HAUSFELD

8 February 2022

Financial Conduct Authority
12 Endeavour Square
London E20 1JN

Attn: Nikhil Rathi, Chief Executive
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By email only

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Our ref: L5082.0001
Your ref: C220128A

Dear Financial Conduct Authority

Review of John Swift QC and the Financial Conduct Authority's Response
LETTER BEFORE CLAIM UNDER THE PRE-ACTION PROTOCOL FOR JUDICIAL REVIEW

Executive Summary

1. We act for the All-Party Parliamentary Group on Fair Business Banking (the "**APPG**" or "**Claimant**"). The APPG was founded in 2012 to highlight the widespread mis-selling of interest rate hedging products ("**IRHPs**") to businesses. A key part of the APPG's work has involved advocating on behalf of affected individuals and businesses for the Financial Conduct Authority ("**FCA**"), previously, the Financial Services Authority ("**FSA**"), to investigate.

2. On 14 December 2021, the FCA published John Swift QC's independent Lessons Learned Review (the "**Review**")[1] of the FCA's supervisory intervention into IRHP mis-selling to businesses, and the establishment of a voluntary redress scheme that the FCA had negotiated with first-tier banks (the "**Scheme**"). On the same day, in response to the Review and having regard to the conclusions in it, the FCA published its decision: (i) to take no further action in relation to IRHP mis-selling and the Scheme; and (ii) not to use its powers to require any further redress to be paid to IRHP customers (the "**Decision**")[2].

3. The Claimant seeks to challenge the lawfulness of the Decision, having regard to the clear and corroborated conclusions in the Review and the reasons for the Decision given by the FCA. The Claimant considers the Decision to be unlawful and/or irrational and/or to have involved procedural impropriety, for the reasons set out below. Indeed, in the view of the Claimant, it is manifestly obvious that, by the Decision, the FCA neither accepts nor even engages with the central findings of the Review.

4. The Claimant wrote to the FCA on 14 January 2022 requesting that the Decision be revisited. The FCA responded on 31 January 2022 (the "**31 January Letter**"), declining to revisit it. The Claimant considers that the FCA's response is unlawful. It also ignores the grave damage wrought by IRHP mis-selling, which involved livelihoods being lost, businesses built up over many years being destroyed and lives being ruined.

[1] https://www.fca.org.uk/publication/corporate/independent-review-of-interest-rate-hedging-products-final-report.pdf
[2] https://www.fca.org.uk/news/press-releases/fca-publishes-swift-review-supervisory-intervention-interest-rate-hedging-products

5. This is the Claimant's letter before claim pursuant to paragraph 14 of the Pre-Action Protocol for Judicial Review (the "**Protocol**"). It contains the details set out in section 1 of Annex A to the Protocol. Whilst this letter is intended to put the Claimant's case fully, in accordance with the letter and spirit of the Protocol, at this early stage the Claimant must necessarily reserve the right to amend or augment its case or grounds in due course, and its rights remain fully reserved.

6. Please note that the Claimant intends to publish this letter and any response from the FCA (including enclosures), absent any specific requests to the contrary, which the Claimant will consider.

Part 1 – Proposed claim for judicial review

7. The proposed defendant is:

   The Financial Conduct Authority
   12 Endeavour Square
   London E20 1JN

Part 2 – The Claimant

8. The Claimant is the All Party Parliamentary Group on Fair Business Banking, a cross-party group of Members of the Houses of Commons and Lords that was established to address IRHP mis-selling. In the current Parliament, the Claimant's Co-Chairs are Kevin Hollinrake MP (Conservative) and William Wragg MP (Conservative). The Vice-Chairs are Bill Esterson MP (Labour), Lord Holmes of Richmond (Conservative), Tonia Antoniazzi MP (Labour), Dr. Lisa Cameron (SNP), Lord Cromwell (crossbench), Alison Thewliss MP (SNP), The Early of Lindsay (Conservative), James Cartlidge MP (Conservative), Sammy Wilson MP (DUP), Chris Stephens MP (SNP), Ben Lake MP (Plaid Cymru), Julian Knight MP (Conservative), Viscount Waverley (crossbench), Harriett Baldwin MP (Conservative), Kirsty Blackman MP (SNP), Chris Matheson MP (Labour), Alexander Stafford MP (Conservative), Chris Law MP (SNP), Peter Gibson MP (Conservative), Tom Tugendhat MP (Conservative), Peter Dowd MP (Labour), and Greg Smith (Conservative).

9. For nearly a decade, the Claimant has campaigned on behalf of and advocated for the thousands of victims of IRHP mis-selling. It has been instrumental in conceiving of and establishing the Business Banking Resolution Scheme, an alternative dispute resolution mechanism created in the wake of IRHP mis-selling, and it maintains a network of support that is populated by a significant number of the customers who transacted the Excluded Transactions (defined below). The Claimant also has experience in litigation, having been granted permission to intervene in cases which affected its stakeholders and constituents, namely *Sevilleja v Marex Financial* [2020] UKSC 31 (rule against reflective loss) and *Pakistan International Airline Corp v Times Travel* [2021] UKSC 40 (economic duress).

10. For the avoidance of doubt, the Claimant contends that it has standing to claim for judicial review of the Decision because:

    a. of its status as described above;

b. this is a public interest challenge concerning the lawfulness of the Decision, which has denied access to justice to thousands of bank customers, for whom the APPG was created, and on whose behalf the APPG has advocated for nearly a decade. In the context of such a challenge, anyone with a real and genuine interest in the decision under challenge (which the APPG has in the Decision) is likely to be found to have standing (e.g. *R v Secretary of State for Foreign Affairs, ex p World Development Movement* [1995] 1 WLR 386, DC, 392–396 per Rose LJ); and/or

c. the proposed grounds are based on conventional public law principles.

Part 3 – The Defendant's reference

11. This letter will be emailed to all FCA email addresses included in the correspondence between the Claimant and the FCA referred to above concerning this matter.

The FCA's reference: C220128A

Part 4 – The Claimant's legal advisers

12. The details of the Claimant's legal advisers dealing with this claim are as follows:

Solicitors:
Ned Beale, Simon Bishop, Rachael Baillie
Hausfeld & Co LLP
12 Gough Square
London EC4A 3DW
Ref: L3035.0004
Email: nbeale@hausfeld.com; sbishop@hausfeld.com; rbaillie@hausfeld.com
Tel: 020 7665 5000

Counsel:
Thomas Roe QC, 3 Hare Court
Anna Lintner, 39 Essex

13. All correspondence should be directed to the Claimant's solicitors. Please send all emails to all three email addresses.

Part 5 – Details of the matter being challenged

14. The Claimant seeks to challenge the Decision having regard to: (i) the clear conclusions in the Review as to the so-called "**Sophistication Test**" (as amended) that was adopted in the Scheme, which excluded over 10,000 IRHP transactions (the "**Excluded Transactions**") from the Scheme. This is understood to have denied redress to over 5,000 bank customers (the "**Excluded Customers**") on an arbitrary basis and in contravention of the regulatory purview of the FSA (as the FCA then was); (ii) the relevant regulatory framework and the extant powers of the FCA to establish a mechanism for redress for customers who were party to the Excluded Transactions; and (iii) the reasons given for the Decision.

Part 6 – Details of any interested party

15. There are no interested parties.

Part 7 – The Issue

Legislative framework

Regulatory objectives of the FSA/FCA

16. The FSA was originally created by the Financial Services and Markets Act 2000 ("**FSMA**") to regulate insurance, investment business and banking. FSMA set out the FSA's key regulatory objectives, which included market confidence, financial stability, the protection of consumers, and the reduction of financial crime.[3] In discharging its general functions, the FSA was required to have regard to the following considerations under s 2(3) of FSMA:[4]

    (a) the need to use its resources in the most efficient and economic way;

    (b) the responsibilities of those who manage the affairs of authorised persons;

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

    (d) the desirability of facilitating innovation in connection with regulated activities;

    (e) the international character of financial services and markets and the desirability of maintaining the competitive position of the United Kingdom;

    (f) the need to minimise the adverse effects on competition that may arise from anything done in the discharge of those functions;

    (g) the desirability of facilitating competition between those who are subject to any form of regulation by the [FSA];

    (h) the desirability of enhancing the understanding and knowledge of members of the public of financial matters (including the UK financial system).

17. The objective of consumer protection was further defined in s 5 of FSMA as securing the appropriate degree of protection for consumers.[5] The FSA was required to have regard to the

[3] FSMA s 2(2) as amended by the Financial Services Act 2010. Subsection (ba) – "financial stability" was inserted by the Financial Services Act 2010 on 8 April 2010. Originally, s 2(2)(b) also included "public awareness" as a regulatory objective, but this was omitted on 12 October 2010 by the Financial Services Act 2010. This section was superseded on 24 January 2013 by Part 1A, as amended by the Financial Services Act 2012.
[4] FSMA s 2(3) as amended by the Financial Services Act 2010. This amendment inserted subsection (h).
[5] Section 5(1) FSMA. This section was superseded on 24 January 2013 by Part 1A, as amended by the Financial Services Act 2012.

following considerations when considering what degree of protection may be appropriate:[6]

> *(a) the differing degrees of risk involved in different kinds of investment or other transaction;*
>
> *(b) the differing degrees of experience and expertise that different consumers may have in relation to different kinds of regulated activity;*
>
> *(ba) any information which the consumer financial education body has provided to the Authority in the exercise of the consumer financial education function;*
>
> *(c) the needs that consumers may have for advice and accurate information; and*
>
> *(d) the general principle that consumers should take responsibility for their decisions.*

18. The definition of "consumer" under s 5 has been amended but has not materially changed over time.[7] The key concept is that a consumer is a person (i) who uses or may use any of the services provided by authorised persons carrying out regulated activities or those acting as appointed representatives; (ii) who has rights or interests derived from or attributable to the use of such services by other persons; or (iii) whose rights or interests may be adversely affected by the use of any such services by persons acting on their behalf or in a fiduciary capacity in relation to them.

19. The FSA was later restructured in 2013 and became the FCA, with some of its responsibilities being transferred to the Prudential Regulation Authority ("**PRA**"). As part of this restructuring, FSMA was substantially amended. The amendments and restructuring included reframing the FCA's objectives in a new Part 1A which supersedes the earlier Part 1 of FSMA.

20. The FCA's strategic objective is to ensure that the relevant markets function well.[8] Its operational objectives are consumer protection, integrity and competition.[9] Section 1B(4) of FSMA states that the FCA must, so far as is compatible with acting in a way which advances the consumer protection objective or the integrity objective, discharge its general functions in a way which promotes effective competition in the interests of consumers.

21. The consumer protection objective is further defined in s 1C FSMA. It is materially the same as the earlier definition set out in s 5 which applied to the FSA, save that it includes the following additional considerations for the FCA to take into account when considering the appropriate degree of consumer protection:

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

[6] Section 5(2) FSMA. Subsection (ba) was inserted on 12 October 2010 by the Financial Services Act 2010.
[7] Section 5(3) FSMA originally referred to the definition of "consumer" in s 138. The subsection was amended on 8 April 2010 by the Financial Services Act 2010 to refer to sections 425A and 425B. Those definitions are substantially similar to the definition of consumer. This has since been superseded by s 1G of FSMA (as currently enacted), which again provides a similar definition of consumer.
[8] Section 1B(2) FSMA.
[9] Section 1B(3) FSMA.

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

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

…

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

22. The definition of "consumer" is now found in s 1G, but this is not materially different from the definition that applied previously.

Regulatory status of IRHPs

23. Section 22 of FSMA sets out the broad test for classes of activities and categories of investments that are regulated. These are further defined in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the "**RAO**").[10] The RAO provides that regulated activities include, *inter alia*, (i) dealing in investments as principal (article 14); (ii) dealing in investments as agent (article 21); (iii) arranging deals in investments (article 25); and (iv) advising on investments (article 53).

24. Part III of the RAO sets out the kinds of investments that are specified for the purposes of s 22 FMSA. These include, pursuant to article 85, "Contracts for difference etc." which are stated to be:

a. a contract for differences; or

b. any other contract the purpose or pretended purpose of which is to secure a profit or avoid a loss by reference to fluctuations in –

i. the value or price of property of any description; or

ii. an index or other factor designated for that purpose in the contract.

25. The FSA recognised[11] that IRHPs are a type of contract for difference under article 85 RAO, as their purpose is to secure a profit or avoid a loss by reference to fluctuations in interest rates. Therefore, these instruments fall within the FSA and FCA's regulatory remit.

Regulatory obligations imposed on banks

26. FSMA granted the FSA (and later the FCA) the power to make rules, which are published in the Handbook. The Handbook is divided into modules and contains, among other things, High-Level Standards, which include overarching requirements such as the Principles for Businesses (the

[10] Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544.
[11] Review, pg 51, para 36.

"**Principles**") that outline fundamental obligations of all regulated firms, and Business Standards, which outline the day-to-day conduct rules that apply to all regulated firms.

27. The Principles have remained largely unchanged since their introduction. The key Principles relevant to the sale of IRHPs are:

> *6. Customers' interests*
>
> *A firm must pay due regard to the interests of its customers and treat them fairly.*
>
> *7. Communications with clients*
>
> *A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.*
>
> *8. Conflicts of interest*
> *A firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client.*
>
> *9. Customers: relationships of trust*
>
> *A firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment*

28. The Review found that the FSA identified Principles 6 and 7 as relevant to the sale of IRHPs for the purposes of the Scheme.[12]

29. The Business Standards module of the Handbook contains a section setting out Conduct of Business ("**COB**") rules. The original rules were updated from time to time until 31 October 2007, when they were replaced with the Conduct of Business Sourcebook ("**COBS**"). As the mis-selling of IRHPs spanned both periods, both sets of rules are relevant.

30. The FSA identified the following provisions as relevant to the sale of IRHPs for the purposes of the Scheme:[13]

    a. for sales up to 31 October 2007: COB 2.1.3 R (the requirement to take reasonable steps to communicate information in a way which is clear, fair and not misleading), COB 5.2.5 R (the requirement to take reasonable steps to ensure that a firm has sufficient personal and financial information about a customer when giving a personal recommendation concerning a designated investment), COB 5.4.3 R to COB 5.4.6 E (the requirement to give risk warnings to customers) and COB 5 Annex 1 (a risk warning notice); and

    b. for sales from 1 November 2007: COBS 2.1.1 R (the requirement to act fairly and professionally in accordance with the best interests of the firm's client), COBS 2.2.1 R (the requirement to give appropriate information in a comprehensible form to a client so that

[12] Review, pg 60, para 64(a).
[13] Review, pgs 60-61, para 64(b)-(c).

the client is reasonably able to understand the nature and risks of the service and of the specific type of designated investment that is being offered and, consequently, to take investment decisions on an informed basis), COBS 4.2.1 R (the requirement for the firm's communication to be fair, clear and not misleading), and COBS 14.3.2 R (the requirement to provide a client with a general description of the nature and risks of designated investments, taking into account, in particular, the client's categorisation as a retail client or a professional client).

31. The Review found that the following provisions were also relevant to the sale of IRHPs:

    a. for sales up to 31 October 2007: COB 2.2 in its entirety, which broadly required firms to conduct their business with integrity and to pay due regard to the interests of their customers and to treat them fairly. COB 2.2 states that its purpose is to ensure that a firm does not conduct business under arrangements that might give rise to a conflict with its duty to customers. It therefore prohibits inducements that could create conflicts of interest; and

    b. for sales from 1 November 2007:

        i. COBS 2.1.2 R, which prohibits firms from seeking to exclude or restrict the duties or liabilities they owe to clients under the regulatory system;

        ii. COBS 9.2.1 R which requires firms to take reasonable steps to ensure that a personal recommendation, or a decision to trade, is suitable for its client. Those steps included obtaining necessary information regarding the client's relevant knowledge and experience in the investment field, financial situation and investment objectives; and

        iii. COBS 10.2.1 R, which requires firms to ask clients to provide information regarding its relevant knowledge and experience in the investment field, so as to enable the firm to assess whether the service or product envisaged was appropriate for the client. This included consideration of whether the client had the requisite knowledge and experience to understand the risks involved.

Regulatory protections of different customers

32. In addition to setting out rules for the conduct of banking business, COB and later COBS also set out different categories of customers, who were given different levels of regulatory protection.[14] Both COB and COBS set out three categories of customers. The categories were:

Degree of regulatory protection	**COB classification**	**COBS classification**
Most protected/regulated	Private Customer	Retail Client
Less protected/regulated	Intermediate Customer	Professional Client
Least protected/regulated	Market Counterparty	Eligible Counterparty

[14] Review, pg 55 para 50-51 and pg 58, para 57.

33. Under both COB and COBS, all customers were Private/Retail customers unless they met the test for Intermediate/Professional customers or Market/Eligible Counterparties. Additionally, firms and their customers could "opt up" into a higher category of customer (with a corresponding reduction in regulatory protection) if certain criteria were met.

34. Under COB, certain types of customers were designated as Intermediate Customers. These were: a local authority or public authority; a body corporate whose shares have been listed or admitted to trading on any European Economic Area exchange or on the primary board of any International Organization of Securities Commissions member country official exchange; or a special purpose vehicle.

35. Additionally, a customer whose business met certain quantitative thresholds would be deemed to be an Intermediate Customer, namely:

    a. a body corporate which has or had at any time during the previous two years (either itself or through its subsidiaries/holding companies), called-up share capital or net assets of at least £5 million;

    b. a partnership or unincorporated association which has, or has had at any time during the previous two years, net assets of at least £5 million;[15] and

    c. a trustee of a trust (other than an occupational, small self-administered or stakeholder pension scheme) which has, or has had at any time during the previous two years, assets of at least £10 million.[16]

36. In order to opt up from being a Private Customer to an Intermediate Customer, COB required the firm to (i) take reasonable care to determine that the client had sufficient experience and understanding to be classified as an intermediate customer; (i) give a written warning to the client of the protections under the regulatory system that it would lose and sufficient time to consider the implications; and (iii) obtain the client's written consent, or otherwise demonstrate that informed consent had been given. The criteria for a firm to consider whether the client had sufficient experience and understanding were: (a) the client's knowledge and understanding of the relevant designated investments and markets, and of the risks involved; (b) the length of time the client had been active in these markets, the frequency of dealings and the extent to which it had relied on the advice on investments of the firm; (c) the size and nature of transactions that had been undertaken for the client in these markets; and (d) the client's financial standing, which may include an assessment of net worth or of the value of its portfolio.

37. The criteria for categorizing different customers were changed under COBS in order to comply with the requirements of the Markets in Financial Instruments Directive.[17] Under COBS, a similar approach was taken in terms of designating certain types of businesses as Professional Clients (such as credit institutions, investment firms, institutional investors, insurance companies and

[15] Calculated in the case of a limited partnership without deducting loans owing to any of the partners.
[16] Calculated by aggregating the value of the cash and designated investments forming part of the trust's assets, but before deducting its liabilities.
[17] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC.

pension schemes) and setting quantitative size criteria for other customers. Two of the following criteria needed to be met in order for a customer to be deemed to be a Professional Client:

> *in relation to MiFID or equivalent third country business a large undertaking meeting two of the following size requirements on a company basis:*
>
> *(a) balance sheet total of EUR 20,000,000;*
>
> *(b) net turnover of EUR 40,000,000;*
>
> *(c) own funds of EUR 2,000,000;*

38. Unlike COB, COBS applies these criteria on an individual company basis, not a group basis. Therefore, COBS includes a larger number of corporate customers in its most regulated customer category.

39. The criteria to elect to be a Professional Client under COBS are also more restrictive than the opting up criteria to be an Intermediate Customer under COB. In addition to the firm assessing the customer's knowledge, providing a warning about losing regulatory protections and obtaining informed written consent, under COBS a customer can only opt up if at least two of the following criteria are met:

> *(a) the client has carried out transactions, in significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters;*
>
> *(b) the size of the client's financial instrument portfolio, defined as including cash deposits and financial instruments, exceeds EUR 500,000;*
>
> *(c) the client works or has worked in the financial sector for at least one year in a professional position, which requires knowledge of the transactions or services envisaged;*

40. The thresholds to be designated a Market/Eligible Counterparty under COB/COBS are yet more restrictive, as are the criteria to opt in to this categorisation.

Regulatory powers in response to IRHP mis-selling

41. FSMA granted the FSA, and now the FCA, a range of statutory powers to intervene in response to breaches of the regulatory protections under the Handbook. Of relevance to the Scheme, the FSA had, and the FCA has, the power to: (i) order firms to undertake a consumer redress scheme; (ii) apply for a restitution order for consumers; and (iii) vary firms' permissions to undertake regulated activities.

42. A consumer redress scheme is defined in s 404 FSMA as a scheme where a firm is required to take one or more of the following steps: the firm must first investigate whether, on or after the specified date, it has failed to comply with regulatory requirements, whether that failure has caused (or may cause) loss or damage to consumers and, if it has, the firm must determine what

the redress should be in respect of the failure and provide that redress to consumers.[18] A firm can be required to take these steps even if a defence of limitation becomes available to it in respect of the loss or damage in question[19]. Section 404A sets out examples of the kinds of rules that the FSA could, and the FCA can, impose on firms in carrying out a redress scheme.

43. Pursuant to s 404(1) FMSA, the FSA could, and the FCA can, order a redress scheme if: (a) it appears that "*there may have been a widespread or regular failure … to comply with requirements*"; (b) it appears 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 is considered to be "*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)*"[20].

44. The FSA was, and the FCA is, also able to either apply to the High Court for a restitution order or make such an order itself under ss 382 or 384 of FSMA respectively. The requirements for making an application or an order are that a person has contravened a relevant requirement, or been knowingly concerned in the contravention of such a requirement, and (a) that profits have accrued to him as a result of the contravention; or (b) that one or more persons have suffered loss or been otherwise adversely affected as a result of the contravention.[21] A restitution order requires firms to pay a just amount to those affected[22] having regard to the profits that appear to have been accrued or the extent of the loss or other adverse effect.[23] The specific contraventions which triggered the FSA's, and now trigger the FCA's, power to make or seek a restitution order have changed over time, but contravention of a requirement by or under FSMA has always been a basis for the exercise of this power.[24]

45. Finally, the FSA's power to grant permission to a firm under Part IV FSMA (as was then in force) to carry out a regulated activity also included the power to impose certain conditions which required the firm to take or refrain from taking certain actions.[25] The FSA also had the power to vary any conditions on its own initiative if it was desirable to do so in order to protect the interests of consumers or potential consumers.[26]

46. Part IV FSMA has been replaced with a new statutory regime in Part 4A which reflects the division of certain regulatory responsibilities and functions between the FCA and PRA. However, the power to grant permissions, impose conditions and vary conditions remains in all material respects the same for the FCA in respect of IRHP mis-selling.[27]

The Facts

IRHP Mis-selling and the FSA's Response

[18] Section 404(4)-(7) FSMA.
[19] Section 404(8) FSMA.
[20] Section 404(1) FSMA.
[21] Section 384(1) FSMA. To obtain a court order under s 382, the FSA/FCA need to prove these same factors to the court's satisfaction.
[22] As defined in s 382(8) and 384(6) FSMA.
[23] Sections 382(2) and 384(5) FSMA.
[24] Sections 382(9)(a)(i) and 384(7)(a).
[25] Sections 42 and 43 FSMA.
[26] Section 45 FSMA.
[27] Sections 55E, 55G and 55J of FSMA.

47. According to the Review, the FSA first became aware of potential IRPH mis-selling in 2010 and for a period of two years thereafter, complaints directly to the FSA and to the banks substantially increased in number. By March 2012 the FSA was facing increasing public pressure to do something about IRHP mis-selling, including from campaigning groups such as Bully Banks, interventions from MPs on behalf of constituents, further individual complainants, and increasing media scrutiny. In this light it was treating the mis-selling of IRHPs as "*an issue requiring further investigation*"[28] and commenced a period of further information gathering.

48. At this stage, it is recorded in the Review that the FSA had a limited understanding of the extent of the issue and assumed that just 5% of IRHPs had been mis-sold (on the basis of the rate of success of IRHP complaints made to the Financial Ombudsman Service), but that it later became clear to the FSA that the mis-selling rate was likely to be much higher than first thought[29].

49. The FSA proceeded to gather information as to how many IRHPs had been sold so that it might understand the potential volume of transactions in scope. Having established that the issue was extremely widespread, the FSA considered the options available to it as to its regulatory response. The Review refers to a memorandum entitled "*Options For Action On Interest Rate Derivatives*", and records the manner in which the FSA carried out this exercise:

> *The options were assessed against the FSA's desired outcomes, which the memorandum identified as: (i) swift and appropriate remediation for customers who had suffered misselling; (ii) the need for the chosen option to "lead to fairer and/or faster redress than consumers might otherwise receive (were we to take a different action, or none)", "be legally robust/enforceable/ etc.; and", "not [to] place unsustainable burdens on [the FSA's] resources given other supervisory priorities"; and (iii) to ensure adequate mitigation against the re-occurrence of similar issues in the future. <u>The memorandum also emphasised that "opting for what seems initially to be swifter actions generally makes in practice for messier and delayed solutions in the longer run</u>. Early investment in gathering a strong evidence base speeds solutions in the long run.*[30] (Emphasis <u>added</u>.)

50. It is in this context that the option of a voluntary redress scheme, whether by way of a collective agreement or individual agreements with the offending banks, came to the fore. The consideration of this option included whether or not to implement a supervisory mechanism of any such scheme using the Skilled Person regime provided by s 166 of FSMA.

51. Other options were also considered. Of particular relevance to the APPG's challenge, the Review records the FSA's consideration of:

    a. The use of its powers to establish a compulsory redress scheme under section 404 FSMA, in respect of which it was noted that the FSA "*felt that the hurdle for starting the 404 scheme evidentially was quite high and we probably weren't meeting it … we did not have much clear definitive evidence of rule breaches causing loss … we would have needed to gather significant further, broader, deeper evidence of such to justify a 404". Clive Adamson also stated that: "it's difficult to use, the bar is high, and in practice would*

[28] Review, pg 90, para 15.
[29] Review, pg 92, para 21.
[30] Review, pg 100, para 36.

probably have meant a significant degree more discovery work to even get to the point of even proposing it". This was reinforced by FCA employee G, who stated: "you'd say, well we want something that is going to deliver redress, not just a smack on the hand. But we're in a situation here where the legal position is not strong. So if you looked at a 404, for example, there was not evidence of widespread mis-selling so perhaps not in that space where we were"[31]. (Emphasis added.)

b. The use of its powers of restitution under sections 382 and 384 FSMA, in respect of which it is recorded that "*The FSA restitutionary powers under sections 382 and 384 FSMA received less detailed consideration but in the FSA's view were similarly affected by the lack of evidence. The FSA's paper of 19 May 2012 noted that an application to court for a restitution order/injunction would have to be preceded by the use of a discovery tool such as a section 166 FSMA review, and that the "evidence hurdle" was "H[igh]? [court standards]" and "would have to be pure, by legal precedents". As such, it would take quite a long time to set up, albeit an injunction could potentially be secured more quickly. A later FSA paper, in the context of seeking restitution either through the court under section 382 FSMA or by the FSA directly under section 384 FSMA, indicated that such redress "would have to be based on breaches of rules (not Principles), requires [the] Court or FSA to be satisfied that loss has been suffered and quantification of customer loss". It reiterated that these options entailed a high evidence hurdle. As FCA employee G put it: "The main problem was that we just didn't have evidence of rule breaches. Most of those you need to have a breach. You can't order restitution if you haven't actually got a breach of rules which has led to a loss. So, when we worked through or when GCD worked through those particular options, the absence of rule breaches precluded most of them at that time*"[32]. (Emphasis added.)

c. The power of the FSA pursuant to section 42 to 45 FSMA (as in force at the time) to vary the permissions of any of the relevant banks.

52. In the end, in around June 2012, the FSA proceeded with seeking to establish what is referred to in the Review as the "**Initial Agreement**" with the first-tier banks, which would set out the terms of an initial voluntary redress scheme, with the supervisory assistance of a section 166 Skilled Person. Upon the Initial Agreement being executed, the Banks and the FSA commenced the "**Pilot Review**", through which a sample of IRHP sales for each bank would be reviewed in accordance with the Initial Agreement.

The Initial Agreement and the Sophistication Test

53. The negotiations around the Initial Agreement between the FSA and the banks appear to have been the origin of the Sophistication Test. Of central relevance to the concerns of the APPG is the manner in which the Sophistication Test developed in the course of these negotiations. It is important to make clear that the initial purpose of the Sophistication Test, and the basis upon which it was proposed to the banks by the FCA, was to identify the most vulnerable IRHP customers who had traded the most complex IRHPs, so that they could be given redress

[31] Review, pg 103, para 40(a).
[32] Review, pg 107, para 40(d).

automatically, i.e. without consideration of the circumstances of the sale.[33] All other IRHP sales in scope (including the Excluded Transactions) would be subject to a review process whereby the circumstances of the sale would be reviewed and assessed.

54. The Review records the following:[34]

> *a. In a meeting between the FSA and Barclays on 11 June 2012 at which Clive Adamson presented the FSA's findings, a question was raised about the distinction between proactive redress and a proactive past PBR. In response, FCA Employee G explained that proactive redress was sought where the FSA believed there was prima facie evidence to suggest a product was mis-sold, but "exceptions might exist where the customer was sufficiently sophisticated. If this is the case, this will have to be established on a case by case basis". To similar effect, in a call with RBS, FCA employee G referred to the sale of structured collars, indicating that the FSA was proposing that proactive redress be provided, except where firms can positively evidence that the client truly understood the risks involved. On the same call, FCA employee G indicated in respect of Structured Collars that the FSA considered there were certain features of these products which were "unsuitable for unsophisticated retail customers" and that in such cases redress should be offered quickly unless the bank could prove that the sales were suitable in terms of the customer fully understanding the risks; i.e. that the bank should provide redress "except in cases where [the bank] can demonstrate that the customers were sufficiently sophisticated".*
>
> *b. The banks embraced these suggestions and emphasised that there needed to be a recognition of different levels of sophistication in the customer base and that there should not be a blanket approach to redress.*
>
> *c. In a meeting with Barclays, FCA employee G accepted that "structured collars may have been suitable for sophisticated retail customers and that the FSA is willing to work with Barclays to determine how "sophisticated" should be interpreted". In the same meeting, FCA employee FP also stated that criteria for "sophistication" would be agreed, but their application would need to be independently reviewed.*
>
> *d. HSBC subsequently proposed criteria for customer sophistication, suggesting that turnover and/or number of staff be used as a proxy.*
>
> *e. Following this, the FSA proceeded to include a sophistication test as an eligibility threshold for the Initial Scheme, initially drafting this test by reference to the Companies Act small companies criteria. An internal FSA email of 22 June 2012 explained that this made the sophistication test more objective, aligning it with the thresholds in the Companies Act for the definition of a small company on whom the reporting requirements were limited. It indicated that the FSA presumed larger firms would have had more burdensome reporting requirements and be more sophisticated. This approach broadly aligned with the HSBC proposal and it was indicated that if this approach was adopted then the Skilled Person would not have to review the firm's decision on sophistication.*

[33] Review, pg 123, para 66(b).
[34] Review, pgs 117-118.

However, the email also warned that "the arguments against are that it may be more arbitrary and is much less of an assessment of an individual".

55. However, in the exchanges that followed, and upon the proposal of some of the first-tier banks party to the negotiations, the FSA assented to an amended formulation and application of the Sophistication Test that differed substantially from the first iteration that it had prepared, after what the Review describe as "*the briefest possible consideration*"[35]. The criteria for the Sophistication Test that were included in the Initial Agreement (derived from sections 382 and 477 of the Companies Act 2006[36] and as suggested by the banks) were as follows:

> *1.11 "Sophisticated Customer Criteria" means:*
> *1.11.1 In the financial year during which the sale was concluded, a Customer who met at least two of the following:*
> *1.11.1.1 a turnover of more that £6.5 million;*
> *1.11.1.2 a balance sheet total of more than £3.26 million; or*
> *1.11.1.3 more than 50 employees;*
> *Or*
> *1.11.2 The Firm is able to demonstrate that, at the time of the sale, the Customer had the necessary experience and knowledge to understand the service to be provided and the type of produce or transaction envisaged, including their complexity and the risks involved.*

56. The drastic effects of these fundamental changes to the Sophistication Test which are of particular relevance to the APPG's challenge, were to:

a. put the question determination of sophistication partially in the hands of the wrongdoers, the banks, by adding in a subjective test as to sophistication which the banks would decide; and

b. exclude from the Scheme altogether, any customer deemed to be sophisticated (irrespective of the category of product that they transacted).

57. With the Initial Agreement in place, the Banks proceeded with the Pilot Review with the FSA and the Skilled Person supervising, and with the objective of testing the parameters of the Initial Agreement against the desired objectives of the FSA. As part of the Pilot Review, sample sets of customers of each of the banks who would otherwise be deemed sophisticated were nonetheless reviewed with the purpose of assessing the efficacy of the Sophistication Test.

58. In the Pilot Review, widespread mis-selling (i.e. over 95% of cases) was revealed. Structural issues with the Initial Agreement were also identified, including in relation to the functioning of the Sophistication Test. It had been identified that the existing criteria were not successfully triaging customers, although the criteria against which the Sophistication Test was being measured were not clear. The FSA nonetheless took a period of time to consider what amendments to the Sophistication Test might be required.

[35] https://www.fca.org.uk/publication/corporate/independent-review-of-interest-rate-hedging-products-final-report.pdf, pg 320.
[36] Review, pg 321, para 16 and fn 1331.

59. Many exchanges followed between the banks and the FSA. The Review records that, during this time, many of the decisions being taken by the FSA would affect portions of the potential claimant population but were not properly tested by way of impact analysis, nor was there any proper analysis as to why certain groups of potential groups should or should not be excluded from the Scheme[37].

60. HM Treasury also became actively involved in the negotiations. At around that time, the British Government, through HM Treasury, owned a c.80%[38] stake in the Royal Bank of Scotland plc, which had sold more IRHPs within the scope of the Scheme than any other bank (almost twice as many as the second most). It is of note that RBS was a vocal outlier in the negotiations that led to the Initial Agreement and was the only bank who did not accept at all that mis-selling had occurred, nor that the FSA was right to be intervening[39].

61. Some of the exchanges between the FSA and HM Treasury are recorded in the Review:[40]

> *117. HMT official H is recorded acknowledging this may be seen as a "volte face", given HMT's previously adopted position: "i.e. that HMT fully supported small businesses and that the FSA needed to build a robust review and redress exercise". However, "the desire of ministers to limit the cost of this exercise over-rode HMT's previous position". HMT also considered that "the 31 January deadline was optimistic and should be put back". In response, Clive Adamson "explained that the FSA is an independent regulator and not a political body. As the CBU, we are focused on achieving fair and reasonable outcomes for consumers. We find it inappropriate for HMT to intervene in this manner given the nature of its involvement in the issue". The FSA appears to have resisted pressure to use the meeting to look at "the issues where the banks are lobbying hardest, and try to find ways to cut the cost". FCA employee G explained that while the FSA was prepared to explain its position more fully it would not engage in such an exercise. Nonetheless, the meeting then covered several issues of detail, including the proposed Sophisticated Customer Criteria, break costs disclosure, and redress, with HMT setting out its views on how these might be used to reduce the overall cost of the Scheme to the banks. The FCA emphasised that it was "not willing to compromise getting the right outcome for small businesses".*
>
> *118. Reflecting on this meeting, Clive Adamson stated in evidence to this Review that: "The financial crisis… was still continuing and there was still pressure on the financial position of banks including in relation to one in particular which had a large government ownership. So it wouldn't be unusual that there would be lobbying by the banks. … what was unusual here was a view clearly expressed about [the] desire of ministers to … question what we were doing and I think it[']s fair to say that we were disappointed in that".*
>
> …

[37] For example, Review, pg 169, para 65.
[38] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/254540/PU1581_RBS_bad_bank_Govt_review.pdf at para 1.41, which records HM Treasury's stake in RBS in around November 2013.
[39] Review, pg 169, para 71.
[40] Review, pgs 188-190, paras 117-121.

> *120. On 24 January 2013, a further meeting took place between Sajid Javid MP (then Financial Secretary to the Treasury), Martin Wheatley, and officials H and F of HMT. The FSA's note of the meeting records that Sajid Javid MP explained his concern about where to "draw the line" in respect of sophistication. Both he and HMT official F pressed the FSA for "flexibility" and challenged the FSA's proposed timeline for redress, which they considered "artificial".*[768]
>
> *121. HMT official H sent a follow-up email later that evening. In that email, they set out their position that certain key details of the Scheme had not yet been considered or worked through. They said: "there is still a large gap between the FSA and the banks on the detail. Given that the scheme itself is complicated, then it is the detail that will really make a difference". In respect of sophistication, they took issue with the feedback loop, which they described as allowing customers to have "another bite of the cherry through the main test of sophistication". HMT official H also questioned whether the test could be simplified "to deal with this complexity" without having a "negative impact on banks that don't have records for that period". They made a number of suggestions about how to achieve that end. FSA records noted that one such suggestion was including an "additional test to deem any customer with a hedge greater than £3.26 m[illion] as sophisticated". In response, the FSA explained that "this would remove a large number of customers we believe to be clearly non-sophisticated".*[41] (Emphasis added.)

62. Following these discussions with HM Treasury, in which the suggestion of a low and arbitrary IRHP notional threshold to determine sophistication was made, the FCA considered further, both internally and externally with other stakeholders, whether the Sophistication Test should be amended to include such a threshold. These discussions culminated in an amendment to the Sophistication Test by which any customer would be deemed sophisticated (and would therefore be excluded from the Scheme entirely) if either they – or the group of connected clients[42] that they were part of – had an aggregate notional value of IRHPs over £10 million. The Review refers to witness evidence collected in the course of the Review as to how the £10 million figure was arrived at:

> *FCA employee I, who played no part in the discussions at the time, later heard from those involved that the £10 million threshold was arrived at through the use of "an Excel spreadsheet containing the entire retail customer population" and the relevant team having '"played with the thresholds' until they were left with a 'reasonable population' that 'felt about right'". FCA employee A confirmed the existence of "a spreadsheet … that I was using … to model", but explained that the FSA "[had] limited data and intelligence and you have to make a decision and you can't quite quantify the lasting impact of that". They considered that the FSA "certainly did not know who would be captured by the objective test. We did not have that level of data or understanding about the potential unskilled population and therefore we were making judgments based upon samples and … discussions with the firm". Looking back, they concluded that "it's actually, now I think about it, really bad that we couldn't get more data from the firms on their base to model*

[41] Review, pg 190.
[42] Such a group of connected clients or parties was defined in accordance with the BIPRU (i.e., the Prudential sourcebook for Banks, Building Societies and Investment Firms) definition of groups of connected clients.

this. What we were told is they just didn't have it."[43] (Emphasis added.)

63. As the Review notes, the FCA communicated the amendments to the banks by way of a letter dated 29 January 2013, which appended a flow-diagram illustrating the functionality of the revised Sophistication Test. The content of that letter is helpfully summarised by the Review:

> *a. The flow chart set out below (Figure 3) illustrates the finalised Sophisticated Customer Criteria.*
>
> *b. The starting point for determining whether a customer was sophisticated (and therefore fell outside the Scheme) had shifted – from both the test outlined in the Initial Written Undertaking agreed in June 2012, and the proposed amendments to the Initial Sophisticated Customer Criteria outlined on 17 January 2013. A speaking note prepared for meetings with the banks on 29 January 2013 described the FSA as having made two "big concessions" in relation to the Sophisticated Customer Criteria (particularly for Lloyds), and that it was likely to be unpopular with consumer groups, who had not been consulted on the changes. It outlined. that a £10 million notional threshold rather than £7.5 million or £5 million had been selected for a number of reasons. In particular, it stated that the FSA had looked in detail at the types of customers who fell on both sides of an absolute cut-off for notional value. As noted above, however, based on the contemporaneous records and the witness evidence provided to the Review, it does not appear that the FSA undertook such work in any great detail, if at all.*
>
> *c. The letter enclosed the FSA's finalised redress principles. These remained largely unchanged from those principles communicated to the banks on 17 January 2013. One notable point of difference, however, was that in the version sent on 17 January 2013, only Category B and Category C customers could be found to have a "no redress" outcome where they either suffered no loss or where it was determined that, even absent the mis-selling, they would have bought the same IRHP. This now applied to all customers, so that there was no longer a right to automatic full tear up for Category A customers, nor an automatic right to redress, in such circumstances.*[44]

64. The events that followed immediately after, and the impression of both the FSA and the Banks is again helpfully summarised by the Review:

> *140. The same day, after 10.00 p.m., HMT official H contacted FCA employee M, apologising for the late hour and requesting to "speak briefly". M and FCA employee G called them that night. An internal FCA email circulated just before midnight records that HMT official H "had spoken to all the banks and… wanted to feedback on two key issues which they had raised" (in particular, RBS) regarding the FSA's position set out in its letter of 29 January 2013. HMT official H explained that their "impression was that the [banks] were a lot happier overall and in particular on sophistication and the FOS…. [Their] impression was that as a result of this, they seem to have shifted their position 'quite a lot'". FCA employees M and G "confirmed again that whilst we had moved substantially on sophistication to ensure that the right customers were involved in this exercise, we felt*

[43] Review, pg 196, para 131.
[44] Review, pg 198.

strongly that we should maintain our position on redress". In the round, they considered that the position arrived at by the FSA represented "a balanced approach which ensured fair and reasonable outcomes for the small and unsophisticated customers who had been mis-sold and was fair to the banks". HMT official H "asked us to keep…[them] informed as issues progressed tomorrow".

141. Despite their remaining reservations regarding certain aspects of the Scheme, all of the first-tier banks responded to the FSA on 30 January 2013, confirming their agreement in principle to the FSA's terms. The CSRC was informed that unconditional agreement had been received from the first-tier banks.[45]

65. As such, the terms of the Scheme were settled and the relevant sales proceeded to be reviewed by the Banks, under the supervision of the Skilled Person, over the course of the next 3 years.

Outcomes of the Scheme

66. The FCA published the final results of the Scheme in its results diagram on 30 September 2016.[46] The statistics most relevant to the Claimant's challenge are as follows:

a. There was a total of 30,784 IRHPs that came within the "review population" of the Scheme. That population comprised 2,104 Category A sales (sales of structured collars), 26,089 Category B sales (sales of all other standalone IRHPs) and 2,591 Category C sales (sales of caps). In total, there were 7,501 Category C sales, but these were only included in the Scheme (and therefore the "review population") where the customer proactively raised a complaint in relation to their cap(s).

b. At the first stage of the assessment, 10,577 sales of IRPHs were excluded from the Scheme on the basis of the Sophistication Test. This represented approximately 34.3% of the review population.

c. The basis of the exclusion for 4,977 of the sales was the "companies test" – i.e. those customers were automatically excluded based factors relevant to the size of the business, which was assessed on a group basis rather than the individual company level. A further 5,309 sales were excluded because the value of the IRHP exceeded £10 million, which was again assessed on an aggregate basis across company groups, not on an individual company basis. The final 291 were excluded based on the Banks' subjective assessment of their customers' sophistication.

d. Those figures can be broken down by the type of product as follows:

i. 505 Category A sales were excluded based on the Sophistication Test. For all other customers of structured collars, redress was automatically provided.

ii. 9,809 Category B sales and 263 Category C sales were excluded based on the Sophistication Test. Of the 16,570 customers who were permitted to raise

[45] Review, pg 201.
[46] https://www.fca.org.uk/publication/data/aggregate-progress-final.pdf

complaints about Category B and C sales through the Scheme (and did not opt out), approximately 90.6% of the sales were assessed as non-compliant.

Background to the Review

67. In June 2015, the FCA committed to a review of its supervisory intervention on IRHPs. Following the conclusion of legal action relating to the Scheme, the Review was announced in June 2019. The Review was intended to examine the "*quality and effectiveness of the supervisory intervention*". It covered the period from 1 March 2012 to 31 December 2018, so that it could assess both the implementation and operation of the pilot that preceded the Scheme and the Scheme itself. The FCA stated that the purpose of the Review was to consider what lessons could be learned from its intervention, not to reopen the Scheme or individual cases. However, the FCA did not appear to have contemplated the conclusions that would be reached in the Review.

68. The Review's Terms of Reference cover four broad topics:[47] (i) whether the approach to the intervention was reasonable, including consideration of the other options available to it and the parameters for the Scheme; (ii) whether the eligibility criteria for the Scheme were appropriate; (iii) whether the scheme delivered fair and consistent outcomes for SMEs in a proportionate and fair way; and (iv) whether the redress exercise was delivered in an effective and timely manner.

69. Of particular relevance to the Claimant's claim, the terms of reference include the following questions about the appropriateness of Scheme's eligibility criteria:[48]

> *(a) The scope of the scheme in light of the FSA's jurisdiction, including the definitions of SMEs who might benefit from it, the products covered and whether it was right to exclude commercial loans with mark-to-market break costs*
>
> *(b) The different approach to remediation based on the complexity of the products*

70. Further, in terms of whether the Scheme delivered fair and consistent outcomes for SMEs, the Terms of Reference expressly include consideration of the eligibility criteria:[49]

> *The approach to technical issues, such as but not limited to break cost, contingent liability, application of the sophistication criteria and alternative products as redress (swaps for swaps).*

71. Finally, the Terms of Reference directed the Review to consider the extent of the FSA's jurisdiction over IRHP sales and the work it took to analyse the extent of IRHP sales when considering the reasonableness of its response.[50]

72. The Review noted that it did not consider that the alternating use of the terms "reasonable" and "appropriate" in the Terms of Reference was intended to adopt different standards by which the FSA/FCA's conduct should be assessed. Rather, the standard to be adopted was that of "*an*

[47] The Terms of Reference are set out in the Review at Appendix 3.
[48] Question 2 of the Terms of Reference (see pg 425 of the Review).
[49] Question 3(a) of the Terms of Reference (see pg 425 of the Review).
[50] Questions 1(a) and (b) of the Terms of Reference (see pg 424 of the Review).

experienced, skilled and efficient regulator acting in accordance with its statutory duties and taking full account of the evidence available to it at the time of the decisions."[51] The Review also expressly precluded using the benefit of hindsight in making evaluations.[52]

Conclusions reached by the Review

73. The Review concluded that reaching a voluntary agreement with the Banks was an appropriate way for the FSA to respond to its concerns about the sale of IRHP to those customers who were eligible under the terms of the Scheme. However, in respect of the Excluded Customers, the Review concluded that the Scheme was an inadequate response, and the FSA was "*wrong to confine [the Scheme] to a subset of Private Customers/Retail Clients designated as 'non-sophisticated'*".[53]

74. The Review explained that all Private Customers/Retail Clients who fell within the FSA's remit had the same rights and were owed the same obligations by the Banks, and the FSA had the same corresponding duty to protect those rights. While the FSA may have been able to treat some customers more advantageously than others, the Review concluded that the FSA's decision to restrict the scope of the whole Scheme to 'non sophisticated' customers was made "*after only the briefest consideration*" and without adequate consultation.[54] It found no evidence of any impact analysis being conducted nor evidence as to how the Sophistication Test was appropriate.[55]

75. Not only did the FSA adopt a problematic process to exclude certain customers through the Sophistication Test; the Review also concluded that it was wrong in law.

76. The Review explained that the Private Customers/Retail Clients customers who fell within the FSA's remit are defined through a legislative test.[56] There are stringent conditions imposed upon a bank if it wishes to move a customer from this category into that of Intermediate Customers/Professional Clients, the consequence of which is to reduce the regulatory protections afforded to the customer.

77. The FCA's position when making representations to the Review was that not all customers were entitled to the same regulatory protection, nor did it owe them the same duty to protect against risk under s 5 of FSMA (as it applied to the FSA at the relevant time).[57] The FCA considered that some customers falling within its remit would have appreciated the risks in purchasing IRHPs, and therefore the redress scheme should be limited to non-sophisticated customers in order to secure them more timely redress than those non-sophisticated customers would otherwise receive.

78. The Review concluded that this approach was wrong. FSMA contemplated that a different level of protection was appropriate for different categories of consumers, but the legislation itself sets out these different categories: Private Customers/Retail Clients and Intermediate

[51] Review pg 295, para 3.
[52] Review pg 295, para 3.
[53] Review pg 316, para 1.
[54] Review pg 32 paras 42-43.
[55] Review pg 322 para 17.
[56] See paras 36 and 39 above.
[57] Review pgs 318-9, para 9.

Customers/Professional Clients. Section 5 of FSMA does not enable the FSA to further differentiate between customers within those categories.[58]

79. The Review further found that the Sophistication Test which was used to distinguish between the customers who came within the FSA's remit had no connection to the legislative framework that comprises the FSA's jurisdiction. Rather, the initial quantitative criteria – which excluded customers based on the size of their business (turnover, assets or employees) – were based on the Companies Act 2006. The Review concluded that there was no adequate explanation for why the customer's size meant that it should not qualify for redress under the Scheme, and the criteria were "*not objectively reasonable, nor appropriate*".[59]

80. The Review also found the subjective criteria in the Sophistication Test were not appropriate. The Banks were entitled under the terms of the Scheme to assess whether a customer had sufficient knowledge and experience to understand the IRHP contract. However, whilst a customer's understanding may be relevant to some of the Banks' regulatory obligations, other regulations, which were also within the FSA's jurisdiction, were breached even if the customer was capable of understanding the contract. The subjective element of the Sophistication Test therefore also did not align with the FSA's regulatory remit.[60]

81. Further, the Review found that the additional criteria added to the Sophistication Test in the Supplemental Agreement reached with the Banks further compounded the above errors of law. The FSA again took the approach that it was trying to include the "right" group of customers in the Scheme, without a clear definition of what constituted the right customer. The further exclusions were based on hypothetical examples, and there was again no evidence that the FSA undertook an impact assessment of these changes:

    a. The first additional criterion - namely the size of a business based on employee numbers, turnover, or assets - was applied collectively across groups of companies, regardless of whether the individual companies in the group fell below the threshold. Therefore, the Review found that the FSA simply "*assumed knowledge and experience of IRHPs as a result of the group structure, even if none existed at the level of the subsidiary that had purchased the relevant IRHP*".[61] The Review also noted that Sophistication Test was amended to remove customers' ability to demonstrate that they did not satisfy the company size criteria;[62] and

    b. The second additional criterion was that any IRHPs which exceeded £10 million in notional value were excluded. Again, the FSA assumed that this meant the customer of such an IRHP would have acquired the appropriate knowledge and experience of IRHPs and their risks. This was also applied to aggregate IRHPs across groups of companies, so that even if an individual company's IRHP was less than £10 million, if the total notional value of IRHPs sold to the group exceeded £10 million, the entire group was excluded from the Scheme.[63]

[58] Review pg 318, paras 4-7.
[59] Review pg 322, para 16.
[60] Review, pg 322, para 18.
[61] Review, pg 328, para 31.
[62] Review, pg 330, para 36.
[63] Review, pgs 328-9, paras 32-33.

82. Additionally, the Scheme defined groups of companies not just by concepts derived from the Companies Act 2006, but also by the test in the BIPRU.

83. Finally, the Review notes that the Excluded Customers were left to look after themselves, and the FSA ought to have known that their alternative options for redress were limited. Few would have been eligible to complain to the Financial Ombudsman Service, and many claims were time-barred by the time the Scheme was announced.

The Decision, the Reasons, and the 31 January Letter

84. The FCA responded to the Review on the same day that it was published. The detail of its response is set out in a document entitled "*Report of the Independent Review into the FSA and FCA's supervisory intervention on Interest Rate Hedging Products (IRHP) – The FCA response*", which is appended to this letter (the "**Response**")[64]. In the Response the FCA set out its reasons for the Decision.

85. The reasons relevant to the APPG's challenge are given in response to the following recommendation made by the Review:

> "*The FCA should aim to ensure that persons within the same category are treated consistently: where rules exist for the protection of all within a defined class, regulatory intervention should not be restricted to benefit only a subset of that class unless there is an objective justification founded on strong evidence and tested through consultation.*"[65]

86. Under the heading "Looking Back", the FCA explains[66] that: (i) it considers that it was appropriate for the FSA/FCA to seek to protect more vulnerable customers who had purchased IRHPs; (ii) the voluntary nature of the agreements necessarily involved some trade off and that there was no evidence that the Banks would agree to a voluntary scheme that included **all** Private Customers/Retail Clients; (iii) the FSA was obliged by FSMA to assess what it considered to be an appropriate degree of protection for consumers who had been sold IRHPs (in alleged accordance with section 5 FSMA as it then applied to the FSA); (iv) it was reasonable to judge that some customers were more likely to have understood the risks of their IRHPs and so it was reasonably to implement the sophistication test; (v) it was reasonable for the redress scheme to prioritise, and if appropriate be limited to, less sophisticated customers, so as to secure more timely redress for them; and (vi) the Scheme provided swift redress for the customers it reasonably considered to be most at risk, and the differentiation of customers within the Private Customer/ Retail Client class was considered to be an appropriate mechanism for achieving that outcome, based on their likely sophistication as identified by detailed criteria the FSA developed (each a "**Retrospective Reason**" and together, the "**Retrospective Reasons**").

87. Under the Heading "Looking Forward", the FCA explains the following:

> "*It remains important that we can use flexibility, both in redress interventions and more generally, to ensure appropriate protection for consumers in real-world circumstances.*

[64] https://www.fca.org.uk/publication/corporate/independent-review-irhp-fca-response.pdf
[65] Response pg 11.
[66] At paras 3.22 to 3.28 of the Response.

That means we will sometimes need to use our regulatory judgement to treat different types of consumers differently, even if they belong to the same regulatory classification. In the case of potential redress interventions, this judgement will take account of the wider framework of pathways to redress that the customers may or may not have, such as the approach and jurisdiction of the Ombudsman Service (as enhanced now for SMEs), the BBRS, Financial Services Compensation Scheme, and the Courts" (the "**Prospective Reason**").

88. The Retrospective Reasons and the Prospective Reason are helpfully captured in summary by the FCA in the preamble to the Decision: "*The FCA does not consider that the FSA was wrong to limit the scope of the redress scheme to less sophisticated customers*"[67].

89. The Claimant has also carefully considered the 31 January Letter, which seeks to justify the Decision by reference to the following additional reasons (each and "**Additional Reason**" and together the "**Additional Reasons**"):

a. the FCA relies on the fact that the terms of refence of the Review were made clear that it "was "*not intended to be a route by which the redress scheme can be re-opened" and the Swift Report did not suggest that this should be the case*"[68];

b. the FCA states that "*it is nearly ten years since the FSA made its key decisions about the nature and scope of the scheme and 9 years since the eligibility criteria were finalised. Those decisions were widely discussed, with some stakeholders expressing reservations about them at the time, and the eligibility criteria expressly challenged (unsuccessfully) in judicial review proceedings*";

c. the FCA repeats that at the time the Scheme was set up, "*the FSA had a limited knowledge base at the time in respect of IRHPs*" and that at, at the time, it "*acted with pace*" and "*sought to direct redress as quickly as possible*"; and

d. the FCA notes that "*whilst we recognise that the FSA's regulatory remit and conduct of business rules extended to both the "sophisticated" and "unsophisticated" customers, that does not lead to a conclusion that the FSA was (or the FCA is) bound to regard all customers in the same way or as requiring the same degree of protection. Under FSMA, the FSA was obliged to assess what it considered to be an 'appropriate' degree of protection, taking into account several factors including the differing degrees of experience and expertise that different consumers may have had. The FSA's decision was in accordance with this approach and it was not unreasonable for it to agree a voluntary scheme for only the unsophisticated SMEs within the Private Customer/Retail Client class, given the 'bird in the hand' benefits identified by Mr Swift*".

90. The Claimant does not consider that any of the Additional Reasons do justify the Decision, for the reasons set out in paragraph 95 below.

[67] "*FCA publishes the Swift Review into the supervisory intervention on interest rate hedging products*" at https://www.fca.org.uk/news/press-releases/fca-publishes-swift-review-supervisory-intervention-interest-rate-hedging-products

[68] Page 2, the 31 January Letter.

The Grounds

91. Pending the FCA's response to this letter, the APPG contends the Decision was unlawful for the following reasons:

Ground 1: the Decision was illegal

92. The FCA erred in law when appraising its regulatory jurisdiction in the context of the establishment of the Scheme and the subsequent making of the Decision.

93. Each of the Retrospective Reasons upon which the FCA asserts that it was right to treat sub-sets of the Private Customer/Retain Client differently from each other, is flawed:

a. As to Retrospective Reasons (i), (iii), (iv), (v) and (vi), formulating and adopting sophistication criteria when the regulatory framework had already determined the cohort of customers who had the benefit of enhanced regulatory protection from the FSA, was a contravention of the FSA's regulatory jurisdiction. This is for the reasons set out in the Review, as described in paragraphs 75 to 83 above. The Decision simply does not engage with, let alone answer, the Review's findings in this regard.

b. Further, the FSA's original intention of adopting a "*sophistication*" test was to provide redress for certain "*less sophisticated*" customers of the most complex IRHPs automatically, i.e. without enquiry into the circumstances of the sale. In all other instances, it was intended that an individual assessment would determine whether an IRHP was mis-sold in each case. The FCA asserts that it departed from an individual assessment approach in order to obtain redress for vulnerable customers in a timely manner. However, in fact, two different types of individual assessment did occur for those vulnerable customers in any event: (i) the FSA permitted banks to exclude customers based on a subjective assessment of customers' sophistication and ability to understand IRHPs; and (ii) a factual enquiry was undertaken in relation to the sale of less-complex IRPHs for all customers who were deemed unsophisticated. As such, case-by-case assessments were in fact undertaken even for those "*prioritised*", "*unsophisticated*" eligible customers, whereas customers who were deemed sophisticated under the test were not given the opportunity to disprove that designation, notwithstanding that the FSA's regulatory remit extended equally to both "*sophisticated*" and "*unsophisticated*" customers.

c. Further as to Retrospective Reasons (i), (iv), and (v), following factual enquiry into all of the sales of IRHPs that were reviewed in the Scheme, it is now known to the FCA that the sales were non-compliant, and the products were mis-sold, in over 90% of cases. The Review reveals that, during the establishment of the Scheme, the FSA was concerned that it did not have enough evidence to meet the evidential burden required for it to pursue compulsory redress (as described at paragraph 51 above). This is centrally relevant to the flawed nature of the Decision. The FCA now knows that the majority of sales to those customers deemed to be sophisticated (and thus excluded from the Scheme) are likely to have been non-compliant sales. It follows that there is an even stronger and evidenced compulsion on the FCA to now take steps to establish a route to redress for the Excluded Customers. However, by the Decision, the FCA has elected not to.

d. As to Retrospective Reason (ii), the FCA states that there is no evidence that the banks would have agreed to a scheme that included all Private Customer/Retain Clients. That is not accepted by the Claimant (nor would it be accepted, if alleged, that the banks would not comply with regulatory action by the FCA following the publication of the Review). It is more pertinent to the conclusions of the Review and the lawfulness of the Decision, given the extent of mis-selling that was revealed by the Pilot Review, that there is no evidence that the FSA sought to negotiate on this point at all. Its original proposals as to the purpose and application of the Sophistication Test were simply brushed aside. Further still, the FSA had in its power the ability to vary a firm's regulatory permissions (under section 45(1)(c) FSMA as in force at the relevant time) when it appeared "*desirable to exercise that power in order to meet any of its regulatory objectives*", and this could have been used to apply legitimate pressure on the banks to agree to a voluntary review that encompassed all customers who were subject to greater regulatory protection. In that context it is not accepted that the FSA had to trade away the regulatory protections of nearly 35% of relevant transactions in order to procure agreement from the banks to a voluntary scheme at all. Even if it had, as the Review points out, this was a situation of the FSA's making and it should not have found itself in this position[69]. The FCA has the same power to vary permissions today pursuant to s 55J of FSMA.

e. As to Retrospective Reason (iii), the FSA misinterpreted the operation of s 5 FSMA (as it then applied to the FSA), and the FCA misinterprets the same provisions that apply now, which are found in s 1(c) FSMA. In this connection the APPG refers to and adopts as averments the conclusions reached in the Review on this issue:

> *[The representation from the FCA that section 5 FSMA left it] reasonably open to the FSA to take the view that some customers falling within the Private Customer/Retail Client group likely would have appreciated the risks in purchasing an IRHP, and that any redress scheme should be limited to non-sophisticated customers in order to secure more timely redress given the very difficult financial circumstances that many of them were facing … does not…sit well with the legal and regulatory framework. Under FSMA, a "consumer" includes any person who uses regulated financial services, whether they be retail clients, investment professionals or market counterparties.1320 Given the breadth of the definition, a different level of protection is appropriate for different categories of such "consumers". This was reflected in the COB/COBS customer classifications/client categories. It does not follow, however, that the FSA or the FCA was justified in further differentiating, by reference to the consumer protection objective or at all, as between consumers within the same category without adequate objective justification and without prior proper consultation with stakeholders. I have also seen no contemporaneous evidence to suggest that the FSA analysed or justified the concessions it made from time to time by reference to the consumer protection objective.*[70]

f. As to Retrospective Reason (vi), the Scheme did provide redress for a sub-set of the relevant transactions, but it was achieved in dereliction of the regulatory obligations and

[69] Review, pg 305, para 22.
[70] Review, pg 319, paras 9 and 10.

duties owed by the FSA to those customers who were deemed sophisticated. This left thousands of customers without any redress, who in many cases had their businesses and lives ruined by the mis-selling of IRHPs. The FCA has failed to provide a remedy to this group of customers, which is a further breach of its regulatory obligations. As the FCA itself noted when considering the type of redress mechanism to adopt, *"opting for what seems initially to be swifter actions generally makes in practice for messier and delayed solutions in the longer run.*" The Excluded Customers have been waiting nearly a decade for the ability to seek redress, which has again been denied, this time by the Decision.

94. The Prospective Reason reveals that the FCA continues to err in law as to the scope of its regulatory jurisdiction. The duties and obligations that it owes to Private Customer/Retail Clients, as set out at in Part 7 of this letter above, are the same as those applicable to the FSA when the Scheme was established. The Prospective Reason appears to have provided a foundation upon which the FCA considers itself able to make the Decision, but the FCA's reasoning here is flawed and illegal, for the reasons set out above.

95. Each of the Additional Reasons is also flawed and supports the Claimant's averment that the Decision is illegal. In particular:

a. As to Additional Reason (a), it is a self-serving argument to state that the Decision is justified by the FCA's own decision as regards the scope of the Review and ignores the magnitude of the conclusions reached in the Review, notwithstanding its limited scope. It is noted nonetheless that "*on 30 September 2021 the FCA Board gave careful consideration to the findings of the Swift Report (which it saw in near final form) and the question of whether the FCA should seek to use its powers now to require any further redress to be paid to IRHP customers*" meaning that the FCA appears to accept that the terms of reference cannot reasonably influence whether the FCA should now consider redress in light of the Review, as it in fact proceeded to do.

b. In respect of Additional Reason (b), as to:

i. the time that has passed, the Claimant is not challenging the original scope of the Scheme, nor the original establishment of the Sophistication Test (though it is averred that both were unlawful) – it is challenging the Decision, which was made in December 2021, in light of the findings of the Review and subject to the regulatory framework in place at that time;

ii. discussions with stakeholders expressing reservations at the time, the Review has found that the contemporaneous consultations were deficient and took place after the eligibility criteria had been agreed, and no consultations with stakeholders appear to have taken place at all in respect of the Decision;

iii. "*unsuccessful*" judicial review proceedings at the time, the only proceedings which related to the eligibility criteria and the Sophistication Test was the case of *R (Jenkinson and ors.) v FCA*[71], in respect of which the Review records (and the Claimant adopts as averments) the following:

[71] Judicial review case in 2013 (unreported; CO/5140/2013).

41. It was never clear, nor obvious, why customers who fell on the wrong side of the quantitative criteria (whether as set out in the Initial Agreement or as amended subsequently) should be excluded from the Scheme in the first place. The FSA appears to have proceeded on an impressionistic view that certain kinds of Private Customers/Retail Clients were deserving of regulatory protection, whereas others were not, without ever expressly articulating or testing that approach. On that basis, it adopted and varied the eligibility criteria (often at the instigation of the banks), with only a vague understanding of the real-world impact these changes would have on businesses that had been mis-sold IRHPs. This was particularly problematic as customers deemed sophisticated under the objective test had no opportunity of disproving this under the Scheme. The built-in asymmetry gave the banks 'two bites of the cherry'; whereas customers faced failing either the quantitative or qualitative test, without any adequate means of challenge. Such customers had no opportunity to demonstrate that they were in fact non-sophisticated, no matter how arbitrary the result produced by the strict application of the eligibility criteria was in their case.

42. Overall, far from using the Pilot Stage to satisfy itself that only those with genuine knowledge and experience of IRHPs and their risks would be excluded, the FSA embarked upon a significant further narrowing of the eligibility criteria for the Scheme. Having made further concessions down to the last moment, it ended up with an untested, unsampled mix of criteria so complex they had to be set out in a diagram resembling an intricate ancestry chart.

43. As a result, in respect of some 10,000 excluded sales to customers, the banks were relieved of any responsibility under the Scheme to provide redress. The affected customers had no opportunity of arguing that they were mis-sold IRHPs, and were unable to obtain redress either under the Scheme or through any other action of the FSA/FCA. For the reasons explained above, I have concluded that this was not appropriate.

44. I do not consider that the permission decision of the Administrative Court in R (Jenkinson and ors.) v FCA1372 ("R (Jenkinson)") alters this conclusion. The applicants in that case sought judicial review of a number of aspects of the eligibility requirements under the Scheme, including on irrationality grounds. In an order refusing permission to apply for judicial review, Silber J. gave only brief written reasons. No oral renewal hearing was sought. The issue before the High Court, however, was one of legality on a rationality review and in that context the judge emphasised the high threshold the claimants had to meet in that context and expressed hesitation about interfering with the exercise of discretion by a specialist regulator. In contrast, the issues in the ToR are much broader and relate to what was appropriate, not just rational. Moreover, the judge did not have before him the vast majority of the extensive evidence considered by this Review. Further, the Applicants did not challenge the critical distinction between 'sophisticated' and

'nonsophisticated' customers within the same category. That being the case, it is unsurprising that the £10 million value test – the only aspect of the challenge in relation to which the applicants were not out of time – was not seen by the judge as irrational, but as an exercise of discretion as to how the test might be applied. In the circumstances, I am not persuaded that R (Jenkinson) is relevant to my conclusions.[72]

c. As to Additional Reason (c), the Claimant would repeat the points made at paragraph 90(c) above.

d. As to Additional Reason (d), this is further evidence that the FCA continues to err in law as to the scope of its regulatory purview and obligations, and the matters set out in paragraph 90(e) above are repeated. The FCA refuses to engage with the central issue: the Review concludes (and the Claimant avers) that the FSA then, and the FCA now, was not and is not entitled to sub-divide Private Clients/Retail Customers for the purposes of the regulatory protections that are afforded, because s 5 FSMA then (and section 1(c) FSMA now) provides that the FSA/FCA was/is obliged to consider the appropriate degree of protection for all consumers (i.e. all Private Clients/Retail Customers), not to consider which consumers had protection at all (as it did when making the Decision). The FCA does not engage at all with this point.

96. Further, as a result of the matters described at paragraphs 60 to 63 above, the Claimant is concerned that the Decision was made, at least in part, as a result of undue influence from HM Treasury, whether as a result of the pressure exerted on the FSA at the time which continued to influence the FCA when making the Decision, or as a result of influence exerted by HM Treasury on the FCA around the time the Decision was made.

Ground 2 – The Decision is Irrational

97. For the reasons described above, the Decision is: (i) based on an interpretation of the relevant regulatory framework applicable to the FCA that is manifestly incorrect; and (ii) made in circumstances where the FCA has the relevant statutory powers to procure redress in relation to the Excluded Transactions and is obliged to do so, such that no reasonable financial regulator could ever have come to it.

98. The Decision states in bald terms that the FCA considers that the FSA was entitled to exclude more sophisticated customers from the Scheme[73]. However, the Review explains clearly that the Decision is not based on evidence or on proper analysis and was wrong in law[74]. The information available to the FCA now further indicates that there is likely to have been widespread mis-selling in respect of the Excluded Transactions. The FCA, by the Decision, neither accepts nor engages with this finding of the Review.

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[72] Review pgs 331-332.

[73] "*…we consider that it was reasonable and appropriate for the FSA to exclude from the Scheme the more sophisticated customers within the Private Customer/Retail Client class, given the FSA's regulatory aim of providing swift and certain redress to those who were in the most vulnerable circumstances among that varied customer base*", the Decision, para 1.11.

[74] "*I am clear that the FSA should never have agreed to limit eligibility for the Scheme, without adequate justification and consultation*", the Review, pg 324, para 21.

Ground 3 – The Decision is Procedurally Unfair

99. The Scheme was established without any proper impact assessment in relation to the bank customers who were affected by it, and without any proper consultation with the relevant stakeholders. We refer, without limitation, to the following findings in the Review:

    a. "*The changes to the eligibility criteria were all agreed 'behind closed doors', without consultation or explanation, meaning that customers found themselves suddenly excluded from the Scheme without knowing why this was being done and without any opportunity to comment before the changes were made*…"[75].

    b. "*As indicated above, I have seen no evidence of any adequate analysis or impact assessment underpinning the various changes, whether individually or collectively*"[76].

    c. "*There is nothing in the evidence before this Review that suggests that "consumer groups" were consulted on, or approved of, these changes*"[77].

    d. "*Not only was the Scheme presented as a fait accompli, in respect of which there had been no consultation, but the intended beneficiaries (and the wider public) were not even informed about its full components*"[78].

100. We note that the FCA's letter of 31 January 2022 suggests "*those decisions* [regarding the Scheme's eligibility criteria] *were widely discussed, with some stakeholders expressing reservations about them at the time*". That statement ignores the findings reproduced above. The FCA is wrongly equating the discussions that took place after the eligibility criteria were published with consultation when the eligibility criteria were agreed with the banks – as the Review records, the latter took place without any meaningful consultation with any stakeholders except the banks themselves.

101. Despite the findings of the Review in this regard, the Decision was made without any impact assessment or consultation at all. This was despite the FCA knowing at the date of the Decision (even if the FSA was not aware at the time of the Scheme) that sales were non-compliant and IRHPs were mis-sold in over 90% of cases, making it even more important now to offer redress to these customers (see paragraph 93.c above). The FCA's duty to consult is highlighted in the Review itself,[79] yet the FCA has failed to adhere to this duty in reaching the Decision.

Reserve Grounds

[75] Review, pgs 326-7, para 28.
[76] Review, pg 329, para 35.
[77] Review, pg 330, para 37.
[78] Review, pg 367, para 79.
[79] "*The lesson for the FCA is that, without well-evidenced objective justification, it should apply its Principles and rules without distinction to all who qualify for their protection. Where the FCA considers that there is an objective justification for limiting the scope of a remedy to only certain persons within the same class, there should be proper consultation with stakeholders before any such action is approved. In that context, the FCA should explain its intended approach and the reasons for it (for instance that that group alone has suffered detriment and/or that the wider scope would be disproportionate) and allow affected persons and other stakeholders a proper opportunity to make representations in respect of the proposed restriction*", Review, pg 373.

102. The Claimant reserves the right to expand on the grounds set out above, following provision of the information and documentation sought below.

Part 8 – Details of the action that the defendant is expected to take

103. The Terms of Reference for the Review state that it is not intended to be a route by which the Scheme can be re-opened[80]. However, with the Review having reached such clear findings that sophisticated customers were wrongly excluded from the Scheme, the FCA cannot lawfully ignore them[81]. Rather, it should revise the Decision to offer such customers redress.

104. There are a number of ways the FCA could do this. In particular, it could:

    a. establish a new consumer redress scheme under s 404 of FSMA;

    b. vary a firm's regulatory permissions to compel it to provide redress by way of agreement[82]; and/or

    c. apply for or order restitution under ss 382 or 384 FSMA.

105. Because of the potential challenges associated with a s 404 scheme[83], the Claimant considers that an appropriate revision to the Decision would be:

    a. the imposition of requirements and variations of permissions to require the firms which participated in the Scheme to establish consumer redress schemes (or a single consolidated scheme) to provide redress to the Excluded Customers; and

    b. to consider and consult in respect of using the same powers to require firms which did not participate in the Scheme, but in respect of which there is evidence of IRHP mis-selling, to establish a similar scheme, given that it is now known (as it was not at the time that the Scheme was established) how widely the problem of IRHP mis-selling extended.

106. In carrying out the above, the FCA should be acutely conscious of the criticisms and concerns raised in respect of the Scheme and the actions of the banks both in the Review and elsewhere. The Business Banking Resolution Service ("**BBRS**") may be an appropriate vehicle for such a redress scheme, but the Claimant and other stakeholders should be properly consulted as regards any implementation. For example, the Claimant is aware that at least one Excluded Customer was refused permission by the relevant bank to submit its claim to the BBRS. This would obviously be unacceptable if the BBRS was adopted as the vehicle.

Part 9 – ADR Proposals

[80] See the Terms of Reference at paragraph 4, page 424 of the Report.
[81] The FCA's letter of 31 January 2022 seeks to rely on the fact that the Review did not suggest that the Review be re-opened. However, the Review careful to record that its scope was delineated by the Terms of Reference – it is a self-serving argument to state that the Decision is justified by the FCA's own decision as regards the scope of the Review.
[82] Review, pg 69 para 83.
[83] Review, pg 382 para 32.

107. The Claimant will consider whether ADR has any reasonable prospect of success in light of the FCA's response to this letter. The Claimant will be willing to consider an ADR mechanism that provides for redress in relation to the Excluded Customers and banks who did not participate in the Scheme, but such mechanism will need to be established promptly and upon the basis that the FCA accepts that the Decision is unlawful, as described above. The FCA would also need to agree to a stay of the legal proceedings (once issued) whilst any such considerations are ongoing.

Part 10 – Details of any Information Sought

108. The FCA is urgently required to provide the following information:

a. Please describe the extent to which HM Treasury was consulted in respect of the Decision, including any individuals who were involved and the dates and methods of any relevant correspondence and/or meetings;

b. Please describe the extent to which the Banks that took part in the Scheme were consulted in respect of the Decision, including any individuals who were involved and the dates and methods of any relevant correspondence and/or meetings; and

c. Please explain what, if any, wider consultations were carried out in respect of the Decision.

Part 11 – Details of Any Documents That Are Considered Relevant and Necessary

109. By the date set out for a response to this letter, the FCA is requested to provide copies of the following documents:

a. Minutes of the meeting on 30 September 2021 at which the FCA Board resolved to make the Decision and any briefing material provided to the Board which related to the Decision;

b. Correspondence with HM Treasury, the Banks and any other stakeholders in relation to the Decision and minutes or attendance notes of any calls or meetings with those parties;

c. Correspondence and records of meetings and discussions with HM Treasury relating to the events referred to at para 3.25 of the Decision, including, *inter alia*:

i. the letter to Mark Hoban MP on 29 June 2012;[84]
ii. email records regarding the meeting organized by HM Treasury on 15 October 2012;[85]
iii. minutes and other records of meetings with HM Treasury from November 2012 to January 2013;[86]
iv. minutes of meetings with HM Treasury and Sajid Javid MP on 24 January 2013;[87]
v. email correspondence with HM Treasury on 24 and 25 January 2013;[88]

[84] Review pg 133, para 81.
[85] Review pg 155, para 43.
[86] Review pg 167, para 62 and pg 190 para 120.
[87] Review pg 188, para 116.
[88] Review pg 190, paras 120-121.

vi. email on 24 October 2013 summarising meetings with HM Treasury;[89]
vii. email correspondence with HM Treasury on January 2013;[90]
viii. internal email(s) on 29 January 2013 recording call with HM Treasury;[91]

d. Correspondence and records of meetings and discussions with the banks relating to the events referred to at para 3.25 of the Decision, including, *inter alia*:

i. minutes of the meeting on 11 June 2012 with Barclays;[92]
ii. minutes of the meeting on 18 June 2012 with Barclays;[93]
iii. minutes of the meeting on 27 June 2012 with Barclays;[94]
iv. minutes of the meeting on 17 January 2013 with Barclays;[95]
v. Minutes and other records of meetings with banks from November 2012 to January 2013;[96]
vi. minutes of and emails regarding the meeting with Lloyds on 17 January 2013;[97]
vii. minutes of and emails regarding the meeting with RBS on 18 January 2013;[98]
viii. records of the call with RBS on 15 June 2012;[99]
ix. email correspondence on 17 June 2012;[100]
x. the letter from HSBC on 20 June 2012;[101]
xi. correspondence on 25 June 2012 to the banks providing the draft Initial Agreement;[102]
xii. emails on 12 July 2012[103] and in September and October 2012[104] in relation to the Pilot Review;
xiii. email to Lloyds on 6 December 2012;[105]
xiv. email to Barclays on 10 December 2012;[106]
xv. email correspondence with the Banks on 13 and 14 December 2012;[107]
xvi. email from HSBC on 18 December 2012;[108]
xvii. letters from the Banks on 30 January 2013 confirming agreement in principle to the terms of the Scheme;[109]
xviii. emails to the Banks on 18 February 2013 and responses received on 1 March 2013;[110]

[89] Review pg 189, para 119.
[90] Review pg 198, para 138.
[91] Review pg 201, para 140.
[92] Review, pg 117, para 56(a).
[93] Review, pg 117, para 56(c).
[94] Review pg 127, para 72(d).
[95] Review pg 166, para 61.
[96] Review pg 175, para 61.
[97] Review pg 188, para 114.
[98] Review pg 188, para 115.
[99] Review pg 117, para 56(a).
[100] As referred to in para 56(b) of the Review, pg 117.
[101] Review pg 118, para 56(d).
[102] Review pg 124, para 67.
[103] Review pg 147, para 26.
[104] Review pg 156, paras 45-46.
[105] Review pg 169, para 67(b).
[106] Review pg 169, para 67(b).
[107] Review pg 169, para 68.
[108] Review pg 169, para 67(b).
[109] Review pg 201, para 141.
[110] Review, pg 208, para 14.

xix. internal emails and records summarizing discussions with the Banks dated 18 June 2012,[111] 22 June 2012,[112] 26 June 2012,[113] 27 June 2012,[114] 18 September 2012;[115] 5 November 2012 (recording details of a meeting with Barclays on 2 November 2012);[116] 9 January 2013 (recording responses to the sophistication test);[117] memorandum of 15 January 2013;[118] draft paper of 24 January 2013;[119]

xx. CSRC Summary Papers dated 20 June 2012[120], 18 December 2012[121], 15 January 2013,[122] and 28 January 2013;[123] and minutes dated 26 June 2012;[124] and 28 January 2013[125]; and

e. Any further documents evidencing the reasons for the Decision.

Part 12 – Address for Reply and Service of Court Documents

110. Please use the solicitors' contact details set out in Part 4 above.

Part 13 – Requested Reply Date

111. The Claimant is required to issue its judicial review within 3 months of the Decision, so by 13 March 2022.[126] In light of that deadline, we request that you reply in writing pursuant to paragraph 20 of the Protocol within 14 days, i.e. on or before 22 February 2022.

Yours faithfully

Hausfeld & Co LLP

Hausfeld & Co LLP

[111] As referred to in para 56(b) of the Review, pg 117.
[112] As referred to in para 56(e) of the Review, pg 118.
[113] As referred to in para 69 of the Review, pg 124.
[114] Review pg 126, para 71.
[115] Review pg 167, para 65(b).
[116] Review pg 165, para 59.
[117] Review pg 169, para 67(b).
[118] Review pg 195, para 130.
[119] Review pg 187, para 113.
[120] Review pg 119, para 58.
[121] Review pg 173, para 80.
[122] Review pg 177, para 92.
[123] Review pg 192, para 126.
[124] Review pg 125, para 70.
[125] Review pg 193, para 128.
[126] Being within 3 months of the Decision, as required by CPR 54.5(1). If the FCA sought to argue that these 3 months should run from the decision of its board on 30 September 2021 as referred to in the FCA's letter of 31 January 2022, the Claimant seeks an extension of time, given that the Claimant was not aware of that decision at the time and acted promptly once it became aware of it, via the Decision.