IN THE UPPER TRIBUNAL
(Tax and Chancery Chamber)

VOLKSWAGEN FINANCIAL SERVICES (UK) LIMITED

Applicant

-and-

THE FINANCIAL CONDUCT AUTHORITY

Respondent

GROUNDS OF REVIEW OF RULES ESTABLISHING CONSUMER REDRESS SCHEMES IN THE MOTOR FINANCE SECTOR PURSUANT TO S.404D FSMA

A. INTRODUCTION

1. These are the grounds on which Volkswagen Financial Services (UK) Limited ("**VWFS**") seeks review of the rules made by the FCA to establish two consumer redress schemes in the motor finance sector (the "**Rules**") and/or the FCA's decision to make the Rules (the "**Decision**").

2. The review is sought under s.404D(1) of the Financial Services and Markets Act 2000 ("**FSMA**"). These grounds constitute: (1) the reasons for referring the Rules and/or the Decision to the Upper Tribunal (the "**Tribunal**") under r.26B of and Schedule 3 to the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "**2008 Rules**"); and (2) insofar as necessary, the reasons for making an application to the Tribunal under r.26A of the 2008 Rules.

3. The two consumer redress schemes established by the Rules are referred to below as the "**Schemes**". The Scheme applicable to motor finance agreements entered into between 6 April 2007 and 31 March 2014 is referred to as "**Scheme 1**". The Scheme applicable to motor finance agreements entered into between 1 April 2014 and 1 November 2024 is referred to as "**Scheme 2**".

4. The FCA made the Rules by way of two instruments:

   4.1 the Motor Finance Commission Consumer Redress Scheme (2007-2014) Instrument 2026 (FCA 2026/20) relating to Scheme 1; and

4.2 the Motor Finance Commission Consumer Redress Scheme (2014-2024) Instrument 2026 (FCA 2026/19) relating to Scheme 2.

5. Each instrument was made on 26 March 2026 and provides that it comes into force on 31 March 2026. The effect of each instrument is to amend the Consumer Redress Scheme sourcebook ("**CONRED**") in accordance with the annex to the instrument, by inserting a new chapter of CONRED (CONRED Chapter 5 for Scheme 2 and CONRED Chapter 6 for Scheme 1). The instruments, and therefore the Rules, were made public on 30 March 2026 when they were published on the FCA's website.

6. Unless the context requires the Schemes to be differentiated, the two schemes are referred to below collectively as the Schemes and references to Rules in CONRED 5 include, *mutatis mutandis*, references to the equivalent Rules in CONRED 6.

7. VWFS strongly supports the introduction of a consumer redress scheme in relation to motor-finance agreements. However, it is essential that any such scheme is lawful. For the reasons set out below, the Schemes are unlawful.

8. Section B of these grounds identifies VWFS's grounds of review in outline form. Section C addresses VWFS's standing. Section D describes the applicable legal principles. Section E contains an outline of the Schemes. Section F contains a summary explanation of the grounds of review identified in section B. Section G sets out the remedy sought by VWFS. It is not the purpose of this document, an attachment to Form FTC 3 filed 28 days after the publication of the Rules, to set out VWFS's full case or position in relation to the review it seeks. In particular, VWFS believes that: (1) the Tribunal will require expert evidence in order to understand the failings of the present Schemes, and the means by which those failings might be addressed in a lawful Scheme; and (2) the FCA will require to give disclosure in order that the basis for the present Schemes may properly be analysed and understood.

B. GROUNDS OF REVIEW

9. VWFS's grounds of review are as follows. They apply to both Schemes, unless otherwise indicated.

(1) GROUND 1: The Rules relating to Scheme 1 are *ultra vires* because the FCA has no power to make rules in respect of agreements and/or failures prior to 1 April 2014.

(2) GROUND 2: The Rules are unlawful because they require firms to treat or presume as giving rise to an unfair relationship circumstances that are inappropriate or excessively broad.

(3) GROUND 3: The requirement under the Rules that firms presume causation of loss is unlawful.

(a) The requirement that firms presume causation of loss is *ultra vires* because the FCA has no power to require firms to presume causation of loss in a consumer redress scheme.

(b) Further or alternatively, a presumption of causation of loss would not be a matter that a court or tribunal would take into account for the purpose of determining whether a relevant failure caused loss or damage to consumers. The Tribunal should determine under s.404D(7) FSMA that such a presumption should not be taken into account.

(c) The requirement that firms presume causation of loss is otherwise unlawful on the basis of judicial review principles.

(4) GROUND 4:

(a) The Rules are unlawful because:

(i) they require firms to pay redress that is not rationally or reasonably connected to the loss or damage suffered by a consumer; and/or

(ii) the FCA has failed properly to take into account actual loss or damage.

(b) Further or in any event:

(i) the redress provided under the Rules cannot be considered, and cannot rationally and/or reasonably have been considered by the FCA to be, "just" for the purposes of s.404A(1)(d) and s.404A(4) FSMA; and/or

(ii) the Rules in relation to redress are unlawful on the basis of judicial review principles.

C. VWFS'S STANDING

(1) Position of VWFS

10. VWFS has sufficient interest in the matter to which its reference or application relates. It is directly affected by the Schemes. The Schemes apply to VWFS because it is a lender and the criteria in CONRED 5.1.6 R and 6.1.6 R are met. In summary: (1) between 2007 and 2024, VWFS entered into motor finance agreements with consumers habitually resident in the UK; (2) in relation to those agreements: (a) there were arrangements between VWFS and credit brokers in relation to the payment of commission; and (b) the unfair relationship provisions (i.e. ss.140A to 140C of the Consumer Credit Act 1974 ("**CCA**")) apply.

11. In addition, the Schemes will have a significant financial impact on VWFS. VWFS is the largest captive lender in the UK motor finance market. Throughout the period covered by the Scheme VWFS provided finance to approximately [redacted] million consumers totalling approximately £[redacted] billion. Broadly speaking, VWFS's exposure to the Schemes in their current form equates to a number of years of typical profits after tax, representing a significant and material impact on VWFS's shareholders.

(2) Other challenges

12. In the event that the Schemes are challenged by more parties than VWFS, VWFS is mindful of the need for all challenges to proceed in a manner which is efficient, co-

ordinated, and avoids duplication. It will in due course invite the Tribunal to make appropriate directions to that end, which will depend on the number and nature of the challenges made.

13. In the first instance, VWFS invites the Tribunal to fix a case management hearing at which directions for the resolution of VWFS's challenge (and any other challenges) to the Schemes can be made. VWFS will propose that an expedited timetable be adopted in order that any challenges are resolved as quickly and efficiently as possible.

D. LEGAL PRINCIPLES

(1) The FCA's rule-making powers

14. The FCA's power to make rules requiring relevant firms to establish and operate a consumer redress scheme is conferred by ss.404 and 404A FSMA.

15. Section 404(1)(a)-(c) sets out three mandatory conditions for the FCA to have such power:

> *(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).*

16. Section 404(4) defines "*a consumer redress scheme*" as a "*scheme under which the firm is required to take one or more of*" the steps set out in ss.404(5)-(7). These steps reflect the mandatory conditions in s.404(1).

> *(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.

17. Section 404A makes further provision in relation to the FCA's powers including, in particular, the following.

17.1 Section 404A(1)(b) provides that rules under s.404 may make provision "*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*".

17.2 However, s.404A(2) provides that *"[t]he 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*" (emphasis added).

17.3 Section 404A(1)(c) provides that rules under s.404 may make provision "*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*".

17.4 However, s.404A(3) provides that *"[m]atters 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*" (emphasis added).

17.5 Section 404A(1)(d) provides that rules under s.404 may make provision "*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*".

17.6 However, s.404A(4) provides that "*[t]he 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*".

17.7 Section 404A(5) provides that "*[i]n acting under subsection (4), the FCA must have regard (among other things) to the nature and extent of the losses or damage in question*".

18. The phrases "*may suffer*" and "*may cause*" in ss.404(1)(b), 404(6), 404(7) and 404A(1)(c)(ii) are irrelevant in the present case because they are directed at future losses which have not yet crystallised. They do not have the effect of referring to consumers who might or could have suffered loss or damage in the past. In relation to historic credit agreements (which are the agreements with which the Schemes are concerned), any loss or damage would have been suffered at the point of contracting.

(2) <u>Unfair relationships arising out of credit agreements</u>

19. Sections 140A to 140C CCA enable consumer debtors to bring claims against creditors on the basis that the relationship arising out of the credit agreement is unfair.

20. Sections 140A(1) and (2) CCA provide as follows:

> *(1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following—*
>
> *(a) any of the terms of the agreement or of any related agreement;*
>
> *(b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;*
>
> *(c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).*

(2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor).

21. Section 140B(9) CCA provides that where a debtor alleges that the relationship between the creditor and the debtor is unfair, it is for the creditor to prove the contrary. This does not, however, mean that the claimant is absolved from pleading particulars of claim which identify concisely the facts on which the claimant relies. Nor does it mean that the claimant can make allegations of fact which the court is bound to accept unless the creditor disproves them; it is still the debtor who has the onus of proving facts on which he or she positively relies: Smith v Royal Bank of Scotland [2023] UKSC 34 at [40].

22. Section 140B empowers the court to provide redress for unfair relationships. In particular, the Court may select from a closed list of possible remedial orders under s.140B(1). These include, at s.140B(1)(a), an order to "*require the creditor … to repay (in whole or in part) any sum paid by the debtor … by virtue of the agreement…*".

23. The purpose of an order under s.140B is 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 the relationship as a whole can no longer be regarded as unfair: Smith at [25].

(3) Interference with property rights and proportionality

24. The FCA is a public authority under s.6(3) of the Human Rights Act 1998 (the "**HRA**"). It is unlawful for a public authority to act in a way which is incompatible with a Convention right: s.6(1) HRA. A Convention right includes the right under Article 1 of the First Protocol to the European Convention on Human Rights ("**A1P1**"): s.1(1) HRA.

25. A1P1 provides as follows:

> *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

26. Interference by a public authority with A1P1 rights must comply with the principle of lawfulness and pursue a legitimate aim by means reasonably proportionate to the aim sought to be realised. The analysis focuses upon the question 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 General Insurance v Lord Advocate [2012] 1 AC 868 at [108].

27. In analysing proportionality, it is necessary to determine the following matters (Bank Mellat v HM Treasury (No.2) [2014] AC 700 at [74]): (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right; (2) whether the measure is rationally connected to the objective; (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. In essence, the question at step (4) is whether the impact of the right's infringement is disproportionate to the likely benefit of the impugned measure.

E. OUTLINE OF THE SCHEMES

28. The Schemes follow the basic four-part structure set out in s.404 FSMA.

    28.1 **Stage 1** involves the determination of which cases fall within the scope of the Scheme (each a "**Scheme Case**").

    28.2 **Stage 2** is concerned with whether there is an unfair relationship subsisting in each Scheme Case. Firms are required to presume an unfair relationship if a Relevant Arrangement was present, and such Relevant Arrangement was not adequately disclosed (subject to rebuttal in limited circumstances).

28.3 **Stage 3** is concerned with whether each unfair relationship caused loss or damage to the consumer. Firms are required to presume causation of loss in the event of an unfair relationship (subject to rebuttal in very limited circumstances).

28.4 **Stage 4** concerns the financial redress (if any) to be paid to those consumers presumed to have been caused loss at Stage 3. There are two mandatory methods of calculating redress.

29. Summaries of Stages 2 to 4 of the Schemes are provided below where relevant to the Grounds. As to Stage 1 (Scope), an agreement will fall within the scope of the Schemes if: (1) it falls within the temporal scope of the Schemes; (2) there were arrangements between the lender and the car dealer (broker) for the payment of commission by the lender to the broker in connection with consumers entering into finance agreements with the lender; and (3) the lender determines that if the consumer brought a claim under s.140A CCA, the limitation period would not have expired before the date on which the Scheme rules were made.

F. GROUNDS FOR REVIEW

(1) GROUND 1

The Rules relating to Scheme 1 are *ultra vires* because the FCA has no power to make rules in respect of agreements and/or failures prior to 1 April 2014.

(a) Summary explanation of Ground

30. A consumer redress scheme under s.404 FSMA can only make provision for redress to "*consumers*" in respect of failures by "*relevant firms*": s.404(1).

31. "Consumers" are defined in s.404E(1) and (2) as including (so far as relevant) "persons … who have used … services provided by … authorised persons in carrying on regulated activities". "Relevant firms" means (among others) "authorised persons": s.404(2).

32. "Regulated activities" are defined by s.22 FSMA. Under s.22(1), an activity is regulated (as relevant) "if it is an activity of a specified kind which is carried on by way of business and– (a) relates to an investment of a specified kind; or (b) in the case of an activity of a kind which is also specified for the purposes of this paragraph, is carried on in relation

to property of any kind." "Specified" means "specified in an order made by the Treasury": s.22(5).

33. The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) (the "**RAO**") specifies various activities as regulated activities for the purpose of s.22 FSMA.

    33.1 Article 60B(1) RAO specifies "*[e]ntering into a regulated credit agreement as lender*" as a regulated activity.

    33.2 Article 60B RAO, in its original form, was introduced by way of amendment to the RAO on 1 April 2014, pursuant to Articles 1(6), 4 and 6 of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013 (SI 2013/1881).

34. Accordingly, entering into a regulated credit agreement as lender was not a regulated activity before 1 April 2014.

35. A borrower who entered into a motor finance agreement before 1 April 2014 was therefore not using services provided by an authorised person carrying on a regulated activity.

36. In addition, a consumer redress scheme under s.404 FSMA is required to have as its purpose the securing of redress in respect of failures by relevant firms to comply with requirements applicable to the carrying on by them of any activity (s.404(1)(a) and (c)). For the purposes of the Schemes, the relevant failure is the failure by lenders (or their agents) to disclose the existence of Relevant Arrangements (as defined below) at or before the time of entering into relevant motor finance agreements. That failure can only have happened as at (and certainly no later than) the date on which the relevant agreement was entered into.

37. Where an agreement was entered into before 1 April 2014, the failure to disclose cannot have amounted to a failure which caused loss or damage to a "*consumer*" as that term is defined for the purposes of s.404(1). Therefore, such a failure cannot be the subject of a consumer redress scheme under s.404.

(2) GROUND 2

The Rules are unlawful because they require firms to treat or presume as giving rise to an unfair relationship circumstances that are inappropriate or excessively broad.

(a) Summary of relevant parts of Schemes

38. For each Scheme Case, lenders are required to determine whether any of the following "**Relevant Arrangements**" are present:

    38.1 A discretionary commission arrangement ("**DCA**"), whereby the broker was entitled to vary the interest rate payable by the consumer under the finance agreement, and which affected the amount of commission the broker received. A DCA is not a Relevant Arrangement if the interest rate applied was the lowest rate in the range at which the broker would not have received any additional commission (the "*not acted upon*" exception under CONRED 5.2.19R(3)).

    38.2 A "**High Commission Arrangement**", which is where the total amount of commission was at least: (a) 39% of the total charge for credit; and (b) 10% of the total amount of credit advanced.

    38.3 A "**Tied Arrangement**", which is where there is a contract between the lender and the broker: (a) for the broker to introduce consumers exclusively to the lender; or (b) to give the lender a right of first refusal. This is subject to an exception for captive and white-label relationships with franchised dealers in certain circumstances: CONRED 5.2.20R–5.2.22R.

39. None of the above is a Relevant Arrangement if: (a) the total amount of commission was £150 or less (Scheme 2) or £120 or less (Scheme 1) (the "*de minimis* threshold"); or (b) the APR for the motor finance agreement was 0%: CONRED 5.2.19R(2).

40. If the Relevant Arrangement was not adequately disclosed to the consumer, the lender must presume that there was an unfair relationship: CONRED 5.3.8R. Adequate disclosure is defined to mean the disclosure of information clearly and prominently provided to the consumer before entering into the motor finance agreement, in such a way that it was likely to have drawn the attention of the average customer: CONRED

5.3.10R. The lender must presume that there was no adequate disclosure unless specified primary or secondary records demonstrate otherwise: CONRED 5.3.12R.

41. Where an unfair relationship is presumed under the Schemes, that presumption is capable of being rebutted only in limited circumstances, namely:

    41.1 where there is evidence that the particular consumer could reasonably be expected to have known about or foreseen the undisclosed information because of their specific knowledge or experience, or because of prior transactions with the lender or broker involving adequate disclosure of the relevant arrangements: CONRED 5.3.14R(1); or

    41.2 in respect of Tied Arrangements only, where it can be demonstrated that the lender had agreed to forgo reliance on the tie or the broker had a policy or practice of disregarding it: CONRED 5.3.14R(2).

(b) <u>Summary explanation of Ground</u>

(i) <u>Legislative framework</u>

42. The Rules may 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*" (s.404A(1)(b)). It is inherent in the nature of a consumer redress scheme that such examples must be capable of general application. However, s.404A(2) requires that any such examples must be examples "*that have been, or would be, held by a court or tribunal to constitute a failure to comply with a requirement*". In the context of a consumer redress scheme where the relevant "*failure to comply with a requirement*" is the existence of an unfair relationship under s.140A CCA, this means that the examples must be: (1) circumstances that a court would, typically, treat as giving rise to an unfair relationship, applying the relevant principles of law; and (2) no broader than necessary to comply with the statutory purpose of providing examples of general application that would constitute the failure.

43. An example that applies to an entire category of case that would not, by reason of the matters set out in that example, be treated by a court as constituting the failure would be *ultra vires* s.404A(1)(b) because it would, by unnecessarily including that category of case, go further than necessary to comply with the statutory purpose.

44. The Rules may also make provision requiring firms to take specific "*matters into account*" when determining whether there has been a failure to comply with a requirement (s.404A(1)(c)). As with the power to give examples, this power is limited to matters that have been or would be taken into account by a court or tribunal.

(ii) <u>Effect of inadequate disclosure of Relevant Arrangements</u>

45. As summarised above, where any Relevant Arrangement was present and its disclosure did not meet the standards set out in CONRED 5.3.10R, it is presumed under the Schemes that there is an unfair relationship, rebuttable only on specific limited grounds.

46. However, the inadequate disclosure of a Relevant Arrangement is not an appropriate basis on which to presume an unfair relationship. As a matter of law, the mere inadequate disclosure of a commission arrangement does not in itself give rise to an unfair relationship. If proper disclosure would not have made any difference to the consumer's behaviour or outcome, there is no basis for concluding that the inadequate disclosure meant that the relationship with the lender was unfair.

47. There is no sufficient evidential basis to suggest that there is any consistent link between disclosure in relation to commission and subsequent influence on consumer behaviour. The FCA appears to recognise this in PS 26/3, Technical Annex 1, para. 4.79.

48. In relation to **DCAs**:

    48.1 A DCA confers on the broker a discretion to adjust the interest rate. It does not require the broker to exercise that discretion against the consumer's interest. The existence of the discretion (and, *a fortiori*, its inadequate disclosure) cannot in itself give rise to an unfair relationship absent evidence that the discretion was exercised in a way that caused detriment to the consumer.

    48.2 Where the discretion under a DCA was exercised to the consumer's benefit, inadequate disclosure of the DCA cannot have caused an unfair relationship. For example, if a broker used its DCA discretion to select a rate at or below the lender's standard rate, or at a rate that was competitive in the market, the consumer suffered no harm or unfairness from the commission structure, even if that rate was not the lowest rate at which the broker earned no increased commission.

48.3 Even if the broker did not select an APR that was at or below a comparable market rate, it does not automatically follow that the consumer was worse off by reason of the DCA (let alone its inadequate disclosure). For example, the broker may have provided other benefits to the consumer, for example through a lower vehicle price via a subvented deposit contribution.

48.4 DCAs took different forms. In addition, the impact of a DCA by its nature is likely to have varied between different customers. Discretion is likely to have been exercised differently in different cases. If DCAs caused harm, it is therefore inherently unlikely that all consumers will have suffered harm equally.

49. In relation to **High Commission Arrangements** (which is where the total amount of commission was at least: (a) 39% of the total charge for credit; and (b) 10% of the total amount of credit advanced):

49.1 There is no obvious or necessary connection between the amount of commission and consumer harm. Absent a DCA, there is no evidence demonstrating that the amount of commission received by a dealer affected the APR offered to the consumer.

49.2 Higher commissions could in fact benefit consumers, for example by subsidising the cost of a vehicle. The purchase of a motor vehicle is generally bundled with the finance for that purchase. Dealers compete on the total cost of this bundle. Consumers negotiate over the terms of the bundle as a whole. Therefore, higher margins on one component (e.g., the APR) may be offset by lower margins elsewhere (e.g., on the vehicle price or deposit contribution). If a dealer secured a higher commission, and was therefore able to sell the vehicle at a lower price, or offer other services to the consumer, the amount of the commission will have benefitted the consumer.

49.3 The mere fact of a High Commission Arrangement is therefore not a reasonable proxy for an unfair relationship and there is no basis on which it could be said that the non-disclosure of a High Commission Arrangement would in itself give rise to an unfair relationship.

50. The **commission thresholds** adopted in the Schemes for defining a High Commission Arrangement are arbitrary and without rational and/or reasonable foundation.

50.1 The Schemes adopt thresholds for a High Commission Arrangement at what the FCA calculates is the commission representing the 85th percentile of the market. This is said to be based on the FCA's regulatory judgement on where commission becomes sufficiently high to warrant adequate disclosure: PS, p.84. However, it does not appear to have any logical or evidential foundation.

50.2 In any event, the thresholds are not a reasonable proxy for circumstances that a court would generally treat as constituting an unfair relationship. The threshold is not supported by the judgment of the Supreme Court in Johnson v FirstRand Bank Ltd (London Branch) t/a MotoNovo Finance [2025] 3 WLR 423. In that case, the commission was approximately 55% of the total cost of credit and 26% of the amount advanced, which is materially higher than the thresholds under the Schemes. In addition, the Supreme Court did not find that non-disclosure of the level of commission alone made the relationship unfair.

51. In relation to Tied Arrangements:

51.1 There is no obvious or necessary link between a Tied Arrangement and any detriment to a consumer such that the mere inadequate disclosure of such an arrangement could constitute an unfair relationship.

51.2 There is no sufficient evidential basis for an assumption that Tied Arrangements, in the absence of a DCA or high commission, systematically caused consumers to pay higher credit costs.

51.3 In the competitive consumer motor finance market, ties do not typically cause harm to consumers and instead often give rise to consumer benefits, for example by encouraging lenders to invest in dealerships and improve services to consumers.

51.4 The judgment of the Supreme Court in Johnson does not support the inclusion of Tied Arrangements as a Relevant Arrangement. The Supreme Court did not find that an inadequately disclosed tie rendered the relevant credit relationship unfair by itself.

52. In the premises, the Rules are unlawful because:

52.1 they are *ultra vires* s.404A(1)(b) and s.404A(2) FSMA in that the failure to disclose each Relevant Arrangement is not a circumstance that a court would generally treat as constituting an unfair relationship under s.140A CCA; and/or

52.2 under s.404D(6), the Tribunal has primary jurisdiction to determine whether an example set out in the Rules constitutes a failure to comply with the requirement in question. The Tribunal should determine that inadequate disclosure of a Relevant Arrangement does not by itself constitute circumstances giving rise to an unfair relationship, because it would not be so held by a court (cf. ss. 404A(1)(b) and s. 404A(2)); and/or

52.3 under s.404D(7), the Tribunal has primary jurisdiction to determine whether a matter set out in the Rules should be taken into account for the purpose of assessing evidence as to a failure to comply with the requirement in question. The Tribunal should determine that the presumption of an unfair relationship where there was inadequate disclosure of a Relevant Arrangement, rebuttable only on specific limited grounds as set out in the Rules, should not be taken into account, because it would not be taken into account by a court (cf. ss. 404A(1)(c) and s. 404A(3)); and/or

52.4 they are unlawful applying judicial review principles, in that they:

(1) fail to promote the objects and purposes of ss.404 and 404A;

(2) are an unreasonable and/or irrational exercise of the FCA's statutory discretion to make rules under ss.404 and 404A, including because it could not reasonably and/or rationally have appeared to the FCA under s.404(1)(a) and/or (1)(b) that there may have been widespread or regular relevant failures by relevant firms as a result of inadequate disclosure of Relevant Arrangements and/or that consumers have suffered loss or damage as a result of inadequate disclosure of Relevant Arrangements; and/or

(3) constitute an unlawful interference with VWFS's A1P1 rights by virtue of s.6 HRA, in that the relevant Rules 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 VWFS's A1P1 ECHR rights.

(3) GROUND 3

The requirement under the Rules that firms presume causation of loss is unlawful.

(a) The requirement that firms presume causation of loss is *ultra vires* because the FCA has no power to require firms to presume causation of loss in a consumer redress scheme.

(b) Further or alternatively, a presumption of causation of loss would not be a matter that a court or tribunal would take into account for the purpose of determining whether a relevant failure caused loss or damage to consumers. The Tribunal should determine under s.404D(7) FSMA that such a presumption should not be taken into account.

(c) The requirement that firms presume causation of loss is otherwise unlawful on the basis of judicial review principles.

(a) Summary of relevant parts of Schemes

53. Under the Schemes, if the presumption of an unfair relationship is not rebutted, the lender must presume that the consumer suffered loss or damage as a result: CONRED 5.3.21R.

54. This presumption of loss is rebuttable only where the lender can demonstrate that the consumer would not have been able to obtain a lower APR from another lender with which the relevant broker had a referral arrangement at the relevant time: CONRED 5.3.22R(1)-(3).

55. This rebuttal does not apply to DCA cases, in respect of which the presumption of loss and damage is irrebuttable: CONRED 5.3.22R(4).

56. The Schemes limit the forms of acceptable evidence capable of rebutting the presumption of loss, including by providing that such evidence must show what alternative rates would in fact have been available to the relevant consumer or that the broker would have offered the lowest available rate: CONRED 5.3.22-23R. It is likely to be difficult in practice for a lender to rebut the presumption, especially since it would not hold comprehensive data

about rates offered by other lenders, and records held by brokers are unlikely to be complete, particularly in relation to older agreements where records of available rates are unlikely to be comprehensive.

(b) Summary explanation of Ground

(i) Legislative framework

57. According to the framework set out in ss.404 and 404A, the rules made by the FCA must reflect the following matters:

    57.1 there must be a determination of whether the relevant failure has caused loss or damage to the consumer;

    57.2 the firms themselves must make that determination; and

    57.3 the only matters that the rules may require firms to take into account in making that determination are matters that a court would take into account when determining causation of loss and damage.

(ii) The Rules are *ultra vires*

58. Under the Schemes, where the presumption of loss is not rebutted, the effect of the presumption is to determine that the unfair relationship caused the relevant consumer loss. The Schemes do not provide for any consideration to be given, or determination to be made, by the firms or otherwise, as to whether an unfair relationship in fact caused loss and if so how much and what kind of loss.

59. This is contrary to s.404(6) and (7) which provide that there must be a determination whether a failure has caused loss or damage and that the firm is to make that determination. Accordingly, the Rules, to the extent that they require firms to presume loss, are *ultra vires*.

(iii) Other matters

60. The failure identified by the FCA as justifying the establishment of the Schemes under s.404(1)(a) is the failure by firms adequately to disclose Relevant Arrangements, not the

fact that Relevant Arrangements (which were in themselves lawful) were present in the first place.

61. When determining whether such failure 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. This, in turn, requires an assessment of: (i) what (if anything) the consumer would have done with the information if it had been disclosed (for example, attempted to negotiate a better deal, or secured finance from a different lender); and (ii) what the effect of that would have been. If disclosure would have made no difference to the consumer, or would not have resulted in a different outcome for the consumer, the inadequate disclosure has caused no loss.

62. The Schemes do not approach causation of loss in this way. Instead, they simply require firms to presume that inadequate disclosure caused loss. That approach is without any reasonable foundation.

    62.1 The FCA has failed properly to identify any loss or damage in respect of which borrowers under motor finance agreements with Relevant Arrangements would generally be able to claim a remedy in legal proceedings by reason of the non-disclosure of such arrangements. Loss of opportunity and/or the mere hypothetical possibility that disclosure could have affected consumers' behaviour does not establish causation of loss.

    62.2 As stated above, there is no sufficient evidence demonstrating that disclosure of Relevant Arrangements would have had any material impact on consumer behaviour or that non-disclosure of such arrangements has therefore caused widespread consumer loss.

63. Further and in any event, the presumption of loss is disproportionate, because: (1) it does not take account of whether loss was caused, or the nature of any loss suffered; (2) it is of universal application; and/or (3) it is in almost all cases irrebuttable.

64. In addition:

64.1 It appears in relation to High Commission Arrangements and Tied Arrangements that the FCA has applied the wrong approach in principle because it has treated the relevant question as being simply whether loss may or could have been caused: PS, pp. 30-32.

64.2 By placing the onus to rebut the presumption of loss on lenders, the Schemes impermissibly reverse the burden of proof that would apply in legal proceedings. The FCA has no power to make rules about the burden of proof under s.404A(1)(c)(ii). Even if there were such a power, s.404A(3) precludes reversing the ordinary civil burden of proof that would apply in court.

65. A court would not simply presume that loss or damage had been caused by non-disclosure. It would approach the matter on the basis set out in paragraph 61 above.

66. Under s.404D(7), the Tribunal has primary jurisdiction to determine whether a matter should be taken into account for the purpose of determining whether loss or damage has been caused. The Tribunal should determine that the presumption of loss (without regard to what the consequence of disclosure would or might have been) should not be taken into account, because it would not be taken into account by a court (cf. ss.404A(1)(c) and s.404A(3)).

67. Otherwise, in the premises, the requirement to presume loss is unlawful because:

67.1 it fails to promote the objects and purposes of ss.404 and 404A;

67.2 it amounts to an unreasonable and/or irrational exercise of the FCA's statutory discretion to make rules under ss.404 and 404A, including because it could not reasonably and/or rationally have appeared to the FCA for the purpose of ss.404(1)(a) and/or (1)(b) that consumers have suffered loss or damage as a result of inadequate disclosure of Relevant Arrangements; and/or

67.3 it amounts to an unlawful interference with VWFS's A1P1 rights by virtue of s.6 HRA, in that the relevant Rules 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 VWFS's A1P1 ECHR rights.

(4) GROUND 4

(a) The Rules are unlawful because:

(i) they require firms to pay redress that is not rationally or reasonably connected to the loss or damage suffered by a consumer; and/or

(ii) the FCA has failed properly to take into account actual loss or damage.

(b) Further or in any event:

(i) the redress provided under the Rules cannot be considered, and cannot rationally and/or reasonably have been considered by the FCA to be, "just" for the purposes of s.404A(1)(d) and s.404A(4) FSMA; and/or

(ii) the Rules in relation to redress are unlawful on the basis of judicial review principles.

(a) Summary of relevant parts of Schemes

68. If the presumption of loss and damage is not rebutted, the lender must calculate and pay redress. There are two methods of calculating redress:

68.1 a "**Commission Repayment Remedy**", which is the total amount of commission plus interest: CONRED 5.4.4R; and

68.2 a "**Hybrid Remedy**", which is the default remedy in all cases where the Commission Repayment Remedy does not apply. It averages the Commission Repayment Remedy and the APR Adjustment: CONRED 5.4.16R.

69. In relation to the Hybrid Remedy, the APR Adjustment is calculated by: (a) reducing the consumer's APR by 17% (under Scheme 2) or 21% (under Scheme 1) to produce a market-adjusted APR; and (b) recalculating what the consumer would have paid at that rate: CONRED 5.4.9R.

70. Where the agreement includes a DCA, the market-adjusted APR cannot be lower than the lowest rate of interest in the DCA range: CONRED 5.4.9R(3).

71. The Hybrid Remedy is then subject to caps:

71.1 a 90% commission cap: redress cannot exceed 90% of the total commission plus interest: CONRED 5.4.19R;

71.2 an adjusted realised cost of credit cap: redress cannot exceed the total cost of credit actually paid by the consumer, adjusted to deduct a minimal cost of credit based on the 5th percentile APR for the relevant year plus interest: CONRED 5.4.20R; and

71.3 a total realised cost of credit cap: redress cannot exceed the total cost of credit actually paid by the consumer plus interest: CONRED 5.4.21R.

72. Where the consumer's APR was at or below the 5th percentile APR for the year (excluding 0% APR agreements), no redress is payable under the Hybrid Remedy (the "**5th Percentile Threshold**"): CONRED 5.4.6R.

73. A consumer will receive the Commission Repayment Remedy if the Relevant Arrangements include a High Commission Arrangement that is also a Very High Commission Arrangement, together with either or both of a DCA and a Tied Arrangement: CONRED 5.4.3R. A Very High Commission Arrangement is defined as one where the commission was at least 50% of the total charge for credit and 22.5% of the total amount of credit: CONRED 5.1.1R(29).

74. In all other cases, a consumer will receive the Hybrid Remedy (subject to the caps).

(b) Summary explanation of Ground

(i) Legal framework

75. According to the framework set out in ss.404 and 404A FSMA:

75.1 any redress must compensate consumers for the loss or damage caused by the relevant failure;

75.2 the only kinds of redress to be made under the rules are those which the FCA considers to be just;

75.3 in this regard, the FCA must have regard to the nature and extent of the losses or damage in question.

76. In addition, the purpose of any financial redress under s.140B CCA is limited to reversing any damaging financial consequences to the debtor of the unfairness identified in the relationship.

(ii) Summary of defects

77. However, the Rules which make provision for redress are contrary to this framework, in summary because:

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;

77.2 further and in any event, redress is calculated arbitrarily, in that it is not rationally or reasonably linked to any loss actually suffered (or likely to have been suffered) by the consumer. Instead, it is designed to give the consumer a windfall.

(iii) Specific defects

(A) APR Adjustment

78. The APR Adjustment is not a measure of, or a reasonable proxy for, loss at all.

79. The FCA has derived the **17% APR Adjustment** that applies to Scheme 2 by comparing the APRs of all loans with a DCA with loans with a flat commission over the same period. That approach is flawed.

79.1 It wrongly assumes that the harm to be remedied is the mere fact that the loan contained a DCA when in fact the actual harm to be remedied is the failure to disclose the DCA.

79.2 It wrongly assumes that all consumers would have changed their behaviour as a result of adequate disclosure, when in fact there is no basis to assume that disclosure would generally have changed consumers' behaviour.

79.3 It wrongly assumes that all consumers suffered equally, when in fact that is inherently unlikely to have been the case, particularly in relation to DCAs.

79.4 It wrongly assumes that all DCAs were harmful.

79.5 The 17% APR Adjustment figure is not derived from a like-for-like comparison. DCAs and flat commissions were used for fundamentally different types of motor finance loans with fundamentally different characteristics in the period prior to the DCA ban. In particular, loans with flat commissions: (a) were primarily available in relation to new vehicles; and (b) frequently had subvented APRs. By contrast, DCA loans: (a) primarily related to used vehicles; and (b) less frequently had subvented APRs.

79.6 The 17% APR Adjustment is not statistically robust. The year-on-year APR adjustment calculated by the FCA varied widely between 11.1% (for 2020) and 24.2% (for 2017): Technical Annex 1, Table 11 on p.57. The 17% APR Adjustment therefore appears to depend to a very significant extent on the data for a single year, 2017.

79.7 The APR Adjustment (and the Hybrid Remedy more generally) ignores the effect of any deposit contributions or other benefits obtained by the consumer.

80. To the extent that the APR Adjustment Remedy is an appropriate proxy for loss, the FCA appears to acknowledge that, in most cases, averaging the APR Adjustment and the Commission Repayment Remedy (as required by the Hybrid Remedy) will result in redress that is higher than under the APR Adjustment alone: PS, para. 11.42. It therefore follows that, in most cases, consumers will receive compensation that significantly exceeds their actual loss.

81. As regards **High Commission Arrangements** and **Tied Arrangements**:

81.1 The use of the 17% APR Adjustment for Scheme 2 as a proxy for loss caused by inadequate disclosure of these arrangements is arbitrary. It does not appear to be grounded in any economic data and appears to be justified on the basis of operational simplicity alone: PS, para. 1.31.

81.2 Moreover, High Commission Arrangements and Tied Arrangements do not involve any discretion. There is therefore no logical basis for applying the 17% APR Adjustment to them because that figure is derived from comparing loans with a discretionary element (DCAs) to loans without a discretionary element (flat commission loans).

82. As to the **21% APR Adjustment** in Scheme 1:

82.1 It is said to reflect a "*bounded regulatory judgement*" representing the mid-point between the 17% APR Adjustment and 26%, with 26% being the point at which (it is said) the hybrid remedy redress amounts on average to commission repayment redress (PS, para. 1.30 and p.205).

82.2 However, this is misconceived and arbitrary because: (1) the 21% figure is not sufficiently grounded in evidence or economic data; and (2) the 21% adjustment is set in part by reference to a metric that has nothing to do with the consumer's actual loss.

82.3 As regards its application to High Commission Arrangements and Tied Arrangements, the defects identified in paragraph 81 above in relation to the 17% APR Adjustment are present *mutatis mutandis*.

(B) Commission Repayment Remedy

83. There is no reasonable basis for treating commission as a loss for which consumers are entitled to be compensated.

83.1 Johnson does not provide a reasonable basis for a rule that commission ought generally to be repaid.

83.2 In any event, the commission repayment remedy as awarded to the borrower in Johnson was not compensatory in nature at all.

(C) The Hybrid Remedy

84. The Hybrid Remedy is derived by amalgamating the two remedies considered above. This amalgamation suffers from, and does nothing to alleviate, the defects in its constituent parts.

(D) Caps

85. The caps in the Schemes are presented as the mechanism by which windfalls will be avoided (PS, paras. 11.2 and 11.5). However, they do not achieve this aim. In broad terms, the caps only limit redress by reference to the lower of: (a) 90% of the total

commission; (b) the adjusted realised cost of credit; or (c) the total realised cost of credit. The caps therefore do not relate to the loss consumers have suffered at all. They do nothing to address the fundamental flaw in the Schemes' approach to redress, i.e., that it is an arbitrary methodology which has no rational connection to actual loss and which is not even designed to compensate consumers for actual loss.

(iv) Failure to take account of subvention

86. Further and in any event, the FCA has failed to take into account (properly or at all) the incidence and effects of partial subvention. In summary, subvention is a subsidy provided to the consumer primarily in the form of a subsidised APR or deposit contribution to the price of the vehicle. It was and remains a common feature of the market, at least for new cars. Subvention therefore constitutes a clear benefit received by consumers. The Schemes exclude fully subvented (i.e. 0%) APRs from redress, but do not take account of partially subvented APRs at all or indeed other forms of subvention (e.g. deposit contributions).

87. The FCA's failure to take these matters into account is likely to inflate the redress which is required to be paid under the Rules.

(v) Conclusion on Ground 4

88. In the premises, the Rules are unlawful because:

88.1 the Rules require firms to pay redress that is not rationally or reasonably connected to the loss or damage suffered by a consumer;

88.2 the FCA has failed properly to take into account actual loss or damage;

88.3 the redress provided under the Rules is not, and cannot rationally and/or reasonably have been considered by the FCA to be, "just" for the purposes of s.404A(1)(d) and s.404A(4) FSMA;

88.4 the Rules fail to promote the objects and purposes of ss.404 and 404A;

88.5 the Rules are an unreasonable and/or irrational exercise of the FCA's statutory discretion to make rules under ss.404 and 404A; and/or

88.6 the Rules constitute an unlawful interference with VWFS's A1P1 rights by virtue of s.6 HRA, in that the Rules 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 VWFS's A1P1 ECHR rights.

G. REMEDY SOUGHT

89. For the reasons given above, VWFS seeks an order quashing (in whole or in relevant part) the Rules.

RICHARD HANDYSIDE KC
DAVID MURRAY
THOMAS EVANS
JOSEPH FARMER

27 April 2026