⁵

54. In basic terms, the hybrid remedy operates on the basis of a so-called "*total APR adjustment*" calculation. Under Scheme 2 the customer is to be repaid the difference between the APR in fact charged to them under their agreement and the amount of that APR "*multiplied by 0.83*."³⁶ Under Scheme 1 a larger adjustment must be made, the relevant multiplier being 0.79.³⁷

55. The FCA's stated reasoning for the use of, and adjustments employed within, the hybrid remedy were as follows:

(a) Since the existence of a redress scheme does not prevent consumers from going to court, it was necessary to "*reflect on remedies that could be available to consumers who go to court and how these compare to remedies under the scheme*": CP25/27, ¶8.33.

(b) Deploying a "*universal approach for most cases enhances operational simplicity for firms, provides clarity for consumers, and also supports effective implementation of the scheme*": CP25/27, ¶8.40.

³⁵ CONRED 5.4.1G & 5.4.5R(1) / 6.4.1G & 6.4.5R(1).

³⁶ CONRED 5.2.9R(2).

³⁷ CONRED 6.2.9R(2).

- (c) They were “*based on economic analysis, drawing on independent statistical advice, that there was a difference in the interest rate charged on loans with DCAs compared to those with flat fee arrangements...*”: CP25/27, ¶1.27.
- (d) Although there appears to have been no particular data produced in relation to the effect of high commission and tied arrangements on loan costs, the FCA asserted its belief that “*we can also use [the DCA] estimation as a reasonable proxy for losses in the small number of non DCA cases covered by our scheme*”: CP25/27, ¶1.27.
- (e) The particular justification for the difference in the level of adjustment as between cases in Scheme 1 and Scheme 2 (introduced for the first time in the final published rules) was that “*DCAs were both more prevalent and, on average, more harmful in earlier years than that covered by our economic analysis*”: PS26/3, p.29.
56. A detailed explanation of the available data and the analysis undertaken in respect of it was offered in [Technical Annex 1](#) to CP25/27, and updated in [Technical Annex 1](#) to PS26/3 to take account of further data provided by respondents to the consultation process. In summary, the vast majority of the available data related to loans subject to DCAs in the pre-January 2021 period. The data on the impact of disclosure in non-DCA cases was admittedly more limited. Thus, “*there is a lack of evidence showing a consistent link between disclosure and subsequent influence on consumer behaviour.*”³⁸ In spite of that, the FCA nonetheless maintained the position quoted at ¶55(d) above.
57. Although captive lenders were specifically considered in the context of redress liability estimates,³⁹ it appears that no analysis was undertaken in respect of the impact of relevant arrangements on APRs in the captive (cf. third-party) lending market.
- (ii) The FCA’s error**
58. In failing to account for the particular features of the captive lending market in arriving at the APR adjustment calculations, the FCA omitted an obviously relevant matter from

³⁸ Technical Annex 1 to PS26/3, ¶4.79.

³⁹ Technical Annex 1 to PS26/3, Chapter 7.

its considerations. In consequence, it exercised its regulatory judgment on the question of redress under the Schemes in an irrational way.

59. In approaching redress, the FCA “*must have regard... to the nature and extent of the losses or damage in question*”: s.404A (5) FSMA. Necessarily that required consideration of the vice said to give rise to the “*alleged widespread or regular failure*” in question and what loss/damage resulted (or may result) from it. Here the FCA proceeded on the basis that alleged failures to give “*necessary information about commission arrangements and tied arrangements*” meant consumers were less able to “*understand the deal they’ve been offered*” and less “*aware that better deals might be available*”. As a result, consumers were less “*likely to shop around for other loans, negotiate a better rate or simply decide not to go ahead with the deal.*” See CP25/27, ¶13.25.

60. However, the FCA failed to take any account of whether the analysis applied in light of the particular characteristics of the captive lending market. Had it done so it could and should have had regard to the following material features of the captive market:

(a) The emphasis in the captive market was (and is) on creating and retaining brand loyalty. [REDACTED]

(b) Consumers purchasing from branded franchised dealers using finance from a captive lender were less likely to “*shop around*” and, still less, to “*decide not to go ahead with the deal.*” Rather, given manufacturers’ central focus upon brand loyalty, customers were more likely simply to return to their regular dealership at the end of the finance period to ‘trade-in’ their existing model for an upgrade.⁴⁰

(c) The widespread use of subvention and campaign offers necessarily meant that there was far less opportunity for customers to negotiate the level at which the APR was set. [REDACTED]

40 [REDACTED]

61. Thus, the captive lending market particularly emphasised finance pricing which was consistent, transparent and competitive, with the result that the key harms identified and relied upon by the FCA in determining its approach to loss/damage and remedy were heavily mitigated. Accordingly, where they were used, there is likely to have been a far smaller differential between: (i) APRs on loans with an inadequately disclosed DCA; versus (ii) APRs on loans with disclosed/no DCA.
62. However, the FCA's neglect of those features means that captive lenders are now required to adhere to a hybrid remedy which does not properly reflect the market in which they operated. Had the FCA properly analysed the market as a whole it would have been immediately obvious that there were fundamental distinctions between captive and third-party lenders. In turn, it ought then to have considered the impact of those distinctions on costs to consumers. Had it done so, a more bespoke APR adjustment calculation could have been put in place for the captive market.
63. Ultimately, however, the FCA's monolithic view of the market has risked the APR adjustment calculation being considerably overinflated so far as captive lenders are concerned. There can be no reasoned or logical basis for that result. Indeed, no doubt because it simply did not consider the point, the FCA has not offered any justification for it. Accordingly, it has erred in taking an irrational approach to remedy.

G. APPLICATION FOR INTERIM SUSPENSION

64. Finally, pursuant to the Tribunal's case management powers,⁴¹ MBFS seeks an interim order from the Tribunal suspending the operation of the Schemes pending determination of its (and any other) challenge under s.404D FSMA.
65. Further particulars of MBFS's position are to be found in the written evidence of [REDACTED] filed with these submissions, to which the Tribunal is invited to have regard.

⁴¹ Pursuant to r.5(5) of the Tribunal Procedural (Upper Tribunal) Rules 2008 and/or s.25(1) of the Tribunals, Courts and Enforcement Act 2007.

66. In summary, however:

(a) On the FCA's own estimate, the Schemes involve nominal costs for firms of **£1.65 billion** as against a total redress figure of up to **£7.5 billion**.⁴² [REDACTED]

(b) Firms have been given a relatively compressed timescale for implementation. There is a period of up to three months for Scheme 2 and up to five months for older agreements within Scheme 1.⁴³ That being so, and assuming permission is granted under s.404D(3) FSMA, there is no real prospect of MBFS's challenge being resolved before Scheme 2 must be fully implemented. The same is likely to be true in respect of Scheme 1. [REDACTED]

(c) If MBFS's challenge (or, indeed, any other similar challenge) is successful in whole or in part, the rules governing Schemes 1 and 2 will be quashed. The design of any motor finance consumer redress scheme will then be remitted to the FCA for reconsideration. In that eventuality one or both of the Schemes are likely to be reworked in one or more material respects. [REDACTED]

(d) [REDACTED]

(e) [REDACTED]

⁴² "Cost Benefit Analysis", Annex 1 to PS26/3, ¶¶191 & 201.

⁴³ See definition of "implementation period" in CONRED 5.1.1R(10) / 6.1.1R(10).

(f) [REDACTED]

(g) By contrast, while further delay to consumers who may have been unfairly treated is undesirable, they will not financially lose out by reason of a further short delay in implementation. The rules of both Schemes provide for two categories of interest to be paid on redress payments: (i) compensatory interest at a rate 1% above Bank of England base rate from time-to-time;⁴⁴ and (ii) further interest 8% per annum if redress payments are not made in a timely fashion.⁴⁵

67. In all the circumstances, the Tribunal can be reasonably satisfied that suspension of the Schemes would not prejudice the interests of those intended to be protected by them. To the contrary, if a suspension were refused there is a real prospect of significant and irrecoverable financial loss to MBFS and other firms which may, in turn, impact upon the operation and stability of the market.

**THE RT. HON. LORD RICHARD KEEN K.C.
THOMAS SAMUELS**

27 April 2026

⁴⁴ CONRED 5.4.34R / 6.4.34R.

⁴⁵ CONRED 5.4.39R / 6.4.39R.