Reference Numbers: UT-2026-000045, UT-2026-000046,
UT-2026-000047, UT-2026-000048

IN THE UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER
BETWEEN:

(1) CA AUTO FINANCE UK LIMITED
(2) CONSUMER VOICE LIMITED
(3) MERCEDES-BENZ FINANCE SERVICES UK LIMITED VOLKSWAGEN FINANCIAL SERVICES (UK) LIMITED

Applicants

-and-

THE FINANCIAL CONDUCT AUTHORITY

Respondent

RESPONDENT'S GROUNDS OF RESPONSE

TABLE OF CONTENTS

A. INTRODUCTION

1. The Applicants seek permission, under s.404D(3) of the Financial Services and Markets Act 2000 **(**"**FSMA**"), to make applications to the Upper Tribunal to review rules made under s.404 FSMA[1] (the "**Applications**"). The Applications are, by s.404D(5), to be determined on the application of "*principles applicable on an application for judicial review*". They are public law challenges, allocated – as with the regulatory work of the Respondent (the "**FCA**") under FSMA generally – to the Upper Tribunal (Tax and Chancery Chamber).

2. Those rules were made by the FCA. They are set out in Chapter 5 and Chapter 6 of the Consumer Redress Scheme sourcebook ("**CONRED**").[2] The rules introduce two consumer redress schemes, which are summarised below in Section B (the "**Schemes**").

3. The four Applicants are as follows:

    3.1. Volkswagen Financial Services (UK) Limited ("**Volkswagen**"),[3]

    3.2. CA Auto Finance UK Ltd ("**CAAF**"),[4]

    3.3. Mercedes-Benz Financial Services UK Limited ("**Mercedes**"),[5]

    3.4. Consumer Voice Limited ("**Consumer Voice**").[6]

4. Volkswagen, CAAF and Mercedes are, collectively, the "**lender Applicants**".

5. The FCA defends the Applications and the legality of the Schemes in their entirety. Ultimately, each of the grounds advanced in the Applications is an attempt – operating with differing degrees of disguise – to challenge the merits of the Schemes and the various

[1] By way of two instruments: the Motor Finance Commission Consumer Redress Scheme (2007-2014) Instrument 2026 (FCA 2026/20) (Scheme 1) - https://api-handbook.fca.org.uk/files/instrument/CONRED/FCA%202026/20-2026-03-31.pdf - and the Motor Finance Commission Consumer Redress Scheme (2014-2024) Instrument 2026 (FCA 2026/19) (Scheme 2) - https://api-handbook.fca.org.uk/files/instrument/GLOSSARY-FEES-DISP-CONRED/FCA%202026/19-2026-03-31.pdf. Both instruments came into force on 31 March 2026. Those instruments were made in particular under s.404(3) FSMA (as to consumer redress schemes), but see the full list of "***Powers exercised***" at p.1 of each instrument.

[2] References in this Response to the Scheme rules under CONRED 5 should be read as referring also to the equivalent provisions under CONRED 6, unless otherwise stated.

[3] Company number 02835230, represented by Freshfields LLP.

[4] Company number 02739931, represented by Hogan Lovells Cadwalader International LLP.

[5] Company number 02472364**,** represented by Shoosmiths LLP.

[6] Company number 14575806, represented by Courmacs Legal Limited.

lines necessarily drawn within them. But in a public law challenge, it matters not whether the FCA might have designed some aspect of the Schemes differently; Parliament has entrusted the function of making a consumer redress scheme ("**CRS**") to the FCA alone. The Tribunal will draw its own conclusions from the fact that the balancing exercise carefully carried out and implemented by the FCA in the Schemes is under challenge by the lender Applicants for being too generous to consumers, and by Consumer Voice for being too generous to the motor finance industry.

6. The Tribunal will also be astute to identify that, although the lender Applicants purport not to dispute the justification for a motor finance CRS, their arguments and interpretation of s.404 would, if accepted, have that effect in substance. The FCA does not accept that such an outcome aligns with the intention of Parliament, or indeed the public interest.

B. OVERVIEW OF THE SCHEMES

1. Background to introduction of the Schemes

i) The CCA

7. On 6 April 2007, ss.140A – 140C of the Consumer Credit Act 1974 (**"CCA"**) came into force, inserted by the Consumer Credit Act 2006.[7] The provisions provided for creditor liability where the relationship between a creditor and a borrower is deemed to be 'unfair'.

7.1. Under s.140A CCA, the court may determine, with respect to a credit agreement or any related agreement, whether the relationship between a creditor and debtor is unfair with respect to the terms of the agreements (s.140A(1)(a)), the way the creditor has exercised or enforced its rights under them (s.140A(1)(b)), or any other thing done or not done by the creditor, or on its behalf, with respect to the agreements (s.140A(1)(c)).

7.2. If the court determines a relationship is unfair under s.140A CCA, it may make an order under s.140B CCA. Section 140B CCA affords the court a wide

[7] Sections.140A–140C CCA replaced the old narrower "*extortionate credit bargains*" regime under ss.137–140. Those earlier provisions set too high a bar to debtors and sureties wishing to challenge the terms of their agreements. *Plevin v Paragon Personal Finance Ltd* [2014] 1 WLR 4222, *§*§7-10.

remedial power with respect to an unfair relationship, including requiring the repayment of or reducing any sums paid or due under the relevant agreement, and altering the terms of the agreement or discharging any debt due under it. The powers are extensive and can be exercised alone or in combination. Under s.140B(9) CCA, the creditor bears the burden of proving that a relationship alleged to be unfair was fair.

ii) The FCA, OFT and FOS

8. On 6 April 2007, the consumer credit jurisdiction of the Financial Ombudsman Service (**"FOS"**) was created.

9. On 1 April 2013, pursuant to the Financial Services Act 2012, the Financial Services Authority (**"FSA"**) was replaced by the FCA (s.1A FSMA).

10. Prior to April 2014, the responsibility for regulating consumer credit lay with the Office of Fair Trading (**"OFT"**). The OFT introduced guidance on irresponsible lending and credit broker remuneration practices in March 2010 and again in November 2011.[8]

11. On 1 April 2014, the OFT was abolished, and the regulation of consumer credit was transferred to the FCA. Aspects of the regulatory framework which are now articulated in the FCA Handbook "*reflect the principles previously set out by the OFT*",[9] including CONC 4.5.3R which requires consumer credit brokers to disclose the existence and nature of any commission, fee or other remuneration payable to them if its existence or amount could actually or potentially affect the broker's impartiality or, if made known to the customer, have a material impact on the customer's transactional decision. As explained further below, the FCA has the power to introduce a CRS for regulatory failures prior to April 2014.

iii) Review and ban of DCAs

12. On 18 April 2017, in its Business Plan 2017/18, the FCA announced a review of the motor finance sector. It noted its concern that there "*may be a lack of transparency, potential*

[8] *Irresponsible Lending* (OFT 1107), 2010, and *Credit Brokers and Intermediaries* (OFT 1388), 2011.

[9] Consultation paper §§2.6–2.8.

conflicts of interest and irresponsible lending" in the industry, which was the driver behind an "*exploratory piece of work to identify who uses these products and assess the sales processes, whether the products cause harm and the due diligence that firms undertake before providing motor finance*".[10] The FCA stated that, following the review, it would assess whether and how to intervene in the market.

13. On 1 March 2019, the FCA published its final findings.[11] It noted that it was not satisfied that firms were complying with regulatory requirements and stated its concern that commission arrangements operated within the motor finance industry were leading to consumer harm on a "*potentially significant scale*".[12] The FCA noted its particular concern about the widespread use of discretionary commission arrangements. By way of brief context, when a customer is buying a car from a motor dealer, it is common for the motor dealer (acting as credit broker) to offer to arrange finance for them. The broker typically receives commission from the lender for introducing the customer's business to them (under a separate agreement between broker and lender). If the customer accepts the finance offer, the dealer then sells the car to the lender, and the lender enters into a credit agreement with the customer. In discretionary commission arrangements ("**DCAs**"), the amount of commission which the broker receives is linked to the interest rate that the customer pays, and the broker has the power to set or adjust that rate. As the FCA noted in its March 2019 report, this "*gives rise to conflicts of interest and creates strong incentives for the broker to charge a higher interest rate*".[13]

14. On 15 October 2019, the FCA published a consultation on banning the use of DCAs in the motor finance sector; the ban was implemented from January 2021.[14] At the same time, the FCA clarified its rules on commission disclosure.[15]

15. As set out in its eventual Consultation Paper regarding the then-proposed CRS for motor finance, the FCA's review illustrated that DCAs were widespread before they were

[10] Business Plan 2017/18, p.72.

[11] "Our work on motor finance – final findings" ("Final findings"), March 2019.

[12] Final findings, p.4.

[13] Final findings, pp.4-5. For a general overview of these 'three cornered' transactions, see e.g. *Johnson v FirstRand Bank Limited* (CA) [2024] EWCA Civ 1282, §§1-5, and (on appeal to the Supreme Court) [2026] AC 877, §2.

[14] PS20/8.

[15] Amendments to CONC 3.7.4G and 4.5.3R .

banned, and featured in the majority of motor finance contracts. Nonetheless, firms were disinclined to address harms proactively or adequately:

> "*[…] between April 2007 and our ban in January 2021, around 61% of all motor finance agreements involved a DCA. Thousands of consumers have since complained about lenders' failure to appropriately disclose commission arrangements. Firms had closed 30,000 such complaints by June 2023, and notwithstanding our previous request to firms to address harm they identified, firms rejected 99% of complaints they received. By March 2025, the Financial Ombudsman had received over 80,000 complaints*".[16]

16. On 11 January 2024, following two decisions published by the FOS (discussed below), the FCA announced "*a review into whether motor finance customers had been overcharged because of the past use of DCAs*".[17] The FCA carried out diagnostic work to review historic disclosure practices related to DCAs between 2007 and 2021 across eleven lenders accounting for approximately 66% of the market, "*to understand if there was widespread misconduct, whether consumers had lost out, and if so, how they should be compensated in an orderly, consistent and efficient way"*.[18] When launching its January 2024 review, the FCA also paused the usual deadlines for motor finance firms to respond to customers' DCA complaints. Further details about the FCA's reviews informing its eventual proposals for a CRS for motor finance, and about its 'pause' on the usual deadlines for motor finance firms to respond to customers with complaints about DCA agreements (later extended to include non-DCA agreements), are set out in the FCA's witness evidence (see the first witness statement of Charlie Gluckman at §§19-24 and §§32-33, and the first witness statement of Katherine Collyer, §§11-30).

iv) Clydesdale *and* Johnson

17. On 10 January 2024, the FOS published two lead decisions by its ombudsmen relating to DCAs ("**FOS Decision(s)**"), concluding that the relevant brokers and lenders had breached regulatory requirements regarding commission disclosure, and that the relationships in question would have been considered '*unfair*' under s.140A CCA.

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[16] Consultation Paper CP25/27, §2.17.

[17] PS24/11, §2.1

[18] CP25/27, §2.19. The FCA's work following the DCA ban taking effect in 2021, including in respect of non-DCA cases, is summarised in the "Timeline of key events" in the Consultation Paper (CP25/27, p.17).

18. One of the FOS Decisions concerned Clydesdale Financial Services Ltd. This lender sought a judicial review of the FOS Decision: judgment was handed down on 17 December 2024. In *R (Clydesdale Financial Services Ltd) v Financial Ombudsman Service Ltd* [2024] EWHC 3237 (Admin) (***"Clydesdale"***), in which the FCA appeared as an Interested Party, the Administrative Court dismissed the lender's challenge. The court upheld the FOS Decision,[19] which had found that the broker had not adequately disclosed the commission arrangement to the consumer in breach of the FCA's rules, that the broker's actions were attributable to the lender, Clydesdale (s.56 CCA), and that (a court would likely find) the inadequately-disclosed DCA gave rise to an unfair relationship between Clydesdale and the consumer, within the meaning of s.140A CCA. Inter alia, the court held that the ombudsman was entitled to find that the relationship was unfair in the s.140A sense, "*independently of any breach of rule*" (referring to provisions within the FCA Handbook).[20] Permission to appeal was granted by Kerr J but the appeal was withdrawn following the Supreme Court's Judgment in *Johnson* outlined below.

19. On 1 August 2025, the Supreme Court handed down judgment in *Johnson v FirstRand Bank Ltd* [2026] AC 877 (***"Johnson"***). The case involved three joined appeals relating to hire-purchase agreements entered into by consumers with the two Appellant lenders. The finance agreements each involved commission payable to the dealers that were either not, or only partially, disclosed to the consumers.

20. The Supreme Court concluded that the relationship between one of the consumers, Mr Johnson, and his lender was unfair under s.140A CCA. The consumer's agreement featured a DCA that was not operated. It also featured very high commission[21] and a commercial tie giving FirstRand a right of first refusal.[22] The Supreme Court's *"very clear view"* that the relationship was unfair, arose by reason of "*the size of the undisclosed commission, the failure to disclose the commission, and the concealment of the commercial tie*"

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[19] *Clydesdale,* §199, §256, §313, §369, §372. Details of the FOS Decision in: §83, §266, §§315-316, §368

[20] *Clydesdale*, §368. See also *Plevin v Paragon Personal Finance Ltd* [2014] 1 WLR 4222, §17: a relationship under s.140A may be "*unfair for a variety of reasons, which do not have to involve a breach of duty"*; relevant regulatory standards "*cannot be determinative of the question posed by section 140A*".

[21] Expressed relative to the credit, this amounted to 17.5% of the total amount payable (£9,422.20), 26% of the advance of credit (£6,399), 55% of the total charge for credit comprising interest and fees (£3,023.20), and 63% of the interest payments alone (£2,635.20). *Johnson* §323.

[22] *Johnson* §332.

between the broker and the lender.[23] The Supreme Court analysed the nature of s.140A CCA as follows:

20.1. The Supreme Court approved the previous guidance given by Lord Sumption and Lord Leggatt respectively in *Plevin v Paragon Personal Finance Ltd* [2014] 1 WLR 4222 (***"Plevin"***) at §§10 and 29[24] and *Smith v Royal Bank of Scotland plc* [2024] AC 955 (***"Smith"***) at §22.[25] In particular, that the test of unfairness "*is stated in general terms which permits courts to take account of a very broad range of factors*" and will "*inevitably, be a highly fact-sensitive exercise*" in each individual case.

20.2. The fact of non-disclosure or partial disclosure of a commission alone will not necessarily establish that a relationship between a lender and customer is unfair: it is a factor to be taken into account in the "*overall balancing exercise*" the court is required to perform under s.140A.[26]

20.3. The Supreme Court agreed with the FCA (intervening) that the following non-exhaustive factors will "*normally be relevant*" to the question of unfairness: "*the size of the commission relative to the charge for credit; the nature of the commission (because, for example, a DCA may create incentives to charge a higher interest rate); the characteristics of the consumer; the extent and manner of the disclosure*; *and compliance with the regulatory rules"*.[27]

21. Three factors were said in *Johnson* to render the relationship unfair:

21.1. The very high size of the commission was significant: it was held to be a "*powerful indication*" that the relationship was unfair.[28]

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[23] *Johnson* §337(4), §340

[24] *Johnson* §§297, 318.

[25] *Johnson* §297.

[26] *Johnson* §320.

[27] *Johnson* §319, §297. The Court also set out the history of the FCA's regulation of relevant credit activities at §§251-266, before dealing with Mr Johnson's s.140A CCA claim at §§291-338.

[28] *Johnson* §§323-329.

21.2. It was "*highly material*" to the question of unfairness under s.140A that there was a commercial tie between the lender and broker which had been concealed from / not disclosed to Mr Johnson.[29]

21.3. Mr Johnson was a commercially unsophisticated consumer, and lenders could not necessarily reasonably expect customers to read and understand the detail of car finance documents. Even though Mr Johnson failed to read the documents, "*no prominence*" was given to the relevant statements and they did not indicate a high commission would be payable, nor disclose the existence of the commercial tie.[30] Furthermore, it was not necessary for Mr Johnson to prove that he would not have proceeded with the transaction had he known the size and nature of the commission. It was enough that the non-disclosed information would have been a major consideration for the consumer.[31]

21.4. The Court chose to decide the matter for itself, rather than remit the issue of unfairness under s.140A to the District Judge, *inter alia* noting "*the submission on behalf of the FCA that the public interest in achieving finality and clarity in the law under section 140A in the motor finance context and that consistency in respect of the many thousands of pending complaints and claims would be aided by an authoritative ruling".* Having found that the relationship was unfair, the Court ordered that the commission sum be paid to the consumer, with a commercial rate of interest from the date of the agreement.[32]

2. Consultation process

22. Prior to the *Johnson* appeal being heard in the Supreme Court, in March 2025, the FCA confirmed that "*if, taking into account the Supreme Court's decision, we conclude motor finance customers have lost out from widespread failings by firms, then it's likely we will consult on an industry-wide redress scheme*".[33]

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[29] *Johnson*, §330, §334, §340.

[30] *Johnson*, §336.

[31] *Johnson* §327, approving *Plevin* at §20 and *Smith* at §§25 and 29.

[32] *Johnson* §§337-338.

[33] https://www.fca.org.uk/news/statements/motor-finance-review-next-steps.

23. On 5 June 2025, it published a statement outlining '*Key considerations in implementing a possible motor finance consumer redress scheme*'. The FCA noted that more than 2 million vehicles were bought using motor finance each year, further noted the need for the motor finance market to function well with effective competition "*so consumers can get a fair deal*", and said that a majority of complaints relating to undisclosed commissions were being rejected by firms. The seven key principles guiding the design of a CRS would be: comprehensiveness, fairness, certainty, simplicity and cost effectiveness, timeliness, transparency and market integrity. The FCA acknowledged: "*[T]here may be tensions between some of these principles, which will require us to consider how to strike the right balance*." Consultation responses would be "*vital in helping [the FCA] get this balance right.*"[34]

24. On 3 August 2025, two days after judgment was handed down in *Johnson*, the FCA announced it would consult on an industry-wide CRS, in order to compensate consumers who had "*lost out … in an orderly, consistent and efficient way*".[35] In the same press statement, the FCA said it had "*moved quickly"* and recognised that "*consumers want to receive any compensation owed quickly and firms and investors want certainty. The regulator will be working intensively and engaging widely over the coming weeks on the detail of how a scheme would work."*

25. Before publishing its Consultation Paper, the FCA carried out an "*extensive programme of pre-consultation"* as set out in the first witness statement of Charlie Gluckman at §§29-31.

26. The FCA published its Consultation Paper, *Motor Finance Consumer Redress Scheme,* CP 25/27, (**"the CP"**) on 7 October 2025. Overall, the CP estimated that the proposed CRS "*will achieve the following outcomes"* (CP §1.46):

    26.1. *"Complaints are resolved and fair redress paid in a timely manner, without unnecessary or disproportionate administrative costs to the [FOS] and firms.*

    26.2. *"Consumers in similar situations receive consistent outcomes".*

[34] https://www.fca.org.uk/news/statements/key-considerations-implementing-possible-motor-finance-consumer-redress-scheme and https://www.fca.org.uk/publication/information-sheets/principles-motor-finance-consumer-redress-scheme.pdf.

[35] https://www.fca.org.uk/news/statements/fca-consult-compensation-scheme-motor-finance-customers.

26.3. *"The motor finance market continues to work well due to complaints being handled in an orderly, consistent and efficient way."*

27. The CP set out that the FCA had carried out extensive reviews to inform its proposals (including commissioning a skilled person review under s.166 FSMA). In particular, the FCA's review of data covering 32 million motor finance agreements (DCA and non-DCA) had revealed "*widespread failings on how motor finance firms disclosed commission payments and commercial ties between lenders and brokers*" meaning that consumers could not take informed decisions on finance deals, shop around or get a better deal. The FCA's analysis indicated that many people may have overpaid on their motor finance.[36] The CP further acknowledged the complexity and competing objectives involved in designing a mass CRS, and the FCA's role as expert regulator in balancing complex legal issues, operability, and fairness to stakeholders:

> "*A scheme on the scale we are proposing requires judgements to simplify in a reasonable way some complex legal and operational issues. This means not everyone will get everything they would like from a scheme. We have engaged extensively in developing the proposed scheme.[…] This [CP] feedback will enable us to further enhance our evidence base, assumptions and estimates to ensure a robust and operationally effective scheme.*"[37]

28. By way of brief summary only (without addressing all issues consulted on), the CP proposed:

28.1. That the scheme scope would cover regulated motor finance agreements entered into between 6 April 2007 (when ss.140A-C CCA came into force) and 1 November 2024 (one week after the Court of Appeal judgment in *Johnson*) where commission was payable by the lender to the broker.[38]

28.2. That liability would be triggered where one or more of three "*relevant arrangements*" were present in a motor finance agreement: (i) a DCA (described earlier in this section), (ii) a high commission arrangement, where commission was equal to or greater than 35% of the total cost of credit and 10% of the loan amount, and (iii) a tied arrangement, being a contractual

[36] CP, §1.5, §3.3-3.7. See further: Technical Annex 1 and the Diagnostic Report : https://www.fca.org.uk/publications/consultation-papers/cp25-27-motor-finance-consumer-redress-scheme. See also the first witness statement of Charlie Gluckman at §19.

[37] CP, §1.4.

[38] CP, Chapter 4, §4.22, Timeline of Key Events (p.17).

requirement that the broker introduce consumers exclusively to one lender, or give the lender a right of first refusal. The FCA explained that it saw these "*relevant arrangements*" as being "*strongly associated with an unfair relationship"*.[39] Liability would operate on the basis of two rebuttable presumptions in favour of consumers: that failure to adequately disclose a relevant arrangement gave rise to an unfair relationship, and that the unfair relationship caused the consumer loss or damage.[40]

28.3. That redress would be calculated by reference to three types of remedy. The three remedies proposed at the time of the CP were:

28.3.1. A commission repayment remedy (**"CRR"**) (i.e. "*repayment of commission plus interest*"), in cases closely aligning with *Johnson*, where an unfair relationship was determined to have both a "*very high commission*" (commission equal to, or greater than, 50% of the total cost of credit and 22.5% of the loan amount) and a tie.[41]

28.3.2. A hybrid remedy ("**Hybrid Remedy"**) in the majority of other cases, being the average of the CRR and a loss-based annual percentage rate (**"APR"**) adjustment (**"APR adjustment"**). The APR adjustment would apply a 17% reduction to the consumer's actual APR, and require repayment of the resulting differential (overcharge) per payment plus compensatory interest.[42]

28.3.3. In limited circumstances, the APR adjustment would be available alone where it would produce greater redress than the CRR or Hybrid Remedy, acting as a minimum 'floor' across the scheme remedies.[43]

[39] CP, §4.45, §4.5. To note that a 'high' commission arrangement is distinct from a 'very' high commission. The latter is a feature of cases closely aligned with *Johnson,* which receive the commission repayment remedy (see paragraph 28.3.1).

[40] CP, §7.9 et seq.

[41] CP, §1.26, §8.47, §8.53, Table 10 (Scheme steps to calculate redress).

[42] CP §8.21-§8.32, §8.39–8.45.

[43] CP, §8.8, 8.48–8.51

28.3.4. The CP observed that appropriate redress for this particular scheme is more complicated than the "loss-based approach" adopted for previous redress schemes: including because s.140A CCA gave the courts very wide remedial powers which did not confine them to loss-based remedies.[44]

28.4. It was proposed in the CP that redress should include compensatory interest, "calculated using a set rate of simple interest … based on the annual average of the daily Bank of England base rate for that year plus 1 ppt and rounded up to the nearest quarter percentage point." This would be rebuttable by consumers who could show with specific evidence that lost opportunity due to deprivation of money had led to higher borrowing costs.[45]

3. Policy Statement and Scheme Rules

29. The consultation period ended on 12 December 2025 (having been extended from the original deadline of 18 November 2025: CP, p.2). The FCA received over 1,000 responses, from consumers, consumer groups, lenders, brokers, investors, motor manufacturers, trade bodies and professional representatives. As well as considering the written responses, the FCA engaged extensively with consumer groups, trade bodies, firms and their legal representatives both before and during the consultation (see the first witness statement of Charlie Gluckman at §29 and §71).

30. On 30 March 2026, the FCA published its Policy Statement on *Motor Finance Consumer Redress Scheme* (PS26/3) (**"the PS"**). The PS confirmed that the FCA was introducing a CRS and that the proposal to do so was widely supported in the consultation responses: "*Most respondents to our consultation agreed that an industry-wide scheme, free for consumers to use, would be the best way to make sure consumers receive redress in a consistent and efficient way, while ensuring a well-functioning market.*"[46]

31. As set out in more detail in Chapter 1 to the PS, the FCA explained that the design of the Schemes was guided by its seven key principles (set out in §23 above) (PS, §1.4). The PS

[44] CP, §8.6-8.7.

[45] CP, §§8.73–8.81.

[46] PS, §1.3.

reiterated the complexity of the competing objectives, as well as the competing viewpoints of stakeholders (including lenders and consumer groups), noting that the FCA had carefully considered such competing views when modifying the proposals contained in the CP:

> "*1.6 Unsurprisingly, there were many conflicting views on the details of the proposed scheme. Among the views expressed, consumer voices raised concerns that the amount of redress was not enough. Firms said that, in some instances, we would be compensating for loss not incurred. […]*
>
> *1.7 We have listened. We have made changes to balance sometimes competing principles such as simplicity and cost effectiveness, comprehensiveness and fairness. In doing so, we have carefully weighed the data we have alongside our judgement about the most fair and proportionate solution.*"

32. At Annex 3,[47] the FCA appended a "*Compatibility Statement*" setting out how the FCA had taken into account various statutory objectives and mandatory considerations, including the "*need to use our resources in the most efficient and economic way*" and the "*principle that a burden or restriction should be proportionate to the benefits*".

33. By way of brief summary only (without addressing all aspects of the Schemes), the PS set out the following decisions:

Temporal scope and limitation issues

33.1. Two schemes were introduced, covering agreements entered into during the periods 6 April 2007 – 31 March 2014 (**"Scheme 1"**) and 1 April 2014 – 1 November 2024 (**"Scheme 2"**) (together, the "**Schemes**").[48] This decision was aimed at protecting "*the integrity, deliverability and timely implementation*" of the Schemes as a whole, in circumstances where some consultation responses had challenged the FCA's power to introduce a scheme for the earlier period.[49]

[47] PS, pp.356-364.
[48] PS, §1.16-1.17.

[49] PS, §2.28, PS p.36. The relevant rules are contained in CONRED 5 (for Scheme 2) and CONRED 6 (for Scheme 1). The Scheme rules are substantially the same, except with respect to redress. As noted above, references in this Response to the Scheme rules under CONRED 5 should be read as referring also to the equivalent provisions under CONRED 6, unless otherwise stated.

33.2. Cases that fall outside of the scope of the Schemes – i.e. which are not a scheme case – include those where the underlying claim would have been time barred as at 25 March 2026 (i.e. the day before the FCA made the Scheme rules).[50]

33.2.1. The starting point is that the limitation period for a monetary claim under s.140A CCA is 6 years from the end of the credit relationship – typically the end of the motor finance agreement.

33.2.2. However, in line with s.32(1)(b) of the Limitation Act 1980, where a relevant fact was deliberately concealed from the consumer by the lender or its agent, limitation does not run until the claimant discovered, or could have discovered, the concealed fact.[51]

Liability

33.3. The three relevant arrangements are DCAs, high commission arrangements and tied arrangements:[52]

33.3.1. DCAs are described earlier in this section (see §13 above).

33.3.2. A high commission arrangement is one where total commission is at least 39% of the total charge for credit and 10% of the total amount of credit.[53]

33.3.3. A tied arrangement is a contractual arrangement requiring the broker either to introduce consumers exclusively to a lender; or to give that lender a right of first refusal (or equivalent priority right) before approaching other lenders.[54]

33.4. In general, the lender must presume that there was an unfair relationship if a relevant arrangement existed and there was inadequate disclosure of that arrangement.[55] There is a presumption that disclosure of an arrangement was

[50] CONRED 5.1.17R.

[51] 5.1.20G-5.1.23G.

[52] CONRED 5.2.19R.

[53] CONRED 5.1.1R(9).

[54] CONRED 5.1.1R(24).

[55] CONRED 5.3.8R.

not adequate unless it can be supported by documentary evidence, the burden of proof being on the lender to show disclosure occurred.[56]

Exceptions: carve-outs and rebuttals

33.5. Cases where an arrangement would not be treated as a relevant arrangement relevantly include:

33.5.1. Where a DCA, high commission arrangement or tied arrangement featured a total amount of commission of £150 or less under Scheme 2, or £120 or less under Scheme 1 ("**de minimis exception**").[57]

33.5.2. Where the APR on the agreement was 0% ("**zero APR exception**").[58]

33.5.3. In the case of DCAs, where the interest rate selected was the lowest rate of interest that could have been selected by the broker under the DCA.[59]

33.5.4. For tied agreements, where all of the following conditions are met: (i) the lender was a captive lender of, or operating as a white-label lender for, the vehicle manufacturer, (ii) the introducing broker was a franchised dealer of that manufacturer; and (iii) the manufacturer's branding was clearly and prominently presented to the consumer in dealership and pre-contract materials ("**captive and white-label exception**").[60]

33.6. The presumption of unfairness arising from inadequate disclosure could also be rebutted in circumstances where:

[56] CONRED 5.3.12R.

[57] CONRED 5.2.19R(2)(a), CONRED 6.2.19R(2)(a).

[58] CONRED 5.2.19R(2)(b).

[59] CONRED 5.2.19R(3), CONRED 6.2.19R(3)

[60] CONRED 5.2.19R(4) and CONRED 5.2.20R

33.6.1. In the case of tied arrangements, if the contractual tie was not operated in practice and this can be evidenced;[61] or

33.6.2. Where the particular consumer has specific industry expertise or knowledge from prior transactions.[62]

33.7. The presumption of loss and damage arising from any unfairness can also be rebutted where the lender can demonstrate that the consumer could not have obtained a lower APR from another lender with whom the broker had a referral arrangement (the "**no better deal rebuttal**").[63]

Redress

33.8. The PS decided that, as to redress, cases will receive either the CRR or the Hybrid Remedy (including compensatory interest). The CP proposal that the APR adjustment would be the minimum 'floor' (i.e. that redress would be no less than that), was not ultimately adopted, in light of consultation feedback. Further, the PS introduced various caps on redress in response to consultation feedback.[64] In particular:

33.8.1. The CRR applies in cases with (a) a very high commission arrangement and also (b) either a tied arrangement or a DCA, or both (as set out above, the CP had proposed the CRR would only apply to cases with very high commission and a tied arrangement).[65] The FCA therefore modestly expanded the number of cases that would fall into the CRR, compared to the position in the CP.[66] The amount payable is the total commission payable and compensatory interest on that commission from the

[61] PS §10.66 et seq. CONRED 5.3.14R(2)

[62] CONRED 5.3.14R(1)

[63] CONRED 5.3.22R. This rebuttal is only available in high commission cases and tied arrangement cases, and not in DCA cases (5.3.22R(4)).

[64] PS, p.17 (and see further below).

[65] CONRED 5.4.3R

[66] PS, §11.2, pp.198-199, p.200-201

date of the agreement until the redress payment date,[67] i.e. effectively a full commission refund plus interest.

33.8.2. The Hybrid Remedy applies in all upheld cases except those falling within the CRR. The lender is required to calculate the CRR, the APR adjustment,[68] apply the hybrid formula,[69] calculate the applicable caps and apply them where necessary.[70]

33.9. The APR adjustment differs between each of Scheme 1 and Scheme 2. The APR adjustment component of the Hybrid Remedy is set at 21% for Scheme 1 and 17% for Scheme 2. This reflects the greater harm that consumers suffered in the earlier period of 2007-2014.[71]

Redress caps and exclusions

33.10. In broad terms, the PS introduced three caps on redress where the Hybrid Remedy applies:[72]

33.10.1. "**Adjusted commission plus interest cap**", limiting redress by reference to 90% of the total commission paid.[73]

33.10.2. "**Total realised cost of credit cap**": preventing redress exceeding the total cost of credit actually incurred by the consumer.[74]

33.10.3. "**Adjusted realised cost of credit cap**": the total cost of credit paid by the consumer is "*adjusted to account for a minimal cost*" of credit. The "*minimal cost*" corresponds broadly to finance offered to the cheapest 5% of borrowers in the market at the time

[67] CONRED 5.4.4R.

[68] The APR adjustment rules are contained in CONRED 5.4.8R-5.4.14R.

[69] The hybrid formula is contained in CONRED 5.4.15R-5.4.16R.

[70] CONRED 5.4.5R(2).

[71] PS, §11.2, pp.198-199, pp.201-206.

[72] PS, pp.206-211. In each case, the level of the cap also takes account of compensatory interest (see further Section H – Redress).

[73] CONRED 5.4.19R, PS pp.207-208.

[74] CONRED 5.4.21R, PS pp.210-211.

(excluding 0% APR agreements).[75] This reflects the idea that "*consumers should have expected to pay a minimal cost of credit even with adequate disclosure of a relevant arrangement"*. Relatedly, where the consumer paid a minimal cost of credit, in the above sense, no redress is payable.[76]

33.11. The Hybrid Remedy applies unless the redress amount calculated under it exceeds that calculated under any of the caps, in which case the lowest capped amount is payable as redress.[77]

Compensatory interest

33.12. The PS decided that compensatory interest will be paid at the proposed rate of Bank of England base rate + 1% per annum. The PS introduced a floor on compensatory interest of 3% in any year, and removed the rebuttal mechanism for consumers to show they faced higher borrowing costs (following feedback from the consultation exercise).[78]

C. OVERVIEW OF GROUNDS OF CHALLENGE

34. The grounds of challenges in the four Applications can be summarised as follows, grouping together common or related points into nine Issues:

34.1. **Issue 1 (Temporal Scope):**

Alleged temporal limit on the FCA's powers such that Scheme 1 is *ultra vires* (s.404(1) FSMA):

34.1.1. Volkswagen Ground 1[79]

34.1.2. CAAF Stage 1[80]

[75] CONRED 5.4.20R, PS pp.208-210.

[76] CONRED 5.4.6R. PS, §11.5, PS p.16

[77] CONRED 5.4.22R.

[78] PS §11.2, pp.219-220. CONRED 5.4.34R-35R.

[79] Volkswagen's "Grounds of Review" dated 27.04.26 ("**Grounds**"), §9.1, §§30-37.

[80] CAAF's "Reasons for Seeking Review" dated 27.04.26 ("**Grounds**"), §63, §§65-71.

34.1.3. Mercedes Ground 1[81]

34.2. **Issue 2 (Relevant Arrangements / Unfair Relationships):**

Alleged unlawful/irrational approach to unfair relationships in the Schemes' rules, i.e. to "*things done … that are to be regarded as constituting a failure to comply with a requirement"* (s.404A(1)(b) FSMA):

34.2.1. Volkswagen Ground 2[82]

34.2.2. CAAF Stage 2[83]

34.3. **Issue 3 (Loss or Damage/Causation)**:

Alleged unlawful/irrational approach to the statutory threshold that: "*consumers have suffered (or may suffer) loss or damage…*" (s.404(1)(b) FSMA) and/or to causation of loss in the Schemes' rules (s.404A(1)(c)(ii) FSMA):

34.3.1. Mercedes[84] Ground 3

34.3.2. Volkswagen Ground 3[85]

34.3.3. CAAF Stage 3[86]

34.4. **Issue 4 (Redress):**

Alleged unlawful/irrational approach in the Schemes' rules as to redress (see in particular ss.404A(1)(d), 404A(4) and 404A(5) FSMA):

34.4.1. Volkswagen Ground 4[87]

34.4.2. CAAF Stage 4[88]

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[81] Mercedes' "Grounds of Challenge" dated 27.04.26 ("**Grounds"**), §5C, §§15-21.

[82] Volkswagen's Grounds, §9.2, §§38-52.

[83] CAAF's Grounds, §§71-73.

[84] Mercedes' Grounds, §§41-51.

[85] Volkswagen's Grounds, §§53-67.

[86] CAAF's Grounds, §§109-120.

[87] Volkswagen's Grounds, §§68-88.

[88] CAAF's Grounds, §§121-142.

34.4.3. Mercedes Ground 4[89]

34.4.4. Consumer Voice Ground 3[90]

34.4.5. Consumer Voice Ground 2[91]

34.5. **Issue 5[92] (Limitation):**

Alleged unlawful approach to limitation in the Schemes' rules.

34.6. **Issue 6[93] (Market Integrity):**

Alleged unlawful/irrational approach to the "*market integrity objective*" (s.1D FSMA) and/or to consumer protection.

34.7. **Issue 7[94] (Compensatory Interest):**

Alleged unlawful/irrational approach to the rate of compensatory interest and in not including a mechanism for consumers to seek a higher rate of interest.

34.8. **Issue 8 (Article 1 of the First Protocol to the ECHR ("A1P1"))**

Alleged incompatibility of the Schemes with A1P1 property rights.[95]

34.9. **Issue 9 (Consumer Voice only) (Standing)**

Whether Consumer Voice should be refused permission to apply, or relief, for a lack of sufficient interest (s.404D(4) FSMA), and/or a lack of candour.

35. These Issues are addressed in turn, following a general overview of the s.404 FSMA power exercised by the FCA in making the rules introducing the Schemes. A proper

[89] Mercedes' Grounds, §§52-63.

[90] Consumer Voice's "Statement of Facts and Grounds" dated 27.04.26 ("**Grounds**"), §§78-88 "APR Adjustment"

[91] Consumer Voice Ground 2 alleges, in sum, that the FCA took an irrational approach to the Supreme Court decision in *Johnson.*

[92] Mercedes' Ground 2, §§22-40.

[93] Consumer Voice's Grounds, §§64-69.

[94] Consumer Voice's Grounds, §§89-100.

[95] This argument is advanced, but wholly unparticularised, at Volkswagen's Grounds 2, 3 and 4: §52.4(3), §67.3, §88.6; and CAAF's Stages 2, 3 and 4: §108.3, §120.3, §142.5. Consumer Voice also attempts to rely on A1P1 under its market integrity ground (Issue 6): §69. This is accompanied by unexplained reference to Articles 6 and 8 ECHR (the right to a fair hearing and the right to private and family life). This point is hopeless, and is addressed shortly under Issue 6 (market integrity) below.

understanding of this power, and of the Tribunal's role in applying the principles of judicial review to its exercise, is critical to understanding the fundamental flaws in the challenges presented by all of the Applicants.

D. THE SECTION 404 POWER

1. The statutory provisions

36. Sections 404-404G FSMA form part of a cross-heading within Part XXVIII FSMA, entitled "*Consumer redress schemes*". These provisions were inserted (and in the case of s.404, substituted) by s.14 of the Financial Services Act 2010. In its prior form, s.404 provided a power to HM Treasury to make orders authorising the FCA (the FSA as it then was) to make schemes for "*reviewing past business*". The amendments made by s.14 were contained under the cross-heading "*Measures to protect consumers*".

37. Section 404 relevantly provides for the power to make a CRS in the following terms:

> "*(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; and*
> >
> > *(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.*
>
> *(4) A "consumer redress scheme" is a scheme under which the firm is required to take one or more of the following steps in relation to the activity.*
>
> *(5) The firm must first investigate whether, on or after the specified date, it has failed to comply with the requirements mentioned in subsection (1)(a) that are applicable to the carrying on by it of the activity.*
>
> *(6) The next step is for the firm to determine whether the failure has caused (or may cause) loss or damage to consumers.*
>
> *(7) If the firm determines that the failure has caused (or may cause) loss or damage to consumers, it must then—*

(a) determine what the redress should be in respect of the failure; and

(b) make the redress to the consumers.

(8) A relevant firm is required to take the above steps in relation to any particular consumer even if, after the rules are made, a defence of limitation becomes available to the firm in respect of the loss or damage in question."

38. Section 404A relevantly provides that:

"*(1) Rules under section 404 may make provision—*

(a) specifying the activities and requirements in relation to which relevant firms are to carry out investigations under consumer redress schemes;

(b) setting out, in relation to any specified description of case, examples of things done, or omitted to be done, that are to be regarded as constituting a failure to comply with a requirement;

(c) setting out, in relation to any specified description of case, matters to be taken into account, or steps to be taken, by relevant firms for the purpose of—

(i) assessing evidence as to a failure to comply with a requirement; or

(ii) determining whether such a failure has caused (or may cause) loss or damage to consumers;

(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;

(e)as to the things that relevant firms are, or are not, to do in establishing and operating consumer redress schemes…

(2) The only examples that may be set out in the rules as a result of subsection (1)(b) are examples of things done, or omitted to be done, that have been, or would be, held by a court or tribunal to constitute a failure to comply with a requirement.

(3) Matters may not be set out in the rules as a result of subsection (1)(c) if they have not been, or would not be, taken into account by a court or tribunal for the purpose mentioned there.

(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.

…

(9) Nothing in this section is to be taken as limiting the power conferred by section 404."

39. Section 404F(1) relevantly provides that for the purposes of these provisions, "*redress*" "*includes: (a) interest; and (b) a remedy or relief which could not be awarded in legal proceedings*".

2. The scope of the power

40. There has been no direct consideration by the courts or tribunals of the lawful exercise of the s.404 power in a s.404D challenge.[96] There have been some judicial observations as to the purpose and scope of the power in other proceedings.

41. In *FCA v BlueCrest Capital Management (UK) LLP* [2025] 1 WLR 746, the Court of Appeal was required to consider the respective scope of the s.404 power and the FCA's power in s.55L FSMA to impose requirements on individual regulated persons, so as to consider whether the s.55L power extended to a requirement to establish a specific redress scheme. In his discussion of the different roles fulfilled by s.55L and s.404 under FSMA, Popplewell LJ described the s.404 power at §76 as follows:

> "*the fact that a consumer redress scheme under s. 404 requires widespread or regular failures by multiple firms reflects the fact that it 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 in contravention of any requirement. Indeed although s. 404(4) defines a consumer redress scheme as one which contains any one of the following features, one of which, in s. 404(7)(b), is the making of redress, the sequence of subsections (5) to (7) and the language that "the firm must first investigate" and that "the next step" is determining loss suggests that the paradigm case of a market wide redress scheme will involve all these steps, starting with an investigation by individual firms as to whether they have contravened any requirements. Such consumer redress schemes can be used to protect public confidence in sectors of the market as a whole.*"

42. The statutory pre-conditions to the exercise of the s.404 power, set out in s.404(1), involve the exercise by the FCA of regulatory discretion and assessment ("*it appears*", "*it considers*", "*desirable*"). The language used does not admit of hard-edged questions of law but of expert judgement ("*may have been*", "*may suffer*", "*widespread*", "*desirable*"). As to this:

    42.1. It is well-established that, where Parliament has conferred a complex discretion upon a public authority, it is for the authority alone to consider the economic arguments, weigh the competing considerations and arrive at a judgement. The Court will be astute to avoid the danger of substituting its views for those of the decision-maker, and it should be even slower to impugn the "*educated*

[96] A s.404D challenge was brought before the Tribunal to the CRS established to provide redress for former members of the British Steel Pension Scheme. However, the application was (rightly) withdrawn.

prophecies and predictions for the future" effect of those decisions: *R v Director General of Telecommunications, ex p Cellcom Ltd* [1999] ECC 314 at §26 *per* Lightman J; *R (Lord Carlile) v Secretary of State for the Home Department* [2015] AC 945 at §32 *per* Lord Sumption; and, in application to the FCA itself, *BlueCrest* at §83 and *R (The All-Party Parliamentary Group On Fair Banking) v FCA* [2025] EWHC 525 (Admin) at §144 *per* Freedman J.

42.2. Parliament may use criteria which "*are sufficiently imprecise that there is room for different decision-makers, each acting rationally, to reach different answers. In such a case the court will not interfere with the decision taken unless it is "irrational" in the sense either that it is outside the range of reasonable decisions open to the decision-maker or that there is a demonstrable flaw in the reasoning which led to the decision*": see *R (Finch) v Surrey County Council* [2024] PTSR 988, SC, at §56 *per* Lord Leggatt and *R v Monopolies & Mergers Commission, ex p South Yorkshire Transport Authority* [1993] 1 WLR 23, 32 *per* Lord Millett.

43. The effect of ss.404(4)-(7) is that a CRS may encompass, in substance, one or more of three steps, which a firm is then required to take in accordance with the CRS rules: an investigation into failures to comply with the relevant requirements; a determination of whether the failures caused (or may cause) loss or damage; and a determination of what redress should be made (which the firm must then pay to the consumers). There is no dispute that the Schemes under challenge impose these three steps.

44. Section 404A(1) sets out a long list of matters which the rules of a CRS may make provision for, some of which are subject to controls. The scheme rules may set out examples of things done or not done that are to be regarded as a failure to comply with a specified requirement, save that they may be set out only if a court or tribunal has held, or would hold, them to constitute a failure to comply: ss.404A(1)(b) and (2). The scheme rules may set out matters to be taken into account or steps to be taken for the purpose of assessing evidence of a failure to comply, save that matters may not be set out if they have not been, or would not be, taken into account by a court or tribunal: ss.404A(1)(c)(i) and (3). The scheme rules may set out matters to be taken into account or steps to be taken for the purpose of determining whether the failure has caused or may cause loss or damage to

consumers, save that matters may not be set out if they have not been, or would not be, taken into account by a court or tribunal: ss.404A(1)(c)(ii) and (3).[97] In relation to redress, the scheme may provide for the kinds of redress to be made or not made, and the way redress is to be determined, save that the provision must secure that the only "*kinds of redress*" to be made are those which the FCA considers to be "*just*" (and in doing so the FCA must have regard, among other things, to the nature and extent of the loss or damage): ss.404A(1)(d), (4) and (5).

45. The terms of ss.404 and 404A read together identify certain clear indications from Parliament as to the nature and purpose of the s.404 power, which are relevant to its exercise:

45.1. The power has been entrusted to the FCA, by way of making scheme rules, replacing a power conferred on HM Treasury to be made by way of Order subject to Parliamentary approval. That change was made to place responsibility with the expert regulator, with a more flexible process.

45.2. The purpose of the power is, first and foremost, to benefit and to protect consumers: see the cross-headings in FSMA and in the 2010 Act. It is a power which, by definition, advances the consumer protection objective in s.1C FSMA (see further Issue 6 below).

45.3. The statutory question of desirability in s.404(1)(c) encompasses not just whether a CRS should be made at all, but also what the terms of that CRS should be. The desirability of a CRS can only be assessed by reference to its terms and predicted effect. This is an exercise of regulatory judgement to which the authorities cited above, concerned directly with the judicial respect to be shown to such judgements, apply with particular force.

45.4. The consumer is aided by a CRS, which offers an alternative to making a complaint (such as to FOS) or to bringing legal proceedings, but they will nonetheless receive a proactive assessment of their entitlement to redress from the firm (or a decision that they are not within scope). They are not precluded from bringing legal proceedings if they consider the redress offered is

[97] The control in s.404A(3) applies only to rules on the "*matters to be taken into account*" and not on the "*steps to be taken*".

insufficient. Further, the effect of s.404B is that any complaint made to the FOS which is within the scope of the scheme will be determined by reference to the scheme, and not the wider jurisdiction of the FOS.

45.5. The relevant firms are aided by a CRS because the precondition is the possibility of "*widespread or regular*" failures of compliance that would be capable of being litigated by consumers. A CRS obviates the need to defend large numbers of potential civil claims (or handle consumer complaints in line with the regulated complaint handling framework within the FCA Handbook) that stem from a widespread failure of this kind.

45.6. A CRS is to be applied on a collective basis, across a potentially very wide sector. The power must therefore be capable of being operated effectively and efficiently, so as to strike a proportionate balance between the competing interests of consumers and regulated firms, having regard to generally applicable regulatory objectives and principles.

45.7. Similarly, for a CRS to be "*desirable*", and for it to achieve its statutory purpose of being more proportionate and efficient than leaving individual claims and complaints to be litigated and determined, the CRS must be designed in a manner which is practical and capable of operational implementation at scale. As CAAF accepts in terms, "*any such Scheme must comprise Rules capable of general application to a large body of consumers in an efficient way*".[98] This is correct but proves too much, for it concedes that these are matters of design and judgement for the FCA.

45.8. The FCA is not required to have "*grounds for believing that each and every firm which is subjected to it has been in contravention of any requirement*": *BlueCrest* §76. Accordingly, it is envisaged by the legislation that the CRS will be designed by reference to market-wide factors and assumptions. Similarly, the FCA is not required to show that every conceivable set of consumer circumstances within the scope of the redress scheme would have been found to have been unlawful and remediable by a court or tribunal. The failure of

[98] CAAF's Grounds, §6.

compliance must be "*widespread*", not 'uniform' or 'universal'. Parliament did not expect that a CRS could only be designed by reference to fact patterns which had been the subject of decided case law; the language of s.404(1) requires the FCA to form a judgement as to the pool of contexts within a market which, it "*appears to*" the FCA, "*may have been*" failures of compliance.

45.9. The array of rule types available to the FCA in s.404A(1), and the breadth of the discretion afforded to the FCA with each such type as to the design adopted, are reflective of the expert and predictive regulatory judgement which Parliament has afforded to the FCA in this respect.

45.10. The language of s.404A directly envisages that the rules of the CRS may be highly prescriptive. The FCA may prescribe: things that are "*to be regarded*" as compliance failures (s.404A(1)(b)); "*steps to be taken*" (s.404A(1)(c)) to assess the evidence of failure, and in determining causation of loss; the kinds of redress "*that are, or are not, to be made*" (s.404A(1)(d)); "*things that relevant firms are, or are not, to do in establishing and operating*" the CRS (s.404A(1)(e)). These prescriptions may differ as between different "*specified descriptions of case*". The choice of these prescriptions is a matter of discretion and of expert regulatory judgement.

46. The safeguards provided for in s.404A(2)-(3) are that the prescriptions provided for in the scheme rules in relation to liability and causation of loss must address circumstances which are capable of being found by a court or tribunal to constitute a failure of compliance, or as evidence of non-compliance, or as evidence of causation of loss, in equivalent proceedings concerning the relevant failure. These safeguards reflect the principle in s.404(1)(b) that the consumer should have suffered (or may suffer) loss or damage in respect of which a remedy or relief would be available in legal proceedings, but also that this being borne out need only to "*appear*" to the FCA to be the case. The FCA is not required when designing the CRS to be certain that every case caught by the scheme's prescriptions will always satisfy the requirements of civil liability.

47. The scope of the FCA's area of regulatory judgement to prescribe circumstances capable of being found to constitute a failure of compliance, which could cause loss or damage, will be affected by the nature of the actionable requirement the CRS is instituted to provide

redress in relation to. Some requirements may involve the application of simple binary rules, which require little intervention on the part of the scheme's rules in order to render their application operational at scale. Other requirements will involve a much greater degree of contextual assessment of circumstances in establishing non-compliance. In those instances, it is particularly appropriate and necessary for the FCA to use its regulatory expertise to establish a CRS – predicated upon and addressing an identified widespread failure of compliance – which ensures ready and consistent identification of cases of non-compliance which caused loss or damage. The present Schemes concern only widespread failures to comply with the requirement that the motor finance industry's relationships with its consumers must not be "*unfair*" to the consumer debtor, in breach of the terms of s.140A CCA. Identifying and adopting CRS rules so as to provide operational clarity and consistency as to what should be considered "*unfair*" for the purposes of compliance failures, and caused loss or damage in s.140A terms, is an exercise of regulatory judgement on the part of the FCA *par excellence*. Significant judicial respect should be afforded to that judgement.

48. The scope of the FCA's area of regulatory judgement is particularly wide to prescribe rules within the CRS to reflect its view of what redress (including in forms going beyond that capable of being ordered by a court or tribunal) should be awarded in order to be "*just*". The safeguards described above at §46 are deliberately omitted in relation to this exercise of discretion. The FCA returns to this under Issue 4 below.

3. The Upper Tribunal's Jurisdiction

49. The jurisdiction of the Upper Tribunal over the Applications is provided by s.404D FSMA. By s.404D(5), the "*general rule is that, in determining an application, the Tribunal is to apply the principles applicable on an application for judicial review*". For this reason, the Applications correctly seek to frame their grounds of challenge by references to public law errors: lack of *vires*, error of law, irrationality, breach of human rights and so forth. The sole remedy available to the Tribunal is the discretionary remedy available in judicial review of a quashing order of the CRS rules, or any provision of the rules: s.404D(2).

50. In two specified respects, the Tribunal has a jurisdiction "*in addition to its jurisdiction under subsection (5)*": s.404D(8). In relation to this additional jurisdiction only, the

Tribunal may consider evidence relating to that additional jurisdiction, "*whether or not it was available at the time the rules were made*". The jurisdiction is provided for in s.404D(6)-(7):

"*(6) If (or so far as) an application relates to an example set out in the rules as a result of section 404A(1)(b), the Tribunal may determine whether the example constitutes a failure to comply with the requirement in question.*

(7) If (or so far as) an application relates to a matter set out in the rules as a result of section 404A(1)(c), the Tribunal may determine whether the matter should be taken into account as mentioned in that provision."

51. The scope of this additional jurisdiction is carefully and unsurprisingly limited.

51.1. Section 404D(6) arises only in relation to s.404A(1)(b), and the power of the FCA to set out "*examples of things done, or omitted to be done, that are to be regarded as constituting a failure to comply with a requirement*" (i.e. here the requirements of s.140A CCA), which must by s.404A(2) be examples of things "*that have been, or would be, held by a court or tribunal to constitute a failure to comply with a requirement*".

51.2. Section 404D(7) arises only in relation to s.404A(1)(c), and the power of the FCA to set out "*matters to be taken into account*" for the purposes of assessing evidence of a failure to comply, or determining causation of loss or damage, which must by s.404A(3) be matters which have been or would be "*taken into account by a court or tribunal*" for that purpose.

52. In other words, in both instances, the limited nature of the additional jurisdiction is directly tied to, and limited by, an assessment of whether or not the FCA has correctly understood the law applicable to the requirement in question and how that law would be applied by the courts in a civil claim brought (for present purposes) under s.140A CCA, which the FCA accepts is a matter of law for the Tribunal. It is in this sense that CONRED 1.7.5G describes the additional jurisdiction as enabling the Tribunal to "*conduct a full merits review to consider whether the FCA's interpretation of the law was correct*".

53. In the context of the present Schemes, the relevant issues will be whether a liability assessment has been based on principles and guidance from the case law as to the indicators of unfairness and whether the approaches of the Schemes to causation and loss are permissible ones given the limited role for causation and loss analyses in the context

of s.140A CCA proceedings.[99] The FCA's position as to why its approach in the Schemes has involved no error of law in the sense identified in ss.404A(2) or (3) is set out in Sections F and G below. However, the Tribunal's additional jurisdiction does not create for it a 'merits' role in the sense of being entitled to substitute some different example or matter for that contained in the Scheme; such an approach would be inconsistent with the language of ss.404D(6) and (7), incompatible with the quashing order remedy in s.404D(2), and contrary to basic principles as to the proper constitutional role of the Tribunal. Nor does the additional jurisdiction justify overlooking the context in which it sits: the exercise still arises in relation to the creation of a CRS under s.404 with all of the need for operability and broad-brush rules which flow from Parliament's creation and definition of that power.

54. The reliance on this additional jurisdiction is not pleaded at all by Mercedes or Consumer Voice. Volkswagen and CAAF do plead such reliance, but only sparsely: see the respective Grounds at §§52.2, 52.3, 59, 65 (Volkswagen) and 53, 107, 116.3 (CAAF). Those pleadings do not set out which specific rules in the Schemes are impugned, do not specify which "*thing done*" would not be held by a court to constitute unfairness, and do not specify which "*matters*" are "*set out*" in the Schemes which would not be "*taken into account*" by a court in a s.140A CCA claim. This specificity is important in the context of a carefully delimited additional jurisdiction.

55. The Tribunal's additional jurisdiction under s.404D expressly does not extend to assessment made by the FCA within any given CRS of what form and amount of redress is "*just*".

E. ISSUE 1 – TEMPORAL SCOPE

1. Introduction and overview of arguments

56. The lender Applicants each argue that the FCA lacked the *vires* to introduce Scheme 1. In sum, they contend that the scope of the FCA's powers is limited temporally, such that it

[99] In a context of a different CRS concerning breaches of a different requirement, the scope for the additional jurisdiction may well be different too; the ability of the Tribunal to identify that a specified "*thing done*" or "*matter*" set out has fallen into error because no court or tribunal would reason in that way will vary depending upon the nature of the requirement, the cause of action and the court's jurisdiction. The provisions of ss.140A-140B CCA are, as set out further below, unusual in various respects in this regard.

cannot introduce a CRS in respect of motor finance agreements entered into before 1 April 2014.

57. The effect of this submission, if correct, would be that the FCA lacks the power to introduce *any* CRS covering the period of 6 April 2007 – 31 March 2014. That is a period for which the FCA has determined – in light of all the evidence before it and the consultation feedback which it received – that consumer harm was *greater* than in the later period (covered by Scheme 2).[100]

58. This challenge is not, however, correct. The relevant provisions, in particular the breadth of s.404(1) FSMA and the temporal reach of Article 60B of the FSMA (Regulated Activities) Order 2001 (as amended) (SI 2001/544) ("**RAO**"), make clear that the FCA did have *vires* to make the rules[101] introducing Scheme 1.

2. Legal principles

59. Section 404(1) has been set out above in Section D. For present purposes, there are two relevant definitions: "*authorised persons*" and "*consumer*". As addressed further below, it must appear to the FCA that:

59.1. There "*may*" have been failures (of the kind set out in s.404(1)(a)), by "*relevant firms"*, a phrase defined under s.404(2)(a) as including "*authorised persons*",

59.2. As a result, "*consumers*" may be, or have been, affected (in the manner set out in s.404(1)(b)). The term "*consumer*" includes those who have "*used, or may have contemplated using, any of*" certain services: including services "*provided by… authorised persons in carrying on regulated activities*" (s.404E(1)-(2)).

[100] Policy Statement p.29 and Chapter 11: the FCA considered evidence "*on the evolution of commission practices over time that indicates DCAs were both more prevalent and, on average, more harmful in earlier years…*".

[101] By way of the Motor Finance Commission Consumer Redress Scheme (2007-2014) Instrument 2026 (FCA 2026/20), relating to Scheme 1, which introduced a new chapter (Chapter 6) into the Consumer Redress Scheme sourcebook ("**CONRED**"). https://api-handbook.fca.org.uk/files/instrument/CONRED/FCA%202026/20-2026-03-31.pdf.

3. Background to the FCA's response

60. The lender Applicants argue that:

60.1. **First,** prior to 1 April 2014, firms entering into motor finance agreements were not "*authorised persons*" (ss.404(2) and 31 FSMA); i.e. authorised by or under, and for the purposes of, that Act. It is said to follow that firms subject to Scheme 1 are not "*relevant firms*", for the purposes of introducing a CRS (ss.404(1)-(3) FSMA).[102]

60.2. **Second,** prior to 1 April 2014, the firms were not "*carrying on regulated activities*". It is said to follow that the definition of "*consumer*" is not satisfied (ss.404 and 404E FSMA).[103]

61. On 1 April 2014, the regulation of consumer credit was transferred from the OFT to the FCA. Prior to that point, firms carrying on consumer credit activities were regulated by the OFT, i.e. required a licence under s.21 CCA. The transfer to the FCA of this regulatory responsibility "*was effected in legislative terms by specifying various consumer credit activities as regulated activities*"[104]. Section 19(1) FSMA generally prohibits carrying out such activities without authorisation/exemption. Consequently, since 1 April 2014, a firm has required – in place of the previous OFT licensing regime – "*appropriate permissions under Part 4A* [FSMA] *before it can lawfully carry on consumer credit regulated activities.*"[105]

62. This specification of consumer credit activities as "*regulated activities*" for FSMA purposes required an amendment to the RAO. That was effected by the FSMA (Regulated Activities) (Amendment) (No 2) Order 2013 (SI 2013/1881) ("**2013 Amendment Order**"). In particular, Article 6 of the 2013 Amendment Order inserted Article 60B RAO ("*regulated credit agreements*"), with effect from 1 April 2014.[106]

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[102] Most clearly, see Mercedes Grounds, §19(e).

[103] All three lender applicants' Grounds make the *consumer* argument: Volkswagen Grounds, §37; CAAF Grounds, §71; Mercedes Grounds, §19(f).

[104] *Firm A v the Financial Conduct Authority* [2016] UKUT 18 (TCC), §§6-7

[105] Ibid.

[106] See Article 36A (credit broking) and 60B (regulated credit agreements) RAO, and Article 1 of the 2013 Amendment Order, as to commencement.

63. Section 404 FSMA was enacted in a fashion that intentionally gave the FCA broad power to establish a CRS, including over historical breaches. The Financial Services Act 2010, s.14(2), provided that the provisions of ss.404-404G FSMA have "*effect in relation to failures occurring before the commencement of this section…*" (emphasis added).[107] This gives clear retroactive effect to the FCA's powers and supports a broad and purposive construction of s.404 FSMA. The safeguards provided for by Parliament include that the CRS framework under FSMA only aggregates existing liabilities; it does not create a new cause of action against lenders, nor retrospectively render unlawful conduct which was lawful at the time, and it preserves limitation defences.

4. "Authorised persons"

64. The short answer to the lender Applicants' first argument under Ground 1 is that nothing in s.404(1) requires that "*relevant firms*" were "*authorised persons*" at the time of the relevant failure (or at the time that the motor finance agreement was entered into). Rather, Scheme 1 was lawfully made in respect of "*relevant firms*" if they were "*authorised persons*" at the time that the FCA's power was exercised (i.e. when the rules were made).[108] In addition, this position is supported by other provisions of FSMA, notably s.415AA, which expressly refers to formerly authorised persons "*in addition to persons who are authorised persons at the time when the power is exercised*" (emphasis added).

65. There is no warrant to read into s.404(1)(a) words which are not there, in order to exclude firms which were previously licensed by the OFT in respect of consumer credit activities and are now "*authorised*" by the FCA for the same purpose. The wording of s.404(1) is amply wide enough to cover historic failures of firms which are currently "*authorised persons*". *A fortiori*, since the statutory purpose of s.404 is to serve as a remedial provision and it was expressly contemplated, by Parliament, that it would have retroactive effects.

[107] The Tribunal will observe that this is sufficient to dispose of the apparent suggestion, by Volkswagen, that a "*failure"* arising prior to 1 April 2014 cannot be the subject of a CRS under s.404 FSMA. It is unclear from the pleading whether Volkswagen intends to make this as a separate point (or whether it is parasitic on its argument that the definition of "*consumer"* is not satisfied). If it does so intend, it is plainly wrong: Volkswagen Grounds, §§36-37. See also CAAF Grounds, §70, which suffers from the same flaw.

[108] To note this is not exhaustive of the FCA's powers: as the definition of "*relevant firm"* is extended by s.404F(5)-(6) FSMA to also include persons who were "*at any time*" a relevant firm but have ceased to be a relevant firm and persons who have assumed liabilities incurred by a relevant firm.

66. The correct position, therefore, is that "*authorised persons*" includes firms authorised to provide consumer credit services under FSMA and under the RAO, at the time when the FCA makes rules establishing a CRS.

5. "*Consumer*" and "*regulated activities*"

67. The second point made by the lender Applicants under this Issue is that the FCA's s.404 power is limited by the definition of consumer: which is linked to "*carrying on regulated activities*" (s.404E(1)-(2)).

68. "*Regulated activities*" are defined by the RAO, an order made by the Treasury 'specifying' certain activities (s.22(5) FSMA). As noted, consumer credit activities became "*regulated activities*" with effect from 1 April 2014.[109] The lender Applicants accordingly say that firms were not providing "*specified*" "*regulated activities*" when services were rendered to the consumer prior to 1 April 2014.

69. However, that argument is also misplaced. It is contradicted by the express wording of Article 60B RAO, in particular 60B(3),[110] which reads:

> *"**Regulated credit agreements***
>
> *(1) Entering into a regulated credit agreement as lender is a specified kind of activity.*
>
> *(2) It is a specified kind of activity for the lender or another person to exercise, or to have the right to exercise, the lender's rights and duties under a regulated credit agreement.*
>
> *(3) In this article— ...*
>
> *"regulated credit agreement" means—*
>
> > *(a) in the case of an agreement entered into on or after 1st April 2014, any credit agreement which is not an exempt agreement; or*
> >
> > *(b) in the case of an agreement entered into before 1st April 2014, a credit agreement which—*
> >
> > > *(i) was a regulated agreement within the meaning of section 189(1) of the Consumer Credit Act 1974 when the agreement was entered into; or*
> > >
> > > *(ii) became such a regulated agreement after being varied or supplemented by another agreement before 1st April 2014,*

[109] As a result of Article 6 of the 2013 Amendment Order inserting Article 60B into the RAO.

[110] Introduced by the FSMA (Regulated Activities) (Amendment) Order 2016 (SI 2016/392), Article 2(10) ("the **2016 Amendment Order**").

and would not be an exempt agreement pursuant to article 60C(2) on 21st March 2016 if the agreement were entered into on that date."

70. The underlined wording, in particular the definition of "*regulated credit agreement*", makes clear that the relevant regulated activity includes agreements entered into prior to 1 April 2014, provided that they were then "*regulated agreements*" (as defined).

71. Section 189(1) defined those agreements as follows, before April 2014:[111] "*"regulated agreement" means a consumer credit agreement, or consumer hire agreement, other than an exempt agreement, and "regulated" and "unregulated" shall be construed accordingly*".[112] Thus, before April 2014, a consumer credit agreement was regulated under the CCA, unless it was exempt.[113] Accordingly, by virtue of Article 60B RAO, "*regulated activities*" include "*regulated credit agreements*" entered into prior to 1 April 2014 (i.e. "regulated agreements").

72. Notwithstanding the plain meaning of this provision, Mercedes argues (Grounds, §19(b)) that the relevant wording in Article 60B(3) was introduced in 2016 "*merely to clarify that agreements made before 1 April 2014 nonetheless fell within <u>the [Article] 60B(2) regulated activity</u> (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 [Article] 60B(1)*" (emphasis added). Mercedes' approach is to 'read in' additional words to the definition in Article 60B(3) RAO: such that it applies to Article 60B(2) <u>only</u>; but not to Article 60B(1).

73. There is no warrant for such an approach:

73.1. On its face, Article 60B(3) ("*In this article…*") applies to Article 60B(1) and (2) equally. Indeed, the statutory language permits of only one interpretation, which is consistent with the statutory purpose. There is no wording in Article 60B(3) which even arguably supports Mercedes' restrictive interpretation. It would have been easy to specify "*in paragraph (2)*" instead, had that been the

[111] It follows, from the cross-reference in Article 60B(3)(b)(i) ("*within the meaning of [s. 189 CCA] when the agreement was entered into*"), that the relevant version of section 189 is that which was in place prior to 1 April 2014: *before* the transfer of regulatory oversight from the OFT to the FCA.

[112] Section 189 CCA was amended, with effect from April 2014, by the 2013 Amendment Order discussed above at §62 (Article 20(60)(a)(vi)).

[113] None of the exemptions are relevant for present purposes: the exempt agreements at the time included agreements specified in ss.16, 16A, 16B, and 16C CCA, covering matters such as high-net-worth clients, high value business loans above £25,000 or investment properties.

intended scope of the definition. Mercedes' approach equates to an amendment, not interpretation.

73.2. The relevant pre-April 2014 agreements were already "*regulated*" under the CCA (and consumer credit lending was already a licensed activity, as Mercedes accepts: Grounds §19(e)). The effect of Article 60B(3) RAO is simply to 'carry across' that pre-existing status into "*regulated activities*" within the meaning of s.22 (and thereby s.404E) FSMA.

73.3. The FCA's interpretation promotes the remedial statutory purpose, and does not entail any impermissible retrospectivity. On the footing that pre-April 2014 consumer credit activities are "*regulated activities*" for the purposes of section 404(1) FSMA, this allows the FCA to introduce a redress scheme in respect of conduct which was <u>already</u> unlawful under the previous regulatory regime. Conversely, the restrictive interpretation would afford a windfall to non-compliant firms whose breaches happened to take place prior to the transfer of functions from one regulator to another, which cannot have been the legislative intention.

73.4. For completeness:

73.4.1. Mercedes' reliance on §7.4 of the Explanatory Memorandum to the Order which introduced Article 60B(3)[114] is misplaced (Grounds, §19(c)). The passage quoted simply clarifies that the *scope* of the regulation was not expanded by Article 60B(3). In other words, pre-April 2014 agreements which fell outside of s.189(1) CCA, do not become "*regulated agreements*" by virtue of Article 60B. In any event, an Explanatory Memorandum cannot override the plain and natural meaning of the RAO.

73.4.2. Mercedes' reliance on 2010 guidance on s.404 FSMA produced by the FSA does not take the matter any further (Grounds, §20). The

[114] I.e. the 2016 Amendment Order (see footnote 109 above).

quoted part of the guidance was wrong, for the reasons set out above.

74. In the alternative, the FCA submits that, even if the lender Applicants were correct that "*entering into*" the relevant agreement prior to 1 April 2014 was not a "*regulated*" activity for these purposes, the effect of Article 60B(2)-(3) is that pre-April 2014 agreements cannot be entirely disregarded: Mercedes accepts that "*agreements made before 1 April 2014 nonetheless fell within the [Article] 60B(2) regulated activity*" (§19(b)) and CAAF's position appears to be that its *vires* complaint applies only to agreements which started and ended prior to 1 April 2014 (CAAF Grounds, §§70-71). None of the lender Applicants squarely confront the issue of relevant agreements which "straddle" 1 April 2014: see Article 60B(2).[115] This difficulty simply does not arise on the FCA's interpretation, since agreements entered into either side of this date are "*regulated credit agreements*" and thus "*regulated activities*".

6. Conclusion on Issue 1

75. Accordingly:

75.1. Section 404(1) includes 'historic' failures.

75.2. "*Relevant firms*" includes those currently[116] authorised under FSMA, regardless that prior to 1 April 2014, those firms were regulated by the OFT, rather than the FCA, for the relevant purposes (consumer credit activities).

75.3. The definition of "*consumer*" is closely linked to "*regulated activities*" (ss.404E(1)-(2) FSMA).

75.4. "*Regulated activities*" for present purposes means "*regulated credit agreements*". "*Regulated credit agreements*" expressly includes agreements "*entered into before 1st April 2014*" (Article 60B RAO).

[115] This may be because of the clear case law – addressed further below – that limitation to bring an unfairness complaint only begins to run from the end of the allegedly unfair relationship, rendering it particularly unlikely that such relationships were intended by the legislation to be omitted.

[116] Strictly, it must appear to the FCA that the relevant conditions are met at the time of making the rules, reading s.404(1)-(3) together (and cf s.404F FSMA: s.404(1) includes but is not limited to those *currently* authorised).

76. While the FCA recognises that, as to "*consumer*", the 2013 Amendment Order extended the meaning of that term for certain purposes,[117] the definition of "*regulated activities*" is the key consideration when deciding what "*consumer*" means for the purposes of s.404 FSMA. Indeed, this appears to be common ground, as each of the lender Applicants places considerable weight on the meaning of "*regulated activities*" (while, at the same time, neglecting the key definition in Article 60B(3) RAO).

77. Were the lender Applicants to be correct, there would be an unjustifiable lacuna in enforcement. Neither the OFT (which was abolished on 1 April 2014) nor the FCA (to which the relevant functions were transferred) could take steps to procure redress for consumers using a CRS in respect of the pre-April 2014 period, even assuming that those consumers were entitled to such redress under the general law, and even though the relevant powers plainly encompass 'historic' failures and express provision is made for the specific purpose of avoiding such lacunae. There is no policy rationale for such an outcome, which further supports the FCA's approach to *vires*.[118]

F. ISSUE 2 – UNFAIR RELATIONSHIPS AND THE RELEVANT ARRANGEMENTS

1. Introduction and overview of arguments

78. Volkswagen Ground 2 and CAAF Stage 2 both challenge aspects of the Schemes which address liability. In essence, they contend that the circumstances in which a firm must determine that the lending relationship was unfair under s.140A CCA are excessively broad, and therefore unlawful.

79. As summarised in §33.3 above, in broad terms (and subject to certain exceptions), the Schemes provide that firms must determine that the lending relationship was unfair when one of three "*relevant arrangements*" (a high commission, DCA or tie) was present, but inadequately disclosed.

[117] Article 65 of the 2013 Amendment Order specifies that "*consumers*" includes persons "*who before 1st April 2014*" used relevant credit services, for the purposes of the provisions listed in Article 65(3), which do not include s.404 FSMA. "*Relevant credit services*" were defined for these purposes as including services provided by a person holding a licence under the CCA.

[118] Mercedes tacitly recognises this, since it argues that the interpretation for which it contends could be "*resolved by application to HM Treasury under s.404G to amend the definition of "consumer"*" (Grounds, §21). The FCA's position is that the definition of "*consumer*" is met, and therefore intervention by HM Treasury is unnecessary.

80. The thrust of Volkswagen and CAAF's challenge is that the Scheme rules on liability are unlawful because they require firms to presume an unfair relationship in circumstances where a court may not find unfairness. In particular:

80.1. Volkswagen and CAAF both contend that in general, unfairness cannot arise unless proper disclosure of the relevant arrangement would have made a difference to the consumer's behaviour or otherwise materially impacted the consumer. They say that the Scheme rules impermissibly presume unfairness where proper disclosure may not have had such an impact.[119] Both submit that the presence of any one of the three "*relevant arrangements*" in isolation is not sufficient to demonstrate unfairness, and/or that each of them is too broadly defined (and would therefore capture relationships which are not unfair).[120]

80.2. On that basis, the liability rules are said to be ultra vires, *Padfield* unlawful, irrational and/or an unlawful interference with the Applicants' A1P1 rights.[121]

81. These submissions are wrong. They are based on fundamental misunderstandings as to the nature and scope of the FCA's powers under s.404, and misinterpret the key authorities on s.140A CCA.

2. Legal principles: the s.404 power, unfairness under s.140A CCA and the Scheme rules on liability

82. The nature and purpose of the s.404 power in this context have been addressed in Section D above. As explained, a central tenet of that power is the ability to exercise regulatory judgement in making rules that are workable and capable of broad application in the context of a CRS.

83. Before addressing Volkswagen and CAAF's submissions, it is necessary to examine: (a) the nature of the FCA's powers to make rules on liability (i.e. identifying a relevant "*failure*"); (b) the application of that power in the context of failures arising under s.140A CCA; and (c) the legal basis for the rules adopted by the FCA.

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[119] Volkswagen §46, CAAF §74.

[120] Volkswagen §§48-51, CAAF §§80-102.

[121] Volkswagen §52, CAAF §§105-108.

i) *The FCA's powers to make scheme rules on liability*

84. Section 404A(1) makes express provision as to the FCA's power to make rules concerning the circumstances that constitute a relevant "*failure*". It provides:

> "*(1) Rules under section 404 may make provision…*
>
> *(b) setting out, in relation to any specified description of case, examples of things done, or omitted to be done, that are to be regarded as constituting a failure to comply with a requirement;*
>
> *(c) setting out, in relation to any specified description of case, matters to be taken into account, or steps to be taken, by relevant firms for the purpose of—*
>
> *(i) assessing evidence as to a failure to comply with a requirement;*"

85. These powers are constrained by the safeguards in ss.404A(2) and (3). Section 404A(2) provides that "*examples*" of failures given under s.404A(1)(b) must be "*examples of things done, or omitted to be done, that have been, or would be, held by a court or tribunal to constitute a failure to comply with a requirement*". Similarly, by s.404A(3) the rules may not require firms to take into account matters which "*have not been, or would not be, taken into account by a court or tribunal*" (although rules on the "*steps to be taken*" for the purposes of determining liability are not subject to the same constraint).

86. However, the promulgation of rules which satisfy those conditions remains a matter of regulatory judgement for the FCA:

86.1. First, the power to make rules concerning the identification and assessment of "*failures*" must be read in light of the FCA's discretion to identify such failures, and to determine whether they would give rise to a remedy or relief, as part of the thresholds for introducing a CRS under s.404. In that context, the FCA may introduce a CRS where it "*appears to the FCA*" those thresholds are met (ss.404(1)(a) and 404(1)(b)). The explicit breadth of that discretion must flow through into the FCA's rule-making powers on precisely the same issues: it would be nonsensical if it were any narrower.

86.2. Second, the power explicitly extends to providing "*examples*" which "*would be*" held by a court or tribunal to constitute a relevant failure (and *mutatis mutandis* matters that may be taken into account in the assessment). That connotes a predictive discretion whereby the FCA may, in the exercise of its

regulatory judgement, extrapolate from established legal principles and indications provided in relevant authorities in making the rules. That discretion is consistent with the nature and purpose of the s.404 power to introduce a CRS: it will be a rare case (if ever) that a situation demanding a CRS arises, and there is pre-existing authority that captures all of the possible factual permutations of the different individual cases caught by the scheme.[122] In this connection, it must be borne in mind that one of the purposes of a CRS is to allow for redress without recourse to the courts.

86.3. Third, the FCA's rule-making powers in this regard must be viewed in light of the nature and purpose of its powers to introduce a CRS as a way of delivering redress on a collective basis across a wide constituency of consumers, and the operational exigencies of doing so (including the need for the rules to be appropriately straightforward, practical and produce consistent and fair results). This is common ground: both Volkswagen and CAAF concede that the rules on the identification of relevant "failures" must be "*capable of general application to a large body of consumers in an efficient way*". [123]

ii) Making scheme rules on liability in the context of s.140A CCA

87. It is common ground that an unfair relationship under s.140A CCA, which gives rise to the availability of a remedy under s.140B CCA, is a relevant "*failure*" under s.404(1) FSMA. There is no doubt that the FCA has the power to introduce a CRS responding to widespread or regular instances of unfair relationships in s.140A CCA terms. However, defining in CRS rules the circumstances in which a relationship would be regarded as unfair within the terms of s.140A CCA requires a particular exercise of regulatory judgement. The s.140A test is highly fact-sensitive and allows courts hearing s.140A claims to take account of a very broad range of factors.[124] That calls for a balance to be struck between fidelity

[122] This power is subject to review by the Tribunal under s.404D(6), which has a power ("*may determine*") to conclude that the "*example*" would not constitute a relevant failure; but the availability of this "backstop" review does not alter the nature of the FCA's power and discretion in this regard.

[123] CAAF's Grounds, §6, §37; see also Volkswagen Grounds §42: "*It is inherent in the nature of a consumer redress scheme that such examples must be capable of general application*".

[124] *Johnson per* Lord Reed at §297; *Plevin per* Lord Sumption §§10 and 29; *Smith per* Lord Leggatt at §22.

to that open-textured enquiry and the need to implement rules on liability that can be operationalised at scale in the context of a CRS.

88. Contrary to the logical implication of the Volkswagen/CAAF submissions, a workable CRS cannot simply leave the application of the s.140A test in the hands of the firms that are subject to it: that would not be appropriate (given they would be sitting as a judge of their own liability), would lack clarity and would likely lead to highly inconsistent and unfair results, as well being immensely impractical to operate. It is both appropriate and necessary for the FCA to set clear, objective and practical rules as to how firms must approach the question of s.140A unfairness under the Schemes. That involves the exercise of the FCA's expert regulatory judgement, to which significant respect should (and, on the authorities, must) be afforded.

iii) The FCA's approach to liability in the Schemes and its legal and evidential basis

89. The Scheme rules defining the circumstances which give rise to an unfair relationship are set out at 5.3.1-5.3.20R. They represent a careful balance between the fact-sensitive nature of the s.140A test (as applied in the most relevant authorities) and the need to implement workable scheme rules. That balance has been struck based on the available empirical evidence, feedback received in consultation and the FCA's regulatory judgement and expertise.

90. By way of summary (and in part as noted in the Overview of the Schemes at §33 above):

90.1. Per CONRED 5.3.8R, the lender must presume there was an unfair relationship where one or more "*relevant arrangements*" are present and there was a failure to disclose any of those arrangements adequately.

90.2. "*Relevant arrangements*" are defined at CONRED 5.2.19R and 5.1.1R. They are: DCAs (where the amount of commission which the broker receives is linked to the interest rate that the customer pays, and the broker has the power to set or adjust that rate); high commission arrangements (where the total commission was at least 39% of the total charge for credit and 10% of the total loan amount); and tied arrangements (where the broker is contractually obliged

to introduce consumers exclusively to the lender, or give it the right of first refusal).

90.3. However, these are subject to various exceptions under 5.2.19R (summarised in §33.5-33.6 above):

90.3.1. There is no "*relevant arrangement*" if the total amount of commission fell below the de minimis threshold (£120 in Scheme 1, £150 in Scheme 2) or the APR for the agreement was 0%.

90.3.2. A DCA is not a relevant arrangement where the lowest rate of interest that could have been selected by the broker was applied.

90.3.3. A tie does not constitute a relevant arrangement where it falls within the captive and white-label exception, as defined above at §33.5.4 (where (i) the lender was a captive lender of, or operating as a white-label lender for, the vehicle manufacturer, (ii) the introducing broker was a franchised dealer of that manufacturer; and (iii) the manufacturer's branding was clearly and prominently presented to the consumer in dealership and pre-contract materials).

90.4. Per 5.3.10R, there will not have been adequate disclosure of a relevant arrangement where the pertinent information (i.e. the nature of the DCA, the size of the commission or the existence of a tie) was not clearly and prominently provided to the consumer in a way that was likely to have drawn the attention of the average customer to whom it was directed (including in the ways outlined in the guidance at 5.3.11G).

90.5. However, the presumption of unfairness arising from inadequate disclosure of a relevant arrangement can be rebutted, where: the particular consumer has specific industry expertise, or knowledge from prior transactions; or (in respect of a tie) where the tie was not operated in practice (5.3.14R).[125]

[125] Further, lenders do not need to pay redress under the Schemes where the "no better deal" rebuttal applies: this operates as a rebuttal of the presumption of causation of loss and damage and is addressed in §33.7 above.

91. The FCA explained its basis for its formulation of the "*relevant arrangements*" which (where inadequately disclosed) give rise to a presumption of an unfair relationship in its PS. At pp.25-27, it noted the need to set objective, common and identifiable criteria for unfairness against the backdrop of the fact-sensitive s.140A test, and explained that its approach derived from the empirical evidence gathered in its diagnostic work and the guidance provided in relevant caselaw. It cited three key authorities in that regard:

91.1. *Johnson*, in which the Supreme Court held that the relationship between lender and borrower was unfair on the basis of the size of the undisclosed commission and the concealment of the tie between dealer and lender. The Supreme Court also made statements of principle as to the application of s.140A in the motor finance context, cognisant of the large number of motor finance complaints in the market. In particular, it set out a non-exhaustive list of factors which were indicative of unfairness:

> *"319. In its helpful written case the FCA, while observing that a relationship will not be unfair merely because a commission was paid of which a borrower was unaware, has identified the following as relevant factors pointing towards unfairness. The court agrees that the factors in this non-exhaustive list will normally be relevant: the size of the commission relative to the charge for credit; the nature of the commission (because, for example, a discretionary commission may create incentives to charge a higher interest rate); the characteristics of the consumer; the extent and manner of the disclosure (including by the broker insofar as section 56 is engaged); and compliance with the regulatory rules."*

91.2. *Clydesdale*,[126] in which the High Court dismissed challenges to a decision of the FOS which found that a failure adequately to disclose a DCA gave rise to an unfair relationship; and

91.3. *Plevin*,[127] in which the Supreme Court found that non-disclosure of a particularly large commission gave rise to an unfair relationship.

92. As the PS makes clear, the formulation of the rules on identifying unfair relationships was an iterative process:

[126] *Clydesdale*§§368-369.

[127] *Plevin,* §18.

92.1. The FCA's original Scheme rule proposals in the CP included various measures which sought to calibrate the definition of "*relevant arrangements*" and the presumptions of unfairness to reflect the fact-sensitive nature of the s.140A test, and exclude cases where, in its expert judgement, it considered it unlikely a court would identify an unfair relationship. These included (inter alia) detailed rules defining adequate disclosure and detailed exclusions where a DCA was not acted upon or where the customer could be expected to be aware of the relevant arrangements.[128]

92.2. The proposed rules were refined in light of further evidence and submissions made in consultation (see the first witness statement of Mario Theodosiou at §§67, 101, 109-110, 114, 121). Adjustments included the introduction of the de minimis exception, the zero APR exception, the captive and white label exception, the exception for ties that were not enforced, and refinements to certain evidential requirements for establishing rebuttals/exceptions (including softening some requirements in light of feedback).[129]

93. Accordingly, the final Scheme rules which define where an unfair relationship arises, and which Volkswagen and CAAF now seek to impugn, reflect the culmination of a highly complex policy-making exercise, which involved a series of considered, evidence-led regulatory judgements balancing the multiple competing factors outlined above. Volkswagen and CAAF's challenges fail to grapple with that reality.

3. Role of customer detriment / change of behaviour

94. Both Volkswagen and CAAF contend that an unfair relationship can only arise where a failure to disclose a commission arrangement would have made a difference to the consumer's "*behaviour or outcome*": Volkswagen §46, CAAF §74.

95. It is unclear what exactly Volkswagen or CAAF means by this contention, and what change exactly in "*behaviour*" or "*outcomes*" would, on their analysis, be required for an unfair relationship to arise. However, to the extent it can be understood, there is nothing

[128] CP §7.37-7.46

[129] See summary of changes following consultation at PS §§5.3-5.4, §§10.2-10.3

in the authorities (as cited or otherwise) which demonstrates that the FCA has made a legal error in defining unfair relationships in the Schemes:

95.1. As to "*behaviour*": the Supreme Court made clear in each of *Johnson*, *Plevin* and *Smith* that in a s.140A commission inadequate disclosure case "*it is not necessary for [the claimant] to prove that he would not have proceeded with the transaction had he been made aware of the fact and amount of the commission*".[130] In both *Johnson* and *Plevin* the Court was comfortable inferring from the circumstances alone that undisclosed commission arrangements would have represented a major consideration for <u>any</u> customer: "*it is clear that the amount of the undisclosed commission would have been a major consideration in Mr Johnson's mind had he been made aware of it at the time of entering into the arrangements, as it would be to any similar customer.*"[131] Accordingly, the authorities are clear that a s.140A claimant need not prove that they would have changed course, or that disclosure would have impacted their thinking (to the extent that is even possible to prove): the circumstances can speak for themselves. The FCA's rules, which similarly infer unfairness from the fact of inadequate disclosure of defined "*relevant arrangements*", reflect those clear principles.

95.2. As to "*outcomes*", the thrust of the allegation appears to be that unfairness can only arise if inadequate disclosure results in lenders making abnormal profits or consumers paying above-market prices (CAAF §§76-77; Volkswagen §61). The authorities do not support that contention. In *Johnson*, Lord Reed found that the relationship was unfair even though the claimant was "*in a position to compare the cost of the finance agreement offered to him with other options available on the market*" (§326), and without any assessment of how the price he paid for finance compared to market rates. Similarly, the Supreme Court in *Plevin* identified an unfair relationship even though the price paid by the claimant may have reflected the market price, noting that "*had [the claimant]*

[130] *Johnson* §327, citing *Plevin* §20 and *Smith* §§25 and 29.

[131] Johnson §327. See also *Plevin* §18: "*Any reasonable person in her position who was told that more than two thirds of the premium was going to intermediaries, would be bound to question whether the insurance represented value for money, and whether it was a sensible transaction to enter into. The fact that she was left in ignorance in my opinion made the relationship unfair.*"

shopped around, she would not necessarily have got better terms" (§18). And in *Clydesdale*, Kerr J resoundingly rejected the lenders' arguments that the complainant was not treated unfairly because she got a "*good deal*", holding: "*the accusation of unfair treatment is not satisfactorily answered by invocation of market forces and a claim to have served the customer handsomely in the market place*" (§§253-256).

95.3. Accordingly, it is beside the point that (as the FCA readily accepted)[132] there is insufficient data to test empirically a link between inadequate disclosure of the "*relevant arrangements*" and impact on behaviour or outcomes. That is not required to prove s.140A unfairness.

95.4. Volkswagen and CAAF's contention proves too much: if they were correct that the FCA needed to demonstrate such a link, the fact that empirical testing was impossible (given the lack of any available evidence) would mean that the FCA could not introduce a CRS in respect of motor finance unfairness claims at all (no matter how unfairness was defined). Where the data simply does not exist and/or cannot reasonably be obtained, any scheme would always fall at the hurdle CAAF and Volkswagen seek to construct. That cannot be right and is not – at least purportedly – CAAF or Volkswagen's own case.

4. DCAs

96. Volkswagen and CAAF's challenges to the FCA's characterisation of DCAs as a "*relevant arrangement*" are substantively identical, and largely repeat the overarching points addressed above.

97. First, it is said that a DCA can only cause harm where it is exercised in a way that "*caused detriment to the consumer*", and it would not be unfair where the rate selected was "*at or below the lender's standard rate, or at a rate that was competitive in the market*" (CAAF

[132] Technical Annex to the Policy Statement, §§4.78-79. As explained there, the major obstacle to such analysis was that relevant arrangements were not disclosed during the relevant period, so there was no "clean" data to compare and empirically test the extent of the impact of disclosure. See the first witness statement of Katherine Collyer at §§34-35, 121 and 125; and the first witness statement of Mario Theodosiou at §§84(b), 108, 114.

§§81-82; Volkswagen §§48.1-48.2). This is wrong: the FCA's rules reflect clear authority that an unfair relationship can arise without proof that it caused the claimant to pay more.

98. Second, Volkswagen and CAAF both argue that no unfairness arises even if the customer paid more for their finance, where they received "*other benefits*" like a lower vehicle price. This is a variation of their first point, and is wrong for the same reasons. This was precisely the sort of argument that was rejected by Kerr J in *Clydesdale*, who held that unfairness arose from an undisclosed DCA "*whether or not, in the self-serving view of the lender and the broker, [the claimant] is more than compensated for that by other features of the transaction*". As was made clear in the PS, arguments of this nature are simply after-the-fact rationalisations: they cannot explain or excuse a failure to provide adequate disclosure in the first place, which obviously deprived the consumer of the opportunity to assess for themselves how the finance arrangements and costs interacted with other elements of the transaction.[133]

99. Third, Volkswagen and CAAF argue that the impact of a DCA was variable and the discretion was likely to be exercised differently from case to case: CAAF §§83-84, Volkswagen §84.4. It is unclear what point is being made here, or on what basis the Scheme rules are said to be unlawful. The common feature of all of the DCA arrangements which constitute a "*relevant arrangement*" under the Scheme rules is that they linked the sum paid by the consumer for the finance to the commission received and were not adequately disclosed: that is the essence of the unfairness, and does not change from customer to customer. To the extent Volkswagen and CAAF's point is just a reformulation of their point that some customers may have got a 'good deal', then that is wrong for the reasons outlined above.

5. High Commissions

100. Between them, Volkswagen and CAAF make five points about the FCA's approach to undisclosed high commissions. None has any merit.

101. First, they both recycle the same points outlined above regarding the (lack of) impact of a high commission on the overall cost of the finance or on the broader vehicle transaction

[133] PS, p.33.

price (Volkswagen §49; CAAF §§87-88). Those submissions are wrong for the reasons already given. To the extent it is suggested (in CAAF §90 and Volkswagen §49.3) that the Scheme rules are unlawful because an undisclosed high commission cannot by itself give rise to an unfair relationship (i.e. without some other unfair feature), that is clearly wrong. The Supreme Court held in *Plevin* that "*at some point commissions may become so large that the relationship cannot be regarded as fair if the customer is kept in ignorance*" (§18). Whilst the Supreme Court in *Johnson* noted differences between the PPI context of *Plevin* and the present motor finance context (§326),[134] it held that "*[n]evertheless, the fact that the undisclosed commission was so high is a powerful indication that the relationship between Mr Johnson and FirstRand was unfair.*" The Scheme rules reflect that commissions above a certain level are at least a "*powerful indication*" of an unfair relationship, in a way that is workable in the context of a CRS.

102. Second, CAAF submits that higher commissions may have "*reflected differences in costs or business models between dealers*", and where large commissions merely reflected higher overheads, that did not give rise to an unfair relationship. This is a variation on the same 'good deal' argument (but with even less supposed benefit to the consumer whom the legislation is intended to protect), and is wrong for the same reasons: it is an after-the-fact rationalisation which cannot justify inadequate disclosure. Indeed, the submission that higher commissions were not unfair when they reflected "*reasonable broker remuneration*" was specifically rejected in *Clydesdale,* in the context of DCAs,[135] and there is no reason why undisclosed high commission arrangements should be treated any differently in this regard.

103. Third, CAAF submits that "*any*" commission threshold is more likely to capture an agreement if it has a lower cost of credit (because that means commission will represent a greater proportion of the cost). This appears to object to the very principle of setting a threshold at all. Again, it is not clear why CAAF considers that this demonstrates any unlawfulness in the FCA's approach.

103.1. The authorities – particularly *Plevin* and *Johnson* – make clear that there is a point at which a commission can be so large as a proportion of the total cost of

[134] A point also noted more recently in *Black Horse Limited v Stuart Angel & ors* [2026] EWCA Civ 831 at §87, albeit the Court stressed the very different context of that appeal from the FCA's motor finance scheme (§105).
[135] *Clydesdale* §§253 and 255.

credit that inadequate disclosure is at least a powerful indicator of unfairness. It therefore cannot be said that the act of setting a threshold for the point at which that indicator of unfairness arises is in itself unlawful.

103.2. In any event, in designing the scheme, the FCA specifically took account of the risk of "false positives" arising from the application of a threshold to low-APR products, short-term and small loans. That was why it decided that both limbs of the high commission threshold (39% cost of credit and 10% loan amount) needed to be met for unfairness to arise; and it also factored this consideration into its decision to include *de minimis* thresholds.[136]

103.3. Accordingly, the FCA's approach constitutes an exercise of regulatory judgement, reflecting a careful balance between the need to ensure the Schemes are appropriately targeted (and do not capture relationships which are not unfair) with the need to make rules that are clear, objective and are capable of general application at scale.

104. Fourth, both Volkswagen and CAAF challenge the 39%/10% level of the high commission thresholds (Volkswagen §50; CAAF §92). There appear to be two strands to this challenge:

104.1. It is said that the threshold is "*not supported*" by *Johnson*, on the basis that in that case, the commission level was higher: 55% of the total cost of credit and 26% of the loan amount. Neither Applicant explains how this renders the threshold in the Schemes unlawful. To the extent they are suggesting that the figures in *Johnson* should be interpreted as setting the 'benchmark' for the point at which a commission renders the relationship unfair, that is clearly wrong: there is nothing in the judgment to suggest that the Supreme Court considered that the undisclosed commission had to reach that level in order to render the relationship unfair.[137] The FCA has an express statutory power under s.404A(2) to make rules reflecting what it considers a court "*would*" find to constitute an unfair relationship. Applying a threshold lower than that which arose on the particular facts of *Johnson* clearly falls within the parameters of

[136] PS, p.85.

[137] CAAF also note that the Schemes mandate a different remedy in cases where the level of commission is greater, and closer to *Johnson* (§92.2). Again, it is entirely unclear what point is being made here, or how it has any bearing on the lawfulness of the definition of high commission arrangements in the Schemes.

that power. (It is noted that, at §137, CAAF says that *Johnson* "*was a fact-specific decision*" and that the facts "*were extreme*". The FCA relies on the Supreme Court's judgment for statements of principle and the guidance these provide, not the application of those principles to the particular facts of that case.)

104.2. CAAF and Volkswagen suggest the threshold for a high commission in the Schemes was irrational, on the basis that it lacked a "*proper evidential or logical basis*". This is unsustainable. The FCA explained its approach at pp.84-85 of the PS. It used data on the distribution of commission levels across the market to provide an objective evidential basis for identifying where commission is materially above market practice, and therefore represents an "*outlier*" which presents a higher risk of consumer harm when undisclosed. The thresholds were set at the 85th percentile of the market distribution (excluding zero APR arrangements), reflecting a carefully calibrated judgement that the 'trigger' for unfairness may be below the levels in *Johnson* (which was above the 95th percentile), but should be sufficiently high to avoid capturing typical commission arrangements. That is quintessentially a matter of regulatory judgement which the FCA is institutionally well-placed to make, in circumstances where there is no guidance in the statute or authorities and (as Lord Sumption put it in *Plevin*), it is "*difficult to say*" where the "*tipping point*" may lie. Neither CAAF nor Volkswagen have explained or identified the supposed irrationality in the FCA's exercise of discretion: they simply disagree with it.

105. Fifth, CAAF challenges the definition of high commission arrangements on the basis that (i) in a "*four-party*" arrangement (where the finance was arranged by a credit broker separate to the car dealer) any inadequate disclosure is a failure of the broker, and cannot be attributable to the lender; and (ii) in four-party transactions customers tended to get a "*better deal*" (CAAF §91). This kind of situation (and the arguments CAAF are now making) was specifically addressed by the FCA in the PS at p.51. CAAF's submissions demonstrate no unlawfulness:

105.1. The argument that the inadequate disclosure of a high commission can only be attributable to the broker, not the lender, is belied by the decision in *Plevin*. There, Lord Sumption held that, as the lender knew about the total commission payable, they could themselves have disclosed it directly to the debtor, and "*in the interests of fairness it would have been reasonable to expect [the lender] to do so. Had they done so this particular source of unfairness would have been removed*". Accordingly, he held: "*I think it clear that the unfairness which arose from the non-disclosure of the amount of the commissions was the responsibility of Paragon*" (i.e. the lender): §20.[138]

105.2. The second strand of the argument, that 'four-party' arrangements result in better deals for consumers (and thus no unfair relationship), is wrong for all the reasons outlined above: this is after-the-fact rationalisation which, as the authorities make clear, does not render fair the inadequate disclosure of a high commission.

105.3. In any event, as explained on p.51 of the PS, the FCA specifically took account of the special situation of 'primary brokers' which are not the car dealer, who can facilitate certain consumers in sourcing credit. It explained that where it can be shown that the primary broker did its job, and provided the lowest APR available from the lenders with which it worked, the lender will not be required to make redress under the "*no better deal*" rebuttal.[139]

6. Tied arrangements

106. Volkswagen and CAAF both contend that the FCA erred in including tied arrangements as a "*relevant arrangement*" giving rise to a presumption of unfairness. Between them, they make three points.

107. First, they repeat their arguments that tied arrangements did not necessarily cause detriment to consumers or cause them to pay higher credit costs, and may have given rise

[138] See also *Clydesdale*, where the Court noted (at §315) that the FOS had found the relationship between the lender and creditor was unfair on the basis of the lender's own non-disclosure of the DCA, and went on to uphold the FOS decision. There is no reason why an inadequately disclosed high commission should be treated any differently in this respect.
[139] 5.3.22 R. This rule does not rebut the presumption of unfairness under the Scheme rules (which would be inappropriate for the reasons given), but rebuts the presumption that the unfair relationship caused loss or damage (which means that the lender need pay no redress).

to consumer benefits such as improved customer service (Volkswagen §§51.1-51.3, CAAF §§93-95). This is essentially the 'good deal' argument that lacks merit for all of the reasons given above.

108. Second, they seek to impugn the FCA's approach on the basis that *Johnson* does not support the inclusion of ties as a "*relevant arrangement*" (Volkswagen §51.4, CAAF §§96-98). This is advanced on the basis that the Supreme Court did not find that an inadequately disclosed tie rendered the relationship unfair by itself; and that the inadequate disclosure of the tie in *Johnson* was "*extreme*" because the documents given to Mr Johnson created a false impression that the dealer was offering products from multiple lenders (whereas the FCA's definition of a tie does not include such a requirement).

108.1. This is wrong for the same reasons as the Volkswagen and CAAF's similar submissions on the difference between the high commission threshold and the facts of Johnson.

108.2. *Johnson* is clear authority for the proposition that an undisclosed tie is an indicator of an unfair relationship; but nothing in the Court's judgment provides any indication that (as CAAF and Volkswagen suggest) an unfair relationship could arise only where there were other unfair features, such as a high commission or positive misleading statements.

108.3. The FCA's decision as to the definition of tied arrangements, explained in the PS at pp.31-2 and 86-87, falls well within the purview of its regulatory judgement, extrapolating from the principles outlined in authority, and the particular facts of *Johnson* provide no basis to impugn that approach.

109. Third, CAAF alleges that the exceptions provided in the Scheme rules, under which a lender may rebut a presumption of unfairness arising from a tied arrangement, are too "*narrow*" (CAAF §§99-102). This is advanced on the basis that the exception for "*captive*" lenders does not go far enough, and should also have extended to situations where the lender was linked to the dealer; the exception as to a customer's specific knowledge will only apply rarely; and the difficulty of meeting the evidential requirements to establish these and other exceptions. There is no merit to any of this.

109.1. These scattergun complaints fail to identify how the FCA's approach was unlawful: they are nothing more than a bare disagreement with its exercise of discretion in designing the Schemes.

109.2. As explained in §92 above, the relevant Scheme rules reflect the culmination of a careful, iterative and evidence-led process, informed by consultation (including points raised by consultees regarding evidential requirements on this issue), and involve striking a difficult balance between the need to target relationships that are genuinely unfair with the operational exigencies of implementing a scheme that can be operationalised at scale (see first witness statement of Mario Theodosiou at §§116-118). It is common ground that the rules need to be capable of "*general application*", and a degree of generality, which may not admit of every conceivable factual permutation, is both unavoidable and entirely consistent with the FCA's statutory powers to introduce a CRS.

109.3. Accordingly, CAAF's complaints about the precise formulation of particular rules and exceptions are incapable of demonstrating that the FCA has acted unlawfully.

7. Conclusion on Issue 2

110. In the premises, there is no basis for Volkswagen and CAAF's contentions (in Volkswagen §52 and CAAF §§105-108) that the Scheme rules on "*relevant arrangements*" and unfair relationships are unlawful:

110.1. They have not identified any aspect of the Scheme rules which is outside the FCA's statutory powers to introduce them (and/or which would justify the Tribunal exercising its discretion under ss.404D(6) or (7)). The rules reflect a careful and evidence-led regulatory judgement reflecting the principles outlined in authority, calibrated to reflect the exigencies of making rules which are capable of general application.

110.2. Nor have either CAAF or Volkswagen identified any aspect of the FCA's decision-making in relation to these rules which even approaches the high *Wednesbury* unreasonableness standard.

110.3. The balance of their arguments, concerning *Padfield* unlawfulness and interference with A1P1 rights, are entirely unparticularised. To the extent they are simply a re-framing of the *vires* and rationality points, they are wrong for the reasons already given.

G. ISSUE 3 – CAUSATION, LOSS AND DAMAGE

1. Introduction and overview of arguments

111. The lender Applicants each challenge the FCA's approach to causation, loss and damage under the Schemes as unlawful:

111.1. Mercedes, by its Ground 3,[140] contends that establishing "*loss or damage*" is a threshold condition for introducing a CRS under s.404(1)(b), and this threshold was not met. It says that an unfair relationship under s.140A CCA can be established without "*loss or damage*", and that the FCA erred in conflating the two. In the alternative, it argues that the FCA's decision that the "*loss or damage*" threshold was met was irrational because it lacked an evidential basis, and that the FCA failed to take into account the economically beneficial features of captive lender finance such as subvention and/or promotional deals on finance.

111.2. CAAF and Volkswagen's challenge is different. Rather than the s.404(1)(b) threshold, they focus on the Scheme rules which define the circumstances in which lenders must presume the failure has caused loss or damage. They say that under s.404(6), it is for the lenders to determine whether or not a consumer suffered loss or damage, and the use of presumptions in the Scheme rules unlawfully usurps that function. Further, they submit that the presumptions in the Scheme rules are unlawful because they differ from the approach a court

[140] Mercedes' Grounds, §§41-51; note however that the point is summarised at §3(b)(ii)) with the erroneous phrase "*loss <u>and</u> damage*" (sic).

or tribunal would take, in particular by taking a different approach to causation and loss and by reversing the usual civil burden of proof.[141]

112. These arguments are wrong.

112.1. Mercedes correctly identifies the limited role of causation and loss in the assessment of an unfair relationship under s.140A, but fundamentally misunderstands the nature of the threshold conditions for a CRS under s.404(1), and how they apply in the context of Schemes which reflect "*failures*" arising from liability under s.140A CCA.

112.2. CAAF and Volkswagen's errors are even more basic. The remarkable submission that the firms who are responsible for widespread failures must simply be left to determine whether those failures caused loss is obviously wrong: that cuts across the entire nature and purpose of the FCA's powers to make rules under s.404. Further, CAAF and Volkswagen misunderstand the role of loss in the assessment of liability and remedy in s.140A claims, and posit that the Scheme rules should impose a loss requirement which a court or tribunal clearly would not.

2. Legal principles: s.404 FSMA regime, ss.140A-B CCA and the FCA's approach to causation and loss

i) *The role of "loss or damage" in the threshold for imposing a CRS*

113. As noted in Section D above, ss. 404(1)(a) and (b) establish two gateway conditions which must be satisfied for the FCA to introduce a CRS:

> "*(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*"

114. Several points are clear on the face of the legislation:

[141] CAAF §§109-120; Volkswagen §§53-67

114.1. The meaning of the words "*loss or damage*" in s.404(1)(b) must be construed in light of both the nature of the "*failure*" from which it arose, and the circumstances in which that failure would give rise to a "*remedy or relief*" in legal proceedings. These requirements are interlinked: they do not operate independently of each other.

114.2. In the context of the Schemes, where the "*failure*" is an unfair relationship under s.140A CCA, that means that the requirement of "*loss or damage*" must be viewed through the s.140A lens. The question for the FCA was: did it appear to the FCA that the "*failures*" (i.e. unfair relationships) gave rise to whatever "*loss or damage*" is required to establish liability under s.140A and availability of a remedy or relief under s.140B CCA?

114.3. The answer to the s.404(1)(b) question is explicitly a matter that Parliament has left to the FCA ("*it appears to it*").

114.4. In answering this question, the FCA may conduct a market-wide, 'top down' assessment of whether the failure caused "*loss or damage*" in the ss.140A/B sense, rather than a 'bottom-up' assessment of whether it did so in every case within the scope of the CRS.

ii) <u>The FCA's power to make scheme rules regarding the assessment of causation, loss and damage</u>

115. The terms of s.404 as a whole reveal that the essence of the FCA's power in this regard is to "*make rules requiring*" firms to take certain steps, which those firms must follow. The FCA imposes the obligations to investigate and make redress, and the firm complies. These provisions are not conferring any powers <u>on the firms</u>.

116. Section 404A sets out the FCA's very broad rule-making powers, providing a non-exhaustive list of the matters which may be addressed in scheme rules. Insofar as causation of loss or damage is concerned, this includes the power under s.404A(1)(c) to make rules "*setting out, in relation to any specified description of case, matters to be taken into account, or steps to be taken, by relevant firms for the purpose of (i) assessing evidence as to a failure to comply with a requirement; or (ii) determining whether such a failure has caused (or may cause) loss or damage to consumers*". That is supplemented by the

FCA's general power under s.404A(1)(e) to make rules "*as to the things that relevant firms are, or are not, to do in establishing and operating consumer redress schemes*". This power is subject to a constraint. By s.404A(3), "*Matters may not be set out in the rules as a result of subsection (1)(c) if they have not been, or would not be, taken into account by a court or tribunal for the purpose mentioned there*". This, however, applies only to rules on the "*matters to be taken into account*", and not the "*steps to be taken*".

117. The FCA's power to make rules concerning the determination of loss or damage: (i) must be read in light of its discretion to identify loss or damage in s.404(1)(b) (i.e. where it "*appears to*" the FCA that it has arisen); (ii) includes a predictive or speculative discretion to identify or conjecture what a court "*would*" do in a given (possibly unprecedented) situation (which may, indeed, be one in which no loss or damage has yet occurred but "*may*" in the future); and (iii) must be viewed in light of the nature and purpose of a CRS in delivering redress on a collective basis across a wide constituency of consumers. These are all matters in which the FCA's regulatory judgement, as the expert regulator of financial services and consumer credit, should be afforded considerable deference.

118. Further, the rule-making powers in s.404A(1)(c) draw the same link between the "*failure*" and the "*loss or damage*" as the threshold conditions for establishing a CRS. Rules on the determination of causation of loss or damage must correspond to the specific "*failures*" at issue. So, where (as here) the "*failure*" is an unfair relationship under s.140A CCA, the scheme rules on causation, loss and damage must reflect how those concepts are applied by courts and tribunals in the context of s.140A claims. Indeed, were the rules to do otherwise, they would contravene the guardrails in s.404A(3) FSMA by requiring firms to take into account a matter which a court or tribunal would not.

iii) *The role of causation, loss and damage in "unfair relationship" claims under s.140A*

119. The Schemes concern liability under s.140A CCA, for which the special statutory remedy of s.140B CCA is available. As noted under Issue 2 above, the court's enquiry into liability and its assessment of remedy are broad, multifactorial exercises. In *Smith*, Lord Leggatt emphasised "*the breadth and open-ended nature of the assessment required by section 140A*", noting it "*would be hard to cast the possible causes of unfairness more broadly*" (§22). He went on at §25:

"*…as well as requiring the court to make a very broad and holistic assessment to decide whether the relationship between the creditor and the debtor is unfair to the debtor, the legislation also gives the court, where a determination of unfairness is made, the broadest possible remedial discretion in deciding what order, if any, to make under section 140B. Section 140B gives the court an extensive menu of options from which to select but says nothing at all about how this selection may or 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 or tort. Some constraint is, however, imposed by consideration of the general purpose of an order under section 140B. In principle, the purpose must be to remove the cause(s) of the unfairness which the court has identified, if they are still continuing, and to reverse any damaging financial consequences to the debtor of that unfairness, so that the relationship as a whole can no longer be regarded as unfair.*"

120. It is thus clear that in a s.140A claim the claimant may establish liability and be awarded a remedy or relief without the analysis of causation, loss and damage that may be required in contract or tort claims. Instead, the essence of the court's task in a s.140A claim is to identify the unfairness and order a remedy which removes it.

121. This is reflected in the other key authorities on s.140A, in particular:

121.1. The Supreme Court in *Johnson* recognised that "*it is not necessary for [the claimant] to prove that he would not have proceeded with the transaction had he been made aware of the fact and amount of the commission*".[142] It went on to find that the relevant lending relationship was unfair, and Mr Johnson was entitled to a remedy reflecting the commission paid, even though he was "*in a position to compare the cost of the finance agreement offered to him with other options available on the market*" (§326), and without any assessment of how the price he paid for finance compared to market rates (let alone whether the overall deal represented good or bad value).

121.2. The Supreme Court identified an unfair relationship in *Plevin* even though the price paid by the claimant may have reflected the market price: "*had [the claimant] shopped around, she would not necessarily have got better terms*" (§18).

[142] *Johnson* §327, citing *Plevin* §20 and *Smith v RBS* §§25 and 29.

121.3. Similarly, in *Clydesdale* the Court rejected the lenders' arguments that the complainant was not treated unfairly because she got a "*good deal*" (§§253-256) and dismissed their challenges to the remedy awarded by the Ombudsman (§313).

122. These decisions make clear just how different the ss.140A and 140B enquiries are from the standard 'but for' approach to causation and loss in contract and tort claims. A s.140A claimant need not prove that, absent the impugned conduct, they would not have proceeded with the deal; nor do they even need to show that it caused them to pay more. That is not to say that causation of financial loss to the consumer in the ordinary (contract or tort) sense cannot form part of the s.140A analysis: financial loss (or its absence) is capable of falling within the broad range of relevant factors a court may take into account, in relation to both identifying unfairness and awarding a remedy.[143] But proving causation of loss is not a pre-requisite for either.

iv) <u>The FCA's approach to causation, loss and damage</u>

123. In accordance with the legal principles outlined above, the FCA has introduced Schemes which reflect both its powers under s.404 FSMA and the contours of s.140A CCA claims, and in particular the attenuated role of causation, loss and damage in the s.140A context. That applies to both (i) its decision that the s.404(1)(b) FSMA threshold for introducing a CRS is satisfied, and (ii) its design of the Scheme rules.

124. In relation to the former, the FCA explained the reasons why it considered s.404(1)(b) FSMA to be satisfied at pp.28–33 of the PS. It sets out there the range of factors which led it to conclude that the three "*relevant arrangements*" gave rise to "*loss or damage*" (in the s.140A sense), including how inadequate disclosure of DCAs, high commission and tied agreements deprived consumers of information which would allow them to make an informed decision or seek alternative financing, and the consequent propensity of that conduct to impact on consumer behaviour and pricing. In coming to that decision, the

[143] See the discussion of the relationship between causation, unfairness and remedy in s.140A cases in *Kerrigan & Ors v Elevate Credit International Limited (t/a Sunny)* (in administration) [2020] EWHC 2169 (Comm) at §§213-224. There, HHJ Worster noted that "*The terms of section 140A(1) CCA do not impose a requirement of "causation" in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss.*" The judge also cited *Carney v Rothschild* [2018] EWHC 958 (Comm) where it was held that (lack of) causation could "*count against a finding of an unfair relationship*" (§51): but even there that was clearly only an indicative factor, and was not determinative (as it would be in e.g. a negligence claim).

FCA explicitly drew on the guidance in the authorities as to how these considerations contribute to unfairness (particularly *Johnson*) and its own expert analysis of harm to consumers (including empirical analysis).

125. As to the Scheme rules themselves, considerations of loss or damage are reflected in several different aspects of the Schemes, corresponding to their role in the open-textured liability and redress enquiries under ss.140A and 140B CCA:

125.1. Causation and loss considerations play a role in various aspects of the unfairness assessment that firms must carry out, including both in the definition of a "*relevant arrangement*" and in the unfairness assessment addressed in Section F/Issue 2 above. See, in particular, the *de minimis* exception and the exceptions for DCAs where the lowest rate of interest was applied, for ties that were not operated in practice and the exception for zero APR deals.[144] Those are all carve-outs from liability under the Scheme which (in the FCA's judgement) reflect circumstances where the arrangement, even if undisclosed, caused no prejudice to the consumers, and therefore a court would be unlikely to find that it gave rise to an unfair relationship under s.140A. In that way, these carve-outs ensure that attenuated considerations of causation and loss are factored into the multi-factorial s.140A unfairness assessment, reflecting the way a court would take the absence of material financial benefit into account in a s.140A claim (so far as possible, in the context of a CRS).

125.2. There is also a specific "*stage*" of the investigation which lenders must carry out under the Schemes which addresses causation of loss or damage directly. This is set out at 5.3.22-5.3.25R. The inclusion of this stage reflects the essential structure of the firm-led CRS investigations envisaged in ss.404(5)-(7), where lenders must determine whether the failure caused loss or damage (s.404(6)). However, the FCA has calibrated the rules to be applied at this stage to the s.140A context, where (unlike many forms of civil liability), there is no distinct causation and loss enquiry. It has done so by adopting a rebuttable presumption

[144] See paragraphs 33.5 above. Mercedes erroneously suggests that "*zero APR*" deals operate as a rebuttal for the presumption of loss and damage: §50(a). This is wrong. Where the APR for the agreement was 0%, a "*relevant arrangement*" does not arise: 5.2.19R(2)(b). As explained in PS §5.58, this exception reflects the FCA's judgement that such a credit relationship would not be considered "*unfair*".

that where the relationship was unfair, that caused loss or damage to the consumer (5.3.21R), thereby making both issues part of the same enquiry.

125.3. The presumption of loss or damage is rebuttable where the "no better deal rebuttal" applies: i.e. where the broker had access to a panel of lenders, and it can be shown that the consumer got the best deal available from that panel at the time (5.3.22R). This reflects the FCA's judgement as to a situation in which a court would be unlikely to award a remedy because the essential prejudicial impact of the inadequate disclosure was negated.[145] It represents another way – alongside the carve-outs identified above – in which the (limited) role of causation and loss in a s.140A claim is factored into the assessment to be carried out under the Scheme rules.

3. Mercedes' challenge to the FCA's approach to causation, loss and damage

126. By its Ground 3,[146] Mercedes asserts that the statutory threshold of s.404(1)(b) has not been met with respect to arrangements featuring high commission or tied arrangements, on the basis that the FCA has not established that "*loss or damage*" has been suffered by consumers. It is said that the FCA's conclusion that s.404(1)(b) was satisfied is an error of law, or that it was irrational because there is no evidential foundation in respect of high commission and tied arrangements, and took no account of incentives offered by captive lenders when considering loss or damage.

127. The crux of Mercedes' submission is that a court may identify an unfair relationship under s.140A and order a remedy under s.140B which "*does not necessarily reflect or compensate for any financial loss*" (§45). But, they say, s.404(1)(b) means that for the FCA to introduce a CRS, "*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*" (§47). In other words, s.404(1)(b) imposes an *additional* causation of loss threshold, over and above what a court would apply in a s.140A claim.

[145] See PS §10.84-10.98 and pp.186-188. The rebuttal is only available in high commission cases and tied arrangement cases, and not in DCA cases (5.3.22R(4)).
[146] Mercedes' Grounds, §41-51

128. The submission that s.404(1)(b) adds an additional loss or damage requirement, untethered from the s.140A "*failures*" to which the CRS responds, is wrong and unprincipled:

128.1. The meaning of the words "*loss or damage*" in s.404(1)(b) must be construed in light of both the nature of the "*failure*" from which it arose, and the circumstances in which that failure would give rise to a "*remedy or relief*" in legal proceedings. Where the "*failure*" is an unfair relationship under s.140A CCA, the requirement of "*loss or damage*" must be construed in the same way as it would be in a s.140A claim.

128.2. That is clear from the wording of s.404(1) and also reflects the purpose of the s.404 power. It would create a bizarre lacuna if there were widespread failures which entitled consumers to "*a remedy or relief*" in court, but the FCA could not introduce a CRS because some *different* conception of "*loss or damage*" in FSMA, which does not correlate to either the legal wrong or remedy afforded by Parliament in the CCA, was not satisfied. That would lead to a situation where large numbers of consumers would bear the burden of bringing individual civil claims or FOS complaints, lenders would bear the burden of facing all of them and the courts/FOS would bear the burden of deciding them, and the FCA would be unable to intervene by exercising its s.404 powers at all. That cannot be right.

129. Once Mercedes' fundamental error in that regard is recognised, the rest of its complaints under this ground all fall away:

129.1. Mercedes' argument in §48 of its Grounds that the FCA's conclusion on the satisfaction of s.404(1)(b) threshold was "*irrational*" rests on an allegation that the data did not show "*that non-disclosure of each of the relevant arrangements was causative of loss or damage*". This, seemingly, means causative of loss or damage in the contract or tort sense. For the reasons explained above, that is not the test. However, even on its own terms, the irrationality argument does not extend beyond bare assertion and is not legally tenable.

129.2. Mercedes' submission at §§49-51, that the FCA's decision on the s.404(1)(b) threshold failed to take account of particularly cheap finance offered by captive

and third-party lenders, is similarly hopeless. This is the 'good deal' argument which the authorities make clear does not cure unfairness or remove the consumer's entitlement to a remedy, as discussed under Issue 2 above. This argument is again predicated on erroneously importing into the s.404(1)(b) gateway condition a threshold for causation and loss that differs from the approach courts would take under s.140A.

130. In the premises, it was clearly open to the FCA to decide that the s.404(1)(b) threshold was met on the basis of the market-wide indications of loss or damage identified in its PS. That is a matter of regulatory judgement for the FCA.

4. CAAF and Volkswagen's challenge to the FCA's approach to causation and loss

131. On CAAF and Volkswagen's primary case it is for firms, not the FCA, to determine causation of loss.

131.1. Volkswagen's primary contention on this issue is that ss.404(6) and (7) "*provide that there must be a determination whether a failure has caused loss or damage and that the firm is to make that determination*" and therefore the Scheme rules are ultra vires "*to the extent they require firms to presume loss*" (Volkswagen §59).

131.2. Similarly, it is said by CAAF that, "*As s.404(6) makes clear, that determination must be made **by the firm**; the FCA has no power under s.404 itself to determine whether a failure has caused loss*." It continues: "*for all those cases where the presumption is not rebutted, the Schemes expressly require firms to determine that the unfair relationship caused the relevant consumer loss, thereby usurping the firm's role under s.404(6) to make that determination*" (CAAF §§109, 114.3: original emphasis).

131.3. In the same vein, CAAF alleges that s.404A(1)(c)(ii) means that the Scheme rules may require only "*certain matters to be included in the decision-making process*" which are "*procedural only*". It is said on that basis that "*The FCA has no power to require firms to presume causation of loss in any case; the determination of causation of loss can be made only by the relevant firm*" and

therefore the rebuttable presumption on causation of loss in the Scheme rules "*goes beyond the scope of the FCA's powers*" (CAAF §§109-115).

132. These submissions apparently proceed on the basis that ss.404(6) and 404A(1)(c) empower firms which are subject to a CRS to make their own decisions about whether or not their conduct caused loss or damage to consumers, and that that is a matter for them with which the FCA cannot interfere. That is plainly wrong.

132.1. The whole point of the s.404 power to introduce a CRS is the ability to impose rules on firms which are responsible for widespread failures, requiring those firms to investigate the failures and make redress according to those rules. The FCA makes the rules, and the firms have to follow them. Section 404 does not confer any powers on the firms. Nothing in the statutory language indicates an intention of Parliament to let the foxes guard the henhouse.

132.2. Indeed, were Volkswagen and CAAF's construction of s.404(6) correct, then presumably it would also be entirely up to each firm to determine "*whether ... it has failed to the comply with the requirements*" (s.404(5)), and to "*determine what the redress should be in respect of the failure*" (s.404(7)(a)); and those would again be matters for the firms to decide, with the FCA prevented from making rules interfering with that discretion. That interpretation is absurd. It would denude the FCA's rule-making powers – and indeed the whole CRS mechanism – of any substance. Firms would sit as the judge of their own case, free to decide for themselves whether their conduct amounted to wrongdoing, whether it caused harm, whether they should make redress and, if so, of what kind and to what extent.

133. CAAF's related contention that the FCA's use of rebuttable presumptions is outside its powers under s.404A(1)(c) and/or irrational is similarly wrong.

133.1. Introducing rules requiring firms to apply rebuttable presumptions falls within the discretion afforded to it both by s.404A(1)(c) to prescribe the "*matters to be taken into account, or steps to be taken"* by firms in determining questions of loss or damage, and by s.404A(1)(e) to make rules "*as to the things that*

relevant firms are, or are not, to do in establishing and operating consumer redress schemes".

133.2. The promulgation of workable rules under s.404A(1) is a matter of regulatory judgement for the FCA. The use of a rebuttable presumption in this context is a straightforward way of reflecting the attenuated role of causation and loss in the s.140A/s.140B analysis a court would carry out, in a way which is reasonably workable in the context of a mass CRS.

133.3. Accordingly, the FCA's approach is a rational exercise of its powers.

5. CAAF and Volkswagen's other objections to the FCA's approach to causation, loss and damage

134. Volkswagen and CAAF advance a miscellany of further related objections on the issue of causation, loss and damage, none of which take matters any further.

135. First, Volkswagen contends that when determining whether inadequate disclosure of "*relevant arrangements*" caused loss "*the relevant enquiry is what would have happened if the information had been disclosed. This is how the matter would be approached by a court. This requires an assessment of whether, if there had been adequate disclosure, the consumer would have ended up in a better financial position than the position under the agreement that they actually concluded*" (§§61-63). CAAF makes a similar point at §119.

136. This is wrong. The submission proceeds on the basis that claimants in s.140A claim would have to prove causation of loss or damage, apparently in the sense applied in contract and tort claims. That is incorrect for all of the reasons outlined above. Indeed, if (as Volkswagen and CAAF seem to suggest) the FCA should have introduced a rule which required firms to assess whether the unfair relationship caused loss or damage (in the contractual/tortious sense) in order to determine their eligibility for redress, that would represent an error of law. It would interpose into the liability and redress assessments an enquiry which a court would not carry out in a s.140A claim. That would breach the constraint on the FCA's rule-making powers in s.404A(3), because it would require firms to take into account something that "*ha[s] not been, or would not be, taken into account by a court or tribunal*".

137. Second, both lenders contend that the FCA's use of a rebuttable presumption in this context "*impermissibly reverses the burden of proof*" that would apply in court. This is said to be a breach of the constraint in s.404A(3) that rules may not set out matters which would not be taken into account by a court in assessing causation and loss (CAAF §§114.5 and 116.4, Volkswagen §64.2).

138. Again, that proceeds on the erroneous basis that s.140A claimants must prove causation and loss in the contractual or tortious sense. It also ignores the fact that the burden of proof in a s.140A claim is *already* reversed: once a debtor alleges unfairness, it is by s.140B(9) for the lender to prove the relationship was not unfair.

139. But in any event, even to the extent a claimant does bear the burden of proof, that does not mean the FCA cannot lawfully adopt presumptions in a CRS which have the effect of reversing it:

139.1. Section 404A(3) requires the FCA to seek to reflect the court's approach in relation to the *substance* of a complaint; there is nothing in s.404 which requires firms to adopt the court's approach to the *burden of proof*.[147]

139.2. A central function of the s.404 power is to enable the speedy resolution of claims arising from widespread harm through a firm-led investigative procedure that relieves consumers of the time, costs and risks involved in bringing individual claims or FOS complaints.[148] It is inherent in any firm-led investigative process that customers generally will not bear the burden of proving facts in the way they would in a civil claim. Otherwise, the purpose and benefit of the CRS would be materially undermined.

139.3. In that context, it will often be appropriate for a CRS to place the onus on firms to investigate matters necessary to establish any entitlement to a remedy, including (so far as relevant) in establishing causation to the requisite legal standard, rather than simply requiring consumers to prove the relevant facts.

[147] Indeed, although s.404A(3) requires that the rules on "*matters to be taken into account*" by firms in the causation of loss assessment must reflect the approach of a court or tribunal, rules on the *"steps to be taken*" in that regard are not subject to the same constraint: see §116 above.

[148] The fact the s.404 power envisages firm-led investigations, rather than quasi-litigation, is reflected in the wording of ss.404 and 404A: see e.g. s.404A(1)(a), which provides that "*firms are to carry out investigations*"; s.404A(1)(c) which provides that the scheme may make provision as to "*steps to be taken by relevant firms*"; and s.404A(1)(e) "*as to the things that relevant firms are, or are not, to do in establishing and operating consumer redress schemes*".

This is all the more important when the market failure for which the CRS is providing redress arises out of widespread inadequate disclosure to consumers of relevant information, and there is an inherent information asymmetry.

139.4. Accordingly, the submission that the FCA was unable to introduce a rebuttable presumption to that end, as a matter of principle, is wrong. Its approach was within its regulatory discretion.

140. Third, Volkswagen contends that the FCA has taken the wrong approach in high commission and tied arrangement cases, because it treated the relevant question as whether loss "*may or could*" have been caused by the failures. It is not clear whether this is an attack on the FCA's decision that the s.404(1)(b) threshold for introducing a CRS was met, or on the Scheme rules. Either way, it is wrong. The FCA conducted its assessment of harm to consumers in a way that was calibrated to the legal principles of the relevant failure (i.e. liability under ss.140A-B), and came to its conclusion on the basis of the guidance in the authorities and its own expert regulatory analysis.

141. Fourth, CAAF contends that "*the FCA may not dispense with the requirement for causation of loss*", because "*causation is a precondition for redress under a s.404 consumer redress scheme*" (CAAF §118). It is not correct that the FCA dispensed with this requirement: the FCA included a specific stage addressing causation and loss to reflect the structure for a CRS envisaged in ss.404(5)-(7). As to the allegation that it erred in its approach by failing to require causation and loss in the contractual/tortious sense: that is essentially the same as Mercedes' challenge, and is wrong for all of the reasons given above.

6. Conclusion on Issue 3

142. In the premises, all of Mercedes, CAAF and Volkswagen's contentions as to the unlawfulness of the FCA's approach to causation, loss and damage in the Schemes should be dismissed.

142.1. The FCA was entitled to conclude that the threshold for introducing a CRS in s.404(1)(b) was met. That decision was justified by its expert assessment of the harm to consumers arising from inadequate disclosure of "*relevant*

arrangements"; and the FCA correctly directed itself to make that assessment with reference to how causation of loss or damage are considered in the context of s.140A unfair relationship claims.

142.2. None of the lenders have identified any aspect of this part of the Scheme rules which is outside the FCA's statutory powers to introduce them (and/or which would justify the Tribunal exercising its discretion under ss.404D(6) or (7)). The rules reflect a careful and evidence-led regulatory judgement reflecting the principles outlined in authority, calibrated to reflect the exigencies of making rules which are capable of general application.

142.3. Nor have any of the lenders identified any aspect of the FCA's decision-making in this regard which even approaches the high *Wednesbury* unreasonableness standard.

142.4. The balance of Volkswagen and CAAF's arguments, concerning *Padfield* unlawfulness and interference with A1P1 rights, are entirely unparticularised. To the extent they are simply a re-framing of the *vires* and rationality points, they are wrong for the reasons already given.

H. ISSUE 4 – REDRESS

1. Introduction and overview of arguments

143. Each of the Applicants advances wholesale attacks on the way in which the Schemes are designed and structured to provide what the FCA considers to be 'just' redress. Some of those attacks are mutually inconsistent. Within this overall Issue 4, the FCA outlines its response to the following grounds.

144. Volkswagen takes issue with the substance of the Schemes at Ground 4[149], asserting that the Schemes call for redress to be calculated "*arbitrarily*". The Grounds of Review purport to identify four "*specific defects*", namely: (i) the APR Adjustment; (ii) the CRR; (iii) the derivation of the Hybrid Remedy; and (iv) the operation of the caps.

[149] Volkswagen Grounds §§68-88

145. CAAF argues[150] that the FCA's power is limited to compensating consumers who have "*in fact*" suffered loss or damage, whereby the redress is "*at least rationally connected to that loss*". It is noted that, at §122, CAAF conspicuously elides the statutory wording, omitting that the justness is to be determined by what the FCA "*considers*". CAAF says that the FCA's approach to redress in the Schemes is arbitrary. The calculation is specifically criticised by reference to: (i) the structure of the Hybrid Remedy; (ii) the APR adjustment of 17% for Scheme 2; (iii) the APR adjustment of 21% for Scheme 1; (iv) the CRR; and (v) the operation of the caps.

146. Mercedes' Ground 4[151] deals with redress, focusing on the APR adjustments. It is said that the FCA failed to have regard to the particular characteristics of the captive lending market.

147. Consumer Voice takes issue with the FCA's calculation of redress, from the other direction, in its Grounds 2 and 3. Ground 2 (§§70-77) challenges the CRR, asserting a misdirection as to the legal effect of *Johnson* and irrationality in not extending the CRR to cases which did not closely align with *Johnson*. Ground 3 (§§78-88) challenges the APR adjustments, asserting failure of inquiry and conscientious consideration; irrationality of the figures of 17% and 21%; and misdirection of law on the basis that s.404A(4)-(5) are said to require rates to be a "*just proxy for loss*".

148. All of these criticisms (inconsistent with each other as they are) are unmeritorious for two essential reasons. First, they are predicated on an unrealistic level of fact-sensitivity: to the extent that the complaints focus on the application of broad-brush criteria to large numbers of cases, the Applicants are effectively taking issue with the very concept of a market-wide CRS directly legislated for by Parliament in s.404 which is capable of being operationally applied. Second, the Applicants fail to respect the wide, subjective discretion afforded to the FCA by Parliament in determining what would represent "*just*" redress for the purposes of such a scheme. In that context, the complaint that the calculation method is "*arbitrary*" or otherwise imperfect is misconceived. The Applicants erect straw man standards different to those set by FSMA itself, in order to assert that the FCA has failed to meet them. That is not a permissible approach to this challenge, generally governed as

[150] CAAF Grounds §§121-142
[151] Mercedes' Grounds §§52-63.

it is, by judicial review principles. Without prejudice to these overarching submissions, the various points of challenge are addressed briefly in turn from paragraph 156 below.

149. The essential structure of the redress provisions of the Schemes are set out above at paragraphs 33.8-33.11. For present purposes, they may be summarised as follows:

150. The Schemes provide for two alternative methods of calculating redress: the Commission Repayment Remedy ("CRR") and the Hybrid Remedy. The CRR applies only in specified circumstances. In all other cases in which an unfair relationship has been established, redress is calculated by reference to the Hybrid Remedy (CONRED 5.4.3R - 5.4.22R).

150.1. CRR. The CRR applies where the lender determines that the unfair relationship arose from the inadequate disclosure of (a) a high commission arrangement which also constituted a very high commission arrangement; and (b) a DCA and/or a tied arrangement: CONRED 5.4.3R. The CRR entails a payment to the consumer of a sum equivalent to the total commission and compensatory interest: CONRED 5.4.4R. The CRR is not subject to caps.

150.2. The Hybrid Remedy. The Hybrid Remedy applies in every scheme case in which an unfair relationship has been established and the CRR does not apply (CONRED 5.4.5R). The Hybrid Remedy involves calculating the average of the CRR and a loss-based APR adjustment, subject to any applicable cap.

151. The APR adjustment. For Scheme 1 cases (i.e. agreements entered into between 6 April 2007 and 31 March 2014), the prescribed adjustment is 21 percentage points (i.e. a coefficient of 0.79) to the contractual annual percentage rate ("APR") (CONRED 6.4.8R-6.4.14R). For Scheme 2 cases (i.e. agreements entered into on or after 1 April 2014), the APR adjustment is calculated by reference to a reduction of 17 percentage points (i.e. a coefficient of 0.83) (CONRED 5.4.8R-5.4.14R). The Hybrid Remedy is then calculated as the average of (i) the amount calculated under the CRR; and (ii) the amount calculated as the APR adjustment, plus compensatory interest (CONRED 5.4.16R / 6.4.16R).

152. Caps. As summarised above at §33.10, where the Hybrid Remedy applies, the amount of redress payable is limited to the lowest of: (a) 90% of the CRR (the "adjusted commission plus interest" cap); (b) the "adjusted realised cost of credit" cap, being the difference between the payments actually made under the agreement and the payments that would

have been made had the agreement been entered into at the prescribed 5th percentile non-zero APR for the relevant year, together with compensatory interest; and (c) the "total realised cost of credit" cap, where the lender can identify the total value of all payments made under the agreement, together with compensatory interest (CONRED 5.4.19R-5.4.21R).

153. Minimal cost of credit. Where the annual percentage rate of charge paid by the consumer was minimal – defined as less than or equal to the 5th percentile annual percentage rate of charge for the year in which the motor finance agreement was executed, as set out in the table in CONRED 5.4.7R – the lender must assess the amount of redress payable to the consumer as £0 (CONRED 5.4.6R).

2. Legal principles

154. The FCA's submissions above on the proper interpretation of, and approach to, the power in s.404 to make a CRS are incorporated but not repeated. The scope of the FCA's regulatory judgement to prescribe rules within the CRS to reflect its view of what redress would be "*just*" to make is particularly wide.

155. The breadth of the FCA's discretion in this respect is evident from the following aspects of FSMA:

155.1. Section 404A(1)(d) provides in broad terms that scheme rules may be made "*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*".

155.2. When determining the redress to be made under the scheme, the FCA must "*have regard to*" the "*nature and extent of the losses or damage in question*" (s.404A(5)), but is not bound by or restricted to that loss or damage. To the contrary: the statute expressly provides that regard must be had to that factor "*among other things*". It is a matter for the FCA what weight to attach to any factor, including losses or damage, in all the circumstances. Notably (and unlike in relation to the FOS, see s.229 FSMA), no definition is given of loss or damage.

155.3. The liability gateway under s.404(1)(b) which empowers the FCA to make CRS rules in the first place requires that it appears to the FCA that "*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*". The remedy or relief which might be available need not be monetary nor even compensatory or restitutionary in nature.

155.4. The Schemes concern claims and remedies available under s.140A and s.140B CCA. In that context, it is notable that the court has "*a wide range of powers*" as to the forms of relief which might be ordered by a court for breach of the duty of fairness under s.140B: *Smith* at §14 per Lord Leggatt. As discussed above (see, in particular, Issue 3), in a s.140A claim no assessment of causation or loss (in the contract or tort sense) is required for the court to order a remedy, or to determine what that remedy should be: *Smith* at §25; *Johnson* at §338.

155.5. The redress determined by the CRS is expressly defined as extending beyond that which could be awarded under s.140B, and indeed including "*a remedy or relief which could not be awarded in legal proceedings*": s.404F(1). The purpose of this definition is plainly to differentiate between (i) the liability gateway for making a scheme in the first place, at s.404(1)(b), and (ii) the redress which may be made in respect of the failure from which that loss or damage resulted.

155.6. In this connection, it is notable that Parliament chose to make provision by reference to "*redress*", and enacted ss.404-404G FSMA without using the words "*compensation*", "*reimbursement*", "*restitution*", etc. This is a departure from the statutory wording of s.404 prior to the amendment effected by s.14 of the Financial Services Act 2010, which referred at former s.404(2)(c) to the FCA "*determining the amounts payable by way of compensation payments*".

155.7. The legislation makes clear that it is a matter for the expert judgement of the FCA what kind of redress is to be made under the scheme. Thus, the kinds of redress may be only "*those which it considers*" just: s.404A(4) (emphasis added).

155.8. The controlling condition prescribed by s.404A(4) is, and is only, that the FCA considers the kind of redress provided for in the scheme to be "*just*". The choice of the word "*just*" by Parliament deliberately imports an exercise of evaluative, inherently multi-factorial judgement, in particular, having regard to the interests of all affected parties including procedural considerations such as speed, cost-effectiveness, clarity and accessibility. It is deliberately an imprecise term, the application of which can only be challenged on an irrationality basis (as per *Finch*). It emphasises that the outcome is not restricted by the remedy a consumer might recover in the courts, but invokes broader considerations of the public interest and the purpose of the statutory redress power: see, by analogy, *R v Mundy* [2018] 4 WLR 130, CA.

155.9. It is instructive to compare paragraphs (4) and (5) of s.404A, which qualify the "*kinds of redress*" which may be provided for under s.404A(1)(d), with paragraphs (2) and (3), which qualify s.404A(1)(b) and (c) respectively (and which, broadly, deal with liability and causation). Both of the latter provisions expressly constrain the FCA's discretion by reference to what have been or would be held or taken into account "*by a court or tribunal*". No such constraint is imposed in relation to redress.

155.10. In this context, there is a striking parallel with the jurisdiction of the FOS to consider complaints as an alternative to court proceedings and make awards by reference to what is "*fair and reasonable*", whether or not a court could or would make such an award: see the well-known analysis in *R (Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service* [2008] Bus LR 1486 at §§36-41. In particular, s.229 FSMA confers on the FOS the power to grant awards including "*an award against the respondent of such amount as the ombudsman considers fair compensation for loss or damage*" (s.229(2)(a)) and "*a direction that the respondent take such steps in relation to the complainant as the ombudsman considers just and appropriate (whether or not a court could order those steps to be taken)*" (s.229(2)(b)). In *R (IFG) v Financial Ombudsman Service* [2006] 1 BCLC 534, Stanley Burton J considered ss.228 and 229, explaining at §19 that in the latter provision the word "*consider*" "*implies a subjective consideration*". That reasoning applies by analogy,

indeed *a fortiori*, to a CRS, which calls on the FCA to "*consider*" what "*kinds*" of redress would be just in relation to "*any description of case*", as opposed to focused consideration of individual complaints on their facts. This is consistent with the "*wide measure of subjective discretion*" which the Court of Appeal in *BlueCrest* held was "*neither surprising nor objectionable*" (§83).

155.11. Moreover, making rules under s.404 is one of the FCA's "*general functions*" (s.1B(6)), so that in doing so the FCA must have regard to the regulatory principles (s.1B(5)), including "*the need to use its resources in the most efficient and economic way*" (s.3B(1)(a)) and "*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*" (s.3B(1)(b)). This further imports wider considerations of expert regulatory judgement, and takes the exercise away from a court/tribunal-like determination.

3. The Hybrid Remedy

156. The challenge to the FCA's approach to remedy overall (Volkswagen, §77, CAAF §§121-123),[152] and the Hybrid Remedy in particular (Volkswagen, §84; CAAF, §§124-127) proceeds on the erroneous assumption that the FCA is required to "*target*" financial loss, and restrict "*compensation*" in the case of any given consumer to the actual loss incurred. The FCA was not required to put consumers into the position they would have been in but for the relevant failing. Rather, the FCA sought to secure that the only kinds of redress which are made are those which it considers just. There is no basis in either FSMA or the CCA to limit that to strict financial loss suffered in an individual case; to the contrary, both regimes expressly provide that broader considerations should be taken into account, and broader remedy or relief may be afforded.

157. In making provision for redress, the FCA was required to, and did, weigh several competing considerations to arrive at the methodology which best served its objectives

[152] Some aspects of these submissions repeat submissions made under Issue 3: see particularly Volkswagen, §77.1 "*since loss is presumed under the Schemes, it is inevitable that at least some § consumers will be treated as having suffered loss when they did not*" (the same point is made at CAAF 123.1); and CAAF §121.2, "*there must be some loss or damage before redress can be required"*. These submissions reflect Volkswagen and CAAF's misconceptions as to the role of causation and loss in both s.140A claims and the s.404 statutory scheme, and are wrong for all of the reasons addressed in Issue 3 above.

and regulatory priorities: see the detailed rationale set out in Chapter 11 of the PS. Having done so, the dissatisfaction of the Applicants does not give rise to a ground of challenge on judicial review principles. Volkswagen and CAAF argue that some consumers may receive compensation which exceeds their actual loss, for emphasis (Volkswagen, §80; CAAF, §125.3); but that potential outcome is expressly envisaged and authorised by FSMA; as explained above, the sole criterion is what "*kinds of redress*" the FCA "*considers to be just*". In light of consultation feedback, the FCA accepted that there was a risk of over-compensation in some cases which, in circumstances where that risk could be reduced without compromising the principle of simplicity and cost effectiveness, would not be just. As a result, the FCA introduced caps on redress to balance fairly the interests of consumers and the industry while maintaining the overall workability and accessibility of the Schemes. See the first witness statement of Charlie Gluckman, §§78-79.

158. The CCA does not itself require the strict financial analysis of loss insisted on by the Applicants. As set out above, ss.140A-140B expressly eschew such formalism. Volkswagen and CAAF both suggest (citing *Smith*) that redress under s.140B is "*limited to reversing any damaging financial consequences*" (Volkswagen §76, CAAF §121.1). That is wrong given the breadth of the remedial discretion afforded to the court under s.140B CCA, and Lord Leggatt's comments at §25 of *Smith* as to the essence of the court's task in formulating the remedy: he made clear that the court was <u>not</u> limited to identifying financial loss or damage in the contract or tort sense, but rather should exercise its discretion so as to remove the unfairness.

159. Indeed, the Supreme Court's order of a payment to reflect the undisclosed commission plus interest in *Johnson* is just the most striking example of why neither the CCA nor FSMA require, in the s.404 context, the FCA to tie its assessment of just redress to financial loss (in the way that concept is applied in the contractual or tortious context), still less be bound by it.

4. APR adjustments

160. Much of the criticism of the APR adjustments applied to the calculation of the just redress amount are in substance a challenge to the very concept of applying a flat rate at all: Volkswagen, §78; CAAF, §§128-135; Mercedes, §§52-63; Consumer Voice, §§78-88. The

FCA's (eminently reasonable) policy decision to adopt a universalised solution over an individualised one which must be determined from scratch in every case inevitably entails a degree of imprecision in securing the outcome which would be appropriate in a given case. This is so regardless of what the ideal solution would be: it is inherent in the nature of a broad-brush approach, involving the adoption of bright-line rules, that it may be both over- and under-inclusive in some cases. It does not follow that the broad-brush approach is irrational or otherwise unlawful, particularly where "*a very large number of individual decisions need to be made, and tailored decision-making must necessarily yield to the desirability of certainty and practicality*": *R (Wikimedia Foundation) v Secretary of State for Science, Innovation and Technology* [2026] 1 WLR 964 (KBD) at §109. To whatever extent the Applicants complain that the chosen approach is not finely tuned enough, by leaving out of account considerations which would tilt the calculation in their favour, such challenges amount to nothing more than a disagreement as to the merits of how the FCA exercised its discretion in setting the rules. That is not a legitimate ground of challenge here.

161. Several of the arguments advanced against the APR adjustment suffer from the same central flaw: namely that they proceed on the basis that the object of using the APR adjustment was to ensure that the outcome in each case would approximate actual financial loss as closely as possible. That was neither the FCA's duty nor its objective, nor was it the FCA's intention in selecting the APR adjustments either in principle or at the levels set.[153] Nor, indeed, is financial loss, in the sense it might be understood in a contract or tort claim, the appropriate yardstick for any remedy in a CRS reflecting liability under s.140A, for all of the reasons given in Issue 3 above. All of the Applicants therefore misstate the purpose of the APR adjustment as a 'proxy' for loss. In the sense in which that term is used by the FCA, it connotes nothing more than an approximation or assumption to be used as a starting point for the calculation, as the very label 'hybrid' indicates, and a conservative starting point at that (see PS §1.30). The FCA recognised in setting the policy, and accepts for the purposes of these challenges, that different approaches (which would necessarily also be, or involve, imprecise proxies) might lead to redress which more closely approximated the actual financial loss suffered by some

[153] This is also a fundamental flaw in the reliance which Consumer Voice seeks to place on the expert report put forward by Dr Gudat, an economist and econometrician ("Gudat 2"). The analysis and views set out in his report will in no way assist the Tribunal in resolving the issues before it given the nature of the s.404D jurisdiction.

consumers. But that was not the only consideration. The FCA made clear at PS §1.4 that the design of the Schemes was guided by a range of principles, namely "*comprehensiveness, fairness, certainty, simplicity and cost effectiveness, timeliness, transparency and market integrity*", and that it would be necessary to strike a "*balance*" between these competing objectives.

162. A hypothetical alternative, more involved and/or granular methodology which yielded a more mathematically 'accurate' outcome in theory or in some cases, but would in practice lead to less actual redress to affected consumers (for example, because the Schemes would be or appear inaccessible, unduly burdensome and/or time-consuming, potentially leading consumers either to attempt to seek relief before the courts or to forsake their entitlement altogether), would not be more "*just*" – or, more relevantly for present purposes, would not necessarily be more just; it was reasonable for the FCA to have regard to those practicalities. Similarly, if that more 'accurate' methodology would in theory avoid over-compensation in some cases but would be significantly more complex and burdensome to operate in practice and/or would lead to inconsistent and/or untransparent outcomes (increasing the likelihood of disputes, FOS complaints and litigation, as well as the supervisory burden on the FCA), that would not entail a net increase in "*justness*" – and certainly not to the extent that the FCA's subjective discretion was irrational. As the PS sets out at §1.36, the FCA "*also had a guiding principle that the scheme should be easy for consumers to participate in and the cost of delivering the scheme should be proportionate*". A CRS which cannot be operationally delivered fails to serve the purpose for which the functions at ss.404-404G were conferred on the FCA.

163. This same misstep appears in Consumer Voice's argument at §88(4), in asserting that the FCA misdirected itself as to the effect of ss.404A(4)-(5) because it had regard to factors which were not related to loss or damage. This is illogical. The fact that the FCA also took into account other factors (as it was required to do under the holistic analysis of what it considered "*just*" and in accordance with its overarching duties to have regard to regulatory principles) does not mean that it failed to have regard to the mandatory consideration set out in the statute. Had Parliament intended to exclude any other considerations, or even to provide that the nature and extent of the losses or damage should be an overriding or determinative consideration, it would have drafted s.404A(5) accordingly; instead, it expressly included reference in that provision to having regard to

it "*among other things*". It is Consumer Voice which misstates the material question by glossing the statutory wording with the notion that the FCA was required to find a "*just proxy for loss*". That is simply not what FSMA says.

164. The same error appears in CAAF's treatment of the issue, in particular at §§128-132 (on APR-17) and §§133-135 (on APR-21). The comparison made between the two schemes reflects CAAF's fundamental error of approach. The section on APR-17 descends to arid technicalities, missing the point that it is in the very nature of a scheme of this kind that it will not perfectly capture every scenario. When transitioning to deal with APR-21, at §133, CAAF tellingly complains that it is "*even more flawed*", when in fact the policy decision in relation to APR-21 underscores CAAF's error of approach. The FCA was clear that the APR level was not intended to "*compensate consumers for their actual loss*" (CAAF §133.4) but rather that it represented a trade-off which took into account workability, efficiency and consistency. In other words, what CAAF identifies as an aggravation of the supposed flaw is in fact a manifestation of the FCA's broader and policy-driven approach.

165. To similar effect, Volkswagen (§§78-82) seeks to identify various ways in which the APR adjustment falls short as a "*measure of, or a reasonable proxy for, loss*", without having regard to the practical benefits (and permissibility) of a broad-brush approach. The specific criticisms enumerated at §79 all stem from that erroneous premise and therefore do not assist. At §80, Volkswagen makes the same unintended concession as CAAF: it directly refers to the FCA's own explanation that the averaging methodology would, in most cases, involve an uplift from the APR adjustment. That explanation is set out in detail in the PS, pp.201-206, expressly and correctly noting that it was not necessary for the redress to be "*strictly based on the financial loss suffered by the consumer*" (p.202). The relevant fact is that the APR adjustment operates as an approximate baseline input within a broader, bounded methodology which results in redress which the FCA considers, in the round, to be "*just*".

166. For its part, Mercedes says that "*the FCA's monolithic view of the market has risked the APR adjustment calculation being considerably overinflated so far as captive lenders are concerned*" (§63). Once again, the premise is false, as it implies that the FCA should be tied to some detailed counterfactual analysis of actual loss to arrive at "*just*" redress. But even if that were true (which it is not), it would still be erroneous for Mercedes to go on

to say that there "*can be no reasoned or logical basis for that result*". In a cohort of the size of those affected in this case, it will always be possible to break down the 'monolith' by reference to any factor, or any number of factors. Such granularity may allow for a more refined or tailored result in some individual cases, possibly to the benefit of the very specific subset of the sector into which Mercedes falls, but comes at a cost to simplicity, clarity, effectiveness, workability, accessibility and consistency, and therefore a disbenefit to the entire sector subject to the Schemes and the consumers for whose protection the statutory powers were entrusted to the FCA in the first place. The FCA was not required to prioritise the protection of the position of Mercedes. Nevertheless, the FCA did modify its proposals to make specific provision for various sub-sectors, including luxury vehicles and captive/white label lenders, to benefit from certain exclusions – so that such considerations have already been accounted for – to the extent the FCA considered appropriate – by the time the redress calculation step is reached.

167. One aspect of the various challenges articulated to the APR calculations is that of inadequate data and/or statistical analysis (see CAAF §§133.1 Volkswagen §§81.1, 82.2; Consumer Voice at §81 (where they seek to invoke detailed and technical arguments put forward in Gudat 2). These are, in substance, *Tameside* complaints of a failure on the part of the FCA to carry out a sufficient enquiry into the 'proper' APR calculation.[154] Any attempt to rely upon the *Tameside* duty of enquiry is to be assessed by reference to the rationality standard: *Balajigari v Secretary of State for the Home* Department [2019] 1 WLR 4647, CA, at §70. Decisions on the manner and intensity of enquiry to be undertaken into any relevant factor accepted or demonstrated as such and the weight to be given to that factor is a matter for rationality review only: *R (Khatun) v Newham London Borough Council* [2005] QB 37, CA, at §35 *per* Laws LJ.

168. That irrationality standard cannot be met; the Applicants simply assert their position. In a scheme of this nature, it will always be possible to supplement, refine, curate, cross-check and update data. It is a matter for the FCA to consider at what point the marginal added benefit of such processes becomes outweighed by the detriment of delay and expense. In the event, the FCA noted that the limited availability of further data meant that there was no guarantee that further evidence-gathering would result in any material improvement

[154] *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014.

which would justify the delay to consumers and firms (PS, p.205, §1.28) (see also the first witness statement of Katherine Collyer at §§65, 77-87, and the first witness statement of Charlie Gluckman at §77). The FCA was required, and certainly entitled, to have regard to such broader considerations, both (i) by the necessarily holistic nature of considering what is "*just*" and (ii) by its general duty to have regard to efficiency, proportionality and economy (s.3B FSMA). These are all multi-factorial evaluative questions for the FCA to decide, and its decision to proceed on the basis of the information it had (informed by its expert prognosis of the sufficiency of the data it already had and the availability and value of further data), rather than to allow the perfect to become the enemy of the good, was rational.

5. The CRR

169. Many of the challenges concerning redress involve a dispute as to the meaning or effect of the Supreme Court's decision in *Johnson*. Volkswagen says that *Johnson* does not provide a reasonable basis for a rule that commission ought generally to be repaid (at §83); to similar effect, CAAF says that *Johnson* was fact-specific and "*cannot rationally be read as establishing, or even as suggesting, that a Commission Repayment Remedy would be available to consumers at large*" (at §§136-139). Consumer Voice, meanwhile, says that the Supreme Court "*did not purport to lay down a general formula for remedy in future cases*": at §§70-77. All of these arguments are misdirected. The FCA has not purported to derive any such principle or rule from the facts of *Johnson* themselves. Rather, in light of the need for "*objective, common and identifiable criteria so that firms can assess very large volumes of cases consistently, quickly and at proportionate cost*" (PS, p.25), the factual matrix in *Johnson* provided, via the Supreme Court's exposition of the relevant principles, a ready touchstone for considering fairness and what remedy appropriately removes any unfairness. For the purposes of this stage of the analysis, then, the relevant principle from *Johnson* is the Supreme Court's decision that the appropriate remedy would be a payment to Mr Johnson reflecting the commission plus interest (§338); see PS pp.200-201, noting the Supreme Court's express reference to the FCA's submission seeking finality, clarity and consistency: §337(3). The fact-sensitivity emphasised by the Supreme Court's judgment in the context of those proceedings is not directly applicable to a s.404 CRS. The findings of principle, in particular as to the size of the commission, the extent

of disclosure and the appropriate remedy for the resulting unfairness, are. This is not to say that a different set of facts might not also be deemed unfair and to attract the same remedy; but the whole purpose of the statutory scheme is to apply bright-line rules to enable a fair and effective CRS.

170. In the same vein, the FCA agrees with Consumer Voice that it would have been legally open to the FCA, in its broad discretion, to extend the CRR approach beyond the facts of *Johnson* even more than it did. It decided not to. It is not surprising that a body purporting to represent the interests of consumers would prefer that the net be cast (even) wider; that is why Parliament conferred the function on the independent regulator. Categorisation of cases is a matter for the FCA, as is the determination of what redress should be available to each category. In any event, there is no free-standing common law ground of judicial review arising from unequal treatment, as confirmed in *R (Gallaher Group) v Competition and Markets Authority* [2019] AC 96 at §§24 and 50. The fact that a hypothetical alternative could also have been a lawful exercise of the FCA's discretion – even, for the sake of argument, a better one – does not render the FCA's actual decision unlawful.

6. The Cap(s)

171. Volkswagen says the caps (see above, §33.10, §152) do not achieve their aim of avoiding windfalls (by reference to the PS at §§11.2 and 11.5), before going on to make the quite different argument that the caps do "*nothing to address the fundamental flaw in the Schemes' approach to redress*", i.e. the "*flaw*" of arbitrariness supposedly identified by Volkswagen: at §85. CAAF's complaint is strikingly similar, namely that the caps "*do not relate*" to consumer loss and therefore "*do nothing to address the fundamental flaw in the Scheme's approach to redress*": at §§140-141. This misunderstands the rationale for imposing the caps, which was to assist in achieving proportionality of outcomes while maintaining the clarity and efficiency of the scheme. The objective was not to ensure that the redress would precisely correspond to financial loss in every case, but rather to avoid, in a necessarily broad-brush way, some of the possible unfair outlier results of the chosen methodology, and to ensure that redress was commensurate with differentiated tiers of seriousness. The use of the caps achieves that aim consistently with the FCA's statutory discretion.

7. Subvention

172. The Volkswagen Grounds, at §86, assert that the FCA failed to take into account the incidence and effects of partial subvention. This concept is defined as a "*subsidy provided to the consumer primarily in the form of a subsidised APR or deposit contribution to the price of the vehicle*", and the complaint is that although the Schemes exclude certain full forms of subvention at earlier stages, those exclusions do not apply in some unspecified graduated form for different kinds of partial subvention.

173. This challenge is hard to understand.

173.1. First, as Volkswagen implicitly concede, the FCA has considered contexts involving subvention and made provision for them (specifically "*zero APR*" cases, which are not considered unfair, and "*5th percentile of non-zero APR*" cases, which attract nil redress); it has simply not made the provision Volkswagen would prefer. The Schemes impose rules which provide exceptions for cases involving subvention which the FCA is content can be properly described as not involving remediable unfairness to the consumer.

173.2. Second, it follows from this that in the remaining contexts of claimed partial subvention, there is unfairness for which redress is in principle warranted.

173.3. Third, the 'justness' of that redress is not to be determined by reference to the asserted benefits of subvention, but by reference to the wider balancing exercise the Schemes involve.

173.4. Fourth, the complaint that consumers obtained a "*clear benefit*" is simply another way of saying that: (i) the consumer got a 'good deal', which is wrong and irrelevant for all the reasons addressed under Issues 2 and 3 and in *Clydesdale*, and (ii) in this respect the redress does not align with the loss to the consumer, which repeats the error of analysis found throughout.

8. Conclusion on Issue 4

174. In the premises, all of the contentions as to the unlawfulness of the FCA's approach to redress in the Schemes should be dismissed.

175. All the complaints are predicated upon a basic mischaracterisation of the nature of the FCA's power to provide for redress which is "*just*". The FCA was not required to, and did not, adopt a design within the Scheme intended to create proxies for what a court would award by way of loss or damage in a contract or tort claim. The nature and scale of the Schemes required and justified a more distinctive approach, balancing the interest in consumers obtaining proper and fair redress for the breaches of their rights to fair dealing (in accordance with Supreme Court guidance on how such unfairness should be remedied), the interests of lenders and the industry, and the interest of all parties (and the wider public interest) that the Schemes be operable at scale in a practical and effective manner. Whether the Applicants would have designed the Schemes differently is not the legal question, nor indeed a relevant one at all.

176. There is no identified aspect of this part of the Scheme rules which is outside the FCA's statutory powers to introduce. The rules reflect a quintessential exercise of regulatory judgement, balancing the FCA's statutory objectives.

177. No aspect of the FCA's decision-making even approaches the unreasonableness standard, heightened as it is by the latitude expressly and impliedly conferred by the statutory scheme.

178. The balance of the arguments, concerning *Padfield* unlawfulness and interference with A1P1 rights, are entirely unparticularised. To the extent they are simply a re-framing of the *vires* and rationality points, they are wrong for the reasons already given.

I. ISSUE 5 – LIMITATION

1. Introduction and overview of arguments

179. Mercedes alone challenges the FCA's approach to limitation in the Schemes (Mercedes Ground 2, §§§22-40). In essence, it contends that the relevant rules (which are the same in both Schemes) are based on an error of law, because they:

179.1. conflate aspects of the statutory test for the postponement of the limitation period under s.32(1)(b) of the Limitation Act 1980 ("**LA 1980**") and for unfairness under s.140A CCA;

179.2. reverse the burden of proving the s.32(1)(b) LA 1980 test is met, which in court proceedings falls on the claimant; and

179.3. do not correctly identify the "*relevant fact*" that must be deliberately concealed for s.32(1)(b) to be engaged in a s.140A CCA claim.

180. There is no merit in these submissions. They rest on misunderstandings of the substantive law on limitation and unfairness under s.140A CCA. Further, they appear to contend that the Schemes should require lenders to adopt precisely the same procedure and approach to assessing the postponement of limitation periods that a court would; that is untenable given the nature and purpose of the FCA's power to introduce a CRS under s.404 FSMA.

2. Legal principles – the approach to limitation in the Schemes

181. Pursuant to s.404(1)(b), the FCA's power to introduce a CRS extends only to failures to comply with a requirement where, if a customer brought proceedings, a remedy or relief would be available. The expiry of an applicable limitation period would bar a remedy (if limitation was raised as a defence), and thus any CRS must be designed to reflect any applicable limitation periods.

182. In practical terms, this means that the Schemes may only capture scheme cases where the limitation period for bringing a claim concerning the relevant "*failure*" has not expired before the date on which the Scheme rules were made.[155]

183. In England and Wales,[156] s.9(1) LA 1980 prescribes the limitation period for claims under statute for a repayment of money:

> *"(1) An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued."*

[155] Policy Statement §4.24. Per s.404(8) FSMA, the introduction of a CRS has the effect of "stopping the clock" on limitation, such that where the limitation period expires *after* the date the scheme rules are made, the firm must still carry out its obligations under the rules.

[156] Mercedes explicitly limits its challenge to the law of limitation as it applies in England and Wales: see Mercedes' Grounds §25.

184. There is broad acceptance that this applies to money claims under s.140A CCA, which are therefore subject to a statutory six-year limitation period.[157] Limitation starts to run when the credit relationship ends.[158]

185. However, the commencement of that limitation period can be postponed under s.32(1) LA 1980:

> *"(1) … where in the case of any action for which a period of limitation is prescribed by this Act, either -*
>
> *(a) the action is based upon the fraud of the defendant; or*
>
> *(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or*
>
> *(c) the action is for relief from the consequences of a mistake;*
>
> *the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it. References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent."*

186. In the Schemes, the FCA made a rule on limitation with associated guidance for lenders to apply when determining whether a complaint is a "*scheme case*", at 5.1.17R and 5.1.20-21G. This specifically addresses the postponement of limitation under s.32(1)(b) LA 1980, which applies where any fact relevant to the claimant's right of action has been deliberately concealed from them by the defendant or its agent.

187. Mercedes' Ground 2 focuses on the limitation guidance at 5.1.21G(5), which provides:

> *"…the fact or facts relevant to the 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*

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[157] *Canada Square v Potter* [2024] AC 679, §55; *Smith v RBS*, §31. At §28 of its Grounds, Mercedes purports to cast some doubt on this, referring to the Supreme Court's recent decision in *Zedra Trust Company (Jersey) Limited v THG Plc* [2026] 2 WLR 479. Mercedes does not appear seriously to contend that by applying a six year limitation period to complaints under the Schemes, the FCA's approach is unlawful: it is said only that the FCA's "*failure to consider* Zedra *might be said to constitute an error of approach*". To the extent that is comprehensible as a challenge to the approach taken to limitation in the Schemes, it is clearly wrong. *Zedra* concerns ss.994 and 996 of the Companies Act 2006, a different statutory remedy entirely. The majority in *Zedra* made clear at §117 that they were not overruling decisions on the limitation periods applicable under other statutory remedies (including the case cited by Mercedes, *Rahman v Sterling Credit Limited* [2011] 1 WLR 497, which concerns s.140A CCA). The two leading cases remain *Smith v RBS* and *Canada Square v Potter,* two Supreme Court judgments which are premised directly on s.9(1) LA 1980 applying to s.140A claims. In any event, Mercedes' submission is not understood, given that Mercedes apparently interprets *Zedra* as meaning there is no LA 1980 limitation period for s.140A claims at all, which is directly contrary to its submissions on the alleged unlawfulness of the FCA's approach limitation which follow.

[158] *Smith v RBS*, §2.

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).”

188. The “*information in CONRED 5.3.10R(1)(a) to (c)*” referred to in 5.1.21G(5) is, in essence, the pertinent information about the three kinds of “*relevant arrangement*” under the Schemes, as follows:

“(a) in relation to a discretionary commission arrangement – the fact that commission was payable to the credit broker in respect of the consumer’s agreement and sufficient information about the discretionary commission arrangement for the consumer 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;

(b) in relation to a high commission arrangement – the fact and amount of the commission payable to the credit broker in respect of the consumer’s agreement, either by the disclosure of the amount of commission in monetary terms or by the disclosure of the method by which the commission amount would be calculated such that the consumer was able to understand its size;

(c) in relation to a tied arrangement – the fact of the tied arrangement and sufficient information about the arrangement for the consumer to understand that the credit broker would introduce consumers exclusively to the lender or give the lender the option to provide an offer of credit to the consumer before the credit broker approached any other lender (as relevant).”

189. The criterion for “*clear and prominent disclosure*” of this information under 5.1.21G(5) is that it was presented in a way that “*was likely to have drawn the attention of the average customer to whom it was directed*” (subject to adjustments reflecting any apparent customer vulnerabilities): 5.3.10R(2)-(4).

190. The postponement of limitation periods under this guidance is subject to an exception at 5.1.21G(7), applicable only to high commission cases, which was introduced in response to feedback in consultation.[159] This applies in a “partial disclosure” situation, where “*there was a clear and prominent disclosure… of the bare fact of, or possibility of, commission being payable (for example, that commission ‘would’ be, ‘may’ be, ‘is’ or ‘is typically’ payable), but not of the amount of commission payable*”. In that scenario, the guidance provides that “*it is likely that the defendant will be able to demonstrate that the claimant could, with reasonable diligence, have discovered the facts relevant to their right of action such that the period of limitation will have begun to run from the end of the motor finance*

159 PS, p.71

agreement". However, the guidance provides that it is unlikely such partial disclosure would prevent the postponement of limitation where the "*relevant arrangement*" was a DCA and/or tied arrangement: 5.1.21G(6).

191. The FCA explained the basis and rationale for introducing this guidance, including the consultation and feedback received, in the PS at §§4.8-4.24 and pp.69-74. In particular, it made clear that its approach was informed by:

191.1. The relevant authorities on s.32(1)(b) LA 1980;

191.2. the FCA's evidence on the scope and scale of inadequate disclosure of information; and

191.3. its regulatory judgment in designing an approach that reflects the fact-sensitive nature of the limitation assessment, but which is appropriate in the context of a CRS and capable of being operationalised at scale (while minimising inconsistency and disputes).

3. The alleged conflation of the statutory tests for s.140A unfairness and s.32(1)(b)

192. Mercedes' first challenge to the limitation guidance contends that it "*wrongly conflate[s] the distinct statutory questions of deliberate concealment and reasonable diligence with the UR assessment under s.140A CCA*" (§29). There appear to be three strands to this challenge, none of which have any merit.

193. First, Mercedes argues that "*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*" (§33(a)).

194. This is wrong. The guidance at 5.1.21G specifically draws exactly that distinction. As set out in paragraph 190 above, the guidance makes clear that in high commission cases, a "*partial disclosure*" of the mere fact or possibility of the commission will likely constitute deliberate concealment of the amount ((5)-(6)), but it is nonetheless likely that the claimant could have discovered it with reasonable diligence ((7)), and therefore the s.32(1)(b) test is not satisfied.

195. That exception only applies in high commission cases, but that reflects the fact-specific nature of the s.32(1)(b) test, and the reality that there is a difference between these scenarios: where a reasonably diligent consumer might enquire as to the amount of a "*partially disclosed*" commission, it is unlikely they would enquire as to the method of its calculation (i.e. a DCA) or whether there was an undisclosed tie. Taking that position is plainly logical and well within the ambit of the FCA's regulatory discretion. It does not demonstrate any erroneous conflation of the parts of the s.32(1)(b) test or misdirection in that regard: indeed, it is clear from the FCA's discussion of that test in its PS, and its response to feedback concerning both the "*deliberate concealment*" and "*reasonable diligence*" aspects of the test, that the FCA fully understood the distinction and had calibrated its guidance accordingly.[160]

196. Second, Mercedes submits that "*no distinction is drawn between "inadequate disclosure*" for the purposes of liability and "*deliberate concealment*" for the purposes of limitation, and this denudes the word "*deliberately*" in s.32(1)(b) LA of effect. This is said to be contrary to *Potter v Canada Square Operations Limited* [2024] AC 769 (**"*Potter*"**).

197. This ignores the facts and ratio of *Potter*. Like the cases falling within the scope of the Schemes, *Potter* concerned the non-disclosure of commission by a lender in the consumer finance context (in that case, commission for PPI sales). At first instance, the court had found that the non-disclosure was deliberate, on the basis that "*as a sophisticated creditor, the decision as to what commission to charge and not disclose must have been considered and at a high level*" (§10); and that conclusion was endorsed by Lord Reed, giving the judgment of the Supreme Court, at §154: "*The defendant deliberately concealed those facts from [the claimant], as the recorder held, by consciously deciding not to disclose the commission to her*".

198. The FCA's guidance reflects that authority, and the basic reality that where sophisticated motor finance lenders put in place commission arrangements, DCAs and/or ties, but did not adequately disclose the pertinent facts of those arrangements to consumers, that is likely to be a conscious decision which meets the intentionality requirement articulated in §§106-108 of *Potter*.

[160] See, for example, the discussions of "*reasonable diligence*" and "*deliberate concealment*" at the bottom of p.71 of the PS.

199. Third, it is said that "*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*" (§33(c)). This too is wrong: the treatment of "*partial disclosures*" of high commissions shows that there are cases which would give rise to a presumption of unfairness under the Scheme, but which would be time-barred.

200. As to other kinds of CRS cases, it must be borne in mind – as the FCA made clear in its PS[161] – that the "*failure*" addressed by the Schemes is the unfairness arising from a failure adequately to disclose pertinent facts concerning the credit relationship. There will obviously be significant factual overlap between situations where that unfairness arises, and the situations of "*deliberate concealment*" which meet the s.32(1)(b) test.

201. Viewed in the round, the FCA's limitation guidance strikes a delicate balance fairly and rationally. It reflects the similarity in the fact patterns which will satisfy the different statutory tests under s.140A and s.32(1)(b), but also recognises the differences which mean that they will produce different results in some situations; and does so in a way which is sufficiently clear and straightforward that it can be operationalised in the context of the mass redress scheme.[162]

202. The last point is key. The central fallacy underlying each of Mercedes' submissions is a misunderstanding of the nature of the s.404 power. The Scheme rules must reflect the substantive law on limitation, but they must do so in a way that also reflects what a CRS is seeking to achieve, i.e. implementing firm-led investigations capable of delivering fair and consistent redress at scale. Expecting firms responsible for widespread failures (including the very concealment which engages s.32(1)(b) in the first place) simply to replicate the precise approach a court would take to interrogating whether a customer can rely on s.32(1)(b) LA 1980 would not be appropriate, practically feasible or produce fair and consistent results. Clear guidance is required in order to operationalise the applicable legal principles in that context.

203. That is precisely what the aspects of the limitation guidance impugned by Mercedes seek to do. In particular, the guidance at 5.1.21G reflects:

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[161] PS, p.70.

[162] See the first witness statement of Mario Theodosiou at §§119-121.

203.1. the likelihood, of the kind recognised in *Potter*, that where sophisticated lenders paid a high commission, set a DCA or implemented a tie, but did not adequately disclose that to the customer, that was a conscious and deliberate decision;

203.2. the likelihood that where the pertinent information required to plead a s.140A unfairness claim (i.e. the amount of a high commission, the existence of a DCA or a tie) was not clearly and prominently provided to the relevant consumers, it could not have been "*discovered with reasonable diligence*"; and

203.3. the reality that the detailed documentary disclosure and fact-finding processes deployed in civil litigation to test whether the relevant facts were either "*deliberately concealed*" or "*reasonably discoverable*" simply are not feasible or fair in the context of a CRS (still less a market-wide one), and any guidance on limitation must be shaped accordingly.

204. Mercedes' submissions do not grapple with this at all: indeed, it is telling that Mercedes advances no case as to what it considers the limitation guidance should have been. Accordingly, its submissions not only misinterpret the underlying law on limitation, they also fundamentally miss the point, and fail to explain how the limitation guidance in the Scheme falls outside the FCA's powers to make such guidance in the context of a CRS introduced under s.404.

4. The burden of proof

205. The second part of Mercedes' challenge to the limitation guidance contends that the FCA erred in law because it reverses the burden of proof that ordinarily applies where a claimant seeks to rely on s.32(1)(b) LA 1980 in court proceedings, and therefore consumers may be "*awarded redress in circumstances where any loss or damage as might have been suffered by the consumer would not be remediable in court proceedings*" (§§37-38).

206. This submission is undermined by the same key flaw as outlined in the preceding section. It proceeds on the basis that the FCA must, in making guidance as to the postponement of limitation in the Schemes, require firms to take precisely the same approach as a court

would; but that is plainly inappropriate and contrary to the nature and purpose of the power to make rules and guidance for a s.404 CRS.

207. Indeed, as discussed in Issue 3 above in relation to similar submissions on the presumption of causation of loss or damage, those practical considerations are *a fortiori* in matters of procedure like the burden of proof:

207.1. The FCA has significant discretion under s.404 FSMA as to how a CRS should be designed. That is clear from the breadth of the rule-making power expressed in ss.404(1)(c) and (3)-(4), and the extensive (and non-exhaustive) list of the kinds of rules it "*may make*" in s.404A(1). That must apply equally to its powers to introduce related guidance.

207.2. There are limited controls on the ambit of the rule-making power in ss.404A(2) and (3), which require certain aspects of the CRS to seek to reflect what a court would do: namely, the identification of a relevant "*failure*" (s.404A(2)), and the matters to be taken into account in assessing evidence on such "*failure*" (s.404A(3)).

207.3. However, these require the FCA to seek to reflect the court's approach in relation to the *substance* of a complaint; there is nothing in s.404 which requires firms to adopt the court's approach to *the burden of proof.*[163]

208. A central function of the s.404 power is to enable the speedy resolution of claims arising from widespread harm through a firm-led investigative procedure that relieves consumers of the time, costs and risks involved in bringing individual claims or FOS complaints.[164] It is inherent in any firm-led investigative process that customers generally will not bear the burden of proving facts in the way they would in a civil claim or individual complaint.

209. In that context, it will often be appropriate for a CRS to place the onus on firms to investigate matters necessary to establish any availability of a remedy, including the

[163] Indeed, although s.404A(3) requires that the rules on "*matters to be taken into account*" by firms in identifying a relevant "failure" must reflect the approach of a court or tribunal, rules on the *"steps to be taken*" in that regard are not subject to the same constraint.

[164] The fact the s.404 power envisages firm-led investigations, rather than quasi-litigation, is reflected in the wording of s.404 and 404A: see e.g. 404(1)(a), which provides that "*firms are to carry out investigations*"; and s.404A, which provides that the scheme may make provision as to "*steps to be taken by relevant firms*" (s.404A(1)(c)) and "*as to the things that relevant firms are, or are not, to do in establishing and operating consumer redress schemes*". A s.404 scheme should also relieve the courts and FOS from the pressure of a very large volume of claims.

postponement of limitation period, rather than simply requiring consumers to prove the relevant facts.

210. It is within the FCA's powers to implement limitation guidance as to the application of s.32(1)(b) LA 1980 which has the practical effect of requiring the investigating firm to demonstrate, in accordance with that guidance, that limitation should not be postponed. Indeed, the FCA specifically addressed this issue in its PS, explaining why (despite the ordinary approach in civil litigation) it was appropriate to "*reverse the burden*" of proving the s.32(1)(b) test was met, in light of the evidence of market-wide inadequate disclosure and the operational exigencies of introducing workable guidance for this part of the Schemes. It is unclear how Mercedes envisages consumers being able to satisfy the limitation threshold on its analysis, against the backdrop of consumers having had the true facts hidden from them at the time. As a matter of principle, the FCA was entitled to introduce limitation guidance in the terms it has: Mercedes' submission to the contrary has no basis in legislation or policy.

211. Mercedes further suggests at §38 that the burden of proof issue is "*compounded*" because the Schemes allow lenders to rebut the presumption only on "*a far narrower basis than would be considered in litigation*". This simply repeats its complaint about the position adopted in the limitation guidance in the Schemes. Mercedes also states that "*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*". If this is suggesting the Schemes must provide for firms to cross-examine consumers, that is plainly absurd, and demonstrates the extent of Mercedes' error in submitting that the Schemes must simply replicate how a court would approach limitation.

5. The "*relevant fact*" for limitation purposes

212. §§39-40 of Mercedes Grounds are difficult to follow, but appear to dispute that the "*relevant arrangement*" (i.e. high commission, DCA or tie) would constitute a "*relevant fact*" for the purposes of postponing limitation in a s.140A claim.[165] This is seemingly advanced on the basis that inadequate disclosure of a relevant arrangement would not give

[165] A "*relevant fact*" for the purposes of s.32(1)(b) is a fact which is relevant to the claim which the claimant does not know and which she needs to know to plead her case: *Arcadia Group v Visa* [2015] BusLR 1362, §49, approved in *Potter v Canada Square* §§96, 154.

rise to s.140A unfairness at all, because customers may not have got a better deal if they had shopped around.

213. To the extent it can be understood at all, this a hopeless submission. It is not about the limitation guidance, but seeks to challenge the FCA's decision that inadequate disclosure of "*relevant arrangements*" constitutes a "*widespread or regular failure*" for the purposes of s.404(1). For the reasons set out in relation to Issue 2 above, that is wrong.

J. ISSUE 6 – MARKET INTEGRITY

1. Introduction and overview of arguments

214. By Issue 6, Consumer Voice asserts that the FCA misconstrued and misapplied the integrity objective in s.1D FSMA and failed to give sufficient weight to consumer protection when calibrating the terms of the Schemes as to redress.

215. The specific arguments advanced under Consumer Voice's Ground 1 are divided into three sub-grounds.[166]

215.1. Ground 1(a) is that the FCA wrongly construed s.1D as being concerned only with supply-side considerations and market impact, when integrity also concerns wider issues such as consumer confidence.

215.2. Ground 1(b) is that the FCA failed to comply with its *Tameside* duty of inquiry in relation to its assessment of the integrity objective. Consumer Voice asserts that the FCA failed to take into account aspects of market integrity which might support greater redress. It asserts that provision for fuller redress would advance market integrity because it would strengthen consumer confidence. It says that the FCA lacked a sufficient evidential basis for placing the reliance it did on the risks of adverse effects on lender viability etc.

215.3. Ground 1(c) is that the FCA, having failed in the above respects, failed to adequately consider and protect the rights of consumers, such that it contravened the *Padfield* principle to promote and not frustrate the statutory

[166] Consumer Voice's Grounds, §§5(1), 58-69.

purpose of s.404; failed to follow its published policy on the s.404 power that particular importance attaches to the consumer protection objective; and failed to have any regard to the human rights of consumers, specifically their Article 6, Article 8 and A1P1 rights.

2. Legal principles – the statutory objectives

216. The power afforded to the FCA in s.404 FSMA to implement a CRS is, as the language of the provision repeatedly makes clear, a rule-making power. Such a scheme is established and operated by reference to rules.

217. The making of rules under FSMA is one of the FCA's "*general functions*": s.1B(6)(a) FSMA. In discharging 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*
>
> *(b) advances one or more of its operational objectives*".

218. The FCA's strategic objective, with which it must act compatibly, is "*ensuring that the relevant markets function well*": s.1B(2) and s.1F.

219. Two of the FCA's operational objectives, which it should seek to advance, are the consumer protection objective and the integrity objective: s.1B(3)(a)-(b). The consumer protection objective is defined in s.1C as follows:

> "*(1) The consumer protection objective is: securing an appropriate degree of protection for consumers.*
>
> *(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 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; …

(h) any information which the scheme operator of the ombudsman scheme has provided to the FCA pursuant to section 232A."

220. The integrity objective is defined in s.1D as follows:

"*(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"

221. Under s.1B(4) the FCA must, so far as is compatible with acting in a way which advances the consumer protection objective or the integrity objective, discharge its general functions in a way which promotes effective competition in the interests of consumers. The FCA is under a further duty set out in s.1B(4A) that it "*must, so far as reasonably possible, act in a way which, as a secondary objective, advances the competitiveness and growth objective*". That objective is defined in s.1EB to be "*facilitating, subject to aligning with international standards – (a) the international competitiveness of the economy of the United Kingdom (including in particular the financial services sector), and (b) its growth in the medium to long term*".

222. By s.1B(5), the FCA must have regard to the "*regulatory principles*" in s.3B FSMA. Those principles are:

"*(a) the need to use the resources of each regulator in the most efficient and economic way;*

(b) the principle that a burden or restriction which is imposed on a person, or on the carrying on of an activity, should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction;

(c) the need to contribute towards achieving compliance by the Secretary of State with section 1 of the Climate Change Act 2008 (UK net zero emissions target) and section 5 of the Environment Act 2021 (environmental targets) where each regulator considers the exercise of its functions to be relevant to the making of such a contribution;

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

(e) the responsibilities of the senior management of persons subject to requirements imposed by or under this Act, including those affecting consumers, in relation to compliance with those requirements;

(f) the desirability where appropriate of each regulator exercising its functions in a way that recognises differences in the nature of, and objectives of, businesses carried on by different persons (including different kinds of person such as mutual societies and other kinds of business organisation) subject to requirements imposed by or under this Act;

(g) the desirability in appropriate cases of each regulator publishing information relating to persons on whom requirements are imposed by or under this Act, or requiring such persons to publish information, as a means of contributing to the advancement by each regulator of its objectives;

(h) the principle that the regulators should exercise their functions as transparently as possible."

3. General submissions

223. First, when deciding whether to adopt the Schemes, and the terms of the rules of those Schemes, the FCA was required to act in accordance with the general duties set out in s.1B FSMA. The FCA must, so far as is reasonably possible, act in a way which is compatible with its strategic objective (that is, making sure the relevant markets set out in s.1F FSMA work well) and advances one or more of its operational objectives (i.e. consumer protection, market integrity and competition). It follows that the FCA is not required to advance more than one operational objective at a time when making rules (although the FCA should, and does, nevertheless have regard to all of them as relevant considerations when discharging its general functions, as well as the regulatory principles in s.3B). In making the Schemes, it complied with that duty, and Consumer Voice, rightly, advances no case that the FCA failed to have regard at all to any of the relevant objectives. The consumer protection objective is to secure an "*appropriate*" level of protection, not an absolute level of protection.

224. Second, the legislative scheme of FSMA must be read as a whole. Thus, although the purpose of the s.404 power is to enable the FCA to impose a mandatory CRS for the benefit of consumers, that power must – when s.404 is read with s.1B – "*so far as is reasonably*

possible" be exercised in a way which advances one or more operational objectives: in this context, the consumer protection objective.

225. Third, as is apparent from the careful statutory language, nothing in s.1B (including read with s.3B) requires the FCA to reach any particular outcome in any given context. This is consistent with orthodox public law principles: so long as the decision-maker has had regard to the matters designated by the statute (which is not in issue in this case), the weight it has accorded each consideration is open to challenge only if it can be shown to be irrational: e.g. *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, HL.

226. Fourth, the principle that weight is for the decision-maker is particularly acute where, as here, the various statutory objectives and principles to which the FCA must have regard may pull in opposing directions, requiring the FCA to strike an appropriate balance between them. By its adoption of this inherent tension as a feature of the legislative design, Parliament recognised and intended the FCA as specialist regulator to have a high degree of discretion as to how to strike that balance. This point was recognised in terms by Popplewell LJ in *BlueCrest* at §83:

> "*...it is commonplace in regulation of complex market activity to have rules and powers which are expressed in general terms and by reference to high level objectives, and to leave the discretion as to how they are to be fulfilled to the expertise of an experienced regulatory body of experts. That is especially necessary in the field of financial markets activity covered by the FCA's regulatory remit, which will potentially involve a myriad of different factual circumstances in a complex market with constantly evolving and novel products and services, something which is positively to be welcomed on a macro-economic level. The FCA is obliged by s. 1B(1)(a) to act compatibly with its strategic objective of ensuring that the relevant markets work well, and by s. 1B(4) to discharge its functions in a way which promotes competition [in] the interests of consumers. By s.1E(2)(e) the FCA must in pursuing its competition objective have regard to how far competition is encouraging innovation. The narrower and more prescriptive the terms in which its powers and rules are expressed, the less likely they are to provide an effective tool for regulating financial market activity to achieve these objectives. It is therefore neither surprising nor objectionable that the FCA, as the specialist and expert regulatory body, should be afforded by Parliament a wide measure of subjective discretion in seeking to achieve the defined statutory objectives.*"

4. Response

227. Consumer Voice's integrity objective ground of challenge carries with it a distinct air of unreality. The very purpose of the Schemes, and the s.404 power, is to create a mandatory

CRS for consumers so as to provide them with a straightforward, simple, free and clear opportunity to obtain redress for what the FCA considers to be widespread market unfairness, which they would not otherwise have. The existence of the Schemes obviates the need for consumers within their scope to make complaints to the FOS, or take the risk of bringing legal proceedings. It is, accordingly, unsurprising that the FCA's extensive public discussion of the Schemes does not repeatedly recite the advancement of the consumer protection objective: that is the fundamental premise for the s.404 power being exercised at all.[167] See, by close analogy, *R (McDonald) v Royal Borough of Kensington and Chelsea* [2011] PTSR 1266, SC, at §24 *per* Lord Brown. The exercise of the power inherently advances the consumer protection objective. To use the language Consumer Voice uses, if the FCA were not "*putting consumers first*", it might not have proposed a CRS at all.

228. In this light, the assertion of Consumer Voice in Ground 1(c) that the terms of the Schemes frustrate the purpose of s.404 to enable the making of rules to protect consumers, so as to breach the *Padfield* principle, is legally and factually incoherent.

229. The true substance of the integrity objective challenge advanced by Consumer Voice is an attempt to invite the Upper Tribunal to re-strike the balance of competing objectives for which Parliament has made provision in deliberately high-level terms, and which it entrusted to the FCA. That is impermissible in a challenge of this nature. The entirety of this Issue 6 is a thinly disguised attempt to clothe as an error of legal interpretation what is no more than a complaint that the FCA did not in the respects otherwise challenged by the Consumer Voice draw the lines of the Schemes in places more advantageous to consumers. On analysis, that formal characterisation collapses into the impermissible substance of a complaint about the weight the FCA attributed to different objectives in its final design of the Schemes.

230. The legal unreality of Consumer Voice's complaint extends into its positive case on the integrity objective. It does not go so far as to say that the integrity objective does not encompass the financial impact of a redress scheme on the motor finance industry (which would be hopeless); nor, it appears, does Consumer Voice say that the FCA was not rationally entitled to give weight to the multi-billion pound cost to the motor finance

[167] Consumers and their interests are, of course, mentioned many hundreds of times throughout the PS.

industry of making redress (even leaving out of account the costs of operating the Schemes). Rather, it seeks, in effect, to collapse the integrity objective into a version of the consumer protection objective, arguing – in particular by reference to the report of Dr Bagci – that the integrity of the motor finance market could withstand a CRS which was even more beneficial to consumers, and hence the FCA was somehow obliged to pursue such a scheme. This is not a sustainable analysis of the legislation or the Schemes.

231. First, the indisputable financial impact of a market-wide CRS such as that made in the Schemes on the motor finance industry, and the ability of that industry to meet the obligations of the Schemes while still being able to function effectively to provide financial products and services on which consumers rely, is a self-evidently relevant aspect of the regulatory balance the FCA must strike when designing the terms of the Schemes. Importantly, that financial impact is reflected in various of the FCA's relevant objectives and matters to which it must have regard. In particular:

231.1. It forms part of the strategic objective to ensure that the relevant motor finance market "*functions well*" (i.e. can and will continue to function and serve consumers) in s.1B(2).

231.2. It forms part of the integrity objective, affecting in particular the "*soundness, stability and resilience*", and the "*orderly operation*" of the motor finance market: s.1D(2)(a) and (d).

231.3. It is relevant to the growth of the United Kingdom economy in the medium to long term (per s.1B(4A) and s.1EB).

231.4. It informs the assessment of whether the burden imposed on the motor finance market by the Schemes is proportionate to the benefits of the Schemes, per s.3B(1)(b).

232. Accordingly, it is a basic flaw of Consumer Voice's analysis, and that offered on its behalf by Dr Bagci, to frame the FCA's consideration of the impact of the Schemes on the motor finance market (the 'supply-side' considerations, as Consumer Voice puts it) as concerning the integrity objective alone. Dr Bagci's opinion evidence is wrong at the level of principle.

233. Second, there is no dispute that the integrity objective includes wider interests in consumer confidence, compliance with laws and regulatory standards, and fair and consistent regulatory responses. This is the FCA's own published view, as Consumer Voice sets out at §64(1). However, it is also right that these aspects fall within s.1D because of the non-exhaustive terms of s.1D(2) rather than because of any specific reference to them. Parliament's express focus in the specified examples of what is encompassed by "*integrity*" is more closely on matters of financial impact, which materially affects the "*soundness, stability and resilience*" of the market. Whether the market's integrity is advanced or undermined in the sense of it being able to offer relevant products and services to consumers and contribute to the economy is at the core of the integrity objective, and matters of consumer confidence and compliance are towards the penumbra of the objective. Consumer Voice's arguments place disproportionate weight on the interests of consumers with existing or potential claims, without engaging with the interests of consumers more broadly, including those who rely on the continued availability, affordability and competitiveness of motor finance (which will include those who may seek to enter into further motor finance agreements in the future). The market integrity objective invokes the interests of the wider consumer population and the functioning of the market over time for the benefit of those consumers, not solely to the maximisation of redress outcomes in individual cases or in respect of the subset of consumers affected by the relevant market failure.

234. Third, this design focus on the part of Parliament is not surprising. If the core focus of the integrity objective were on consumers having confidence in the market and being protected to the maximum possible extent by the design of CRSs (as per Consumer Voice at §65(2)), the integrity objective would collapse into the consumer protection objective. The two objectives were deliberately set out separately, including so as to create and reflect the balance which would need to be struck by the FCA between competing imperatives in any given context.

235. Fourth, the importance and value to consumers of having available a CRS which provided as many of them with redress calculated by reference to the most generous terms possible was self-evident and inherent in how the FCA sought to consult upon and then strike the balance within the terms of the Schemes, which themselves advance the consumer protection objective. Similarly, the exercise of the s.404 power acts, inevitably, as a form

of deterrent to the affected market because it signifies the willingness of the FCA to use its statutory powers to provide for redress where there has been "*a widespread or regular failure*", and reinforces confidence in the market because it is effectively regulated (as the Cost-Benefit Analysis noted in terms at §299). The FCA was not required, contrary to Dr Bagci's apparent view (e.g. the 'provision' analysis at §§54-60), to strike the balance between competing objectives at the point of greatest possible financial impact on the motor finance market without it actually collapsing; no responsible regulator would adopt such an approach or anything like it, for obvious reasons including the ever-changing economic context. As the High Court has held, "*The FCA's statutory objective of consumer protection is not a protection-at-any-cost mandate*", read against the other objectives: see *R (Barclays Bank) v Financial Ombudsman Service* [2026] EWHC 1555 (Admin) at §169. *A fortiori*, the FCA was not required to take Consumer Voice's preferred approach.

236. In all the circumstances, Ground 1(a) identifies no error of law on the part of the FCA.

237. The *Tameside* challenge in Ground 1(b) is an unsustainable rationality complaint: see the authorities cited under Issue 4 above. The basic flaw with Ground 1(b) is that it cannot establish that the FCA was irrational to have specific regard to and place material weight on the readily calculable estimated cost to motor finance lenders of their potential liabilities under the Schemes (depending on the ways in which those Schemes were designed) – and the concomitant and countervailing readily calculable value of the Schemes to consumers – and the likely estimated costs to lenders of operating the Schemes. Consumer Voice cannot show, and do not in fact attempt to show, why the FCA was required as a matter of rationality to attempt to explore how a more onerous CRS on lenders would result in a materially higher degree of consumer confidence in the motor finance industry that would more effectively 'advance' the integrity objective.

238. Nor was the FCA required, on a rule-by-rule basis, to carry out a cost-benefit analysis (or similar exercise) to assess whether the precise formulation of that rule within the Schemes would itself imperil the financial stability of the entirety of the lender market, as Consumer Voice asserts at §65(3). Given the scale of the Schemes, the FCA was rationally entitled to assess the holistic impact of the balance struck within the Schemes, informed by the views expressed through the consultation process as to the workability and fairness of the various rules within the Schemes to both lenders and consumers. The FCA repeats the

point, made above, that the balance struck in relation to the Schemes involved balancing and affording weight to an array of potentially competing and related objectives and principles as required by s.1B, of which the integrity objective was just one.

239. As to the remaining aspects of Ground 1(c), it is incoherent and wrong to assert that there has been some breach of the observation made by the FCA in CONRED 1.3.22G that when considering whether it is desirable to provide for a redress scheme, the consumer protection objective will be "*particularly*" relevant. First, that provision is directed only to whether or not the s.404 power should be exercised at all. It has been and Consumer Voice does not challenge that decision. Second, and in any event, while it is clearly correct that the consumer protection objective is "*particularly*" relevant to whether a s.404 scheme is "*desirable*", the FCA's acceptance of the importance of protecting consumers is inherently bound up in the decision to exercise the s.404 power.

240. The further assertion in Ground 1(c) that the FCA failed to take into account the Convention rights of consumers is misconceived.

240.1. The assertion that taking account of Convention rights is a mandatory relevant consideration is wrong in law. On the highest authority, the relevant question in any ECHR case is whether there has in fact been or not been an act which is incompatible with the right, not how or the extent to which it has been taken into account: *R (Begum) v Governors of Denbigh High School* [2007] 1 AC 100; *Belfast City Council v Miss Behavin'* [2007] 1 WLR 1420, HL. The earlier case law upon which Consumer Voice relies is not consistent with and has been overtaken by that principle.

240.2. No attempt is made, inevitably, to argue that the FCA's decision-making – or the particular rules of the Schemes challenged by Consumer Voice – breach any Convention right of any consumer, still less those of "*all or nearly all*" consumers as would be required in an *ab ante* challenge of this kind: see *Christian Institute v Lord Advocate* 2017 SC (UKSC) 29 and *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2023] AC 505. Even on its own terms, the complaint is an entirely arid one.

240.3. A Convention right would be relevant to the decision-making of a public authority only if it can be said that the decision in question is (or may be) incompatible with that right. No attempt is made by Consumer Voice to explain how this could conceivably arise. It is not explained and not understood what possible Article 6 or Article 8 rights are relevantly engaged on the part of any, still less all, consumers. Nor is it explained how A1P1 creates any right to the adoption of a CRS, still less one with rules of any particular kind, still less how those rules strike a disproportionate balance.

240.4. It is further worth noting that *even if* it were arguable that any particular rules breached any particular Convention rights (which on the pleaded case it is not, for the reasons above), Consumer Voice is not itself a "*victim*" of any such alleged breach. Therefore, Consumer Voice is unable to seek relief against the Scheme rules as incompatible with Convention rights: see ss.6(1) and 7(1) HRA 1998; *Privacy International v Secretary of State for Foreign and Commonwealth Affairs* [2021] QB 1087, §§122-129.

241. Accordingly, Consumer Voice's reliance on the market integrity objective to challenge the Schemes is not sustainable.

K. ISSUE 7 – COMPENSATORY INTEREST

1. Introduction and overview of arguments

242. By Issue 7[168], Consumer Voice alleges that the FCA's approach to compensatory interest was unlawful. In sum, Consumer Voice argues that:

242.1. The FCA erred in law and/or was irrational by taking into account irrelevant considerations or failing to take into account relevant considerations when setting the standardised compensatory interest rate ("**Issue 7(a)**");169

[168] This is referred to as "Ground 4" in Consumer Voice's Grounds: §5(4), §§89-100.

[169] Consumer Voice's Ground 4(a), §98.

242.2. The FCA's removal of its proposed rebuttal mechanism to compensatory interest was an error of law and/or irrational ("**Issue 7(b)**");170

242.3. The FCA failed to comply with its own guidance on vulnerable consumers ("**Issue 7(c)**").171

243. This submission amounts to little more than an assertion that the FCA should have set a higher rate of compensatory interest and should not have removed the proposed rebuttal mechanism. The FCA's decision as to both these matters was both rational and entirely compliant with the requirements of ss.404A(4) and (5) FSMA that redress be '*just*' and have regard to consumers' loss.

2. Legal principles

244. As noted in particular under Issue 4 above, the intention behind ss.404A(1)(d), (4)-(5) and 404F(1) was to afford the FCA a wide discretion to design redress, including the way in which it is to be determined, so long as the FCA considers that redress to be "*just*" in the context of a mass CRS, and having regard – "*among other things*" – to the nature and extent of consumer loss. In sum:

244.1. Unlike the provisions of s.404A dealing with causation and liability,[172] the redress provisions do not impose on the FCA an obligation to adhere to the approach to remedy a court or tribunal would take in equivalent proceedings concerning the underlying "*failure*". This would be an impossible task in the ss.140A/140B CCA context, as has been addressed above. As to interest specifically, the court similarly has discretion to award pre-judgment interest at rates differing from the default court rate of 8%. Section 404F(1) makes clear that redress under a s.404 scheme may depart from the remedies a court or tribunal may award.

[170] Consumer Voice's Ground 4(b), §99.

[171] Consumer Voice's Ground 4(c), §100.

[172] As discussed above in relation to Issues 2 and 3 (Sections F and G) ss.404A(1)(b), (1)(c), (2) and (3), which require scheme rules regarding liability and causation to align in certain respects with how a court or tribunal would assess causation and liability in equivalent proceedings.

244.2. That conclusion is further supported by the wording of s.404A(5), which makes clear that the requirement for the FCA to consider consumer loss is one "*among other things*" that should be taken into account: in other words, this is not the only, or only relevant, consideration the FCA was required to have in mind when designing redress elements for the scheme. Neither ss.404A(4) or (5) prevent the FCA from having regard to broader scheme objectives such as operational simplicity, cost, or making the scheme fair and workable for stakeholders including consumers and lenders.

3. Issue 7(a): ss.404A(4)-(5)

245. The first point made by Consumer Voice is that the FCA was wrong in law to take the interests of firms into account when answering the statutory question posed by ss.404A(4)-(5): it is alleged that the FCA did not answer that question *'in substance*' and/or that the interests of firms was an irrelevant consideration (Grounds, §98(1)-(3)).

246. This relies on a strained reading of ss.404A(4)-(5), which treats the requirement for the FCA to have regard to consumer loss under subsection (5) as limiting or qualifying what constitutes "*just*" redress under subsection (4). That reading is unsustainable, for the reasons explained above. In the event, the FCA was entitled to take "*undue financial strain on firms*", "*operational simplicity*" and "*market viability*"[173] into account when considering whether the standardised rate of compensatory interest was "*just*". Sections 404A(4)-(5) are comfortably broad enough to allow the FCA to exercise its discretion in this manner.

247. Further, and in any event, the FCA clearly demonstrated that it had regard (among other things) to the nature and extent of loss or damage, at least in s.140A CCA terms, as required by s.404A(5). Consumer Voice's Grounds are notably selective in extracting from the PS the way in which the FCA approached compensatory interest. It is nevertheless clear (and implicitly accepted within Consumer Voice's Grounds) that the FCA did have regard to the nature and extent of loss or damage when setting the appropriate rate of compensatory interest:

[173] Consumer Voice, Grounds §98(2).

247.1. The CP addressed the need for redress under the scheme to "*include an amount to compensate consumers for being deprived of money as a result of the lender's actions*" and proposed the BOE base rate + 1% as "*compensating consumers fairly*" (§8.73-8.77) (Consumer Voice, Grounds §91), while mirroring the approach taken in the Commercial Court, in *Johnson*, and the FOS' updated policy. The proposed rebuttal (dealt with below) was intended to address the possibility of under-compensation in certain scenarios (§8.78-8.81). Both proposals demonstrate that the FCA had regard to the statutory questions of ss.404A(4)-(5).

247.2. The PS explained in detail (pp.223-225) the feedback received on the standardised rate, including concerns from consumer groups that the BOE + 1% rate would undercompensate consumers as the scheme spanned years with historically low base rates while borrowing rates remained high (§11.61). It also explained that evidence was presented suggesting that county courts had often awarded a much lower rate of compensatory interest of 2-3% (§11.63), compared to the higher rate of 8% awarded in *Kent v Apple* (§11.64). To address concerns of under-compensation, the FCA introduced a 3% compensatory interest floor across each year of the 2 Schemes which, in many cases, results in materially greater interest than if the BOE base rate + 1% had been maintained: this change was beneficial to consumers and aimed toward encouraging consumers to use the scheme, rather than taking their cases to court (p.220). The 3% floor demonstrates that the FCA had regard to the statutory questions of ss.404A(4) and (5).

248. In answer to the factors which Consumer Voice alleges, at §98(4) of their Grounds, that the FCA did not adequately take into account:

248.1. The likelihood that consumers would have borrowed at higher interest rates. As set out at p.220-221 of the PS, the 3% floor addresses this concern, balanced against other relevant considerations.

248.2. The fact that 8% interest was awarded in the case of IRHP and PPI complaints. These issues were not dealt with by s.404 redress schemes, and provide only an analogy which the FCA was under no obligation to follow or reproduce.

248.3. The fact that 8% interest was awarded in *Clydesdale*. That the FCA places support on *Clydesdale* in other 'relevant contexts' such as liability and causation is consistent with the requirements of ss.404A(2) and (3) – which ss.404A(4) and (5) do not replicate – that the FCA have regard to the approach a court or tribunal would take. It is appropriate that the FCA relies on *Clydesdale* for those purposes, without placing the same emphasis on the decision for the purposes of redress including interest.

248.4. The fact that c.6.3% was awarded in *Johnson* and 8% awarded in *Kent v Apple*. These decisions were expressly taken into consideration by the FCA (see CP, §8.76 and PS §11.64 respectively), and weighed against competing evidence that courts had awarded 2-3% in other cases (§11.63). As explained above, in any event, the FCA was entitled under ss.404A(4)-(5) to depart from the approach a court would take.

249. Accordingly, the FCA's approach to setting the standardised rate of compensatory interest discloses no error of law.

4. Issues 7(b) and 7(c)

250. Issue 7(b) wrongly asserts that the removal of the rebuttal mechanism "*compounds*" the FCA's error of law. In particular:

250.1. As explained above, the fact that the FCA proposed the rebuttal mechanism shows that it had regard to the nature and extent of consumer loss under s.404A(5).

250.2. The rebuttal mechanism was not widely supported by firms *or* consumers/consumer groups, on the basis that it would not in practice assist consumers. As explained in the PS (emphasis added):

> "*Consumers, consumer organisations, and professional representatives who disagreed argued that requiring consumers to make representations imposed too high a burden, and the rebuttal would be extremely difficult to make use of in practice. They noted specific groups, particularly vulnerable customers, may be disproportionately excluded from such a process."* (§11.69)

> *"Stakeholders from all groups highlighted the process introduced significant complexity and subjectivity, which could risk inconsistent outcomes for consumers and could give rise to disputes which would impose further administrative burden on both firms and consumers*" (§11.71)

250.3. The FCA expressly considered (in a paragraph omitted from the quotation at §97 of Consumer Voice's Grounds) "*whether [it] could reasonably address these concerns through modifications to the rebuttal*" but concluded that any changes would involve *"difficult trade-offs*" which would not materially improve the position of consumers and/or vulnerable consumers in particular.

251. In the premises, the FCA fulfilled the requirements of ss.404A(4) and (5) with respect to the rebuttal mechanism.

252. The remainder of Issues 7(b) and 7(c) may be dealt with together: Consumer Voice asserts that the removal of the rebuttal mechanism was irrational, prejudiced vulnerable consumers, and the FCA failed to follow its own guidance on vulnerable customers. These grounds are wrong for largely the same reasons as set out above:

252.1. The rebuttal mechanism was not widely supported by consumers or consumer groups, and was deemed to be operationally burdensome for consumers and vulnerable consumers.

252.2. The position of vulnerable consumers was considered by the FCA and its decision to remove the rebuttal mechanism was appropriately balanced against operational feasibility (PS, p.225).

252.3. There was no conceivable breach of the FCA's guidance for firms regarding the objective to "*protect […] vulnerable consumers*": the FCA initially proposed a mechanism with the protection of vulnerable consumers in mind which was not ultimately supported, workable, or proportionate in the circumstances of the Scheme.

L. ISSUE 8 – A1P1

1. Introduction and overview of arguments

253. Volkswagen and CAAF, plead that the Schemes[174] constitute an unlawful interference with their A1P1 rights and are therefore unlawful by virtue of s.6(1) of the Human Rights Act 1998.[175] The sum total of argument advanced for this ground, in each of the pleaded claims, is the blanket assertion that the relevant aspects of the Schemes are:

> *"(a) unlawful in domestic law and the interference is thus not in accordance with law for the purposes of A1P1; and/or (b) a disproportionate interference with [their] A1P1 ECHR rights."*

2. Response

254. The lender Applicants' allegations in respect of A1P1 rights are unparticularised and are no more than a reframing of the points already made under Issues 2, 3, and 4. To that extent they are wrong for the reasons already given above and the inclusion of A1P1 adds nothing. The FCA does not, in any event, accept that this context could generate an A1P1 claim. It is appropriate briefly to address the architecture of an A1P1 analysis.

255. The Tribunal must first be satisfied that there has been an interference with a possession of the lender Applicants before any question of justification or proportionality can arise. "*Possession*" is an autonomous concept under the Convention: a claimant "*can allege a violation of* [A1P1] *only in so far as the impugned decisions related to*" a possession within the particular meaning of A1P1: *Kopecky v Slovakia* (2005) 41 EHRR 43; *R (Nicholds) v Security Industry Authority* [2007] 1 WLR 2067, §§70-71.

256. No explanation is given of the nature of the alleged possession, the nature of the alleged interference, or how it is said any A1P1 rights are impacted by or related to the specific Scheme rules impugned under Issues 2, 3, and 4. A1P1 cannot merely be asserted to be engaged. The need for specific and clear pleading is all the more important where, regardless of the Schemes, the lender Applicants would in any event be exposed to pre-

[174] Specifically: Volkswagen's Grounds 2, 3 and 4: §52.4(3), §67.3, §88.6; and CAAF's Stages 2, 3 and 4: §108.3, §120.3, §142.5.

[175] Consumer Voice also refers to A1P1 (and under Convention rights) under its market integrity ground: Consumer Voice's Grounds, §69. This argument is unparticularised and hopeless, for reasons addressed under Issue 6 above at §240.

existing and substantial liabilities as a result of their own unlawful conduct over a number of years, which will inevitably significantly overlap with any liability under the Schemes.[176]

257. In its responses to Issues 2, 3 and 4 above the FCA has already addressed why the Applicants are wrong – in their contentions as to liability, causation/loss/damage, and redress – to suggest that the FCA has acted unlawfully. A1P1 adds nothing. Further and in any event, the impugned rules plainly were "*in accordance with the law*" in the relevant ECHR sense as s.404 FSMA provides a lawful domestic basis for the FCA's actions which is adequately accessible to the public, and the operation of which is sufficiently foreseeable: *Gillan v UK* (2010) 50 EHRR 45, §75.

258. In the circumstances, the justification and proportionality stage of the inquiry does not arise. Were it to do so, it would be assessed by reference to the well-established four-stage proportionality test, which in the A1P1 context may be summarised as asking "*whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights*": *AXA v General Insurance v Lord Advocate* [2012] 1 AC 868 at §108. The courts must afford an appropriate margin of appreciation to the primary decision-maker at all four stages of the proportionality analysis, which will vary according to context "*on grounds of relative institutional expertise and democratic accountability*": *Shvidler v Secretary of State for Foreign, Commonwealth and Development Affairs* [2026] AC 607 at §§124, 130. That margin, and the weight to be afforded to the primary decision-maker, "*will normally be substantial in fields such as economic and social policy, national security, penal policy, and matters raising sensitive moral or ethical issues*": *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223 at §161 (emphasis added). The adoption and the terms of a CRS, to provide redress for market wrongdoing, is a highly sensitive economic and moral policy area requiring the balancing of incommensurate interests, in which the FCA has primary institutional competence, and in respect of which a wide margin should be afforded (as the courts accept in the domestic law context: see *BlueCrest*). The very purpose of a CRS is a policy assessment by the expert regulator of the need for a re-allocation of resources to provide redress to consumers who have been the subjects of

[176] See further the Cost-Benefit Analysis accompanying the PS, §5: redress liability estimates are not a "*new*" cost to firms arising from the FCA's Schemes, rather they arise from historic non-compliance. See also *AXA v General Insurance v Lord Advocate* [2012] 1 AC 868, §§113-114.

wrongdoing, and from the industry which engaged in that wrongdoing. That is an unpromising, if not fanciful, basis on which to assert a breach of A1P1 rights based on the fine details of the design of the Schemes.

259. The FCA's exercise of regulatory judgement in making the Schemes reflected its conscientious consideration of consultation feedback, as well as analysis of a large volume of evidence. The PS addresses that the FCA has, throughout, had regard to the need to strike a fair balance between the interests of consumers, the interests of the motor finance industry, and the wider public interests reflected in the FCA's statutory objectives and duties. In all the circumstances, the FCA has struck a fair balance between any A1P1 rights and the general interest in devising rules of the Schemes in relation to liability, causation and loss, and redress. The Applicants' A1P1 claims are inconsistent with principle and authority.

M. ISSUE 9 – STANDING / CANDOUR

1. Introduction

260. Consumer Voice's position on standing is set out at §8 of its Grounds, and supported by the first witness statement of Nikki Stopford, dated 27 April 2026 ("**Stopford 1**"). In the Grounds it is asserted that Consumer Voice: is acting in the public interest (§8(2)); has a real and genuine interest in the matter being challenged (§8(3)); has genuine expertise (§8(4)); is the best-placed public interest challenger in the context of a measure of general application (§8(5)) and indeed "*uniquely*" well-placed (§8(7)). These arguments are all wrong.

261. That position has been marginally supplemented by two further documents (neither of which signed with a statement of truth), along with some additional disclosure. The first is a letter dated 26 June 2026 which purports to respond to various questions set out in pre-action correspondence. The second is a "*Note on behalf of Consumer Voice Limited on 'sufficient interest'*", dated 28 June 2026, prepared for the purposes of a case management hearing which took place on 29 June 2026, and in view of comments from the judge communicated to Consumer Voice and the FCA on 26 June 2026.

262. The FCA does not accept that Consumer Voice has standing to bring its Application. Moreover, the FCA has concerns about Consumer Voice's compliance with its duty of candour, because it has (still) failed to give a full and frank explanation of the nature of its own interest – and that of its solicitors, Courmacs Legal Ltd ("**CLL**") – in the matters at issue on its Application.

263. Standing is a jurisdictional precondition: s.404D(4). It follows that the Tribunal must be satisfied that each applicant has standing to bring the challenge in respect of each ground of challenge. Standing may be considered at the permission stage, the substantive stage (including at a rolled-up hearing) or both.

2. Standing

264. S.404D(4) is materially identical to the second clause of s.31(3) of the Senior Courts Act 1981, in relation to judicial review: "…*and the court shall not grant leave to make such an application [for judicial review] unless it considers that the applicant has a sufficient interest in the matter to which the application relates*". It was therefore plainly Parliament's intention that the same test of standing should be applied to applications under s.404D.

265. Various types of standing were recently discussed by the Court of Appeal in *R (Luton Landlords & Letting Agents Limited) v Luton BC* [2026] EWCA Civ 35. At § 45, Lewis LJ included a category of "*pressure groups who may be particularly active, and have particular expertise, in a particular area (such as environmental groups or social welfare groups) or be formed to campaign on particular national or local issues. They may have sufficient interest to bring a claim to challenge a particular measure, particularly if they have established expertise in an area*".

266. The FCA accepts that the Schemes broadly are matters of "*considerable public importance*", but it does not follow that the "*issues raised*" by Consumer Voice are. Even if they were, it would not follow that Consumer Voice has standing to make those arguments in the public interest. It is noted that, in the context of what are broadly understood to be "*public law challenges*", the applicant should have "*no private interest in the outcome of the case*": *R v Lord Chancellor, ex p Child Poverty Action Group* [1999]

1 WLR 347, QBD, at 353G. It now appears from the 28 June 2026 Note, at §3.e, that Consumer Voice contends to have standing which is "*'surrogate' and/or 'public interest'*".

267. It is not clear what Consumer Voice means by claiming to be a "*consumer organisation*". A more accurate description is that it is a for-profit organisation which purports to provide a service to consumers. It operates and trades in the market for profit, and therefore has commercial incentives of its own. Nor is the fact that individuals involved in Consumer Voice were previously involved with a consumer rights organisation legally relevant.

268. No weight should be placed on the fact that, of all potential 'consumer-side' applicants, Consumer Voice is the only one who has in fact sought to challenge the Schemes. It does not follow that Consumer Voice is "*uniquely well-placed*". No individual consumer affected by motor finance unfairness is said to be represented, still less identified, for the purposes of supposed surrogate standing. In this respect, Consumer Voice bears some resemblance to the claimant entity in *Luton Letting*, where it was held that its claimed representation of others was not an accurate reflection of the company's purpose.

269. The obvious existence of any number of directly affected persons (i.e. actual consumers, or genuinely representative bodies) who might have, but have not, brought proceedings is a significant factor telling against the standing of Consumer Voice: see *R (Good Law Project) v Prime Minister* [2022] EWHC 298 (Admin). There are many such bodies which are in fact better placed to bring a challenge, and in particular who may, unlike Consumer Voice, be non-profits or public authorities:

269.1. Under s.234C FSMA, HM Treasury ("**HMT**") may designate a person as a "*consumer body*" where such a body "*appears to [HMT] to represent the interests of consumers of any description*"; a consumer body so designated has a right under that section to make a complaint (known as a "super-complaint") to the FCA on behalf of consumers. Pursuant to s.234C(3)(b), HMT has published criteria for determining whether to make or revoke a designation, including "*1. The body is so constituted, managed and controlled as to be expected to act independently, impartiality* [sic.] *and with complete integrity*", "*2. The body can demonstrate considerable experience and competence in representing the interests of consumers of any description*" and "5. *The fact that a body has a trading arm will not disqualify it from being designated*

provided that the trading arm does not control the body; any profits of the trading arm are only used to further the stated objectives of the body; and the body has established procedures to ensure that any potential conflicts of interest are properly dealt with".[177]

269.2. In 2013, by the Financial Services and Markets Act 2000 (Designated Consumer Bodies) Order 2013, HMT designated the National Association of Citizens Advice Bureaux, the Consumers' Association, the General Consumer Council for Northern Ireland and the National Federation of Self Employed and Small Businesses; in 2026, by the Financial Services (Designated Consumer Body and Designated Representative Body) Order 2026, it further designated the Money and Mental Health Policy Institute (Charity number 1166493). (The fact that the founders of Consumer Voice were previously executives of the Consumers' Association, says little more than they have previously worked for genuinely representative bodies. For its part, the Consumers' Association (through its brand "Which?") responded to the announcement of the Schemes with a press release on 30 March 2026, describing it as a "*major milestone on the road to redress*" and calling on firms to "*commit to following the process set out by the FCA and act swiftly to ensure customers receive the money they are rightfully owed*"[178].)

270. It is notable that no designated consumer bodies, or indeed any other body purporting to represent consumers or the public interest, have chosen to bring an application. The FCA surmises that this is (i) because they approve of the Schemes (at least sufficiently that a challenge would be disproportionate); and/or (ii) in recognition of the detriment to the interests of, and risk to, consumers and the broader public interest which delay will cause even if successful; and/or (iii) accepting that, even if they disagree with the Schemes, the prospects of successfully challenging them are negligible or do not justify the delay. This reflects the extent to which the concerns of those consumer bodies were canvassed during the formulation of the Schemes and reflected in the final design.

[177] Guidance for bodies seeking designation as super-complainants to the Financial Conduct Authority (March 2013), § 1.5.
[178] https://www.which.co.uk/policy-and-insight/article/which-responds-to-millions-of-drivers-who-were-mis-sold-car-finance-to-receive-829-average-payout-akCNh1C5PrEL.

271. The delay point is particularly salient. If it is the case that Consumer Voice has a commercial or other interest in the outcome of the Application, that interest may not align with that of consumers or the public interest and indeed may be in direct conflict with it. One of the effects of delay may be to channel more cases through Consumer Voice to CLL (generating remuneration for both).

272. Consumer Voice relies on the fact that it was granted permission to intervene in connection with the application for permission to appeal against the Order of Kerr J in *Clydesdale* (proceeding, until the withdrawal of the appeal, under Appeal Case Number CA-2025-000102). This does not assist Consumer Voice and in fact undermines Consumer Voice's position on standing, because the test for an intervention does not require there to be shown any particular form of interest.

272.1. Obtaining permission to intervene does not require meeting a test of sufficient interest, nor indeed of being affected by the decision at all. There are three levels of participation in a judicial review: (i) claimant (the test for which is set out above); (ii) interested party, i.e. any person who is "*directly affected by the claim*" (CPR 54.1(2)(f); and (iii) intervener pursuant to CPR 54.17. CPR 54.17 is supplemented by PD54A §13.4(1), which requires permission to be sought by application notice which should "*explain who the applicant is and indicate why and in what form the applicant wants to participate in the hearing*".

272.2. At s.87(1) of the Criminal Justice and Courts Act 2015, an intervener is defined as a person who "*(a) ... is granted permission to file evidence or make representations in judicial review proceedings, and (b) at that time, the person is not a relevant party to the proceedings*".

272.3. The case-law on the application of this principle emphasises the lack of any need for a direct interest to intervene under CPR 54.17, in contrast to a claimant or even interested party.

272.3.1. In *R (Northern Ireland Human Rights Commission) v Greater Belfast Coroner* [2002] HRLR 35, HL, Lord Oliver remarked at §32 on the practice of allowing "*third persons to intervene in*

proceedings brought by and against other persons which do not directly involve the person seeking to intervene".

272.3.2. In *Wales & West Utilities Limited v CMA* [2025] EWHC 754 (Admin), at §1 (cf. §22), the application under CPR 54.17 was made expressly in the alternative to being an interested party, and therefore depended on the relevant party not being directly affected by the decision. (On the facts of that case, they were.) It is notable that, in the Clydesdale case, Consumer Voice did not apply to be recognised as an Interested Party, either at first instance or on appeal.

272.4. By his orders of 2 May 2025 and 21 May 2025, at first refusing permission for Consumer Voice to intervene in the appeal, Dingemans LJ accepted the "*expertise*" of Consumer Voice. Expertise is a relevant, and in some cases sufficient, consideration for the purposes of an application to intervene, but irrelevant to (or at least a long way short of) sufficient interest.

272.5. The grant of permission on 20 June 2025 was made "*because [Consumer Voice's] intervention may assist the court, and because the intervention will not raise issues about fresh evidence and respondent's notices which is why I had rejected its previous application*". The intervention (granted only at the third time of asking) was limited to written submissions not exceeding 15 pages. (Permission was later granted for further written submissions, up to 5 pages, on the effect of the Supreme Court's judgment in *Johnson*.) Dingemans LJ did not find that Consumer Voice had any interest at all in the outcome of the appeal, nor that it had any representative or public interest role; simply that its intervention "*may assist the court*". In these circumstances, it is unclear on what basis Consumer Voice asserts that it was granted permission to intervene "[*f]or these reasons, amongst others*", given that the only comment Dingemans LJ made was as to Consumer Voice's expertise. In its own request, Consumer Voice had said no more than that "*its submissions are vital to taking into account the interests of the consumer*".

272.6. For completeness, recent disclosure from Consumer Voice reveals that it applied for, and was refused, permission to intervene in *Johnson* by the Supreme Court on 17 February 2025. That application was made on behalf of Consumer Voice and four named individuals. The application itself has not been disclosed and no reasons were given by the Supreme Court for the refusal.

273. The submission of Consumer Voice asserting its "*genuine expertise*" should therefore be viewed in this context.

3. Candour

274. The principles applicable on an application for judicial review include the duty of candour owed by claimants (or, in the present context, applicants). A claim may be refused permission as a result of a want of candour on the claimant's part: *R (Caterpillar (Xuzhou) Ltd) v Secretary of State for Business and Trade* [2025] EWHC 1124 (Admin) at §§163-178.

275. In this connection, the FCA notes that CLL responded on its own behalf to the the CP, on 12 December 2025. CLL's cover letter explained: "*Courmacs Legal Ltd represents more than 1.6 million clients in consumer claims and civil litigation, specialising in particular in mis-sold car finance and undisclosed commission claims*." In its 88-page response, CLL made substantive representations on the structure and terms of the (then-proposed) Schemes. CLL also enclosed, and relied on, the first Report of Dr Nils Gudat, dated 12 December 2025. (These documents were included in Consumer Voice's Application Bundle.)

276. Consumer Voice has failed to comply with its duty of candour in the following respects:

276.1. It has failed to disclose details of or explain its funding of its Application or the nature of its relationship with its solicitors, CLL either generally or in the context of CLL's acting for it in these proceedings beyond saying that CLL is acting "*pro bono on behalf of Consumer Voice in this application for review*" (Stopford 1 §22.b). Consumer Voice's most recent Statement of Financial Position records net assets as of 31 January 2025 at just £3,698. Pro bono representation in an application such as the present, in a jurisdiction in which

an award of costs is exceptional, gives rise to a particularly strong need for candour.

276.2. It has failed to give a full and frank explanation of its (and CLL's) commercial activities and interests in matters relating to the Schemes, and in particular how the existence or outcome of its Application could affect those activities and interests. Even following the recent disclosures, Consumer Voice has failed to give a full picture of the commercial relationship between it and CLL, in circumstances where both entities operate for profit in the sphere of claims management, and what commercial activities and incentives are relevant to the matters raised by the Application or the Schemes more broadly. In belated correspondence dated 26 June 2026, CLL has acknowledged (somewhat vaguely) that it "*has commissioned Consumer Voice to provide professional services, related to consumer research*" – presumably, though this is not stated, for remuneration. The 26 June 2026 letter also sets out a narrow denial of commission or arrangements for customer referrals; but this does not address broader questions of the relationship and incentives arising from it as they relate to the subject matter of the Application.

276.3. Consumer Voice has failed to explain (particularly in light of these commercial activities and incentives, and the fact that the very purpose of the Schemes under challenge is to enable consumers to obtain redress without the assistance of legal representatives) what steps it, and CLL, have taken to satisfy themselves that they do not have a conflict of interest either between themselves or with the consumers whose interests they purport to represent and/or to manage any such conflict. The Tribunal will bear in mind the observation of the Divisional Court in *R v Legal Aid Board, ex p Bateman* [1992] 1 WLR 711, 717 that the "*spectacle*" of a law firm conducting proceedings in the name of its former client "*for their own benefit*" is "*unedifying*".

276.4. Stopford 1 has asserted outright that Consumer Voice "*has no commercial interest in this matter*" (§22). This cannot, however, be verified, given the continuing opacity as to how Consumer Voice generates revenue in connection

with its for-profit activities; and may at least be viewed sceptically given the close connection between Consumer Voice's commercial activities and motor finance redress generally (as emphasised by Ms Stopford).

276.5. Neither Consumer Voice nor CLL have deigned to fully and candidly respond to correspondence from the FCA raising the above issues.

277. It is not in itself objectionable if Consumer Voice and/or CLL have some commercial or financial motivation in the outcome of the application (subject to questions of managing conflict of interest and whether Consumer Voice have a genuine distinct interest, cf *Bateman*). The point for present purposes is that Consumer Voice has, at least, failed to be candid about the issue, and arguably has misrepresented the basis on which, and purpose for which, its Application is brought. This is a matter of particular concern where the private interests of Consumer Voice and CLL are arguably not aligned with those of consumers, particularly in terms of any cost-benefit analysis having regard to the likely risks of the Schemes.

278. In those circumstances, the Tribunal should refuse permission to Consumer Voice to pursue its Application under s.404D; and/or (to whatever extent permission is granted) should decline to grant any relief. Further or alternatively, the breach should be sanctioned in costs.

N. CONCLUSION

279. For all the reasons set out above, and in the witness evidence served on behalf of the FCA, the Tribunal is invited to dismiss all of the Applications and to confirm the legality of the Schemes.

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RACHEL JONES

LEO DAVIDSON

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6 July 2026