

Motor Finance Commission: Responding to the FCA Consultation on its proposals for a Redress Scheme

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SUMMARY

1. The FCA proposes a Motor Finance Consumer Redress Scheme in its Consultation Paper CP25/27 (“the Consultation”). The deadline for responses is 12 December 2025.
2. It is unrealistic to hope that the FCA will abandon the redress scheme entirely, but in this article I set out reasons for the proposal to be curtailed. I suggest that redress should be restricted to transactions in which either:
 - (i) undisclosed commission exceeds the “tipping point” of 50% of the Total Charge for Credit (“TCC”). This was the approach taken by the FCA in its PPI redress scheme applying the Supreme Court (“SC”) decision in *Plevin v Paragon Personal Finance Ltd* [2017] UKSC 23 (“*Plevin*”), or
 - (ii) the dealer breaches an express promise, made in the documents provided to the customer, to obtain, from a panel of different lenders, the terms most favourable for the customer. This applies one of the factors relied upon by the SC in the case of *Hopcraft v Close Brothers Ltd* [2025] UKSC 33 (“*Hopcraft*”).Claims against a lender, which is a subsidiary of the vehicle’s manufacturer, arising from the sale, by the manufacturer’s franchised dealer, should be excluded from head (i).
3. I contend in this article that the scheme as outlined is misconceived, and the justifications it provides are ill-founded. The proposal:
 - (i) did not represent the view held by the FCA for the past decade, and is inconsistent with its conduct throughout that period;
 - (ii) consciously rejects the actual legal position as set out in the Supreme Court (“SC”) . It even runs contrary to the submissions made by the FCA’s own counsel to the court when intervening in that case. An undisclosed Discretionary Commission Agreement (“DCA”), or Contractual Tie,

may give rise to a legal remedy, but it depends on the context. There is no basis for automatically triggering redress when they are present;

(iii) relies on a summary of the decisions in *R (on the application of Clydesdale Financial Services Ltd) v Financial Ombudsman Service Ltd* [2024] EWHC 3237 (Admin) (“*Clydesdale*”) and *Hopcraft*, which omits pivotal facts, and is as a result misleading. It will result in widespread redress in circumstances where the courts would refuse a remedy;

(iv) prevents lenders from relying on evidence that any given customer has not suffered loss, on an arbitrary basis unheard of in any court;

(v) fails to take into account the government’s intention to reform the Financial Ombudsman Service (“FOS”), as announced by the Treasury in its Review published in July 2025;

(vi) disregards key findings of its own market research (set out in its Cost Benefit Analysis in Annex 2 to the Consultation), and as a result runs contrary to the supposed aim of the FCA to foster growth. Imposing a multi-billion pound burden on lenders will lead to increases to the cost of credit for businesses and individuals over the coming years, hindering our economic recovery.

4. Under the Financial Services and Markets Act 2000 (“FSMA”) s404, it is a precondition of a redress scheme that, as a result of failure by firms to comply with requirements, it appears 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 FCA proposes to cast the net far wider than the remedy available in court proceedings.

FCA CONDUCT OVER THE LAST DECADE

5. The FCA now proposes that:

1.21 A relationship would be considered unfair where it involves inadequate disclosure of one or more of the following: a. a DCA b. high commission arrangement (where the commission is equal to or greater than 35% of the total cost of credit and 10% of the loan) c. tied arrangements that gave a lender exclusivity or a first right of refusal

1.22 We estimate 14.2m agreements – 44% of all agreements made since 2007 – will be considered unfair.

6. Between April 2007 and January 2021, around 61% of all motor finance agreements involved a DCA. 94% of new vehicle sales are through franchised dealers, who typically arrange finance with a “captive lender” (a subsidiary of the manufacturer of the car) or a financial partner of the car manufacturer lending under the manufacturer’s brand. This market has operated on the FCA’s

watch, and with its knowledge. The FCA would have been aware of the customary level of disclosure.

7. The FCA did publish a Consultation Paper [CP19/28] October 2019. That stated:

1.5 We have undertaken extensive work in the motor finance sector ..

1.6 In our 2017/18 Business Plan, we announced a review of the sector. We wanted to better understand the use of motor finance products, assess the sales processes employed by firms and consider whether the products could cause consumer harm.

1.7 In March 2018, we published an update report setting out what we had done and our initial findings.

1.10 We are proposing a ban on commission models where the amount received by the broker is linked to the interest rate ...

1.18 ...we aim to finalise these rules at the beginning of Q2 2020. Firms would then have 3 months to implement our proposed ban on discretionary commission models.

8. The FCA's Policy Statement published in July 2020 [PS 20/8] stated

1.6 ...we are giving firms more time to implement the new rules. Both the ban on discretionary commission models in motor finance and the commission disclosure changes that will apply across all credit sectors will take effect from 28 January 2021.

2.9 While we are very keen to address harm in this market, we also need to act proportionately and rationally ...

Nor do we have evidence that prices in this market are inherently too high

9. The prospective ban of DCAs was postponed until 28 January 2021. Such a postponement would of course not have been made if the FCA considered that use of DCAs should trigger a redress scheme on the grounds that they resulted in an unfair relationship.

10. The dramatic change in the FCA's stance has been apparently driven by its misinterpretation of the decisions in *Clydesdale* and *Hopcraft*.

THE FCA'S SUBMISSIONS TO THE SUPREME COURT IN HOPCRAFT

11. The FCA intervened in the hearing of *Hopcraft*. The SC set out the FCA's submissions on unfair relationship in the judgment:

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.

12. The eagle eyed amongst my readers may notice a difference between these submissions and the proposed basis for redress, which I set out in paragraph 5 above. The FCA did not dare argue before the SC that the test was simply: a relationship would be unfair where it involves inadequate disclosure of any one of a DCA, commission over 35% of the TCC, or a tied arrangement. If it had done so, it would have been laughed out of court.

13. There are of course a great many other factors which will normally be relevant. For example, whether viewed as a whole, the customer got a good deal from the transaction. As discussed later in this article, dealer margins on sales on finance are low and they regularly negotiate discounts in the sale price of the car and ancillary products sold with it. As the FCA's own research records, in Annex 2 to the Consultation:

66. The 60% of current motor finance holders in the Yonder research who negotiated when they bought their motor vehicle were more likely to secure up-front benefits, such as reductions in the price of the vehicle (54%) or extra add-ons (40%). Few (18%) reported achieving a reduction in the interest rate on the motor finance.

83. ... Independent and franchised dealers compete on the bundled cost of a sale for used vehicles including vehicle price, motor finance, part-exchange value and other add-ons such as servicing.

84. ...Independent dealers operate on low margins and, in our intermediary survey, report that commissions underpin their business models allowing them to offer low prices on used vehicles

For example, it would be wrong to make a decision on the unfairness of the relationship based solely on the fact that the dealer received £1,000 DCA commission, whilst disregarding the fact that the dealer in effect gave that sum back to the customer by agreeing to sell the car at a £1,000 discount. This of course "cuts both ways". In *Hopcraft* the SC notes at paragraph 40 that "*the Glass's Guide valuation of the Suzuki was less than the purchase price by just under £1,600*". The SC observes:

311. ...However, whether Mr Johnson made a bad bargain in the sense of paying considerably above the market value of the car was not pleaded, and the discrepancy between the sale price and the Glass's Guide price was not explored at the trial. As Mr Howard points out on behalf of FirstRand, there could be many possible explanations. While in other cases the supply of a vehicle at an inflated price could be highly relevant to whether the relationship of lender and customer was unfair, in our view the Court of Appeal erred in taking account of this discrepancy when assessing the fairness of the relationship between Mr Johnson and FirstRand

Not so, says the FCA: the "highly relevant" factor of discount, or increase in the price of the products sold, is to be disregarded entirely

14. The FCA acknowledge this in the Consultation. It states:

4.43 In *Johnson*, the Supreme Court confirmed that the test of unfairness under section 140A CCA is highly fact sensitive and permits courts to take account of a very broad range of factors. However, a consumer redress scheme under section 404 FSMA must have objective, common and identifiable criteria so that firms can assess very large volumes of cases consistently, quickly and at proportionate cost.

4.44 Our approach does not aim to narrow or redefine the court's legal test. It is clear to us that the amount of commission and the nature of commission arrangements can be highly material factors in the assessment of the unfairness of a relationship. We are, therefore, making a regulatory judgement, supported by our diagnostic work and the case law, about the circumstances in which a firm should consider that the inadequate disclosure of certain features is likely to lead to a finding of an unfair relationship.

15. I therefore examine the cases relied upon by the FCA (*Hopcraft* and *Clydesdale*) in more detail.

DISCRETIONARY COMMISSION AGREEMENTS

The lead FOS decisions

16. Two lead decisions on Motor Finance Commission from an ombudsman, Jeshen Narayanan, were published in January 2024. The level of DCA commission was as follows:

DRN 4326581 – Miss L's complaint against Clydesdale Financial Services Ltd : commission of £1,593 was paid - 51% of the TCC

DRN 4188284 – Mrs Y's complaint against Black Horse: commission of £1,299 was paid - 62% of the TCC.

The dealers disclosed respectively that lenders "typically", or "may", pay them commission.

17. The FOS decided in respect of these two complaints that the DCA commission "created an inherent conflict between the interests" of the dealer and customer, as it gave the dealer "an incentive to set a higher interest rate than the lender would have accepted". There was non-compliance with: FCA Guidance (CONC 4.5.2G; FCA Principles (6, 7 and 8), and the failure to disclose the "structure" of the DCA breached an FCA Rule (CONC 4.5.3R). This "created an unfair relationship".

Clydesdale

18. The FCA Consultation describes the judgment of Kerr J in *Clydesdale* as follows:

4.44 ...• In *Clydesdale*, the judicial review of the Financial Ombudsman's decision in the Miss L case, the High Court dismissed challenges to the basis on which the Financial Ombudsman had decided to award compensation, including a decision that the failure to disclose the DCA had resulted in an unfair relationship.

2.22 the High Court .. held that the Financial Ombudsman was entitled to find that the relationship was unfair under s.140A

19. This description is accurate so far as it goes, but omits to mention that the case provides no sensible basis for an FCA redress programme:

(1) The threshold for judicial review is that the FOS decision is “unlawful”. As Kerr J explains:

104. By section 228(2) of the FSMA ...a complaint to the ombudsman “is to be determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case”

106 This court cannot substitute its view for that of the ombudsman. A challenger must show that the decision is unlawful by reason of some flaw such as error of law or irrationality,

254the Ombudsman ...It was for him to determine whether what happened infringed Principle 6. It is not enough to disagree with the outcome of his deliberations to persuade the court to overturn his finding, whether or not the court agrees with his conclusion

304I am struck by the weakness of this irrationality challenge. The bar is a high one and the autonomy of the decision maker correspondingly protected, short of an indefensible decision resting on untenable reasoning or an indefensible conclusion verging on the outrageous.

In short, there is no reported court decision holding that a DCA give rise to an unfair relationship. Kerr J did not hold that he agreed with the opinion of the ombudsman: he simply stated that the opinion did not cross the high bar of being “indefensible”. It would be wrong for the FCA to base its redress scheme on an decision just because it has been held to not be “outrageous”.

(2) All decisions on unfair relationships are fact specific. The facts in Miss L’s complaint were extreme:

- as noted above, the commission was £1,593 - 51% of the TCC
- Mrs Y stated that the interest payments caused her financial hardship.
- the DCA allowed the dealer a discretion to set the flat interest rate within a very wide range (between 2.68% and 15.25%), with the dealer keeping by way of commission all interest above the 2.68% threshold.
- in addition, the lender paid the dealer a fixed commission of 2% of the amount of credit payable to the dealer’s head office.

(3) The decision of an Ombudsman is his subjective opinion, and heavily relies on his interpretation of FCA Guidance and Principles. As Kerr J explains, FCA Guidance and Principles are not actionable through the courts:

88 – 89 The FCA Handbook ... provisions ...vary in their normative potency ...most of the “rules” create “binding obligations”, breach of which can lead to enforcement action and an action for damages; while “guidance” made under section 139A of the FSMA is there mainly to: “explain the implications of other provisions ... indicate possible means of compliance, or ... recommend a particular course of action or arrangement.”

101 ...The Principles ... though not actionable per se can form the basis of a duty which can lead to a complaint to the FOS and that complaint may succeed whether or not any other specific rule is found to have been breached

Hopcraft

20. In Hopcraft, the SC held that “*the dealer remains a separate player in the negotiation from start to finish, free to pursue its own interests at arm’s length from the interests of the customer*”. It

added:

268. ...each of the three participants in the negotiation of the transaction was separately engaged at arm's length from the other participants in the pursuit of a separate commercial objective of their own ...Inevitably, the pursuit of each of those separate objectives had the propensity to come into conflict with the pursuit of the othersNeither the parties themselves nor any onlooker could reasonably think that each of the participants to such a negotiation was doing anything other than considering their own interests.

269 ...this service was ...simply a means whereby the dealer could make use of its knowledge and contacts in the car finance market to oil the wheels of what was for it essentially a sale transaction from start to finish. It was something which was ancillary to the sale of the car, like a delivery service, an extended warranty or some additional equipment sourced from a third party such as a tow bar or a roof rack. It was not a service provided to the customer under any contract or even for a separate reward.

270.at no time in the negotiation of any of these transactions did the dealer give any kind of express undertaking or assurance to the customer that in finding a suitable credit deal for the customer it was putting aside its own commercial interest in the transaction as seller... in three out of the four transactions (ie excluding the Hopcraft transaction) there was disclosure that a commission might be paid by the lender to the dealer, but we do not treat that as typical, or essential to our reasoning

272. ...there were important respects in which the dealer typically intermediated between customer and lender as the agent of the lender in relation to the finance package. ...there is force in the underlying assumption by the Law Reform Committee that the real agency is in fact in line with the statutory deeming

274...there may typically be at least an element of dependency ... there is nothing to stop customers arranging their own finance packages if they wish to do so, or comparing the package offered by the dealer with the best which they can find online, or by ringing around

21. The SC observed:

161. There is nothing inherently objectionable about paying commission, or about seeking to influence people's behaviour by giving them benefits of one kind or another

324. ...in *Plevin* ...Lord Sumption, with whom the other members of the Supreme Court agreed, noted (at para 18) that Mrs Plevin must be taken to have known that some commission would be payable to intermediaries out of the premium before it reached the insurer.

22. The rationale for the lead FOS decisions is stated to be that the DCA “creates” a conflict of interest.

This is untenable given the above findings in *Hopcraft*. As I note above, the reason the FCA gave to the SC for including DCAs in the “non exhaustive list” is only that it “*may create incentives to charge a higher interest rate*”. A conflict of interest is already inherent in the relationship between dealer and customer.

23. An actionable conflict only arises if the dealer is under a legal duty to act in the customer's interests to the exclusion of its own. No obligation to act impartially is imposed on credit brokers by CONC. “Credit brokerage” means only effecting an introduction between customer and lender. For instance, if I go into my high street bank and request a fixed sum loan, or car finance, the likelihood is that the branch will pass the application on to a subsidiary that specialises in such finance. It would be absurd to impose an obligation on the branch to act impartially when doing so.

24. The FCA propose that any DCA will trigger redress. This is based on distinctions which do not bear scrutiny. I illustrate this below

The dealer has a choice of commission rates

25. Firstly, consider 2 scenarios:

- (1) the dealer can obtain credit from a panel of 5 lenders, which each offer loans at different interest rates and will pay the lender different commission rates. The FCA redress scheme will, as the SC states in *Plevin*, be triggered if the commission rate the dealer selects exceeds a tipping point.
- (2) the dealer can obtain credit from one lender, which gives it a choice of 5 APRs, each carrying a different commission rate. The redress scheme disregards *Plevin*, and requires redress even if the commission does not exceed a tipping point.

A distinction between a representative and an agent?

26. Secondly, consider another 2 scenarios:

- (a) a representative of the lender has a desk in the back office of a large dealership. Once the customer expresses an interest in obtaining finance, the customer is introduced to that representative to negotiate the terms of the finance. There is of course a conflict of interest between the lender's representative and the customer, as there is in any negotiated contract. The lender will want to make the loan at the highest rate that the customer is willing to pay: every addition to the APR will directly add to the income of the lender. It may reward its employees and contractors with a bonus tied to the annual profit of their branch. No court would hold that this rendered the credit relationship unfair. It may be that the representative does not disclose the lowest rate at which the lender would be prepared to lend. It may be that the customer does not disclose the highest rate that he would be prepared to pay. The fact that neither party discloses those rates during discussions does not render the relationship unfair. If it did, this would render the relationship in almost all negotiated contracts "unfair".
- (b) the dealer, acting on behalf of the lender as its agent, offers finance to the customer, presents the relevant documentation, and (if any discussion ensues) negotiates the terms of the loan on the lender's behalf. The SC in *Hopcraft* acknowledges the existence of that agency, and it will be self evident to the customer. The dealer in this situation is of course undertaking "credit brokerage" in that it is introducing the customer to the lender, but there is no obligation either in law or the FCA Handbook, for the dealer to be "impartial". As such, this scenario cannot be legitimately distinguished from (a) above.

27. The obligation to advise the customer as to the best terms available from a panel of lenders would only be imposed if the customer and dealer have contracted on that basis .

THE COMMERCIAL TIE

28. The SC in Hopcraft concluded:

340. The relationship between Mr Johnson and FirstRand was unfair within the meaning of section 140A of the CCA, by reason in particular of the size of the commission, the failure to disclose the commission, and the concealment of the commercial tie between the dealer and FirstRand. Mr Johnson is therefore entitled to succeed in his claim on that basis

29. The FCA Consultation draws the following conclusions:

2.28 ...the Supreme Court .. came to the very clear view the relationship was unfair in Mr Johnson's case, particularly because of the size of the undisclosed commission (which was 55% of the cost of credit and 26% of the loan amount), and the concealment of a contractual tie between the dealer and the lender.

4.62 In our view, an inadequately disclosed tie that is likely to give rise to an unfair relationship is a contractual requirement that materially constrains independence by providing a lender with exclusivity or near-exclusivity ..

4.63If a tie of this nature is not adequately disclosed, as was the case in Johnson, the consumer may reasonably presume the broker is free to select from a range of lenders.

30. The first point to make is that, if the SC thought that the size of the commission or commercial tie were each independently sufficient to justify a finding of an unfair relationship, it would have said so. The FCA brazenly disagrees.

31. Secondly, the factual context in *Hopcraft* was considered crucial by the SC – so important that almost the entirety of the section of the judgment under the heading “the commercial tie” is devoted to it. The key passages are:

331. The Suitability Document, given to Mr Johnson by The Trade Centre Wales prior to his signing the hire purchase agreement with FirstRand, states :*“We will undertake an assessment of your Demands and Needs for Consumer Finance and provide an illustration of the Consumer Finance product that best meets your individual requirements based upon the answers you provide. ... we offer products from a select panel of lenders, details of which can be seen below: ...The following pages provide a record of the responses given by you during the assessment of your Demands and Needs for Consumer Finance. The answers provided have been used to generate the following illustration of the Consumer Finance product that best meets your individual requirements.”*

333. ...The Suitability Document created, and was clearly intended to create, the false impression that the dealer was offering “products from a select panel of lenders” and recommending “*the Consumer Finance product that best meets your individual requirements based upon the answers you provide*”. The reality was very different. Mr Johnson was not receiving the benefit of access to a range of possible lenders nor was he receiving advice as to which of their products best met his individual requirements.

32. It was these deliberate lies by the dealer which prompted the SC to hold that the non-disclosure of the right of first refusal given to a single lender was a factor. None of this is mentioned by the

33. FCA when summarising the SC finding, with the result an entirely misleading impression is created. Given the depth of detail the SC lavishes on this aspect, it was plainly considered by the court to be of vital significance to the conclusions.
34. The implied suggestion by the FCA is that if a dealer simply offers the customer a financial product, somehow the customer will assume that the dealer has searched a panel and offered only the lowest rate available from that panel. There are no grounds for such an assumption: it would not be made in this case any more than when the dealer offers other ancillary services or goods (such as a roof rack).

Franchised dealers

35. The FCA Consultation expressly seeks input on how the scheme should affect franchised dealers:

7.24 We recognise that there may be limited situations where it could be argued that the existence of a tied arrangement would have been obvious to the consumer from the circumstances of the transaction. One example might be where a franchised dealership offers finance exclusively through the relevant manufacturer's lending arm. If the dealership sells only that manufacturer's vehicles and the connection between the dealership, the manufacturer, and its finance arm is made clear to the consumer – through prominent references in the premises, point-of-sale materials, brochures, and paperwork – then that may have indicated to the consumer that a tied arrangement was in place even though there was no express statement to that effect in the dealership's communications. We welcome views on whether such situations should be reflected in

the scheme rules when assessing adequate disclosure, given the practical challenges of evidencing what a consumer could have been expected to understand about the arrangement from the wider circumstances of the transaction

36. There is nothing “limited” about this situation. As the FCA’s own research records, in Annex 2 to the Consultation, 94% of new vehicle sales are through franchised dealers:

73. The new vehicle segment is largely served by captive lenders (subsidiaries of original equipment manufacturers (OEMs) offering finance on sales of their own vehicles) with motor finance being used in a large proportion of sales.

74. Strong competition between vehicle brands drives competitive pricing for motor finance.

75. Captive lenders commonly offer national, manufacturer-backed promotional campaigns for new vehicles. Multiple captive lenders in our sample referenced APR discounts subsidised by manufacturers

76. Almost all motor finance sales (94%) in the new segment...were through franchised dealers. Franchised dealers hold rights from brands or manufacturers to sell new vehicles. Franchised dealers typically arrange finance with the captive lender or white-label product offered by the OEM's finance partner. In most cases, the captive lender is the most common choice and default option for motor finance arranged through a franchised dealer. Based on the responses to our survey, we understand that this is typically due to captive lenders offering the lowest APRs for new vehicles or other benefits supported by manufacturer offers, rather than contractual ties

37. For example, Mercedes would sell its cars in Leeds through the local Mercedes Dealership, trading as “Mercedes-Benz of Leeds”. When a customer sets foot in a Mercedes dealership, he does not expect to be offered Toyota products or services: it is apparent that the *raison d’etre* of “Mercedes-

Benz of Leeds” is to market Mercedes goods and services: a Mercedes “package”. There is no suggestion of impartiality.

38. In negotiations as to the package on offer, representations made are viewed as being made by and on behalf of “Mercedes”. Customers will not draw a distinction between the manufacturer, a finance provider which is a subsidiary of the manufacturer, and the Mercedes dealership. Customers would expect that practical and financial support would flow between the entities within the “Mercedes family”, and would not be concerned by the level of subsidy, or how their payments are divided between them. In that context, there is no justification for holding that there is an unfair relationship on any of the FCA grounds for redress: high commission, DCA or commercial tie. This is the approach which has been taken by county courts across the country: they have routinely dismissed s140A claims against lenders which are subsidiaries of manufacturers, in relation to sales by the franchised dealer.

WHICH CONSUMERS “SUFFERED LOSS” FROM NON-DISCLOSURE?

39. As noted above, s404 requires that a redress scheme should only apply to categories of consumer who have “suffered loss” from the failure of the firm to comply with requirements.
40. In the current case, the trigger for redress is the failure to make disclosure. The basis of the scheme is described in the Consultation as:
- 1.5 ...Inadequate disclosure of commission means consumers are less likely to make informed decisions, negotiate or shop around for a better deal.
41. In fact, the FCA has already concluded that no significant loss flows from the failure. Its October 2019 Consultation Paper [CP19/28] states:
- 1.5 We have undertaken extensive work in the motor finance sector ..
- 3.30 We also considered whether significant changes to our disclosure rules would mitigate the harm, either as a standalone proposal or in combination with others. This included requiring firms to tell a customer, possibly orally, about the nature of the arrangement (rather than just its existence) and/or the amount of commission.
- 3.31 We have decided not to pursue this option. Although consumers could be affected by the amount of commission involved, we doubt whether such changes would result in a significant change in behaviour. Consumers are unlikely to engage with detailed explanations of complex commission models. So, the harm caused by discretionary commission models would likely not be significantly mitigated
42. The FCA’s Policy Statement published in July 2020 [PS 20/8] stated

2.9 While we are very keen to address harm in this market, we also need to act proportionately and rationally ...
Nor do we have evidence that prices in this market are inherently too high

43. The current Consultation states:

3.37 - We note that many firms have been fully disclosing commission arrangements and tied arrangements in the light of the Court of Appeal decision in Johnson and have reported very little or no impact on consumer behaviour so far. We also acknowledge that the academic literature is inconclusive on the impact of disclosure. However, we do not think that this is enough to counter the conclusions we have reached ...

44. Annex 2 of the Consultation records the FCA's findings:

64. The Yonder survey found that around half (51%) of current motor finance holders had shopped around for their finance before taking it out.57% of those who shopped around for their motor finance in the 12 months to May 2024 checked the websites of individual providers, and 45% used a price comparison website

73. The new vehicle segment is largely served by captive lenders (subsidiaries of original equipment manufacturers (OEMs) offering finance on sales of their own vehicles) with motor finance being used in a large proportion of sales.

74. Strong competition between vehicle brands drives competitive pricing for motor finance.

77. Consumers in the new segment typically have access to alternative forms of financing such as personal loans under some of the best terms available given their prime credit profile....

78. Consumers in the new segment appear to be sensitive to changes in price. The Yonder consumer research found that 46% of current holders of motor finance on a new vehicle said they had shopped around before selecting their motor finance deal. These consumers said that they did so to get confidence on their deal (68%) but also to improve their understanding of different options (56%) and to negotiate the cost of finance (39%). ...

79. Overall, competition in the new segment appears to be working well for the period we collected data prior to current market challenges. This was driven by strong competition between OEMs to secure vehicle sales. Price sensitivity and availability of alternatives to motor finance provide further competitive constraints on lenders.

87. Consumers in the used segment have a wide range of choice of motor finance providers ... around 30% of current holders of motor finance on used vehicles had used personal loans to finance a vehicle purchase before

88. Consumers are generally engaged in the market with more than half of motor finance holders on used vehicles reporting that they had shopped around in the market, ...The reduction in uptake of motor finance isdue to consumers switching to the alternative credit product offered

92.research found that consumers with sub-prime characteristics were more likely to shop around for finance (reported by 67%) ...The reasons for shopping around included getting confidence that they are getting a good deal (66%), improving their understanding of different options (49%) and to negotiate the cost of finance (42%).

45. Given that the majority of customers have already shopped around, the rationale for the scheme provided in paragraph 1.5 cannot sensibly be applied to all customers. This is a highly competitive market. As I have noted earlier, Annex 2 records at paragraphs 66, and 83-84, that, far from profiteering at the expense of customers, dealers operate on low margins, and commission allows lower prices on other aspects of the transaction.

46. When the FCA sought permission on 14 January 2025 to intervene before the SC in *Hopcraft* it stated inter alia:

As regards oral submissions, it is respectfully suggested that the FCA's presence at the hearing may be of assistance to the Court in ... being able to provide an up-to-date account of the market-wide investigatory work if that would be of assistance.

It is to be regretted that the FCA did not adduce the market research referred to above. The SC was as a result left with little insight as to how efficient the motor finance market in fact is (despite requests for further information made by the court during the Claimant submissions): with this data, its decision in relation to the unfair relationship claim might well have been different.

47. There are very strong reasons why, for the last decade, the FCA has decided not to intervene in this market with any form of redress. Those reasons are as cogent today as they have always been.

REBUTTING THE PRESUMPTION OF LOSS

48. The Consultation states:

7.54 We propose that the presumption of loss or damage caused by an unfair relationship arising from inadequate disclosure of a high commission arrangement or a tied arrangement should be rebuttable if the lender can provide clear, contemporaneous, and customer-specific evidence that the consumer would not have secured a lower APR from any other lender the broker had arrangements with at the time of the transaction.

Clear evidence: – Evidence that is unambiguous and verifiable, showing the actual offers available at the time of the transaction. – Generic statements or reconstructed estimates would not be permitted

Customer-specific evidence: – Evidence must relate to the individual consumer and transaction, demonstrating that alternative, lower APRs were not available for the application in question, e.g. consumer's credit profile, loan amount, and product type.

Contemporaneous evidence: – Evidence must have been created at or very close to the time of the transaction, not generated retrospectively.

Acceptable examples include:

- Dated and version-controlled lender rate sheets for the relevant period, that provide information about rates for consumers with different credit profiles, loan amounts and product types, allowing rates to be matched to the individual consumer.

- Timestamped broker platform screenshots showing the consumer's application and the range of offers available.

- Timestamped communications (eg emails or system notes) confirming the offers considered and the rationale for selection

7.60 Where the broker was tied exclusively to one lender, we consider this rebuttal would not be feasible. In such cases, the presumption of loss or damage would remain irrebuttable.

49. As noted above, the FSMA s404 requires “*loss or damage in respect of which, if they brought legal proceedings, a remedy or relief would be available in the proceedings*” for this to be subject to a redress scheme.

50. The proposed FCA restriction on highly relevant evidence in rebuttal would deny justice to lenders, and award redress where no remedy would be available through the courts. No court has

ever imposed such restrictions on litigants.

TIME BAR

51. The Consultation states:

4.30 Under section 32(1)(b) of the Limitation Act 1980, however, the limitation period does not begin to run where any fact relevant to a claim has been deliberately concealed from the consumer by the defendant or its agent until such time as the consumer could, with reasonable diligence, have discovered it.

4.33 ...inadequate disclosure of a relevant feature of the lending arrangement (ie the fact of a DCA, high commission arrangement or tied arrangement) is the essential basis of the unfair relationship claims that our proposed scheme is intended to capture. In our view, absent adequate disclosure of those features, typically that will amount to deliberate concealment of a fact relevant to the consumer's claim that the consumer could not with reasonable diligence have discovered.

4.34 ... the most common form of disclosure relating to these features made by firms (if any) was a partial disclosure that "commission may be payable". We do not consider that such wording, or a similar partial disclosure such as commission "would be payable", would normally be sufficient for lenders successfully to argue that that the consumer cannot rely on s.32(1)(b).

52. This does not accurately state the law. There is a long line of Court of Appeal authority holding that, to rely on s32(1)(b), Claimants must establish that they could not have discovered the concealment "*without exceptional measures which they could not reasonably have been expected to take*", and the court must assume that the Claimant desires to discover whether or not there has been a concealment. The concept of reasonable diligence carries with it the notion of a desire to investigate – see for example *Law Society v Sephton* [2005] EWCA 1627 at paragraphs 110 and 116. If the documentation given to the customer disclosed that commission "may" be payable, it can hardly constitute "exceptional measures" for a curious customer to enquire how much is paid, and how it is calculated.

THE VOLUME OF FUTURE COMPLAINTS TO THE FOS

53. The Cost Benefit Analysis at Annex 2 to the consultation appears very keen to avoid the burden on firms of a large volume of claims being made to the FOS. It states:

2. In the absence of this regulatory intervention, we would expect to see considerable market disruption, inconsistent and significantly delayed compensation for consumers, and unnecessary costs and burdens to firms, the Financial Ombudsman Service ('Financial Ombudsman') and the judicial system. Without an industry-wide consumer redress scheme and an extension in the rules for handling motor finance complaints, we

would expect the following after 4 December 2025:

- Firms would likely experience a surge in complaints and would be unable to respond to them all within the required 8-week deadline, meaning a large volume of complaints would likely be referred to the Financial Ombudsman.
- Firms could then incur significant costs with complaints being referred to the Financial Ombudsman (facing up to £650 per case after four cases referred in a financial year, as well as any scaling fee) or resolved via the court system. The Financial Ombudsman itself could be overwhelmed with the number of

cases and be forced to recoup costs via its annual levy to industry, affecting firms not directly involved in motor finance. The court system may also face pressures from large volumes of complainants.....

54. This appears to have been written before the Treasury announced the government's intention to exclude the FOS from determining mass redress events: it will be for the FCA to determine what redress should be given in relation to such cases. The consultation on the Review of the Financial Ombudsman Service published in July 2025 states:

1.13 As set out in the government's Regulation Action Plan, predictability is an essential feature of any effective regulatory regime. The government therefore proposes to reform the legislative framework within which the FOS operates, to prevent the FOS acting as quasi-regulator and to provide greater regulatory coherence, with consistent standards of consumer protection set by the FCA and applied by the FOS in resolving complaints.

1.14 In summary, the government will use changes to legislation, when Parliamentary time allows, to deliver the following reforms:

- ...the FOS will be obliged to refer potential wider implications issues or mass redress events to the FCA and the FCA will be obliged to consider those issues. Parties to a complaint will also be able to request the FOS refer such an issue to the FCA. It will be for the FCA to decide how those issues should be addressed;

55. This reform will be long overdue: it is absurd for the FCA to be dictated to on such issues by an Ombudsman which has no access to the market research carried out by the FCA and is singularly ill equipped to assess the wider implications.

56. Even if these changes were not pending, the FCA can of course allow longer for firms to respond to the complaints. Firms are then quite capable of deciding for themselves whether to pay redress in relation to all claims, if it will be more cost effective to do so. They are in a better position than the FCA to judge what is in their interests.

57. Annex 2 continues by stating:

- With firms facing both significant redress liabilities and costs associated with dealing with complaints, with significant uncertainty remaining for several years, there may be consequential adverse impacts relating to the motor finance market. Within the motor finance market, a higher perceived risk of repayment to investors (debt side) and/or lower returns (equity side) could lead to a higher cost of capital for firms. Higher costs to firms could dent profit margins leading some to try and pass on additional costs to future consumers, restrict new lending or, in the extreme, withdraw from the market, and discouraging investment in the UK motor finance market.

3. We believe regulatory intervention is necessary to avoid the above outcomes

This is an accurate description of the damage that would be caused by the redress programme proposed in the Consultation. The only difference is that this damage will be certain.