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Mind the Consumer Protection Gap: the UK Financial Ombudsman Service, Fairness and Reasonableness, and the Law

1. Introduction

This paper provides a new framework to manage the relationship in consumer alternative dispute resolution (CADR) between legal rules (e.g., those emanating from statute, case law, or regulatory bodies) and broader fairness and reasonableness principles (which are based on a blend, in particular, of regulatory standards, good industry practice, consumer expectations, views of consumer protection bodies, principles developed by ombudsmen, and consumer law theory on vulnerability). The framework holds that fairness/reasonableness has a distinct role from legal rules; that this should not usually involve reducing or replacing the standards set by the legal rules but rather enhancing these by acting as a benchmark. The paper argues that it should be asked whether, by reference to these fairness/reasonableness principles, there is an actual or potential consumer protection gap in the legal rules. Does the law not go as far as the fairness/reasonableness principles would in protecting the consumer (whether because there is no legal rule at all, or because the rule in question does not provide sufficient protection)? If so, fairness/reasonableness principles can add the elements needed to plug the gap; or at least fairness/reasonableness can be used to justify the most protective application possible of the legal rules.

It is shown that certain Financial Ombudsman Service (FOS) and court decisions do offer support for this framework. However, FOS' approach to this is not consistent enough. The paper considers the work of FOS on authorised push payment (APP) fraud (whereby, using electronic transfer of funds the consumer is tricked into authorising a payment to a fraudster, e.g., the consumer may be led to believe the fraudster to be someone such as a building company to whom a payment is due). APP fraud is among the most prevalent financial crimes in the UK. In 2019 it affected 121,658;[1] and in 2020, 143,259 consumer victims.[2] This type of fraud shows an upward trajectory,[3] especially considering the greater online presence of consumers in the current coronavirus pandemic.[4] Using the example of APP fraud, it is shown that in most cases FOS did not use fairness/reasonableness in the way we suggest. Whilst the specific APP problem has largely been resolved as since 2019 the Contingent Reimbursement Model Code (CRM Code)[5] protects victims of APP fraud, the fairness/reasonableness

[1] UK Finance, 'Fraud - The Facts 2020' (2020) 45 <https://www.ukfinance.org.uk/policy-and-guidance/reports-publications/fraud-facts-2020> accessed 12 July 2021.
[2] UK Finance, 'Fraud - The Facts 2021' (UK Finance 2021) 53 <https://www.ukfinance.org.uk/policy-and-guidance/reports-publications/fraud-facts-2021> accessed 12 September 2021.
[3] Tamsin MacCormack, 'APP Fraud – Less Talking, More Acting' (*UK Finance*, 2 April 2020) <https://www.ukfinance.org.uk/news-and-insight/blogs/app-fraud-less-talking-more-acting> accessed 12 September 2021.
[4] See e.g. Daniel Thomas, 'UK Bank Account and Loan Fraud Soars in Pandemic' *Financial Times* (24 August 2021) <https://www.ft.com/content/b0d07dac-2a44-40ee-84e0-7217a5d489fb?> accessed 12 September 2021.
[5] The Lending Standards Board, 'Contingent Reimbursement Model Code for Authorised Push Payment Scams' (LSB 2021) <https://www.lendingstandardsboard.org.uk/crm-code/> accessed 13 September 2021.

principles and the framework developed here remain of enormous significance. APP fraud is only one of the large numbers of ever-developing types of disputes dealt with by FOS, where legal protection gaps may arise; and fairness/reasonableness also play a key role in other CADR schemes across other economic sectors in the UK[6] and around the world.[7]

FOS[8] and other CADR schemes[9] are built on the idea of consumer protection: the consumer as the weaker party who needs to be offered something different from the normal route to legal redress. Under s. 228(2) of the Financial Services and Markets Act 2000 (FSMA), "A complaint is to be determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case." We show that this does not only mean procedural fairness (that is e.g., ADR offering affordable and speedy dispute resolution). It also means (and is accepted by the courts to mean) *substantive* fairness:[10] producing a fair outcome, *by using broad fairness/reasonableness principles*, to enhance the substantive level of protection provided by the legal rules.[11] In other words, "fairness/reasonableness" is not just a symbolic, rhetorical statement that brings nothing distinct to the table. On the contrary, fairness/reasonableness *is* intended to be capable of providing something different from what is contained in the legal rules.

What can the principles of fairness and reasonableness bring according to our framework? What can the content of fairness/reasonableness be? The FCA Handbook in Dispute Resolution: Complaints sourcebook (DISP) 3.6.4R provides some context-specific direction, referring to regulatory rules, guidance and standards, codes of practice, and good industry practice; [12] and, as will be explained

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[6] For example, in relation to the Ombudsman Services see section 9.8 of its terms of reference (Ombudsman Services, 'Terms of reference – post 2015' - <https://www.ombudsman-services.org/scheme-rules/terms-of-reference-post-2015> accessed 09/09/2021; the Legal Ombudsman, see s.137(1) of the Legal Services Act 2007 and its Scheme Rule 5.36; the Property Ombudsman, see ss.27 and 28 of its terms of reference available at <https://www.tpos.co.uk/consumers/faq/2-uncategorised/171-corporate-reference-policy-procedures> accessed 09/09/2021; for the Double Glazing & Conservatory Ombudsman Service (DGCOS) see <https://www.dgcos.org.uk/about/alternative-dispute-resolution-adr> accessed 09/09/2021.

[7] For example, the Netherlands Foundation for Consumer Complaints Boards base their decisions on what is reasonable and fair, good practices, terms and conditions negotiated between business associations and consumer unions; Belgium's Service de Médiation Banques-Crédit-Placements can decide based on codes of conduct and equity, see Civic Consulting, *'Study on the use of Alternative Dispute Resolution in the European Union'* (16 October 2009) 4.1.8 <ec.europa.eu/consumers/redress_cons/adr_study.pdf> accessed 09/09/2021; s.9 of the New Zealand Bank Ombudsman states that, "In making any decision, the scheme must be fair in all the circumstances, having regard to the law, any relevant code of practice, and principles of good banking practice." The terms of reference are available <https://bankomb.org.nz/the-complaint-process/> accessed 09/09/2021.

[8] See section 2 below.

[9] Christopher Hodges, Iris Benöhr and Naomi Creutzfeldt-Banda, 'Consumer-to-Business Dispute Resolution: The Power of CADR' (2012) 13 ERA Forum 199, 203.

[10] *R (on the application of Norwich and Peterborough Building Society) v Financial Ombudsman Service* [2002] EWHC 2379; *R (on the application of IFG Financial Services Ltd) v Financial Ombudsman Services Ltd and another* [2005] EWHC 1153 (Admin) at [74], [88]-[90], [92]; *R (on the application of Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service* [2008] EWCA Civ 642; *Berkeley Burke SIPP Administration Ltd v Financial Ombudsman Service Limited* [2018] EWHC 2878 (Admin); *R (British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin).

[11] The separate but analogous procedural/substantive fairness labels used to highlight differences between legal rules on the process of making a contract, and legal rules on the substantive content of the contract: Mindy Chen-Wishart, *Contract Law* (Sixth edition, Oxford University Press 2018); Chris Willett, 'General Clauses and Competing Ethics of European Consumer Law in the UK' (2012) 71 The Cambridge Law Journal 412.

[12] In the context of what was good industry practice at the time. See, *R (on the application of Williams) v Financial Ombudsman Service* [2008] EWHC 2142 (Admin) at [45], the court stated that it is appropriate for the ombudsman to rely on his own knowledge and experience of the industry in the context of simple questions

further below, there also appears to be a role for legitimate (consumer) expectations[13] and views of consumer protection experts such as consumer protection bodies.[14] However, the argument here is that to determine the broad function of fairness/reasonableness (e.g. to subtract and/or add to legal standards) and to help shape the content of fairness/reasonableness, it is vital to draw upon what consumer law theory teaches us about consumer vulnerability. In sum, this theory shows that it is fair and reasonable to protect consumers from their limited capacity to absorb economic losses and their susceptibility to "consumer surplus" effects e.g., loss of time, distress, inconvenience; given their limited ability to protect themselves due to their lack of information, expertise, experience, and bargaining power. Consumer law theory explains that it is especially important, and therefore fair and reasonable, to protect consumers in the financial sector where contracts, such as mortgages, can be of such enormous significance and complexity in nature that it is even more difficult than normal for consumers to understand the risks.[15] Indeed, consumers are even less likely to be alert when they are being purposefully deceived by a fraudster.[16]

Under our framework, the core of fairness/reasonableness involves setting standards that provide adequate protection against these vulnerabilities. First, we argue that this means that the broad function of fairness/reasonableness should usually be to add to (not subtract from or replace) the protection provided by the rules. Then we show how consumer law theory on vulnerability can help shape the approach to the various relevant criteria. It can help determine, for instance, when industry standards are high enough. It can help to support the views of consumer protection bodies as to what is fair/reasonable. It can give specific content to what is probably somewhat vague and general consumer expectations of fairness/reasonableness. Once it is decided what is fair/reasonable based on these sorts of factors, this can be used as a benchmark to determine if there are actual or potential consumer protection gaps in the legal rules and to resolve the problem by adding elements that fill the gap, or to justify the application of the rules in as protective a way as possible.

Despite consumer vulnerabilities and the associated detriment outlined above, remarkably, no previous academic work has provided a framework to manage the relationship in CADR between fairness and reasonableness principles and legal rules. The scholarship on CADR mainly focuses on procedural fairness questions (e.g. legal representation, accessibility, impartiality, decision-making expertise, whether the process is mandatory, etc.)[17] and subjective consumer perceptions of these procedural aspects.[18] The potential of the fair and reasonable jurisdiction to add to the law has been

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and better known considerations rather than rarer or complex considerations; see also *R (on the application of Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service* [2008] EWCA Civ 642 at [80] which states that a determination is not to be left to the ombudsman's entirely subjective views.

[13] EP Ellinger, Eva Z Lomnicka and Richard Hooley, *Ellinger's Modern Banking Law* (5th ed, Oxford University Press 2011) 48.

[14] See DISP 3.5.12G.

[15] Andrea Fejős, 'Social Justice in EU Financial Consumer Law' (2019) 24 Tilburg Law Review 68., 4.1.

[16] Which?, 'Consumer Safeguards in the Market for Push Payments - Which? Super-Complaint' (2016) 6, 11 <https://www.which.co.uk/policy/policy/consumers/347/consumer-safeguards-in-the-market-for-push-payments-which-super-complaint> accessed 9 September 2021.

[17] See e.g. Naomi Creutzfeldt, 'How Important Is Procedural Justice for Consumer Dispute Resolution? A Case Study of an Ombudsman Model for European Consumers' (2014) 37 Journal of Consumer Policy 527; Gerald R. Papica, 'The Ombudsman's Guide to Fairness' (2011) 4 Journal of the International Ombudsman Association 26. Andrea Fejős and Chris Willett, 'Consumer Access to Justice: The Role of the ADR Directive and the Member States' (2016) 24 European Review of Private Law 33.

[18] See e.g. Franziska Weber, 'Is ADR the Superior Mechanism for Consumer Contractual Disputes?—An Assessment of the Incentivizing Effects of the ADR Directive' (2015) 38 Journal of Consumer Policy 265; Joasia Luzak, 'The ADR Directive: Designed to Fail? A Hole-Ridden Stairway to Consumer Justice' (2016) 24 European Review of Private Law 81; Creutzfeldt (n 17); Ben Bradford and Naomi Creutzfeldt, 'Procedural Justice in Alternative Dispute Resolution' (2018) 7 Journal of European Consumer and Market Law 188.

noted;[19] and specific piecemeal examples from the insurance sector have been given of how fairness/reasonableness has in the past been used to provide protection not provided by the law.[20] There has been general discussion of the extent to which this may cause uncertainty.[21] It has also been argued that fairness/reasonableness could step in when the law is unsettled.[22] However, no work has provided (as is done here in section 2) a systematic framework to govern the relationship between fairness/reasonableness and legal rules; a framework that is grounded in consumer law theory on the vulnerable position of consumers. Therefore, this is the first work, rooted in consumer law theory, to argue that fairness/reasonableness principles have a role in CADR (particularly for FOS) that is distinct from legal rules; that normally this role is not to reduce or replace legal standards, rather to plug demonstrable consumer protection gaps; that fairness/reasonableness is based on a blend of, particularly, regulatory standards, industry practice, consumer expectations, views of consumer protection bodies, principles developed by ombudsmen and consumer law theory on vulnerability; how precisely these standards can be used to fill legal protection gaps; and that there is support from FOS and the courts for this framework. It is also the first work to analyse FOS APP decisions to show FOS' inconsistency; this being a category of cases in which FOS did not follow what we suggest in our framework and generally refused to use fairness/reasonableness to plug consumer protection gaps.

This relationship between fairness/reasonableness and the law is hugely important. First, we shall see below that the fairness/reasonableness-law nexus has been of great significance in the context of APP fraud, a serious problem that has been on the rise in recent years, causing significant consumer detriment. Economic loss ranged from small to substantial amounts and entire life savings.[23] Total losses of consumers in 2019 reached £317.1 million[24] that rose to £387.8 million in 2020.[25] In addition to monetary loss, the "consumer surplus" loss is also significant. Apart from spending time to recover the money transferred to the fraudster, emotions ranged from feeling angry and confused and being close to a mental breakdown[26] to suffering from mental illness such as anxiety and insomnia.[27] Second, the obligation to decide based on fairness/reasonableness and law is not restricted to APP fraud but applies to the work of FOS more generally. FOS is the largest private sector ombudsman in the UK and handles thousands of consumer disputes every year. In 2020/21 alone, FOS received 278,033 new complaints across the UK financial sector, and this represented an increase of 6,565 complaints from the previous year.[28] Third, the duty to consider both fairness/reasonableness and law is not restricted

[19] Christopher Hodges, 'Current Discussions on Consumer Redress: Collective Redress and ADR' (2012) 13 ERA Forum 11.

[20] Philip Rawlings and Chris Willett, 'Ombudsman Schemes in the United Kingdom's Financial Sector: The Insurance Ombudsman, the Banking Ombudsman, and the Building Societies Ombudsman' (1994) 17 Journal of Consumer Policy 307; Caroline Mitchell, 'The Financial Ombudsman Service - A Fair and Reasonable Alternative to the Court, Mitchell, Caroline' (2011) 3 European Journal of Commercial Contract Law 65.

[21] Nicholas Megaw, 'Financial Ombudsman Defends Approach after Lender Criticism' *Financial Times* (15 September 2020) <https://www.ft.com/content/69461a98-2c39-454e-ac34-09ffee93c720> accessed 13 July 2021; Judith Penina Summer, 'Insurance Law and the Financial Ombudsman Service [in 3 Volumes]' (phd, University of Southampton 2009) <https://eprints.soton.ac.uk/67654/> accessed 14 July 2021.

[22] Iain MacNeil, 'Consumer Dispute Resolution in the UK Financial Sector: The Experience of the Financial Ombudsman Service' (2007) 1 Law and Financial Markets Review 515.

[23] Ms L transferred £607.20 and £504.93 (Decision Reference Number (DRN) 1428713), Mr W £50,000 (DRN 8054249); the most striking example is the case of Mr and Ms Phillip who transferred their entire life savings of £700,000 in several transactions to the fraudster (Phillip v Barclay Bank UK Plc [2021] EWHC 10 (Comm)).

[24] This was an increase of 29% from the previous year. UK Finance (n 1) 45.

[25] UK Finance (n 2) 53.

[26] DRN 8054249.

[27] DRN 2605137.

[28] Financial Ombudsman Service, 'Annual Complaints Data and Insight 2020/21' (*Financial Ombudsman*, 2021) <https://www.financial-ombudsman.org.uk/data-insight/annual-complaints-data> accessed 13 July 2021; Financial Ombudsman Service, 'Lessons from the Past, Ambitions for the Future: Our 2019/20 Complaints Data

to FOS but is typical in other ADR schemes across all sectors of the economy. The UK ADR landscape is very diverse. In 2017, 147 ADR schemes were identified in a wide range of sectors.[29] The theoretical framework set out here has the potential to affect large numbers of disputes involving significant consumer detriment in these other sectors as well.[30] Fourth, the approach of FOS to the fairness/reasonableness-law relationship may have an effect going well beyond UK shores. In search of practical solutions for the case at hand, it is not unusual for CADR bodies to consider fairness/reasonableness in their work,[31] and FOS is viewed as a world leading model for CADR schemes. It has in the past inspired reforms in Australia, Canada, New Zealand, Ireland, India, and Japan.[32] Fifth, better understanding the relationship between fairness/reasonableness and law contributes to our understanding of the broader relationship between CADR and the law: how CADR decision making influences the development of the law, and how law contributes to CADR decision making. Whilst there has been some discussion of this relationship, the focus has been on whether CADR bodies are at least applying the basic protections imposed by mandatory consumer law, rather than on our question as to what, *in addition to this*, can be offered by fairness and reasonableness principles.[33]

The remainder of the paper is divided as follows. Section 2 discusses how FOS was set up; its objectives; and elements of procedural fairness such as independence, impartiality, and accessibility. It then turns to the question of substantive fairness. Here, it considers the duty to decide substantive outcomes based on law and fairness/reasonableness; and develops the (above-discussed) framework for management of the relationship between fairness/reasonableness and the legal rules, in particular to deal with consumer protection gaps in the law. Section 3 provides a detailed analysis of APP fraud cases, comparing the theoretical framework developed in Section 2 with FOS practice.

Analysis' (*Financial Ombudsman*, 2020) <https://www.financial-ombudsman.org.uk/data-insight/insight/analysis-annual-complaints-data-2019-20> accessed 1 August 2021.

[29] C Gill and others, 'Confusion, Gaps, and Overlaps: A Consumer Perspective on Alternative Dispute Resolution between Consumers and Businesses' (National Association of Citizens Advice Bureau 2017) Report <https://www.citizensadvice.org.uk/about-us/policy/policy-research-topics/consumer-policy-research/consumer-policy-research/confusion-gaps-and-overlaps/> accessed 8 June 2021.

[30] Ombudsman schemes operate across a variety of sectors including communications, energy, property, and legal services etc. These ombudsman schemes deal with vast numbers of consumer complaints, e.g., Ombudsman Services: Communications received 20,183 complaints within their terms of reference in 2019 and 20,426 in 2020; Ombudsman Services: Energy received 68,523 complaints within their terms of reference in 2019; in the year 1 October 2019 – 30 September 2020, The Property Ombudsman dealt with 2,837 residential leasehold management complaints and 11,025 lettings complaints. See, Ombudsman Services, 'Communications Sector Report: January to December 2019' (Ombudsman Services: Communications 2019) <https://www.ombudsman-services.org/about-us/annual-reports> accessed 14 September 2021; Ombudsman Services, 'Ombudsman Services, 'Annual Activity Report for Ombudsman Services: Communications' (Ombudsman Services: Communications 2020) <https://www.ombudsman-services.org/about-us/annual-reports>; Ombudsman Services, 'Energy Sector Report: January to December 2019' (Ombudsman Services: Energy 2019) <https://www.ombudsman-services.org/about-us/annual-reports>; The Property Ombudsman, 'ADR Regulations and Service Standards Report 2019-2020' (The Property Ombudsman 2020) <https://www.tpos.co.uk/news-media-and-press-releases/statistics-report> accessed 14 September 2021.

[31] n 6.

[32] Daniel Schwarcz, 'Redesigning Consumer Dispute Resolution: A Case Study of the British and American Approaches to Insurance Claims Conflict' (2009) 83 Tulane Law Review 735.

[33] See, e.g. Horst Eidenmüller and Martin Engel, 'Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe' (2014) 29 Ohio State Journal on Dispute Resolution 261; Marte Knigge and Charlotte Pavillon, 'The Legality Requirement of the ADR Directive: Just Another Paper Tiger?' (2016) 5 Journal of European Consumer and Market Law 155; Marco BM Loos, 'Enforcing Consumer Rights through ADR at the Detriment of Consumer Law' (2016) 24 European Review of Private Law; see also, Andrea Fejős and Chris Willett, 'Consumer Access to Justice: The Role of the ADR Directive and the Member States' (2016) 24 European Review of Private Law 33.

It is shown that only in a minority of cases did FOS use fairness/reasonableness to fill a consumer protection gap. The concluding section 4 reaffirms the core arguments and their importance, both for FOS and for CADR more generally, emphasising the feasibility of the proposed framework in terms of legality, certainty, and flexibility; and also, how the framework might be embedded into FOS' approach in a way that would enhance consistency and predictability.

2. FOS, Fair Process and a New Framework for Substantive Fairness and Law

FOS is the largest private sector alternative dispute resolution provider in the UK.[34] It was set up in 2000 to resolve complaints between consumers and financial services providers as an alternative to courts. It was established by the Financial Services Authority, the predecessor of the current Financial Conduct Authority (FCA), the conduct of business regulator and supervisor of the UK financial sector including banking, insurance, and investment. It replaced eight different predecessor ombudsman schemes including the Insurance Ombudsman Bureau from which FOS derives its operational model.[35] FOS takes its powers from FSMA and is an embodiment of FSMA's consumer protection objective which is to "secure the appropriate degree of protection for consumers."[36] The consumer protection objective is stated quite broadly and appears not to limit the scope or nature of the protection to be provided, apart from the reference to the need for it to be "appropriate." This arguably provides a degree of flexibility and recognition that consumers within the various financial services sectors may need to be protected in different ways from different problems and risks. The implication is that where appropriate, the level of protection provided to consumers can be adjusted so that there might be a greater or lesser degree of protection depending on the product or service at issue.[37] As will be shown below, whereas the predecessor to FOS previously applied the fairness/reasonableness standard in a way that provided greater protection than the law did to insurance consumers when it appeared appropriate, FOS failed to do the same for banking consumers where the law provided inadequate protection against APP fraud.

Procedural Fairness

The "traditional" primary function of FOS (and CADR more generally) is to provide dispute resolution procedures that adhere to procedural fairness standards while also, particularly compared to courts, being more accessible for consumers.[38] Within the context of ombudsman schemes, procedural fairness includes independence and impartiality; accessibility (including providing users with a genuine opportunity to present one's case and respond to challenges/disputes/decisions); and reasonable consistency in decision-making.[39]

(a) Independence, Impartiality and Accountability

FOS' operation is regulated in detail in DISP. Central to the rationale of an ombudsman service is that it should be capable of acting independently, free from external influence, particularly regarding

[34] Ellinger, Lomnicka and Hooley (n 13).
[35] For more on the influence of the Insurance Bureau to FOS see, Walter Merricks, 'The Financial Ombudsman Service: Not Just an Alternative to Court' (2007) 15 Journal of Financial Regulation and Compliance 135.
[36] FSMA, s.1C.
[37] See FSMA, s.1C(2)(a), (b), (e) and (f).
[38] On procedural fairness in ADR, see Gerald R. Papica (n 17) 31; Creutzfeldt (n 17).
[39] Gerald R. Papica (n 17) 31.

respondents of complaints.[40] FOS is independent from the participants in the dispute, the business, and the consumers, and from FCA.

Due to FOS' funding being derived wholly from participants in the financial services industry, FOS might be accused of bias towards businesses in its decision-making, particularly considering its generally low rate of upholding consumer complaints.[41] However, this does not appear to have been borne out as various mechanisms have been put in place to prevent industry capture. In keeping with the requirement of impartiality, the fees charged remain the same regardless of the outcome of any of its decisions, which means that even if FOS finds in favour of a business, the fee it is charged remains the same. Similarly, the annual levy is collected by the FCA rather than FOS and it is collected regardless of whether a complaint is made against a business. To ensure its accountability, FOS runs an annual public consultation on its proposed plan and budget for the following year, which aids transparency and provides an opportunity for non-business interested parties to participate in how it delivers its service.[42] It also publishes its annual plan and budget online and submits its annual report and accounts to Parliament, the former of which is available on its website; and it is audited by the National Audit Office.[43] These vertical and horizontal scrutiny mechanisms[44] ensure FOS remains independent and unbiased from businesses that finance its operation. In the past, FOS has been investigated for potential bias in favour of consumers but an independent review in 2018 found that there was no evidence of such systemic bias.[45]

FOS' independence is also a requirement in terms of its relationship with the FCA in that it is designed to operate independently from it. s.225 FSMA requires that the ombudsman scheme is operated by a "scheme operator" which is a body corporate "limited by guarantee and not having share capital." The latter enables FOS to run as a non-profit operation and avoids the duties to, and potential influence of, shareholders. However, naturally as the rule-maker for the financial sector, the FCA does exert some influence over FOS. The FCA makes the rules governing how FOS and businesses should deal with complaints;[46] it appoints its chairman and members of its board of directors,[47] and it approves its annual budget;[48] but these factors should not influence FOS in its independent decision-making.[49]

(b) Accessibility (Jurisdiction and Costs)

[40] FSMA, s.225(1); Merricks (n 35) 135; Hodges (n 19) 25.
[41] FOS' overall uphold rate for 2021/21 financial year was 31% of all cases. Financial Ombudsman Service, 'Annual Complaints Data and Insight 2020/21' (n 28); Financial Ombudsman Service, 'Lessons from the Past, Ambitions for the Future' (n 28).
[42] Financial Ombudsman Service, 'Strategic Plans and Budget' (*Financial Ombudsman*) <https://www.financial-ombudsman.org.uk/who-we-are/governance-funding/strategic-plans-budget> accessed 1 August 2021.
[43] Financial Ombudsman Service, 'Governance and Funding' (*Financial Ombudsman*) <https://www.financial-ombudsman.org.uk/who-we-are/governance-funding> accessed 19 July 2021.
[44] Hodges (n 19) 25.
[45] Richard Lloyd, 'Report of the Independent Review of the Financial Ombudsman Service' (2018) 5 <https://www.financial-ombudsman.org.uk/news-events/independent-review> accessed 1 August 2021.
[46] s.226 FSMA; the FCA makes the rules governing FOS' compulsory jurisdiction.
[47] FSMA, sch. 17, para 3.
[48] FSMA, sch. 17, para 9.
[49] According to s.228 FSMA, DISP 3.6.1R and case law mentioned above, it is FOS that decides what is fair and reasonable in all the circumstances of a case. See also, FSMA, sch. 17, para 3(3)-(4), the terms of appointment (particularly those governing removal from office) must be such as to secure FOS' operational independence from the FCA; FSMA and the vacancy in the office of chairman or a defect in the appointment of a person as chairman/board member does not affect the validity of any act of FOS; sch. 17, paras 4-5, rather than the FCA, FOS appoints its own ombudsman, including the Chief Ombudsman. This requirement is designed to ensure the independence of the ombudsman panel from FCA.

According to DISP 2.1, FOS can consider complaints which fall within its compulsory jurisdiction[50] or its voluntary jurisdiction.[51] FOS' compulsory jurisdiction applies to authorised persons[52] undertaking regulated activities[53] so long as the complainant is eligible.[54] The type of complaint FOS can determine depends on several factors, most importantly on the type of activity complained about, the eligibility of the complainant and the time limits for referring a complaint to FOS.[55]

Most activities in the financial sector would fall under compulsory jurisdiction, which covers any act or omission in relation to regulated activities; acts or omissions by a payment services provider relating to payment services or credit-related regulated activities; lending money and financial advice.[56] Importantly for consumers' access to justice, compulsory jurisdiction means that businesses *must* take part in a procedure initiated by the consumer.[57]

A complainant must be "eligible": this includes consumers, micro-enterprises and subject to various conditions, others such as charities and trusts.[58] In addition, the complaint must have arisen from a particular relationship with the business complained about. Typically, this might involve the consumer as a customer, payment service user or electronic money holder of the respondent business; a payer in a payment transaction in which the respondent is the payment service provider; or (most relevant here) someone that has transferred funds as a result of an alleged APP fraud.[59] In 2019 an extra layer of protection in APP fraud was added when FOS was granted jurisdiction not just to hear claims against the consumer's own bank, but also against the fraudster's bank that had received the payment.[60] Bank customers often wished to target the receiving bank but until the change in rules, their complaints were dismissed due to the absence of FOS' jurisdiction.[61]

Generally, FOS can only consider a complaint once the respondent has had an opportunity to resolve it; consequently, where a respondent has provided the complainant with a final or initial response letter, or eight weeks has elapsed since the complaint was raised with the business.[62] FOS cannot consider a complaint if the complainant refers it to FOS more than six months after the date on which the respondent sent the complainant its final response, a redress determination or a summary resolution communication; or more than six years after the event complained of; or if later, three years from the date on which the complainant became aware or ought reasonably to have become aware that s(he) had cause for complaint. These limits can be waived if there are exceptional circumstances, as judged by FOS, as to why the complainant failed to comply with the time limits, or the respondent consents to the ombudsman service considering the complaint regardless of the lapse

[50] DISP 2.3.1.
[51] DISP 2.5.
[52] FSMA s.31(1), a person who has Part 4A permission to carry on a regulated activity or otherwise authorised for the purposes of the Act.
[53] Regulated activities are specified in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544).
[54] S.226(2), (4) FSMA.
[55] DISP 2.2.1.
[56] DISP 2.3.1, DISP 2.3.2A.
[57] See, Fejős and Willett (n 17).
[58] DISP 2.7.3.
[59] DISP 2.7.6 R.
[60] DISP 2.7.6 R (2B); Financial Conduct Authority, 'PS18/22: Authorised Push Payment Fraud – Extending the Jurisdiction of the Financial Ombudsman Service' (2018) <https://www.fca.org.uk/publications/policy-statements/ps18-22-authorised-push-payment-fraud-extending-jurisdiction-financial-ombudsman-service> accessed 10 July 2021.
[61] Ibid.
[62] DISP 2.8.1.

of time.[63] These rules ensure procedural fairness; both parties are given a fair opportunity to participate in the complaints handling process before a final determination is made.[64]

FOS' service is free to consumers, there being no risks of liability for the business's costs.[65] FOS is funded by the financial services industry. Businesses must pay a £750 fee for each case FOS investigates after the first 25 cases each year;[66] and all regulated businesses covered by its service must pay an annual levy to the FCA.[67] Finally, legal representation is not mandatory,[68] and the simple complaint submission and structured complaint process, as we shall see below, is set up in a way that helps consumers navigate through the process without needing to engage and pay for a solicitor. By eliminating prohibitive litigation costs, these provisions provide procedural fairness by ensuring consumers have a fair opportunity to be heard.[69]

(c) Multi-stage Process and the Right to be Heard

Once an eligible complaint has been brought to FOS and it has been determined that the case falls within its jurisdiction, it embarks on a multi-stage process.[70] The complaint is assigned to an investigator who will adjudicate on the matter delivering a decision that can either be accepted by the consumer, resulting in case closure; or rejected,[71] leading to either withdrawal of the complaint or referral to an ombudsman for final decision, followed by closure of the case.

Research shows that in judging the fairness of decision-making procedures, people place great emphasis on the ability to be heard ("voice"), quite apart from the outcome of the process.[72] These aspects of procedural fairness are demonstrated throughout the investigation-stage at FOS, e.g., during the introduction and investigation stage a case handler is allocated a complaint and contacts the complainant to introduce themselves and request any information that has not already been provided. At this point, information requests can be made to respondent businesses to understand their side of the story.[73] These requests for information can be made at different stages of the investigation-stage, to further clarify information already provided. This provides consumers and

[63] DISP 2.8.2.
[64] The participation principle of procedural fairness stipulates that for an outcome to be fair, parties must have a right of participation in the form of notice and the opportunity to be heard. See, Lawrence B Solum, 'Procedural Justice' (Social Science Research Network 2004) SSRN Scholarly Paper ID 508282 <https://papers.ssrn.com/abstract=508282> accessed 10 September 2021.
[65] Merricks (n 35) 139.
[66] FEES 5 Annex 3R Case Fees Payable for 2021/22.
[67] FEES 5.3.6R; Financial Ombudsman Service, 'Governance and Funding' (n 43).
[68] Merricks (n 35) 138; Financial Ombudsman Service, 'Who Can Bring a Complaint to the Ombudsman?' (*Financial Ombudsman*) <https://www.financial-ombudsman.org.uk/faqs/using-service/can-bring-complaint-ombudsman> accessed 10 September 2021.
[69] Creutzfeldt (n 17) 534; Tom R Tyler and Yuen J Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and Courts* (Russell Sage Foundation 2002).
[70] For an early account of how FOS works and an independent assessment of the quality of its procedures based largely on procedural justice standards, see, Elaine Kempson, Sharon Collard, and Nick Moore, 'Fair and Reasonable: An Assessment of the Financial Ombudsman Service' (Financial Ombudsman Service 2004) <https://www.bristol.ac.uk/geography/research/pfrc/themes/banking/fair-and-reasonable.html> accessed 8 June 2021. However, since the report was written in 2004, some of FOS' procedures have since changed.
[71] DISP 3.9.1AR – delegation of the Ombudsman's powers.
[72] Naomi Creutzfeldt, 'How Important Is Procedural Justice for Consumer Dispute Resolution? A Case Study of an Ombudsman Model for European Consumers' (2014) 37 Journal of Consumer Policy 527, 534, 542; Tom R Tyler and Andrew Caine, 'The Influence of Outcome and Procedures on Satisfaction with Formal Leaders' (1981) 41 Journal of Personality and Social Psychology 642.
[73] DISP 3.5.4(1)R.

business with multiple opportunities to make and defend their case. This is also one of the points at which case handlers can settle cases e.g., through informal mediation or referral to other complaint bodies.[74]

Once the investigator has gathered enough information to decide the case, they will provide an initial assessment which informs the complainant and the business of their views on the case. If it is decided that the business must put things right, FOS will explain how in the initial assessment. The investigator will usually telephone the complainant to explain the initial decision, listen to their views on the assessment and try to mediate any lingering dissatisfaction that might still arise before issuing a written version of the initial decision.

Both the complainant and the business are asked to confirm their acceptance of the initial assessment. Most cases brought to FOS settle at this stage with both parties accepting the initial assessment.[75] If any offers or recommendations of compensation are accepted by the complainant in full and final settlement of the complaint, the complainant may be precluded from pursuing a claim in court for the same matter.[76]

However, if either party disagrees with the initial assessment, this party can request for an ombudsman to make a final decision. In some cases, a provisional decision might be issued first which sets out the decision the ombudsman is minded to take. In these circumstances, both parties will be asked to make any final representations which the ombudsman will consider prior to making a final decision or they might decide to settle the case at this stage. The ombudsman can convene a hearing; in practice most ombudsman consider a complaint can be determined fairly without one.[77] Once the final decision has been issued, the parties can either accept or reject it by a date specified in the decision.[78] If the complainant accepts the decision, the business has to comply with it and it is unlikely that the complainant will be able to pursue a claim in court in relation to the same matters.[79] If the claimant does not accept the decision, or fails to respond by the deadline, the final decision is not binding on either party and compliance with the decision will be left to the business' discretion.[80] In these circumstances, the complainant is free to take legal action against the business on the grounds raised in the complaint, but this is where FOS' role comes to an end.[81]

The above illustrates the considerable importance placed on the participation and equal voice of the parties, both factors which are fundamental to a fair process.

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[74] DISP 3.5.1R, DISP 3.5.2R.

[75] In both 2018/19 and 2019/2020, 90% of complaints received by FOS were resolved with an informal view. The Financial Ombudsman Service, 'Annual Reports and Accounts for the Year Ended 31 March 2020' (The Financial Ombudsman Service 2020) 6 <https://www.financial-ombudsman.org.uk/who-we-are/governance-funding/annual-reports-accounts> accessed 13 September 2021.

[76] Financial Ombudsman Service, 'What to Expect' (*Financial Ombudsman*) <https://www.financial-ombudsman.org.uk/consumers/expect> accessed 13 July 2021.

[77] DISP 3.5.6R; The ombudsman's decision making is inquisitorial rather than adversarial. See Walter Merricks, 'A Quarter-Century of Ombudsmen', Ombudsman News, Issue 52, Apr. 2006, 2, available at <https://www.financial-ombudsman.org.uk/data-insight/ombudsman-news> accessed 13 July 2021.

[78] See DISP 3.5.13R, 3.5.14R, 3.5.15R, 3.6.6(2)R.

[79] DISP 3.6.6(3)R.

[80] DISP 3.6.6(4)R.

[81] Financial Ombudsman Service, 'What to Expect' (n 76).

d) The Effect of Ombudsman Decisions on other Ombudsmen/Investigators

Although the decisions of ombudsmen have no formal precedent value, DISP 3.6.5G suggests that ombudsmen should consider determinations of other ombudsmen in equivalent complaints. In practice, ombudsmen do consider previous decisions of ombudsmen,[82] and they often confirm the investigators' decisions. This is because investigators are guided by ombudsmen in their decision-making through internal FOS procedures/guidance that help ensure consistency via "training, mentoring, and access to relevant source materials."[83] These materials significantly influence the investigators' decision-making, although they are not binding on them.[84]

Substantive Fairness: a New Framework for the Relationship Between Fairness/Reasonableness and the Law

The above procedural fairness requirements are focused on the fairness of actions taken by decision-makers to *arrive* at the outcome, rather than the substantive outcome per se.[85] What standards apply when it comes to such substantive outcomes, and how should these standards be shaped by legal rules and by fairness/reasonableness principles?

(a) Distinguishing Fairness/Reasonableness and Law

Under s.228(2) FSMA 2000, "A complaint is to be determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case."[86] Further guidance is provided by DISP 3.6.4R, according to which, when the ombudsman considers what is fair and reasonable, (s)he: "will take into account relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and (where appropriate) what [is considered] to have been good industry practice at the relevant time." However, neither FSMA nor the DISP rules define what fairness and reasonableness means. In due course, we discuss what sort of meanings can be given to the various criteria in DISP 3.6.4R and consider other criteria (e.g., consumer expectations) that could give content to the broad principles of fairness/reasonableness. However, first we must confirm the most basic point as to whether fairness/reasonableness in this context is intended to mean something distinct from the law at all. It is possible that the regime simply intends to make a symbolic statement that law *is* fair and reasonable, that there is no difference between legal rules and fairness/reasonableness principles. This being the case, fairness/reasonableness brings nothing distinct to the table. However, it does not seem that this is what is intended. To explain this conclusion, we must unpack DISP 3.6.4R. To reiterate, it specifies that in determining fairness/reasonableness, account should be taken of law and regulations; *and* regulatory provisions, codes of practice, and good industry practice.

"Law and regulations" seem here to have the "traditional" meaning of common law, primary legislation, and secondary legislation (secondary legislation often coming in the form of "Regulations"). Therefore, although this refers to law *and* regulations, it is surely simply rather loose drafting, with "regulations" here being intended to count as "law" for our general purposes. But what

[82] MacNeil (n 22) 520.
[83] ibid; e.g., the Knowledge and Information Toolkit, Elaine Kempson, Sharon Collard, and Nick Moore (n 70) 37.
[84] Sharon Gilad, 'Accountability of Expectations Management: The Role of the Ombudsman in Financial Regulation [Article]' (2008) 30 Law & Policy 227, 241–242.
[85] Gerald R. Papica (n 17) 31.
[86] This covers complaints within FOS' compulsory jurisdiction, and the same fairness/reasonableness basis applies to its voluntary jurisdiction under DISP 3.6.1R.

of the "regulatory [provisions], codes of practice, and good industry practice" that are supposed to be considered in addition to this? It is certainly arguable that at least some of this can also be said to count as "law." Certainly, to the extent that "regulatory provisions" are very precise in the behaviour they prescribe or prohibit, and are legally binding, they can be considered to be "law." This seems to bring under the umbrella of law, the binding, highly detailed rules in the FCA Handbook;[87] as well as those codes of conduct (such as the CRM Code dealing with APP fraud) that are binding and impose detailed expectations on businesses.[88] Indeed, just like legislation and common law, these rules are in danger of leaving protection gaps. This is especially likely the more narrowly drawn the rules are opening up the risk that they do not cover all possible forms of consumer detriment, particularly, that they are insufficiently "future proof" to cover problems caused by the financial industry creating new and innovative products and services.[89]

However, DISP 3.6.4R, also seems to go beyond what one would normally call "law," allowing for much more weight to be given to (these extra-legal, fairness/reasonableness) criteria than would normally be given in a traditional court action. DISP 3.6.4 refers to "regulators' guidance." This would cover, for instance, the non-binding guidance in the FCA Handbook to help businesses comply with the binding rules,[90] and the even more general, research-based guidance on how firms should behave in certain situations.[91] DISP 3.6.4 also refers to "regulators' standards." This would cover the FCA Principles for Business, which are rather open textured provisions e.g., the Principle requiring firms "to pay due regard to the interests of customers and treat them fairly" (Principle 6). These principles are labelled "rules" in the FCA Handbook,[92] and one might be tempted to call them "law" based on this, and because there is some scope for them to be enforced "top-down" by disciplinary sanctions by the FCA.[93] However, the Principles clearly have a different status from the other rules in the Handbook. They are part of the FCA's "Treating customers fairly" initiative,[94] and represent the idea of a

[87] The FCA Handbook sets out the legislative and other provisions made under powers given to the FCA by FSMA. It contains various "types" of provisions. For our purposes, rules and guidance are the most important. Rules create binding obligations on business, the contravention of which may be subject to an enforcement action by the FCA or an action for damages by the consumer (see also n 94 below) (FCA, 'Reader's Guide an Introduction to the Handbook' 3, 11 <https://www.fca.org.uk/publication/handbook/readers-guide_0.pdf> accessed 20 September 2021). For example, DISP 3.6.4R is a "rule" indicated by the letter "R" following the numbering of the provision. On the status of "guidance" see n 90 below.

[88] The CRM Code is binding on signatories to the Code, and all major UK banks have signed the code. Which?, 'What to Do If You're the Victim of a Bank Transfer (APP) Scam' (*Which?*) <https://www.which.co.uk/consumer-rights/advice/what-to-do-if-you-re-the-victim-of-a-bank-transfer-app-scam-aED6A0l529rc> accessed 22 September 2021.

[89] See e.g., Partnoy, Frank and Thomas, Randall S., Gap Filling, Hedge Funds, and Financial Innovation. Vanderbilt Law and Economics Research Paper No. 06-21, San Diego Legal Studies Paper No. 07-72 <https://ssrn.com/abstract=931254.> accessed 20 September 2021.

[90] In addition to rules (see n 87 above) the FCA Handbook contains "guidance." Guidance explains the implications of other provisions, shows possible ways of compliance, or recommends a course of action. Guidance is not binding and need not be followed to achieve compliance with the relevant rule or requirement (FCA (n 87) 11). Handbook guidance is marked with the letter "G." An example of guidance is DISP 3.5.12G discussed in more detail further below.

[91] Financial Conduct Authority, 'FG21/1 Guidance for Firms on the Fair Treatment of Vulnerable Customers' (Financial Conduct Authority 2021) 21 <https://www.fca.org.uk/publications/finalised-guidance/guidance-firms-fair-treatment-vulnerable-customers> accessed 15 September 2021; Financial Conduct Authority, 'Financial Lives: The Experiences of Vulnerable Consumers' (Financial Conduct Authority 2020) <https://www.fca.org.uk/firms/treating-vulnerable-consumers-fairly#4> accessed 15 September 2021.

[92] There are 11 FCA Principles, which are set out in PRIN 2.1R.

[93] *R (British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin).

[94] For details of the initiative see: Financial Services Authority, 'Treating Customers Fairly - towards Fair Outcomes for Consumers' (July 2006) <https://www.fca.org.uk/publication/archive/fsa-tcf-towards.pdf> accessed 15 September 2021.

principles-based approach to regulation, that is informal and flexible as opposed to "rulebook regulation." They set out broad, over-arching, fundamental obligations for business and rely on businesses' internal self-regulation in applying the broad principles and translating them into concrete actions.[95] Moreover, unlike the other rules in the Handbook, the Principles are explicitly stated not to give rise to private actions for breach of statutory duty.[96] Therefore, just as with non-binding regulatory guidance, these Principles only qualify to be taken into account in private actions taken by consumers via FOS; and this is not because they are "law," but because they fall within the broader "fairness/reasonableness" jurisdiction provided for by s.228(2) FSMA and DISP 3.6.4R.

Then, of course, DISP 3.6.4 refers to "codes of practice and good industry practice." Now, as indicated above, certainly some such codes and industry practice may be legally binding; but some are not.[97] So, the (otherwise non-legally binding) rules and principles from these sources seem clearly to fall within FOS' "fairness/reasonableness" jurisdiction, allowing them to be given equal weight to "law" such as common law and statute.

Indeed, it seems likely that account can also be taken of forms of fairness/reasonableness that are not based on regulatory provisions, codes of practice, and good industry practice (and as will be explained further below this would allow consideration of "legitimate consumer expectations," the views of consumer protection bodies, and ombudsman-developed principles). After all, the provision simply states that the ombudsman "will take account" of regulatory provisions etc. not that this should be seen as exclusive, i.e., that no account can be taken of other fairness/reasonableness principles. Therefore, allowing account to be taken of fairness/reasonableness principles not based on regulatory provisions, codes of practice, and good industry practice would seem to be keeping with the rule of interpretation, *inclusio unius est exclusio alterius* – if it is not excluded, then it is allowed.

Courts support the view that there is a distinct role for fairness/reasonableness. In the leading case, *R (on the application of Heather Moor & Edgecomb Ltd)*[98] the claimant business sought judicial review of the ombudsman's decision, including on the basis that the ombudsman had failed to make its decision according to the law. The court held that based on an ordinary and natural interpretation of the wording of s.228(2) FSMA, the ombudsman was meant to determine the case based on what was in his opinion fair and reasonable in all the circumstances of the case and was not obliged to decide in line with the common law. For Stanley Burnton LJ, the defining part of the section was the wording, "by reference to what is, in the opinion of the ombudsman, fair and reasonable…" because had Parliament intended that the ombudsman's decision be based purely in line with the law, these words

[95] Andromachi Georgosouli, 'The FSA's "Treating Customers Fairly" (TCF) Initiative: What Is So Good About It and Why It May Not Work' (2011) 38 Journal of Law and Society 405; see also Julia Black, Martyn Hopper and Christa Band, 'Making a Success of Principles-Based Regulation' (2007) 1 Law and Financial Markets Review 191.

[96] Under s.138D FSMA consumers have a direct action for damages for breach of statutory duty against a business that breaches FCA Handbook *rules*, but according to PRIN 3.4.4 R, such direct action is not available for breaching PRIN 2.1R.

[97] E.g., The Consumer Credit Trade Association's (CCAT) Code of Conduct is applicable for voluntarily joined members of the association. Compliance with the code is monitored and enforcement actions are taken by the CCAT alone, the ultimate sanction being expulsion from the association. CCAT, 'General-Code-of-Practice-2017-Consumer.Pdf' <https://www.ccta.co.uk/wp-content/uploads/2016/06/General-Code-of-Practice-2017-consumer.pdf> accessed 20 September 2021.

[98] *R (on the application of Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service* [2008] EWCA Civ 642. See also, *R (IFG Financial Services Ltd) v Financial Ombudsman Service* [2005] EWHC 1153 (Admin); *R (on the application of Keith Williams) v Financial Ombudsman Service* [2008] EWHC 2142; *R (British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin); *R (on the application of Aviva Life and Pensions (UK) Ltd) v Financial Ombudsman Service* [2017] EWHC 352 (Admin); *Berkeley Burke SIPP Administration Ltd v Financial Ombudsman Service Limited* [2018] EWHC 2878 (Admin).

would have been unnecessary.[99] The only caveat here for the judge was if the ombudsman deviates from the law, "he should say so in his decision and explain why."[100] The implication being that fairness/reasonableness and the law are separate standards and one is not equivalent to the other. The court's approach is supported by some scholars; for instance, MacNeil, who argues for a distinct role for fairness/reasonableness to allow FOS to pursue the most appropriate consumer protection in each case.[101]

However, there are also scholars who do not support giving fairness/reasonableness a role that is distinct from the "law". Papica, for example, posited that a review of the CADR literature suggests that a fair outcome (i.e., substantive fairness) automatically results from procedural fairness.[102] However, such scholarship tends to focus on the context of mediation which is based on a much looser procedure where the mediator helps the parties reach their own decision on a settlement through back-and-forth discussions with each party. This involves a higher degree of cooperation than FOS' adjudicatory process. In such a process-driven, co-operative context as mediation it is understandable that scholarship would focus on procedural fairness and what it can achieve but this focus surely misses the importance of fair, substantive outcomes in an adjudication context, such as FOS, where the third-party ombudsman decides cases[103] on the parties' behalf.

Others have argued that in the interests of certainty and consistency, fairness/reasonableness should have no role distinct from the law.[104] Summer asserted there should be no difference in outcome depending on whether a matter is brought before a court or FOS, no scope for FOS to apply a potentially whimsical and arbitrary approach to fairness/reasonableness.[105] If the legal rules are not good enough, the remedy should be law reform and not piecemeal action by FOS.[106] There are significant weaknesses with these arguments. Firstly, on certainty, fairness/reasonableness standards need not be intolerably uncertain. Fairness/reasonableness standards are common *within* legal rules. For instance, there is the duty of care in tort based on foreseeability, proximity, and fairness/reasonableness.[107] Specifically in consumer law, we have the broad rules against "unfair commercial practices" (practices contrary to professional diligence, misleading or aggressive);[108] and against "unfair terms" (those contrary to "good faith," causing "significant imbalance in the parties' rights and obligations" to the "detriment" of the consumer).[109] The language of fairness is used throughout the FCA Handbook in setting out rules that provide for specific duties of businesses.[110] These fairness/reasonableness standards are defined and exemplified in case law;[111] and in academic

[99] *R (on the application of Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service* [2008] EWCA Civ 642 at [36] per Stanley Burnton LJ.
[100] Ibid at [49] per Stanley Burnton LJ.
[101] MacNeil (n 66) 518, 522–523.
[102] Papica (n 2) 29.
[103] B Bradford and N Creutzfeldt, 'Procedural Justice in Alternative Dispute Resolution: Fairness Judgments among Users of Financial Ombudsman Services in Germany and the United Kingdom' (2018) 7 Journal of European Consumer and Market Law (EuCML) 188, 190.
[104] Megaw (n 21).
[105] Judith Summer, *Insurance Law and the Financial Ombudsman Service* (Taylor & Francis 2013) 5.75; Summer (n 21) 42.
[106] Summer (n 21) 43.
[107] *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL).
[108] The Consumer Protection from Unfair Trading Regulations 2008.
[109] Consumer Rights Act 2015, Part 2.
[110] See e.g., Banking: Conduct of Business sourcebook (COBS) 2.1.1R requiring the firm to act honestly, fairly and in the best interests of the client when carrying out an investment service.
[111] E.g., *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL).

writing.[112] This all gives significant shape and direction to the broad standards, so we should not overstate the certainty problems surrounding them (whether they are part of, or distinct from the legal regime). Secondly, what of the (closely related) arguments that there is inconsistency between FOS and courts if the former can consider fairness/reasonableness elements that the latter cannot, and that there should be no distinct role for fairness/reasonableness because CADR decisions should reflect court decisions? These arguments miss the point that FOS should not be seen as designed to merely replicate what the court would do. It is there to do something different: to better protect consumers; in particular, to reflect the various consumer vulnerabilities explained below.

(b) A Theory-Based Approach

Next, we must explain some basic consumer law theory about consumer vulnerability, i.e., about what exactly it is that consumers need to be protected against. This is necessary if we are to fully understand the intended relationship between fairness/reasonableness and the legal rules, and what the content of fairness/reasonableness should be.

Consumer law theory shows that in regulating business-consumer relations, the law might choose an approach broadly in line with traditional freedom of contract ideals, what is perhaps better labelled as being about the promotion of business self-interest and consumer self-reliance; an approach that in broad terms, provides for minimal consumer protection.[113] A more protective or more "need-oriented" approach pays significant attention to consumer vulnerability. Vulnerability[114] here means first that consumers, as private citizens, usually have limited capacity to absorb economic losses caused by unfair terms and practices, defective goods, defective services, fraud etc. These things may also have a highly detrimental effect on the private sphere of life: i.e., "consumer surplus" effects e.g., loss of time, distress and inconvenience in personal lives.[115] Indeed, all of this can be at its worst with poor quality, unsuitable, unfair, and mis-sold financial services where large sums may be involved; consumers may stand to lose their home, life planning may be destroyed, extreme distress and social exclusion may result etc.[116] Then where (as in our APP case study) actual fraud is involved, not only may the financial detriment be very high, but the distress is likely to be exacerbated due to the sense of being cheated and the tendency to blame oneself which sometimes accompanies this.

A further feature of a protective or need-oriented approach is the idea that consumers will be vulnerable in the sense that they will usually struggle to exercise self-reliance to protect themselves pre-contractually from these damaging outcomes. Individual consumers are not usually important

[112] E.g. Chris Willett, 'Unfairness under the Consumer Protection from Unfair Trading Regulations 2008' in Mel Kenny, James Devenney and Lorna Fox O'Mahony (eds), *Unconscionability in European Private Financial Transactions: Protecting the Vulnerable* (Cambridge University Press 2010); Chris Willett, 'Re-Theorising Consumer Law' (2018) 77 Cambridge Law Journal 179.

[113] Chris Willett, 'Re-Theorising Consumer Law' (n 112); Willett (n 11).

[114] Consumer vulnerability can be approached and defined in various ways. A considerable attempt has been made to define vulnerable consumers and to find adequate standards of protection. See e.g. Vanessa Mak, 'The "Average Consumer" of EU Law in Domestic and European Litigation' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Hart Publishing 2013); Irina Domurath, 'The Case for Vulnerability as the Normative Standard in European Consumer Credit and Mortgage Law – An Inquiry into the Paradigms of Consumer Law' [2013] 3 EuCML 124; Peter Cartwright, *The Vulnerable Consumer of Financial Services: Law, Policy and Regulation*, Financial Services Research Forum, 2011 <https://www.nottingham.ac.uk/business/businesscentres/crbfs/documents/researchreports/paper78.pdf>accessed 13 September 2021. For a recent and excellent collection of essays on vulnerability, consumer protection and access to justice see Christine Riefa and Séverine Saintier (eds), *Vulnerable Consumers and the Law: Consumer Protection and Access to Justice* (Routledge 2021).

[115] Chris Willett, 'Re-Theorising Consumer Law' (n 112).

[116] Fejős (n 15).

enough to businesses to enable them to bargain on an equal footing to protect their interests. Not being expert, "repeat players" in the field, consumers often have limited knowledge or understanding of the risks of defective, mis-sold, and unsuitable services, or of unfair standard terms. This is likely to be even worse with financial products that are highly complex and so-called "credence" goods, i.e., goods that cannot be tested before purchase and the value of which becomes apparent later though use.[117] Finally, consumers will know even less what to expect where actual fraud is concerned.

The above conceptions of consumer vulnerability refer to the position of most consumers relative to businesses. However, it is also well recognised that there may be sub-categories of consumers who are even more vulnerable than most, e.g., based on cognitive limitations (affecting children, the elderly, those who are poorly educated etc), lack of money, discrimination, and all manner of socio-economic factors.[118] In addition to these often permanent states of vulnerability, as the FCA has recognized, vulnerability is a fluid category, anyone can find themselves in a situation of vulnerability based on all manner of particular circumstances.[119]

Therefore, from a protective, or need-based perspective, a key priority of the law is to protect consumers as vulnerable parties (this covering the generally vulnerable position of most consumers and the special forms of vulnerability suffered by sub-groups). This must surely be used to help define how the relationship between law and fairness/reasonableness should be managed in the context of FOS. After all, FOS and other CADR schemes are built on the idea of consumer protection,[120] the idea of the consumer as the weaker party, the party that needs to be offered something different from the normal route to legal redress. It thus seems a logical development of this to use notions of consumer vulnerability to inform how we think about fairness/reasonableness, rules, and substantive outcomes.

(c) Giving Content to Fairness/Reasonableness

If fairness/reasonableness is to provide meaningful protection, then relying on consumer law theory of vulnerability, we must seek to break down its content into more particular criteria. This theory shows that it is fair and reasonable to protect consumers from high economic losses and undue "consumer surplus" effects to recognise their limited ability to protect themselves due to their limited information, expertise, experience, and bargaining power and that the need for these protections is especially acute in the financial sector, where contracts are especially complex and losses potentially life changing. These points can help to shape the approach to the various relevant criteria.

As discussed above, in defining fairness/reasonableness DISP 3.6.4R provides a useful guide. First of all, *regulatory guidance* may give content to fairness/reasonableness. This, as indicated above, covers the non-binding guidance in the FCA Handbook that accompanies or follows the rules, to guide businesses in their compliance with the binding rules;[121] and the more general, research-based

[117] David Llewellyn, 'The Economic Rationale for Financial Regulation' (1999) 1 Financial Services Authority Occasional Paper; Fejős (n 15); See also, Peter Rott, 'A Plea for Special Treatment of Financial Services in Unfair Commercial Practices Law' (2013) 2 Journal of European Consumer and Market Law 61.

[118] For example, s.2(5) of The Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) on especially vulnerable consumers recognises vulnerability based on mental or physical infirmity, age, and credulity.

[119] FCA, Consumer Vulnerability (Occasional Paper 8, 2015) <https://www.fca.org.uk/publications/occasional-papers/occasional-paper-no-8-consumer-vulnerability> accessed 13 September 2021

[120] FSMA s.1C.

[121] Financial Conduct Authority, 'FG21/1 Guidance for Firms on the Fair Treatment of Vulnerable Customers' (n 91).

guidance on how firms should behave in certain situations.[122] Most recently for example, the FCA has provided guidance on what businesses can do to ensure they treat particularly vulnerable consumers fairly to comply with the FCA Principles. In line with our framework, it instructs businesses to understand the needs of vulnerable consumers in their targeted market or customer base and to respond accordingly. In their product design, service delivery and communications they should consider if any of the product features/services/communications would harm especially vulnerable consumers and they should make improvements where necessary.[123]

Also, DISP 3.6.4R covers *regulatory standards*, which, as already explained above, certainly includes the FCA Principles, the high level principles, setting out the FCA's expectations of businesses:[124] e.g., requiring businesses to act with "integrity" (Principle 1); to conduct their business with "due skill, care and diligence" (Principle 2); "to pay due regard to the interests of customers and treat them fairly" (Principle 6); to "pay due regard to the information needs of its clients" (Principle 7); "take reasonable care to ensure the suitability of its advice" (Principle 9); and "arrange adequate protection for clients' assets when it is responsible for them" (Principle 10). In determining fairness/reasonableness, these FCA Principles should be understood in light of the above points on vulnerability. This means, e.g., that when ombudsmen consider the obligations to "treat consumers fairly" in Principle 6, and to provide "adequate protection for their assets" in Principle 10, they should be thinking in terms of protecting consumers from large losses. When they think of having regard to consumer information needs (Principle 7), they should remember just how limited consumers are in terms of information and expertise and that it may often be unrealistic to expect consumers to be able to make informed choices, especially when provided with formalised information in the context of a complex relationship.

DISP 3.6.4R also refers to *codes of practice* and *good industry practice* at the relevant time and, as argued above, codes and industry practice that are not legally binding can be considered to be part of the "fairness/reasonableness" jurisdiction here.[125] Codes and industry practice may overlap in that we might typically expect good industry practice to be reflected in industry codes but there may of course be good practice that has not been formally included in a code. However, we must be cognisant of the broader theory on vulnerability in potentially placing limits on the relevance of these sorts of norms. Codes/industry practice are prepared/set by the businesses, who inevitably operate with at least a degree of subjective self-interest. Thus, codes/industry standards will not necessarily provide the level of protection from losses or the level of acknowledgement of consumer informational or bargaining weaknesses that the consumer theory on vulnerability would expect.[126]

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[122] Financial Conduct Authority, 'Financial Lives: The Experiences of Vulnerable Consumers' (n 91).British Banker's Association's 'Protecting Customers from Financial harm as a result of fraud or financial abuse – Code of Practice' (PAS 17271:2017); Financial Services Vulnerability Taskforce 'Principles and Recommendations' (Lending Standards Board, 2018) < https://www.lendingstandardsboard.org.uk/wp-content/uploads/2018/10/Vulnerability-Taskforce-summary-report-FINAL_.pdf> accessed 13 September 2021

[123] Financial Conduct Authority, 'FG21/1 Guidance for Firms on the Fair Treatment of Vulnerable Customers' (n 91) 21; Financial Conduct Authority, 'Financial Lives: The Experiences of Vulnerable Consumers' (n 91).

[124] As indicated above (n 96) these Principles would not be thought of as law in general, at least in the context of private law actions as (in contrast with the FCA Handbook rules) they are explicitly stated to not give rise to actions for breach of statutory duty.

[125] See e.g., The Consumer Credit Trade Association's Code of Conduct (n 97); or The Banking Protocol, a UK-wide scheme that enables bank staff to alert their local police when they suspect fraud. See Katy Worobec, 'Why the Banking Protocol matters' UK Finance, 6.9.2019 < https://www.ukfinance.org.uk/news-and-insight/blogs/why-banking-protocol-matters> accessed 13 September 2021

[126] The limits of market norms in setting fairness standards are generally well recognised. See, Roger Brownsword, 'Two Concepts of Good Faith' (1994) 7 Journal of Contract Law 197; Chris Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Ashgate Publishing 2007).

DISP 3.5.12G guides ombudsman to take *evidence from experts in consumer protection matters*, among others. The views of expert and experienced consumer protection bodies (other than simply regulators like the FCA) may be a fruitful source of fairness/reasonableness principles. Citizens Advice and Which?, for instance, have the research base, expertise and experience to provide important insights on what is fair and reasonable.[127] A good example here is the 2018 Citizens Advice super-complaint on the unfairness of giving existing mortgage and energy customers less advantageous offers compared to new customers.[128] This sort of guidance can be a good, indicative source of fair and reasonable standards.

It has also been said that fairness/reasonableness might cover *legitimate expectations*.[129] This arguably includes legitimate expectations of a consumer. It is very common, of course, for legal standards of fairness/reasonableness to seek to touch base with the ordinary person or consumer, seeking to reflect the opinions or expectations of such a person.[130] This can be a useful way of maintaining a link between objective standards of fairness and what the consumer would want or approve of. Indeed, in the case law on unfair contract terms law, fairness of terms is equated by the courts with what a reasonable consumer would have agreed to if only they were able to negotiate the standard terms (which of course in reality they are not).[131] While there is merit in this approach, we must be realistic about the fact that most consumers are unlikely to have a detailed vision of what they view as fair. For this we must again turn to the theory and suppose that most consumers, if it was explained to them, would probably want to be protected against substantial losses and their less informed, less expert, and less experienced position. These, broadly, are their legitimate expectations. Of course, there may also be quite specific expectations that have been generated by the way the firm has marketed and sold the product, by previous dealings with the firm, and by how the firm is seen to be dealing with consumers in general. This should all be considered under the fairness/reasonableness umbrella.

Another source of fairness/reasonableness can be *principles developed by ombudsmen*. For example, and similarly to the Citizens Advice example above relating to equal treatment, in determining whether a business has acted fairly towards consumers, FOS has developed the principle of "relative onerousness;" the idea being to ask whether the consumer is being treated "relatively more onerously" than other consumers. This was challenged by judicial review in the *Norwich and Peterborough Building Society* case.[132] However, the Court said that FOS was entitled to apply such a principle to determine what is fair and reasonable. In reaching its decision, the court provided a clear distinction between the purpose of a code of conduct in the decision-making process of an

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[127] See for example, super-complaints raised to the Competition and Markets Authority by both organisations, Which?, 'Consumer Safeguards in the Market for Push Payments - Which?' (n 16); Which?, 'Misleading Pricing Practices - Which? Super-Complaint' (Which? 2015) <https://www.which.co.uk/policy/policy/food/388/misleading-pricing-practices-which-super-complaint> accessed 13 September 2021; Competition and Markets Authority, '"Loyalty Penalty" Super-Complaint' (*GOV.UK*, 28 September 2018) <https://www.gov.uk/cma-cases/loyalty-penalty-super-complaint> accessed 12 September 2021.

[128] Competition and Markets Authority (n 127); Ellinger et al (n 13).

[129] Ellinger et al (n 13) 48.

[130] E.g., reference to "the man on the Clapham omnibus" by Greer LJ in *Hall v Brooklands Auto-Racing Club* [1932] All ER Rep 208; and the "reasonable man" in *Donoghue v Stevenson* [1932] AC 562 (HL).

[131] Case C-415/15 *Mohamed Aziz v Caixa d´Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* [2013] EUECJ C-415/11; ECLI:EU:C:2013:164; [2013] All ER (EC) 770, as applied in *Parking Eye Ltd v Beavis* [2015] UKSC 67.

[132] *R (on the application of Norwich and Peterborough Building Society) v Financial Ombudsman Service* [2002] EWHC 2379.

ombudsman, and the functions of an ombudsman as a resolver of disputes.[133] Whilst a code is to be used as a collection of rules which guides the decision-making process, FOS is also permitted to adopt a test, i.e. to rely on "ombudsman-developed principles"[134] to resolve disputes.[135] In taking into account the rules, FOS must interpret them correctly, i.e. in line with the court's interpretation of the rule (interpretation of the meaning of the rule is reserved for the court, whereas FOS has the discretion to apply the rule).[136] However, so long as the ombudsman has adopted the correct interpretation of the rule, it is free to set that rule aside, i.e. not to apply the rule in the case at hand, so long as it gives reasons for doing so.[137] Therefore, the case gives clear authority for the development of ombudsman-based principles as part of the fairness/reasonableness jurisdiction. More generally, it can be argued that the case legitimises the formulation and use of broad principles to assess what is fair and reasonable in the circumstances. The case makes it clear that FOS is only required to consider rules/guidance but does not need to apply them, and this is particularly useful where FOS must deal with situations not covered by relevant rules.

Finally, DISP 3.6.4R refers to laws and regulations. Now it may seem unusual to refer to this here, where we are trying to understand what fairness/reasonableness *outside of the otherwise applicable law* might involve. However, we shall see below that fairness/reasonableness might also involve adapting fairness/reasonableness tests from statutory provisions that do not apply to the situation in question. A good example in the past was FOS' adaption of statutory fairness controls on exclusion clauses to insurance contracts. Therefore, it is worthwhile emphasising this possibility: fairness/reasonableness coming not from outside legal rules in general, rather just from outside the legal rules that would apply to the situation in question.

(d) Relationship between law and fairness/reasonableness

Now that we have determined the content of fairness/reasonableness, we must turn back to discussing the possible dimensions of the relationship between legal rules and fairness/reasonableness principles. Looked at entirely in the abstract, fairness/reasonableness can be used to reduce or to increase the protection offered by the law or it might entirely replace the law.

However, under our framework we do not look at these questions entirely in the abstract, rather account is taken of consumer law theory on vulnerability. In this spirit, if we follow the protective or need-oriented approach that underpins much of consumer law, and FOS in particular; then it seems fairly self-evident that fairness/reasonableness standards should not at all, or only very exceptionally, be used to reduce the protection that a legal rule would offer. After all, as already explained above, consumers are normally vulnerable in terms of absorbing economic losses, they are prone to consumer surplus losses (e.g., distress); they tend to lack the bargaining power, information, understanding or expertise to self-protect against such consequences and these problems are likely to be at their most acute in the context of financial services. It is likely therefore to be very unusual to

[133] Richard Nobles, 'Rules, Principles and Ombudsmen: Norwich and Peterborough Building Society v The Financial Ombudsman Service' (2003) 66 The Modern Law Review 781, 784.
[134] MacNeil (n 22) 518.
[135] Nobles (n 132) 784; See *R (on the application of Norwich and Peterborough Building Society) v Financial Ombudsman Service* [2002] EWHC 2379 [108].
[136] See *R (on the application of Norwich and Peterborough Building Society) v Financial Ombudsman Service* [2002] EWHC 2379 at [71], [77]-[78], [88]. The court stated that the Code has "one meaning," and whilst people might differ about what that is, it is for the court to determine what that one meaning is. If an ombudsman misinterprets the Code, then (s)he has failed to take it into account.
[137] *R (on the application of Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service* [2008] EWCA Civ 642, per Stanley Burnton LJ [49].

find consumers who are so well-resourced as not to need protection from financial losses; so "thick-skinned" as to be unaffected by distress; and so knowledgeable, experienced and with such bargaining power as to not need at least the level of protection offered by the legal regime.[138]

Likewise, following the protective or need-oriented approach, it should only be in exceptional cases that fairness/reasonableness principles are used to wholly replace rules. It is one thing to say that fairness/reasonableness can fill the gap when there is no rule on an issue, or where the rule does not provide sufficient protection. However, if there is a rule, then it is hard to see when it would make sense to replace it altogether.[139] If the replacement is with a fairness/reasonableness standard that contains the same protective elements as the rule, then this is simply wasteful and confusing; and if it contains different but beneficial elements then it can simply be added to the existing rule. Beyond these possibilities, it may well be that fairness/reasonableness is being used with a degree of arbitrariness and/or lack of direction, in which case it is likely to cause undue uncertainty.

We have shown above that fairness/reasonableness should not usually involve reducing or replacing the standards set by the rules but rather enhance these legal standards. The obvious role for these standards is to enhance the protection given by legal rules when consumer protection gaps are identified. In English legal theory, "legal gaps" are not part of the general discourse on the philosophical meaning of law and legal rules.[140] Instead, following a pragmatic approach, legal gaps are considered in specific "gap" contexts, such as the gender pay gap in employment law,[141] or a criminal justice gap in criminology.[142] "Contractual gaps" in the parties' agreement are frequently discussed in relation to certainty of contracts, and within the rules on interpretation and implied terms that are used to fill the gaps in the contract left by the parties. The concept of gaps, therefore, is very fluid and context dependent. In the consumer law context, and specifically here in relation to FOS, it seems most appropriate that the fairness/reasonableness principles should enhance legal standards/fill legal gaps by serving as a *benchmark*. By reference to the fairness/reasonableness principles (the benchmark), can we detect an actual or potential consumer protection gap in the legal regime? Do the legal rules clearly reach the level that the fairness/reasonableness principles would reach in protecting the consumer (perhaps there is no legal rule at all, or perhaps the applicable rule provides inadequate protection)? If so, the fairness/reasonableness principles can add elements that fill the gap.

(i) Fairness/Reasonableness to Add to the Law

There are examples in the past where fairness/reasonableness was used to enhance legal standards of protection by adding to the law to fill consumer protection gaps.

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[138] In support of this Christopher Hodges, Iris Benöhr and Naomi Creutzfeldt-Banda, 'Consumer-to-Business Dispute Resolution: The Power of CADR' (2012) 13 ERA Forum 199, 216.

[139] ibid.

[140] Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (Oxford University Press) James Penner and Emmanuel Melissaris, *McCoubrey & White's Textbook on Jurisprudence* (fifth edition, Oxford University Press 2012).

[141] A "gender pay gap" is defined as a difference between the hourly earnings of male and female workers. Stephen Taylor and Astra Emir, *Employment Law: An Introduction* (Fifth edition, Oxford University Press 2019) 322.

[142] A "justice gap" was defined as the discrepancy between the numbers of crimes that are committed and recorded, and the numbers which are prosecuted through the criminal justice system. Steve Case et al, *Criminology* (first edition, Oxford University Press 2017) 120-121.

The first example involved the Unfair Contract Terms Act (UCTA) 1977 which used to regulate exemption clauses in consumer contracts but did not cover insurance contracts.[143] It is well recognised in consumer law theory that exemption clauses in standard terms often lack transparency; that even if they are transparent consumers will often not have the expertise, experience or time to read or understand them; that in any case, they do not have the bargaining power to have them removed; and that the result may be consumers being deprived of the ability to claim losses that the business would otherwise be responsible for.[144] Clearly these vulnerabilities are at least as significant in insurance contracts, so the failure of UCTA to cover insurance contracts was a significant consumer protection gap within our framework. Under the auspices of the fairness/reasonableness principles, the ombudsman filled this gap by applying the sort of reasonableness test applicable under UCTA to exemption clauses in insurance contracts.[145] Therefore, here, fairness/reasonableness meant the statutory provisions on exemption clauses which did not actually apply to this type of contract. These standards were used to benchmark the law, demonstrate that there was a gap, and then fill it. Fairness/reasonableness here did not come from outside legal rules in general, rather just from outside the legal rules that would apply to the situation in question.

The second example is the *Berkeley*[146] case. The complaint involved FOS determining whether a personal pension provider had acted fairly towards its customer who had invested his pension into a scam business. Relying on FCA Principles 2 and 6 the ombudsman ruled that that these principles imposed a "duty of enquiry or investigation" on the business. This required that the business identify whether a specific investment requested by its customer was suitable for that customer, even though it operated on a non-advisory basis and thus no such duty existed in the legal rules.[147] Here the ombudsman used the FCA Principles to plug the consumer protection gap. The FCA Principles are open textured requirements that might be applied narrowly or broadly. For instance, they might be applied only to require that any positive action businesses choose to take should be done with care, skill, and diligence, have regard to consumer interests and treat them fairly. Alternatively, a more interventionist and robust protectionist approach could involve saying that skill, care, diligence, fair treatment etc. may sometimes require businesses to be proactive. Precisely this latter approach was taken by FOS.

A third example is the *Norwich and Peterborough Building Society*,[148] where FOS had to decide whether the complainant had suffered from unfair treatment by the Building Society by receiving a lower rate of interest on his savings account than was being paid to holders of newly created savings accounts, to which the complainant was ineligible; and taking into account also, that certain other terms on the consumer's contract were more onerous than those in the contracts of these holders of new accounts. There is no legal rule that prevents such differentiation as such; reflecting traditional values that parties are free to make contracts with different parties on whatever terms they choose. Yet, one can certainly argue that if we are to be concerned about protecting the economic interests of consumers as the weaker party, then this may logically imply reasonably equal treatment for consumers. After all, the "losses" of the party receiving a lower rate of interest for example, are

[143] UCTA now only applies to business-to-business contracts; while exemption clauses and other terms on consumer contracts are covered by the fairness regime in Consumer Rights Act 2015, Part 2.
[144] Chris Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (n 125).
[145] Rawlings and Willett (n 20).
[146] *Berkeley Burke SIPP Administration Ltd v Financial Ombudsman Service Limited* [2018] EWHC 2878 (Admin).
[147] See also *R (British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin), per Ousley J at [166] and [184] in which the court found that specific rules are subject to the Principles which could be used to augment them and highlighted that the ombudsman's power to decide what is fair and reasonable was wide enough to "prevent any argument…that he cannot decide to award compensation where there was no breach of a specific rule."
[148] *R (on the application of Norwich and Peterborough Building Society) v Financial Ombudsman Service* [2002] EWHC 2379.

arguably directly linked to the "gain" of the party receiving a higher rate; the latter is made possible by the former. In this case indeed the ombudsman developed the above-mentioned principle that certain consumers should not be treated "relatively less onerously" than others.[149] Thus again, we see fairness/reasonableness standards used to benchmark the law, demonstrate it contains a gap and then fill this gap.

(ii) Fairness/Reasonableness in Applying the Law

Another possibility is not to go as far as using the fairness/reasonableness principle to add elements that are not contained in the legal rules, rather to use it to justify *application* of the rules or of other fairness/reasonableness principles in as protective a way as possible, and to thereby fill consumer protection gaps.

A good example of this approach is the ombudsmen's application of the Marine Insurance Act 1906 (MIA). MIA contained the principle of utmost good faith;[150] and this principle was traditionally applied such as to require consumers to disclose to the insurer prior to conclusion of the policy, all facts that an insurer would consider material (whether or not the consumer could reasonably know that the insurer would consider the facts material).[151] This failed to recognise what we know from consumer law theory on vulnerability: that lack of expertise and experience would mean that consumers would be highly unlikely to appreciate everything that insurers might consider material and that the result would often be that consumers would suffer enormous loss, the whole policy failing and no consumer losses being covered, even if the failure to disclose was unconnected to the losses suffered. One might link this to the above-discussed notion of fairness/reasonableness as "legitimate consumer expectations." It could be argued that consumers would reasonably expect to be able to claim on their insurance policies as long as they had disclosed all that they could reasonably imagine would be considered material.[152] The legal rule, however, did not provide this protection. Using the fairness/reasonableness criteria, we can say that under our framework, there was a consumer protection gap. The ombudsmen's response was to look at the reasons for the non-disclosure. Where it was considered to be innocent, i.e., it was reasonable for the consumer to believe the information was not relevant to the insurer, the policy would be considered valid, and the consumer would be able to claim under it.[153] In other words, the gap was filled with the approach demanded by fairness/reasonableness standards. [154]

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[149] *R (on the application of Norwich and Peterborough Building Society) v Financial Ombudsman Service* [2002] EWHC 2379.

[150] s.17 Marine Insurance Act 1906 (MIA).

[151] s.18 MIA; Carter v Boehm (1766) 3 Burr 1905.

[152] Indeed, one might also make the connection to FCA Principle 6. This Principle did not exist when this decision was made but taking account of consumer interests and providing fair treatment can certainly be argued to include not refusing claims based on non-disclosures that consumers would be unlikely to understand the implications of.

[153] Caroline Mitchell (n 20) 68. These principles were imbibed by the Consumer Insurance (Disclosure and Representations) Act 2012 which replaced consumers' duty to disclose any facts a prudent underwriter would consider material with the duty in s.2(2) to take reasonable care not to make a misrepresentation to the insurer, ss.2(2) and (4).

[154] But note the point made by the court that while FOS may apply the law in this way, it is for the court to *interpret* the legal rules (Berkeley Burke SIPP Administration Ltd v Financial Ombudsman Service Limited [82]; *R (on the application of Norwich and Peterborough Building Society) v Financial Ombudsman Service* [2002] EWHC 2379 [71], [77]-[78].

3. APP fraud, FOS, and Consumer Protection Gaps

The above discussion shows that one can find support from FOS and courts for our suggested framework, whereby fairness/reasonableness is used to plug consumer protection gaps. However, this section shows that FOS is nevertheless very inconsistent in this regard, with their work on APP fraud largely failing to follow the framework.

APP fraud occurs when a consumer is "tricked into" sending money to a fraudster using electronic transfer of funds either in a bank branch or by online/electronic banking (also known as "bank transfer fraud"). APP fraud is a "push" payment, whereby consumers obtain details of the payee's account and instruct their bank to send money to this account; the money is "pushed" out of the account on the instruction of the bank customer.[155] Sending the money then involves communication between the sending (consumer's bank) and the receiving (fraudster's) bank.[156]

The factor differentiating APP fraud from other types of payment fraud is that the transaction is *authorized* by the consumer.[157] Fraudsters tend to use highly sophisticated ways to identify and deceive consumers into initiating the payment. APP fraud can happen in several ways.[158] One method is the "malicious invoice" scam: e.g., Miss B thought she was paying for the venue she was booking but was unaware that the venue's email address had been hacked and her money was going to a fraudster's account.[159] Another possibility is the "impersonation" scam: e.g., Ms L was contacted by someone claiming to be from her bank. They asked if she had recently used her card in a certain retailer and she confirmed she had not. They then said her accounts had been compromised so she would need to transfer the money she had with the bank into a different "safe" account, which was the fraudster's account.[160] By the time consumers realize what has happened in such cases, the money has been collected and funds usually cannot be recovered even with the best endeavours of the sending and receiving banks. As the fraudster is usually impossible to trace, the loss must be allocated between the bank and the consumer.

Since 28 May 2019 the CRM Code protects victims of APP fraud allocating the loss to the bank. The Code is premised on the idea that consumers are vulnerable to APP fraud, that it would not be reasonable to expect customers to have protected themselves against the particular scam,[161] and that banks are in a much stronger position to detect and prevent such fraud and, of course, to be able to bear the costs of it.[162] The CRM Code makes the consumer's bank liable to reimburse the money to the consumer,[163] unless one of the exceptions apply, such as the customer ignored effective warnings

[155] Which?, 'Consumer Safeguards in the Market for Push Payments - Which?' (n 16) 5.
[156] Fraudulent transactions can also occur within two accounts with the same bank (the so called "on us" payments); cases involving these are not part of our sample.
[157] See the various forms of APP fraud: UK Finance (n 2) 53-72.
[158] UK Finance (n 1) 47.
[159] DRN2956588.
[160] DRN4659702.
[161] R 2(3) CRM Code; see also Lending Standards Board, 'Authorized Push Payment Scam - Information for Customers on the Voluntary Code' (2019) <https://www.lendingstandardsboard.org.uk/wp-content/uploads/2019/05/APP-Consumer-Guide-Final.pdf> accessed 17 September 2021.
[162] Which?, 'Consumer Safeguards in the Market for Push Payments - Which?' (n 16) 6–7.
[163] R 1 CRM Code.

or was grossly negligent.[164] However, the pre-existing legal regime which did not have specially tailored rules to address the unique features of APP fraud was much less protective, much less likely to make the bank liable and much less sensitive to the vulnerable position of the consumer in terms of detecting and self-protecting against APP fraud. In short, a legal consumer protection gap existed.

FOS delivered 27 ombudsman decisions on APP fraud which involved consumer victims prior to the introduction of the CRM Code.[165] These cases can be differentiated in terms of (i) where the respondent was the consumer's bank (Group 1, containing 17 cases) and (ii) where the respondent was the fraudster's bank (Group 2, containing 10 cases). Our principal focus is on Group 1: the cases on pre-existing rules which gave a limited degree of protection to consumers when there was a consumer protection gap. These cases gave ombudsmen the most chance to show their approach to the law-fairness/reasonableness nexus by applying the substantive rules on payment transactions; whether the transaction was authorized and whether, exceptionally, the transaction could have been refused on suspicion of fraud. The analysis does not focus on Group 2 cases because these raise procedural questions, including whether FOS had jurisdiction to hear cases against a bank that the consumer did not have a contract with. Finally, to a degree we also draw from what we call Group 3 (containing 4 cases), which do not involve APP fraud, there being no bank transfer. However, there are similarities in that the consumer is pressured into withdrawing cash and they authorize the transaction themselves. Subsequently, the principal focus is on Group 1 cases, although occasionally salient points emerge from the Group 2 and 3 cases.

What we find is that FOS very often did not follow the framework we set out above. We noticed strong reluctance to deviate from the legal rules.[166] In applying the rules, most ombudsman took a self-reliant approach failing to take note of and to address the consumer protection gap. Out of the 17 Group 1 decisions, only one ombudsman decided fully in favour, and two partially in favour, of the consumer.[167] Only in these three decisions did the ombudsmen plug the consumer protection gap and enhanced the legal standards of protection. This was done through applying the legal rules considering fairness/reasonableness standards. None of the ombudsmen used fairness/reasonableness to add to the law in filling in the consumer protection gap.

(a) Ombudsman decisions rejecting the consumer's complaint

In this set of decisions, ombudsmen considered the principal legislation governing payment transactions, the Payment Services Regulations 2017 (PSR). The leading rule in the PSR provides that the payment transaction is authorised when the payer has given consent to the execution of the payment transaction;[168] and that the bank must then follow the customer's payment instruction subject to its being held liable for non-execution or defective execution of the payment order.[169] On the most radical approach, the ombudsman based its decision *solely* on this rule, rejecting the

[164] See for the full list of exceptions R 2(1) CRM Code.
[165] On FOS' website, we have searched the Ombudsman Decisions tab using the keyword "APP fraud", using the link <https://www.financial-ombudsman.org.uk/decisions-case-studies/ombudsman-decisions>. We then further narrowed down our sample by disregarding those cases where the complaint originated from a business, and cases on which the CRM Code applied. Sampling completed on 15 May 2021.
[166] The same trend applies to Group 2 and Group 3 cases.
[167] Decisions in favour of the bank: DRN 9496973, DRN 17932973, DRN 9214543, DRN 0247095, DRN 2564687, DRN 2284088, DRN 9214543, DRN 7463144, DRN 4659702, DRN 4407900, DRN 2039763, DRN 1920441, DRN 1194147. Decision in favour of a consumer: DRN 8054249. Decisions partially in favour of a consumer: DRN 1428713, DRN 2204158. DRN 675194 enforced the settlement accepted by the bank. Since it did not go beyond the bank's settlement suggestion, only partially compensating the consumer, we class this decision as being in favour of the bank. The same trend can be observed in Group 2 cases. Out of 10 cases only 1 is positive for consumers; and in Group 3 cases where only 1 is positive out of the 4 decisions.
[168] Reg. 67(1).
[169] Reg. 90(2).

consumer's claim because she authorized the payment transaction.[170] Other decisions have tackled the possibility that the bank could refuse to execute the transfer, or at least to make further enquiries, if it has reasonable grounds to suspect fraud.[171] One ombudsman emphasized that this is the exception and not the rule, that banks can exercise their discretion in refusing payment orders.[172] In most cases ombudsmen concluded that the transaction was not suspicious.[173]

In deciding whether the transaction was sufficiently suspicious to put the bank on alert, the decisions considered whether the transaction was out of the ordinary for the consumer, such that it would have prompted the bank to make additional checks before releasing the payments. However, even within this frame, the decisions tended not to be very protective of consumers. The reasoning in the decisions was often very brief and it was often fairly readily accepted that even where transactions were somewhat out of the ordinary, this was not enough to make the bank suspicious or require the bank to enquire further.[174] In one decision the ombudsman even stated that although the transactions "*may have been out of the ordinary for Ms B"* that did not make them suspicious because the consumer authorized the transaction.[175] The more elaborate decisions considered this in greater detail: justifying the bank's lack of grounds for suspicion by explaining that the bank had reviewed the consumer's "*account statements in the months leading up to the scam and thought about the value and nature of the payments' to compare with 'normal account activity.'"*[176]

Should the payments raise sufficient suspicion to alert the bank, the bank should have made enquiries before processing the transaction.[177] One ombudsman explained that the bank's obligation to enquire arises only in a "*small number of cases"*" and on the facts of the particular case the bank had no duty "*to contact Ms B to question her about the reasons for the transfers she was making or to try to stop her from making them*."[178] Several ombudsmen concluded that asking questions/giving warnings would not have made a difference, consumers' minds were "taken over" by fraudsters,[179] or that this would have been too intrusive for the consumer.[180] In another decision the ombudsman was satisfied that the bank did everything they were supposed to do by probing with only one question, whether someone else asked the consumer to make the transfer.[181]

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[170] DRN 9214543. We can see evidence of this "follow the law" approach by courts too. See e.g., *Tidal Energy v Bank of Scotland plc* [2014] EWCA Civ 1107.

[171] Although most of these decisions do not refer to any other law than the PSR, DRN 0247095 illustrates the array of potentially more protective rules that were available to ombudsmen regarding banks' refusing to honour the customer's payment instruction or at least to make further enquiries on potential fraud: e.g. the common law "*Quincecare duty of care"* developed in *Barclays Bank v Quincecare Ltd* [1992] 4 All EER 363 - an implied duty of the bank to refrain from executing payment orders if, and for as long as, the bank has been "put on enquiry" that the order was an attempt to defraud the customer; examples of good banking practice in the British Banker's Association's 'Protecting Customers from Financial harm as a result of fraud or financial abuse – Code of Practice' (n 122) and the Financial Services Vulnerability Taskforce's report ' Principles and recommendations' (n 122); the Banking Protocol (n 125) and of course the highly important FCA Principles. Decisions fully or partially upholding consumers' complaints also relied on these sets of rules (see e.g., DRN 1428713 and DRN 8054249).

[172] DRN 1920441.

[173] See e.g. DRN 1920441, DRN 247095, DRN 4659702, DRN 9214643, DRN 0247095.

[174] DRN 1920441.

[175] DRN 1920441.

[176] DRN 2564687, see also DRN 0247095.

[177] This obligation can be derived from the common law *Quincecare duty of care*, the FCA Principles and good banking practice. See DRN 0247095 and n 172 for more details.

[178] DRN1920441. See also DRN 2039763.

[179] DRN9496973, DRN 1194147, DRN 6751494.

[180] DRN 6755674 in Group 3 cases.

[181] DRN 2039763.

It is true that ombudsmen frequently considered whether the bank made reasonable efforts to recover the money following the discovery of the fraud, by contacting and cooperating with the receiving bank.[182] As this is not an explicit legal obligation of banks, it can be seen as an example of enhancing legal protection by reference to fairness/reasonableness standards. One might link this analysis e.g., to FCA Principle 6, which requires businesses to have regard to consumer interests and to treat them fairly. It could be said that this requires making a reasonable effort to recover the money. However, it made no practical difference, as ombudsmen concluded that in fact, banks could *not* have done more to recover the money.[183]

Within these decisions there was often acknowledgement that banks are more aware of fraud and scams than customers[184] and that "*there will be no incentive for banks to make more effort to protect customers from fraud unless they are held responsible and have to suffer the loss from scams like these*."[185] All decisions were, on their face, compassionate to consumers' predicament, one decision even acknowledging "*as a matter of good industry practice"* banks should have taken steps to *'identify and assist vulnerable consumers and consumers in vulnerable circumstances, including those at risk of financial exploitation*.'"[186] Yet all this does is provide further evidence of the failure to take into account available fairness/reasonableness principles. As was explained above, good industry practice is one of the criteria that DISP 3.6.4 expressly states can be considered in determining fairness/reasonableness. Yet here is a decision that acknowledges that good industry practice would require more of banks, while wholly failing to recognise that the ombudsman has the power to hold that the failure to follow such practice can lead to the conclusion that the consumer's claim must succeed.

Indeed, there was often also a less sympathetic tone. Ombudsmen even explicitly rejected the relevance of "digital vulnerability," unfamiliarity with using eBay and making online payments;[187] or the "language vulnerability" of someone whose first language was not English, saying that the bank could not have been aware of the effect of this.[188] In one decision the ombudsman said that just because there is a victim does not automatically mean the bank is liable to cover the loss,[189] and in several decisions ombudsmen expressly stated that it would not be fair for the bank to bear the loss.[190]

It is clear from the above analysis that FOS' approach was heavily guided by the applicable legal rules which were not sufficiently protective of consumers, i.e., there was a "consumer protection gap." There was a strong reluctance to depart from these legal rules. One ombudsman in our sample even said directly, "*I don't have the power to make changes to banking procedures, and I must decide this complaint by reference to the rules and law in place at the time of the events complained about. I can only make an award if I am satisfied NatWest was at fault*."[191] Others had suggested the same, saying that they can only hold the bank liable when the bank is at fault, meaning, when the bank had broken the law.[192] In another case the ombudsman acknowledged that the law was deficient, i.e., that there was a "consumer protection gap," but was of the opinion that neither the bank nor FOS could fill this gap. Rather, the change must be led by the appropriate regulatory body, such as the FCA.[193]

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[182] See e.g. DRN0247095; DRN1920441; DRN2039763.
[183] See e.g. DRN 2039763, DRN 1920441.
[184] DRN 0247095.
[185] DRN 1194147.
[186] DRN 0247095.
[187] DRN1793287.
[188] DRN 0247095.
[189] DRN 4407900.
[190] DRN 1920441, DRN 2039763.
[191] DRN1194147, DRN 2564687.
[192] See DRN 9214543, DRN 2284088.
[193] DRN5054402 in Group 2 cases.

(b) Ombudsman decisions upholding (at least partially) the consumer's complaint

The minority of ombudsmen in our sample, only three out of the 17 decisions, used fairness and reasonableness to enhance legal standards of protection by applying the rules in a protective manner.

These protective decisions tend to involve more elaborate legal analysis, referring not only to the PSR, but also to broader legal and regulatory requirements and good banking practices providing for banks' obligation to detect fraud.[194] In particular, decisions refer to the FCA Principles, especially to Principles 2 and 6. The decisions considered that these Principles, as well as guidance by regulatory bodies and professional associations, supported the conclusion that it was fair and reasonable for banks to have been more proactive in enquiring whether there was fraud.[195] Decisions highlighted the nature and purpose of these principles as being intended to protect consumers "*rather than, for example, to help financial businesses avoid liability*."[196] In referring to these broader set of rules and principles, one ombudsman said that to prevent fraud and scams, in addition to following the customers' instructions/mandate, banks should also monitor accounts and any payments made; and have systems in place to look out for unusual transactions or other signs that its customers were at risk of fraud. This was especially important "*given the increase in sophisticated fraud and scams in recent years, which banks are generally more familiar with than the average customer,*" and in "*some circumstances, irrespective of the payment channel used, [banks should] have taken additional steps, or made additional checks, before processing a payment, or in some cases declined to make a payment altogether, to help protect customers from the possibility of financial harm from fraud.*"[197] One decision even emphasized the need for strong measures from banks to detect and prevent APP fraud and placed reliance on the separate legal obligation of banks to act against money laundering and terrorism financing.[198]

Applying the above approach, in the two decisions that went partially in consumers' favour, ombudsmen differentiated the impact of the several transactions that were initiated by consumers. They concluded that the first transaction was not so extraordinary as to raise flags with the bank, but "*by the second payment, a pattern of potential fraud was starting to appear and the activity on the account had started to look suspicious*."[199] The quick succession of payments to a new payee that were high value or reduced the balance to zero, were out of character; not usual account activity for the account and consumer in question. Ombudsmen agreed that these should have been questioned by the bank's fraud team, and that this would probably have revealed the scam.[200]

In the only decision wholly in favour of a consumer the ombudsman focused on how the bank investigated the reasons for the transaction and concluded that, *"I don't on the balance of evidence believe sufficient meaningful questions, designed to get into the detail of a potential scam, were asked of Mr W that day*.'[201] The ombudsman explained that "*Lloyds should have given Mr W a more tailored response to his request to transfer a total of £50,000*." Reading "*a generic scam script [a standard bank warning to be wary of scams] would not necessarily break the spell for someone that's already been*

[194] See also DRN 2886347 in Group 3 cases.
[195] See n 171.
[196] DRN 8054249.
[197] DRN 2204158, see also DRN1428713.
[198] DRN 2204158.
[199] DRN 2204158. See also DRN 2886347 in Group 3 cases.
[200] See DRN 1428713, DRN 2204158. See also DRN2886347.
[201] DRN 8054249.

convinced they're acting in their best interests" and feel under emotional pressure from the fraudster. "*A standard script, simply being read out, can have little impact on a consumer that's caught up in a scam.*" The ombudsman acknowledged that there is a "*balance to be struck and there are limits to the depth of questioning a bank can pursue*." Although questions should not amount to an "*interrogation"* "*Lloyds ought fairly and reasonably to have asked more questions - essentially to challenge the purpose of the payments and ask for more meaningful detail*." The ombudsman concluded that should this have happened, "*Mr W would, more likely than not, have been unable to satisfactorily answer the bank's questions*."[202]

In contrast to the decisions discussed above that failed to uphold consumer complaints, these decisions took a more liberal view of when transactions were suspicious (immediate successive payments or a single large amount); and were also more demanding in terms of what could be expected of banks in discovering fraud. All three decisions concluded that better probing and more meaningful questions, would have discovered the fraud. This, it was decided, should involve better use of skilled staff who are able to recognize the type of fraud and react to the suspicion with appropriate questions.[203]

We have seen that in these decisions that at least partially upheld consumer complaints, ombudsmen were more prepared to use fairness/reasonableness standards to shape the (more protective) approach to the application of the legal rules. However, we have seen that these decisions were a small minority of the total; and in the majority of APP cases, FOS did not follow the framework we have suggested here, to use fairness/reasonableness standards to plug the consumer protection gap. Moreover, in some of these cases that were favourable to consumers, other circumstances may have influenced the approach. In one decision that went partially in favour of the consumer, the bank had already agreed to refund the consumer.[204] The only decision wholly in favour of the consumer was rendered after the adoption of the CRM Code.[205] Although the CRM Code did not apply as such to the facts as they had happened before it came into force (and that the Code was not the vehicle used to reach the decision), it is plausible that the protective approach was nevertheless influenced by the policy change that the CRM Code represented.

We showed in Section 2 above that the regime *does* allow, and *has* allowed before, for the use of fitness/reasonableness to be used to fill in consumer protection gaps; and we explained the various fairness/reasonableness criteria that could be used for this task. However, in our case study of APP fraud, only some ombudsmen recognized these possibilities.

Ombudsmen could have gone further to add to the law elements that were not already there. This would have involved recognising that the rules provided insufficient protection and using fairness/reasonableness principles to add the necessary protective elements. On this approach, it would have been accepted that banks should (irrespective of suspicions) be routinely liable to reimburse consumers; except in exceptional circumstances where, despite the protective steps taken by bank, on balance, consumers could be said to be at fault (the sort of approach taken ultimately by the CRM Code). However, only one ombudsman acknowledged that fairness and reasonableness principles enabled them to depart from legal rules to add to the law if this would be required by fairness: *"while we have to take account of relevant law – we're not bound by it because of our wider 'fair and reasonable' jurisdiction.*"[206] None of the ombudsmen took advantage of this power, all of them squaring their decisions within the boundaries of the legal rules. Similarly, the ombudsman could

[202] DRN 8054249.
[203] DRN 8054249.
[204] DRN 6751494.
[205] DRN 8054249.
[206] DRN 2886347 in Group 3 cases.

have more consistently increased the legal protection standards by justifying a protective application of the rules on bank suspicions and enquiries: using the fairness/reasonableness principles from regulatory standards, codes of practice, good industry practice, consumer expectations, principles developed by ombudsmen and views of consumer protection bodies to justify this. The inconsistent approach to factually highly similar sets of situations not only harms consumer protection but also jeopardizes legal certainty and predictability.

4. Concluding Comments on Fairness and Reasonableness in CADR: Significance, Potential and Limits

This paper has proposed a new framework for the relationship in CADR between legal rules and fairness and reasonableness principles. This framework is rooted in consumer law theory on vulnerability, and it gives fairness and reasonableness principles a role that is distinct from the legal rules. Fairness/reasonableness should not normally reduce or replace the protection provided by the law; but may enhance it when there is a demonstrable consumer protection gap in the law (whether by adding more protective norms to the legal rules, or by applying the legal rules in fair and reasonable ways that best protect the consumer). It was shown that some FOS and court decisions offer support for our framework. However, FOS' approach is inconsistent. In its work on APP fraud, FOS did not usually use fairness/reasonableness in the way we suggest. Most ombudsmen were strongly wedded to the legal rules in these cases, and to applications of them that were not protective. Only a minority of ombudsmen displayed the imagination and appreciation of fairness/reasonableness standards that enabled them to take a more protective approach. The paper therefore provides an important contribution to legal scholarship on CADR and ADR more generally. No previous scholarship has set out a systematic framework to manage the relationship between fairness/reasonableness and legal rules;[207] a framework rooted in consumer law theory on the vulnerable position of consumers. Neither has any prior work provided the case study of FOS APP decisions to discuss this relationship between law and fairness/reasonableness.

The new theoretical framework we have suggested is feasible and permitted under the current regime. Indeed, it reflects very well the consumer protection goal of the regulatory regime for financial services.[208] It involves fairness/reasonableness being used to add to the legal rules, or to determine the approach to their application. It does not involve *interpreting* the law, a task which it has been held can only be performed by the courts.[209] Using fairness/reasonableness need not lead to

[207] For previous work on CADR see (n 17 and 18) above. The general ADR literature mainly discussed via the idea that ADR privatizes justice, removes the public policy function of dispute resolution. See, Richard L Abel, *The Politics of Informal Justice* (Academic Press 1982); Jack B Weinstein, 'Some Benefits and Risks of Privatization of Justice Through ADR' (1996) 11 Ohio State Journal on Dispute Resolution 241; see also, Owen M Fiss, 'Against Settlement' (1983) 93 Yale Lj 1073; Don Ellinghausen Jr. 'Justice Trumps Peace: The Enduring Relevance of Owen Fiss's Against Settlement' (2007) 5 Rutgers Conflict Resolution Law Journal; Daniel Misteravich, 'The Limits of Alternative Dispute Resolution: Preserving the Judicial Function' (1992) 70 University of Detroit Mercy Law Review 37.

[208] FSMA, s.1C.

[209] *R (on the application of Norwich and Peterborough Building Society) v Financial Ombudsman Service* [2002] EWHC 2379 [71], [77]-[78], [88]. See also *Berkeley Burke SIPP Administration Ltd v Financial Ombudsman Service Limited* [2018] EWHC 2878 (Admin) [82] where Jacobs J confirmed that there is an important

uncertainty. As shown above, these concepts are widely used *within* legal rules. What matters is to identify clearly what they mean in various circumstances. Here, we have sought to do this by explaining fairness/reasonableness as a blend, in particular, of regulatory standards, codes of practice, good industry practice, consumer expectations, views of consumer protection bodies, principles developed by ombudsmen; and showing the precise ways in which fairness/reasonableness can enhance legal standards of protection by filling consumer protection gaps. Moreover, the framework need not be used in an unduly rigid or unfair manner. Therefore, the choice could be made not to use the framework where it is obvious from the surrounding legal policy context that the protection set by the law is intended as an absolute upper limit. In addition, decisions are always subject to judicial review, which can overturn them on grounds such as error of law and irrationality.[210]

Providing a framework for the relationship between fairness/reasonableness and the legal rules is immensely important. Legal protection gaps are inevitable, and APP fraud is but one drop in a much larger ocean. FOS is the largest private sector ombudsman in the UK and handles hundreds of thousands of consumer disputes every year across the whole financial sector, involving huge consumer detriment.[211] The power afforded to FOS to decide based on what is fair and reasonable is central to all of its decisions, so it is essential for both consumers and businesses to have a clear understanding of its significance. Consumers need to know that when they approach FOS, it can provide them not only with easier access to justice in the procedural sense (more accessible etc. than courts); but also, that it can provide substantive justice, outcomes that represent what is substantively fair (even if the legal rules do not provide for this). At the same time, businesses need to be aware of the full scope of FOS' decision-making powers, not just so that they can anticipate the outcome of these decisions but also to help them adjust and improve their treatment of consumers in line with the standards of substantive fairness that will be expected of them. Hence, a framework for the relationship between fairness/reasonableness and the legal rules provides important consistency and predictability. This is especially significant in areas of law where gaps between the rules and (ideal) consumer protection standards are very common. The financial sector is certainly one where rapidly changing, technology-driven business models and the creation of new financial services and products make it very likely that businesses and their products/services will often be ahead of the law, leaving consumer protection gaps behind.

Following our analysis in section 2 and evidence of FOS' current inconsistent approach in section 3, it would be useful for ombudsmen and investigators to have guidance on how to approach consumer protection gaps. In order to ensure consistency and predictability, our theoretical framework provides a clear guide on when and how to use fairness/reasonableness to supplement legal rules. However, as we have explained above, ombudsmen often confirm the investigator's decisions and they often follow in the steps of their previous fellow ombudsman, confirming their earlier decisions. It might be difficult to break from this tendency without outside intervention. The non-binding guidance with strong persuasive power could either come internally from FOS[212] and/or externally from the FCA.[213] This would help ombudsmen to use fairness/reasonableness to benchmark the law, demonstrate that there was a gap, and then to fill the gap.

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distinction between interpretation of the rules (a matter for the Court) and the application of those rules to the facts of a case (a matter for the decision-maker).

[210] Hywel Jenkins and Cat Dankos (eds), *A Practitioner's Guide to the UK Financial Services Rulebooks* (Seventh edition, Sweet & Maxwell 2019) s 12.3.16.

[211] Financial Ombudsman Service, 'Annual Complaints Data and Insight 2020/21' (n 28); Financial Ombudsman Service, 'Lessons from the Past, Ambitions for the Future' (n 28).

[212] Elaine Kempson, Sharon Collard, and Nick Moore (n 70) 37.

[213] E.g. a guidance such as the recent Financial Conduct Authority, 'FG21/1 Guidance for Firms on the Fair Treatment of Vulnerable Customers' (n 91).

The significance of our suggested framework extends beyond the scope of FOS and the borders of the UK. Our novel framework could be used by ADR schemes in other sectors in the UK and financial CADR schemes in other jurisdictions. FOS has been said to be the world's largest ombudsman service[214] and is a world-leading model followed by others. [215] The framework we have provided is transferrable to any CADR scheme that can consider both fairness/reasonableness and law in their decision-making.[216] It is also necessary, with legal consumer protection gaps being inevitable as business models and practices (especially under the influence of disruptive technology) change faster than law. Indeed, finding means of closing legal gaps can be important, not just in consumer protection law, but much more broadly in any area of law.[217] Finally, it is hoped that the analysis here helps improve more general understanding of how CADR decision-making affects the development of legal rules and how legal rules contribute to CADR decision-making. These issues have been discussed at length in the general dispute resolution literature,[218] but much less in the context of CADR.[219]

[214] Ellinger, Lomnicka and Hooley (n 13) 47.
[215] Schwarcz (n 32) and accompanying text above.
[216] n 6 and 7.
[217] Stuart Bell et al, *Environmental Law* (Ninth edition, Oxford University Press 2017) ch 20.
[218] n 33.
[219] n 33.