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Bifurcated Substantive and Legislatively-Technical Understanding of the Differences in the UK Statutory "Consumer" Definitions Applicable to Insurance*

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A B S T R A C T

This paper explains why the two UK statutory definitions of "consumer(s)" are so markedly different in the two strands of relevant statutes applicable to insurance. The basic difference between them is that by the narrow definition an insurance consumer can only be an individual whereas by the broad definition it can be either an individual or a firm, and there are other nuanced differences. This basic difference has begged questions about the protection of financial/insurance consumers. The first reason of such a marked difference is that, as a matter of legislative technique and practice in common law countries, the validity and applicability of its statutory legal definition of a terminology in one particular statute is intended to be limited only to that statute and not extendable by default to the same terminology in other statutes. The second and far more important substantive reason is the actual bifurcation of financial consumer protection practically into the judicial approach and the regulatory approach thereto. Consistent with such bifurcation, the narrow and the broad consumer definitions respectively but non-exclusively serve or match the markedly different judicial approach and the regulatory approach to financial/insurance consumer protection.

Keywords: consumer definition, consumer protection, judicial approach, regulatory approach, insurance contract law, financial regulation, dispute resolution

Ⅰ. Introduction

For financial/insurance consumer protection, it seems that the first question that is often asked is: who is the consumer, or what is the definition of consumer? Certainly, this question is of paramount legal and practical importance and therefore it is often evident in financial consumer protection research. For example, in the edited-book *An International Comparison of Financial Consumer Protection*[1] published in 2018, out of the thirteen chapters about financial consumer protection in thirteen legal jurisdictions not including the UK, six chapters[2] each starts

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usefully with a brief discussion of the definition of consumer(s) and then focuses on financial consumer protection.

The purpose of this paper is to explain why the two UK statutory definitions of "consumer(s)" in relation to consumer protection in the insurance sector are so different from each other. In the UK, there are two consumer definitions applicable to insurance. One is the extremely broad definition in the Financial Services and Markets Act 2000 ("FSMA 2000"). According to its section 1G(1), "consumers" means "persons" who use, have used or may use regulated financial services,[3] who have invested or may invest in financial instruments,[4] who have relevant rights or interests in relation to the financial services or to the financial instruments,[5] who have rights, interests or obligations that are affected by the level of a regulated benchmark,[6] and persons in respect of whom another person carry on a prescribed activity whether it is regulated or not.[7] A number of technicalities in this definition are to be detailed later, and here it suffices to say firstly that the definition is applicable to insurance, which is a regulated financial service to which the FSMA 2000 applies. Secondly, such a definition of financial "consumers" is broad in that "persons", without any qualifying words for it, in legal context includes both natural persons (i.e. individuals) and legal persons such as (business) firms/entities unless stated otherwise. In other words, financial "consumers" under the FSMA 2000 could be not only individuals but also (business) firms/entities. However, similarly broad consumer definitions are not more widely used. For example, in the EU and the USA, both their consumer contract law and financial services law adopt the narrow definition[8] similar to what is described below.

The other, and narrow, consumer definition relevant to insurance is in the Consumer Insurance (Disclosure and Representations) Act 2012 ("CIDRA 2012"). It is also in the Consumer Rights Act 2015 ("CRA 2015") which is applicable to contract for supply of "services"[9] including financial-services consumer contract in general[10] and consumer insurance contract in particular[11] regarding matters other than an insured's pre-contractual representations. According to the CIDRA 2012 section 1, "consumer" means an individual who enters into, or proposes entry into, an insurance contract wholly or mainly for purposes unrelated to the individual's trade, business or profession.[12] This definition is consistent with the conventional and narrow consumer definition currently in the CRA 2015 section 2(3): "'Consumer' means an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession." Under both the CIDRA 2012 and the CRA 2015, an insurance "consumer" is only an individual and can never be a (business) firm/entity as under the broad consumer definition in the FSMA 2000.

Similarly different consumer definitions in Asian civil-law jurisdictions, where UK insurance law and (financial) consumer protection is generally well regarded, have perplexed[13] insurance lawyers (academics and/or practitioners)[14] and insurance regulators,[15] and also have caused

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[1] Chen, T.-J. (ed). (2018). *An International Comparison of Financial Consumer Protection.* Springer.

[2] They are the chapters on financial consumer protection in Australian (by Andrew D. Schmulow and James O'Hara, at p 13), the Bangladesh (by Muhammad Ziaulhaq Mamun, at p 51), China (by Xian Xu, at p 133), Korean (by Hongjoo Jung, Misoo Choi, Youkyung Huh, at p 285), Spain (by Montserrat Guillen and Jorge M. Uribe, at p 333), Taiwan (by Jan-juy Lin, at p 345), the USA (by Patricia Born, at p 379), in Chen, T.-J. (ed). (2018). *An International Comparison of Financial Consumer Protection.* Springer.

[3] Financial Services and Markets Act 2000, s 1G(1)(a).

[4] Financial Services and Markets Act 2000, s 1G(1)(c).

[5] Financial Services and Markets Act 2000, s 1G(1)(b) and (d).

[6] Financial Services and Markets Act 2000, s 1G(1)(e).

[7] Financial Services and Markets Act 2000, s 1G(1)(f).

[8] Armour, J., & Awrey, D., Davies, P., Enriques, L., Gordon, J. N., Mayer, C., and Payne, J., (2016). *Principles of Financial Regulation*. Oxford University Press. p 52 (note 15).

[9] Consumer Rights Act 2015, Chapter 4.

[10] FCA, (2018). *FG18/7: Fairness of variation terms in financial services consumer contracts under the Consumer Rights Act 2015*. Financial Conduct Authority.

[11] The Unfair Terms in Consumer Contracts Regulations 1999 ("UTCCR 1999"), which became Part II of the Consumer Rights Act 2015, was applicable to insurance contract. See *Parker v The National Farmers Union Mutual Insurance Society Ltd* [2012] EWHC 2156 (Comm), para. 185.

[12] Consumer Insurance (Disclosure and Representations) Act 2012, section 1.

[13] This was why the author of this paper was invited, by the World Bank research project Framework for the Protection of Financial Consumers, to explain the relevant UK law in an online presentation in April 2021 to the participating lawyers, insurance economists, and insurance regulators from four major Asian civil law jurisdictions (mainland China, Japan, South Korea, and Taiwan).

[14] In relation to China, see for example Hu, W-T., (2017). The Legal Definition of Insurance Consumers Concept. *Journal of Huaqiao University (philosophy and social sciences edition)*. p 110 for the English abstract; Wen, S.-Y., Fan, Q.-R., (2017). An Analysis of the Concept of 'insurance consumer. *Modern Law Science*. 39(2), p 93 for the English abstract.

purported protection gaps for financial consumers potentially in, but not limited to, the insurance sector. For example, in Taiwan, "due to the segregation of investment and consumption" by the judiciary and the executive/administrative, "investors who purchase financial products or services are not eligible for the protection under the Consumer Protection Act."[16] To much extent, this mirrors the differences between the consumer definition under general consumer law (such as, in the UK the CRA 2015 and its predecessor) and the alternative definition under financial regulation law. There is confusion too among academic lawyers in the UK and Ireland, who have raised questions about the black-letter differences between the multiple consumer definitions.[17]

A more in-depth comparison of the two UK statutory definitions of consumer(s), especially when it comes to the broad one in the FSMA 2000, involves understanding the UK insurance regulation. In this regard, however, there has been what could be called "double gaps" in the UK legal academia, where insurance regulation is a marginal area subsumed both in financial regulation/services (law) research and in insurance law research.[18] Studies in financial services/regulation law are overwhelmed by banking law/regulation research, so that books on the law of financial services or financial regulation often have no chapter at all on insurance regulation. Although insurance law books normally have one chapter on insurance regulation,[19] in a single chapter there is little space for intensive discussions of applying the FSMA 2000 consumer definition to insurance, let alone space for comparing that broad definition with the narrow one applicable to insurance.

For that explanatory purpose, Part II briefly explains the legislatively-technical and formalistic reason for the existence of the two vastly different UK statutory definitions for the same terminology "consumer(s)". The other Parts all serve to elaborate on the substantive reasons. Part III sketches firstly the UK contract-law legislative developments leading to the narrow definition, and then the financial regulation law expansions leading to the broad definition, and thereafter analyses additional nuanced differences underlying the two statutory definitions. Part IV bifurcates financial/insurance consumer protection into the judicial approach and the regulatory approach thereto, discussing their fundamental differences in legal nature by analysing their respective key features, on that basis argues for a bifurcated substantive understanding of the definitional differences by explaining how the two consumer definitions respectively serve and match the two financial/insurance consumer-protective approaches. On reflection, Part VI cautions against bifurcating the two approaches or the two consumer definitions too far and wide, by explaining the intersection between the two approaches and also between the two definitions in the Financial Markets Test Case Scheme exemplified by the Financial Conduct Authority's role as a party to the COVID-19 business interruption insurance case, the Insurance Code of Business Sourcebook, and the Financial Ombudsman Service in relation to insurance. Part VI concludes.

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15 Research Team of the Consumer Rights and Interests Protection Bureau of the China Insurance Regulatory Commission., (2012). Thoughts on Issues in Consumer Rights and Interests Protection, *Insurance Studies*. 9, p 91 for the English abstract.

16 Lin, J.-J., Financial Consumer Protection in Taiwan: Systems and Market Issues, in Chen T.-J. (ed). (2018). *An International Comparison of Financial Consumer Protection.* Springer. p 345.

17 By three speakers in the commercial and consumer law conference held at the School of Law and the Centre for Commercial Law and Financial Regulation, University of Reading, in late July 2022 and attended by the author as a member of the audience. The Irish definitions of consumers applicable to insurance seem more complicated and involving more statutes than those two definitions in the UK. For the relevant Irish statutory sections and consumer definitions, see the Consumer Protection Act 2007 section 2(1), the Consumer Rights Act 2022 section 2(1), the Central Bank of Ireland Consumer Protection Code (2012) Chapter 12 (for definitions), the Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Insurance Requirements) Regulations 2022 reg 2, the Consumer Insurance Contract Act 2019 section 1 and the Financial Services and Pensions Ombudsman Act 2017 section 2(1)(a).

18 In contrast, in the USA, insurance regulation researchers sometimes make meaningful comparison between insurance regulation and banking regulation in the USA. See Sharon Tennyson, (2008). *State Regulation and Consumer Protection in the Insurance Industry* (Policy Brief 2008-PB-3). Networks Financial Institute.

19 For succinct but informative and enlightening discussions of insurance regulation in the UK in student textbooks see Chapter 2 (of 15 pages) of Birds, J., & Richards K., (2022). *Birds' Modern Insurance Law*. Sweet & Maxwell.; also Chapter 2 (of 35 pages) of Merkin, R., (2022). *Lowry, Rawlings and Merkin's Insurance Law: Doctrines and Principles*. Hart Publishing. For discussions in more voluminous practitioner's books, see Chapter 34 (of 27 pages) of Birds, J., & B Lynch, B., and Simon Paul S., (2022). *MacGillivray on Insurance Law*. Sweet & Maxwell.; also Chapter 14 (of 50 pages) of Merkin, R., (2022). *Colinvaux's Law of Insurance*. Sweet & Maxwell.

Ⅱ. The Legislatively Technical Reason

Understanding the differences between the two consumer definitions is practically and intellectually relevant. Practically, the differences would have implications for the protection of consumers in various business/financial sectors. Intellectually, when a particular terminology has multiple legal definitions which are obviously different in their wordings, this could perplex ordinarily mindful readers whether they are lawyers or not. In civil-law jurisdictions (mostly in continental Europe, Asia, and South America) where law exists predominantly in statutes and allows little room for making changes to or having flexibility with statutory provisions unless through lengthy legislative process, the understanding of legal rules is intellectually based on the civil/Roman-law tradition of highly systematic legal science in which "[the] emphasis on systematic values tends to produce a great deal of interest in definitions and classification."[20] In pursuit of systemised coherence and certainty in law, readers of statutory law usually tend to expect unitary or consistent legal definitions of almost each and every particular terminology, including "consumer(s)".

Although such an expectation is generally reasonable, it collapses before the specificity of law: statutory definitions are provided always in a specific (part of) Act and they have particular legislative purposes. Any statutory definition in a particular Act is applicable only 'in this Act' (or a specific part thereof[21]) as most statutory definitions often expressly stipulate, but not in other Acts or statutes unless prescribed otherwise. Therefore, technically it is not unusual that different Acts have different definitions even for the same terminology.[22] From this perspective, it is a misconceived intuition or expectation that the definitions of "consumer" in the CIDRA 2012 and the FSMA 2000 *should* be the same.

That being said, such an explanation as above is of pure and mere formalistic technicality in legislation. Beyond the legislative technicality, the substantive and therefore more meaningful query is: why does the FSMA 2000 give so broad a definition whereas the CIDRA 2012 and the CRA 2015 a narrow one? In this regard, although the narrow definition seems to be legislatively made more than ten years after the FSMA 2000, it actually was accepted from continental Europe into UK statutes much earlier.

Ⅲ. The Legislative Developments toward the Two Consumer Definitions

A. The Narrow Consumer Definition: the Evolution and the Application to Insurance

The need for a statutory definition of consumer(s) arose from the statutory law for protection of consumers in contractual transactions. In order for contract law to protect consumers, it must in the first place elucidate and therefore define what or who is a consumer. A brief conceptual history of "consumer" is helpful for understanding the rise of consumer protection and hence the need for a consumer definition.

1. The Rise of Consumer Voice and the Decline of Freedom of Contract

According to Trentmann's fascinating historical research,[23] it was from the late 19th century that citizens started to have their voice as consumers. In England, this started when a Water Consumers' Association was launched in Sheffield in 1871 in protest against water

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[20] Merryman J. H., & Rogelio Pérez-Perdomo R., (2007). *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*. Stanford University Press. p 63.

[21] For example the consumer definition in section 12BC of the Australian Securities and Investments Commission Act 2001 (Cth) is 'For the purpose of this Division' i.e. "Division 2—Unconscionable conduct and consumer protection in relation to financial services", of "Part 2—Australian Securities and Investments Commission and consumer protection in relation to financial services", of the said Act 2001.

[22] For example, in the UK, for the word "property" there are at least three statutory definitions. Law of Property Act 1925 section 205(1)(xx): "'Property' includes any thing in action, and any interest in real or personal property." Sale of Goods Act 1979 section 61(1), "'Property' means the general property in goods, and not merely a special property." In the Insolvency Act 1986 section 436, the "property" definition is more detailed and it is consistent with the one in the Law of Property Act 1925.

[23] The rest of this paragraph benefits from Trentmann F., 'How Humans Became 'Consumers': A History' (2016) 11 The Atlantic; available at <https://www.theatlantic.com/business/archive/2016/11/how-humans-became-consumers/508700/>. It is a concise description of the conceptual history of "consumer". See also Trentmann F., (2016). *Empire of Things: How We Became a World of Consumers, from the Fifteenth Century to the Twenty-First*. Allen Lane/Penguin.

taxes for the middle-class consumers' use of water for bath. Decades afterwards, the years before the First World War witnessed the starting surge of consumer politics. Nevertheless, the pre-1914 rise of consumer power did not go higher in the UK (and most other parts of the world) until after the slow recovery around the 1960s from the dire consumer-demographic and economic consequences of the two costly World Wars and the further decline[24] in the 1970s of the freedom of contract in English contract law. The clearest evidence of this decline was the Unfair Contract Terms Act 1977, which will later be discussed in some details. However, the resurgence of free market principles in the 1980s spurred essentially by Reaganism and Thatcherism 'has caused another shift in the law, with a judicial return to standard contract principles'[25] underpinned by the principle of freedom of contract.

In relation to insurance, the early history of the conception of "consumer" and the centuries it took to make its presence in English *general* contract law shows why there were no consumer definitions in the very brief Life Assurance Act 1774 and the Policies of Assurance Act 1867. Although both Acts concerned life insurance the policyholders of which have been individuals and therefore consumers as narrowly defined since 1970s, the idea of "consumer" had been just too pre-mature a social-economic concept to merit a legislative concern or attention in the 1770s, 1860s, and the late 1890s for the non-exhaustive codification of the pre-existing common/case law of marine insurance which culminated eventually in the still-effective Marine Insurance Act 1906 ("MIA 1906"). In this regard, an additional reason for the lack of a consumer definition in the MIA 1906 is that by its definition of "contract of maritime insurance",[26] this statute is inapplicable to marine life insurance, the individuals-policyholders of which could be consumers in the narrow sense. Besides, the insureds in marine insurance contracts were mostly merchants,[27] who bought insurance in relation to their business, trade, or profession: they were hardly consumers. For this reason too, there was little need for the MIA 1906 to have a consumer definition.

Nevertheless, in Europe (including the UK) the resurgence was soon restrained by the consumer protectionism which led to the Unfair Terms in Consumer Contracts Directive 93/13/EEC for the European Economic Community. The Unfair Contract Terms Act 1977 and the Directive 93/13/EEC set the two benchmarks, i.e. non-'business' and 'individual', for the narrow consumer definition.

2. Unfair Contract Terms Act 1977 and the Non-'Business' Benchmark

The Unfair Contract Terms Act 1977 is an exercise of legislative policing of the long-upheld contractual freedom in the content of contracts. The purpose of the legislative policing as such was to protect the weak party to standardised contracts and to consumer contracts, by controlling not only the effects of standardised terms and conditions in non-consumer contracts but also contracts between a consumer and a non-consumer. For this purpose, under the original UCTA 1977 section 3, for a contact between X "dealing as consumer" or dealing on Y's written standard terms of business, except the contract term satisfies the requirement of reasonableness, if Y is in breach of the contract, then Y cannot use the contract term as against X to exclude or restrict Y's liability in respect of Y's breach.

The original UCTA 1977 section 12(1) interprets the phrase "dealing as consumer":

> (1) A party to a contract "deals as consumer" in relation to another party if—
>
> (a) he neither makes the contract in the course of a business nor holds himself out as doing so; and
>
> (b) the other party does make the contract in the course of a business; and
>
> (c) in the case of a contract governed by the law of sale of goods or hire-purchase, or by section 7 of this Act, the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.

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[24] For English contract law, the 1770s to 1870s were the prime period for the principle of freedom of contract whereas the 1870s to the 1970s witnessed its decline; see Atiyah, P. S., (1985). *The Rise and Fall of Freedom of Contract*. Oxford University Press.

[25] Randall, S., (2007). Freedom of contract in insurance. *Connecticut Insurance Law Journal*. 14(1), p 109. See also Buckley, F.H., ed., (1999). The Fall and Rise of Freedom of Contract. Duke University Press.

[26] Marine Insurance Act 1906, section 1 and section 3.

[27] Merkin, R., (2020). *Marine Insurance: A Legal History*. Edward Elgar. para. 2-008.

This is how the original UCTA 1977 effectively defined "consumer". It was not clear whether such a consumer would be an individual or a firm. This consumer definition "has been interpreted widely by the courts to include legal persons (such as companies) where they are acting outside the normal course of their business. In effect, under the UCTA 1977 a company may sometimes be treated as a consumer."[28]

The big surprise, however, is that the UCTA 1977 section 3 on "dealing as consumer" would not—nor would its consumer definition in section 12(1)—be applicable to insurance contracts. This is because it was stipulated in the original UCTA 1977 that "Sections 2 to 4 of this Act do not extend to: (a) any contract of insurance (including a contract to pay an annuity on human life)"[29] and a few other types of contracts. The non-applicability of the UCTA 1977 to insurance contracts resulted from the British insurance industry argument that exclusion clauses in insurance contract, which had usually been criticised as unfair, "go to the very risk written by insurers and so are not appropriately regulated by general measure applicable to other forms of exclusion clause"[30] and the industry's subsequently successful lobbying for exempting insurance contracts from the UCTA 1977.[31] In return, the British insurance industry was committed to self-regulation which set out how certain aspects of the common/case law of insurance would not be relied upon by insurers in consumer cases.

In spite of the exemption of insurance contracts, the indirect definition of consumer in the original UCTA 1977 section 12(1) as quoted above was important as the first UK statutory definition, albeit indirect, of consumer. Whilst this definition did not clearly limit the consumer status to individuals or natural persons, its exclusion of transactions in the course of the consumer's business effectively set non-business as one of the two important benchmarks of the conventional and narrow consumer definition.

3. *The Directive 93/13/EEC Setting the 'Individual' Benchmark*

The other benchmark, i.e. consumer as an individual or a natural person, was set by and brought into the UK firstly by the Unfair Terms in Consumer Contracts Directive 93/13/EEC (the European Economic Community), with its Article 2(b) providing that "'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession". As a Member State of the then EEC (rebranded later in 1993 as the European Union), the UK accepted the Directive 93/13/EEC and adopted it firstly as the UK statutory law of the Unfair Terms in Consumer Contract Regulations ("UTCCR") 1994, though short-lived for not properly reflecting the Directive 93/13/EEC, and again re-adopted as the long-lived UTCCR 1999. The definition of consumer under the UTCCR 1999 is in essence the same as that quoted above from the Directive 93/13/EEC.

In the early 2010s, the Consumer Rights Directive 2011/83/EU updated and replaced the Directive 93/13/EEC and was adopted as the UK domestic law i.e. the Consumer Rights Act 2015 which replaced the UTCCR 1999. It is worth repeating that under the CRA 2015, "'Consumer' means an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft, or profession."[32] Although differing in wordings, this definition is homogeneous with the old definition in the Directive 93/13/EEC. Unlike the original UCTA 1977 which is inapplicable to insurance contracts, the UTCCR 1994, the UTCCR 1999, and the CRA 2015 were and are applicable to "services"[33] including the provision of insurance.

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28 Conway, L., (1996). *The Unfair Terms in Consumer Contracts Regulations* (Research Paper 96/93). House of Commons Library. p 23.

29 Unfair Contract Terms Act 1977, Schedule 1, paragraph 1(a).

30 Merkin, R., (2022). *Lowry, Rawlings and Merkin's Insurance Law: Doctrines and Principles*. Hart Publishing. p 89, also that "Parliament was persuaded that any judicial supervision of exclusions from insurance coverage would amount to a rewriting of the policy."

31 Tyldesley, P., (2008). 'The Reform of Insurance Contract Law - Why Have Consumers Waited So Long?' *Insurance Research and Practice*. pp 3-4.

32 Consumer Rights Act 2015, section 2(3).

33 The UTCCR 1994 and the UTCCR 1999 were applicable "to any term in a contract concluded between a seller or supplier and a consumer", and a "supplier" was defined in both as "a person who supplies goods or services". Insurance is a type of "services". see the UTCCR 1994 reg 3(1) and reg 2(1), and similarly the UTCCR 1999 reg 4(1) and reg 3(1), also the CRA 2015 Chapter 4. See also *Parker v The National Farmers Union Mutual Insurance Society Ltd* [2012] EWHC 2156 (Comm), para. 185, confirming the applicability of the UTCCR 1999 to insurance contracts.

4. Insurance Contract Law Reform in the late 2000s and the Consumer Definition

The (English) Law Commission and the Scottish Law Commission jointly launched in 2006 the insurance contract law reform project, after 20 years of inaction since the previous major efforts of reform were stalled in 1984-1986 by the British insurer's successful lobby against insurance law legislation.[34] The early stage of the jointly launched project focused on the long-criticised issues with the common/case law of insured's pre-contractual disclosure and misrepresentation. Such common/case law rules had been codified into the Marine Insurance Act 1906 ("MIA 1906") sections 17 to 20, whose applicability extends beyond marine insurance contract to all insurance contracts:[35] life and non-life, marine and non-marine, consumer, and non-consumer. Under the pre-reform MIA 1906 section 18, when buying insurance the insured must voluntarily disclose to the insurer every material circumstance which is known to the insured so that the insurer could make risk-assessment for deciding whether to make the insurance contract and if so on what terms. This duty of pre-contractual disclosure has three major aspects. First, "every circumstance material" is anything which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.[36] Second, the insured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him.[37] Third, a non-disclosure by the insured entitles the insurer to avoid the insurance contract[38] and therefore to fully reject the insured' any insurance claim under the contract in question.

The pre-contractual duty of disclosure is particularly onerous to an insured who is a consumer and hence inexperienced in insurance matters. This is because it could be difficult for the insured at the time of buying the insurance to know what information would influence the judgment of a hypothetical prudent insurer (rather than the actual insurer) and therefore be material and hence must be disclosed voluntarily. It is also because the rule of the insured's deemed knowledge would practically mean that the insured must disclose circumstances which it arguably should know but actually does not know. How could the law oblige a person to disclose what this person does not know? Whether this person should know the circumstance is always arguable. In addition, the consequence of the insured's breach of the onerous duty is very harsh: regardless of whether the non-disclosure is intentional or merely negligent or even innocent,[39] as long as there is even just a slight non-disclosure that induced the insurer to enter into the contract, the insured cannot get any insurance payment at all under the contract. All these are similar, according to the MIA 1906 section 20, for the insured's misrepresentation. The data on insurance complaints in 2006-2007 shows that issues of non-disclosure and misrepresentation cause significant problems for life insurance, vehicle insurance and building/contents insurance claims, and can also occur across a variety of other products, including pet insurance and private medical or dental insurance.[40] Absolutely most these insurance products, as a whole, are consumer insurance.

The insurance contract law reform project in its early stage prioritised solving these issues for insureds or policyholders who are consumers, because consumers are the most vulnerable to these harsh rules. For that purpose, there must be a definition of "consumer" in insurance. The conventional narrow consumer definition from the Unfair Terms in Consumer Contracts Directive 93/13/EEC has been adopted in the UTCCR 1999. At the time of the insurance contract law reform leading firstly to the CIDRA 2012, the Consumer Rights Directive 2011/83/EU, which was yet, but expected, to be adopted as UK statutory law continued to use the conventional narrow definition. So the insurance contract law reform project saw no need to reinvent the wheel. That being said, there were substantial discussions[41] of whether small businesses should

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34 Tyldesley, P., (2008). 'The Reform of Insurance Contract Law - Why Have Consumers Waited So Long?' *Insurance Research and Practice*. pp 7 and 10.

35 *Cantiere Meccanico Brindisino v Janson ELR* [1912] 3 KB 452 (CA), at 467 per Moulton LJ; *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501 (HL), at 518D per Lord Mustill. See also Birds, J., & B Lynch, B., and Paul S., (2022). *MacGillivray on Insurance Law*. Sweet & Maxwell. para.16-103, with footnotes 330 citing five other cases.

36 Marine Insurance Act 1906, section 18(2).

37 Marine Insurance Act 1906, section 18(1).

38 Marine Insurance Act 1906, section 18(1) and section 17.

39 Birds, J., & B Lynch, B., and Paul S., (2022). *MacGillivray on Insurance Law*. Sweet & Maxwell. para.16-103, with footnotes 329 citing twelve cases.

40 LC and SLC, (2009). *Consumer Insurance Law: Pre-contract Disclosure and Misrepresentation* (Cm 7758). Law Commission and Scottish Law Commission. para. 1.35.

and/or could be included in the definition of "consumer" in insurance, and eventually not included therein due to more practical considerations.[42] Hence the CIDRA 2012 has accepted and adopted the conventional and narrow consumer definition.

B. The Expansions to the Broad Consumer Definition in the FSMA 2000

The main reason for having the broad definition of "consumers" in the current FSMA 2000 is to ensure that an increasingly wider scope of persons engaging in dealings with the rapidly growing and expanding finance services providers could be protected through financial regulation. Two legislative expansions have built up toward the formulation of the current broad definition in the FSMA 2000.

1. The First Expansion: the Great Leap Forward from "Investor" to "Consumer"

Before the major expansion from the Financial Services Act 1986 ("FSA 1986") to the original FSMA 2000, the protection offered by the UK financial regulation to financial services users was neither broad nor effective, and such shortcomings were attributable to the narrow scope of the regulatory Prevention of Fraud (Investments) Act 1958 (and an earlier version in 1939) and also four infamous financial scandals in 1981 which demonstrated that a comprehensive review of investor protection was needed.[43] The government commissioned Professor Gower to conduct a review of such protection, and that culminated in the *Review of Investor Protection*[44] ("Gower Report") which proposed passing an Investor Protection Act. The Gower Report and the ensuing White Paper[45] led eventually to the FSA 1986, which was an Investor Protection Act not in name but in substance. Both before and in the FSA 1986, the UK financial services law had hardly used the concept of "consumer". Instead, in the FSA 1986 the terminology for that protective purpose was "investor".

The FSA 1986 indirectly defined "investor" by directly defining "investment". The statutory definition of "investment" was intended to be "specific (to provide certainty for practitioners, customers and investors) and wide (to achieve consistency of treatment between different financial services)."[46] By the FSA 1986 section 1, "'investment' meant any asset, right, or interest" falling within Schedule 1. Included therein as "investments" were shares and stock in the share capital of companies, debentures, government and public securities, instruments entitling to shares or securities, certificates representing securities, units in collective investment scheme, options, futures, contracts for differences etc, long term insurance contracts, rights to and interests an investment.[47] In contrast, non-life insurance were not treated as investment, because non-life policies "are not commonly regarded, or sold, as investments".[48]

For providing tailored protection to different "class(es) of investors",[49] the FSA 1986 distinguished between "professional investors"[50] (also known as business investors, or experienced investors) and occasional customers or ordinary investors.[51] It was noted:

> The conduct of business rules and the other rules and regulations made under Chapter V of Part I of this Act must take proper account of the fact that provisions that are appropriate for regulating the conduct of

41 LC and SLC, (2006). *Insurance Contract Law Issues Paper 1 Misrepresentation and Non-disclosure*. Law Commission and Scottish Law Commission, paras 7.96 to 7.105.

42 *LC and SLC,* (2014). *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment* (Cm 8898). Law Commission and Scottish Law Commission. paras 2.22 to 2.28.

43 Pilmlott, G. F., (1985). The Reform of Investor Protection in the UK－An Examination of the Proposals of the Gower Report and the UK Government's White Paper of January 1985. *Journal of Comparative Business and Capital Market Law*. 7(2), pp 145-147. See also Ryder, N., (2001). Two plus two equals financial education. *The Law Teacher*. 35(2), pp 216-218.

44 Gower, L.C.B., (1984) *Review of Investor Protection* (Cmnd 9125). UK Department of Trade and Industry.

45 UK Department of Trade and Industry, *Financial Services Regulation: A New Framework for Investor Protection* (1985).

46 UK Department of Trade and Industry, (1985). *Financial Services Regulation: A New Framework for Investor Protection*. para. 4.2. See also Leigh, L. H., & Rutterford J., (1984). Investor Protection: the Gower Report. *Business Law Review*. 47(5), pp 89-90.

47 Financial Services Act 1986, Schedule 1, paras. 1 to 10.

48 UK Department of Trade and Industry, (1985). *Financial Services Regulation: A New Framework for Investor Protection*. para. 4.6.

49 Financial Services Act 1986 s 206, para. (e). see also Financial Services Act 1986, Schedule 8, para. 12.

50 Financial Services Act 1986 s 195, para. (a).

51 Barnard, D. M., (1987). The United Kingdom Financial Services Act 1986: a new regulatory framework. *International Lawyer*, 21(2), pp 351-353.

> business in relation to some classes of investors may not (by reason of their knowledge, experience or otherwise) be appropriate in relation to others.[52]

In spite of that, the protection of what was more often plainly known as private investor or ordinary investor or small investor, who "in the contemporary financial world is not unlike a consumer"[53] (known more as "retail investor"), was inadequate and ineffective. According to the finding by JUSTICE (i.e. the British Section of the International Commission of Jurists), with increasing investments and swindles involving the public, the 1980s (including after April 1988 when the FSA 1986 took effect) in the UK was "a decade of disasters"[54] for private investors suffering losses from the financial industry's mis-sale of personal pensions, mismanaged unit of trusts, home-income plans sold to the elderly, and the failure to secure convictions in many highly publicised fraud cases.[55] The regulatory regime under the FSA 1986 was akin to 'a lake of blancmange'.[56]

Through the Financial Services (Glossary and Interpretation) Rules and Regulations 1990, the Securities and Investments Board, one of the statutory regulators created under the FSA 1986, distinguished "business" and/or "professional" investors from "private investors" who were like consumers. The FSA 1986 (rev.1990) section 61A allowed private investors (i.e. financial consumers) the right to sue for the investment business' breach of regulatory rules. For this purpose, as the Department of Trade and Industry ("DTI") tentatively proposed for consultation, "private investor" would mean

> … an investor whose cause of action arises as a result of anything he has done or suffered (a) in the case of an individual, otherwise than in the course of carrying on investment business; and (b) in the case of any other person, otherwise than in the course of carrying on business of any kind, but does not include a government, local authority or public authority.[57]

This was close to a narrow consumer definition. As pointed out however,[58] this definition overlooked the possibility that an individual could be an experienced or even professional investor. In addition, it excluded considerable number of small businesses which might have no expertise in financial investments.

The FSA 1986 was eventually repealed by and replaced with the FSMA 2000. In the original and un-amended FSMA 2000, "consumer" is defined for the purposes of stating the regulator's consumer protection objective[59] and of setting out the consumer factors to which the regulator must have regard when considering the appropriate degree of consumer protection.[60] The original section 5(3)(a) of the FSMA 2000 stipulates that "'Consumers' means persons who are consumers for the purposes of section 138." The original section 138 focuses on empowering the financial regulator to make general rules, which can only be consumer-protective[61] and are applicable to authorised financial institutions regarding their conducting of regulated and unregulated activities.

It was in the context very specific to section 138 which the original FSMA 2000 section 138(7) defined "consumer" as users of services provided by authorised persons in carrying on regulated activities; or persons having rights or interest in the use of such services, and person whose rights or interest in the use of such services may be adversely affected by their agents' conduct. It seems that users and (financial) services referred to in section 138(7) would include "investor" and "investment" respectively. Otherwise, "the differing degrees of risk involved in different kinds of *investment* or other transaction",[62] which are one of the factors for regulatory consideration of meeting the consumer protection objective, would make little sense.[63]

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52 Financial Services Act 1986, Schedule 8, para. 12. The said Chapter V is on "Conduct of Business".

53 JUSTICE, (1992). *The Protection of the Small Investor*. JUSTICE Educational & Research Trust. para. 2.21.

54 JUSTICE, (1992). *The Protection of the Small Investor*. JUSTICE Educational & Research Trust. para. 2.21.

55 Ryder, N., (2001). Two plus two equals financial education. *The Law Teacher*. 35(2), p 216 (note 4).

56 JUSTICE, (1992) *The Protection of the Small Investor*. JUSTICE Educational & Research Trust. para. 1.11.

57 UK Department of Trade and Industry, (1990). *Defining the Private Investor*. p 11.

58 JUSTICE, (1992) *The Protection of the Small Investor*. JUSTICE Educational & Research Trust. para. 2.19.

59 Financial Services and Markets Act 2000 (original), section 2(2).

60 Financial Services and Markets Act 2000 (original), section 5(2).

61 UK Parliament, (2000). *Explanatory Notes to Financial Services and Markets Act 2000* (original), para. 253.

62 Financial Services and Markets Act 2000 (original), section 5(2)(a), emphasis added.

63 This is collaborated by the more relevant section 425A of the FSMA 2000 (rev.2010). For general regulatory purposes, section 425A(2)

The re-definition, in the FSMA 2000 (rev.2010) section 425A, of consumers was still homogeneous to the definition in the original section 138(7).

The definition of "consumers" under the original FSMA 2000 expanded the relatively narrow FSA 1986 definitions of "investment" and "investor". In spite of the FSA 1986 Schedule 1 list of financial products for the purpose of defining "investment" directly and "investor" indirectly, the scope of "investor" thereunder was not as broad as the original FSMA 2000 definition of "consumers", which broadly are users of financial services; in contrast, "investor" under the FSA 1986 did not include users of financial services. This is because, by definitionally limiting the investment "asset, right, or interest" to financial products specified in the FSA 1986 Schedule 1, the "investment" definition effectively narrowed down the scope of itself and the scope of "investor". For example, an individual policyholder of his or her own long-term life insurance which was an "investment" as specified in the FSA 1986 Schedule 1, was an investor. However, the same individual as the policyholder and user of general insurance (like auto insurance or home insurance) was not an investor under the FSA 1986. Nevertheless, in the latter scenario such an individual policyholder certainly would be a "user" (of financial services, i.e. insurance) falling within the broad consumer definition in the original FSMA 2000. This exemplifies the narrow scope of protection under the FSA 1986 relative to and compared with that under the FSMA 2000.

2. The Second Expansion

Through further amendments in 2012 and 2018, the FSMA 2000 section 425A has expanded its consumer to further include persons "whose rights or interests or obligations are affected by the level of a regulated benchmark"[64] and persons "in respect of whom a person carries on [a specified activity whether or not it is a regulated one]."[65] A "regulated benchmark" means,[66] by referring to EU legislation,

> any [regulated] index by reference to which the amount payable under a financial instrument or a financial contract, or the value of a financial instrument, is determined, or an [regulated] index that is used to measure the performance of an investment fund with the purpose of tracking the return of such index or of defining the asset allocation of a portfolio or of computing the performance fees.[67]

The extremely broad consumer definition in the current FSMA 2000 section 1G is a further expansion of the already expanded consumer definition in the amended section 425A referred to above. More importantly, investors become another prominent part of the broad consumer definition in section 1G. This is because both "persons who have invested, or may invest, in financial instruments" and "persons who have relevant rights or interests in relation to financial instruments"[68] also fall within the broad consumer definition. The need for such a broad definition as in section 1G arises because the FCA's general functions as provided for in section 1B extend to those functions under the FSMA 2000 Part 6 (official listing). So it is appropriate, for example, for the consumer definition to extend to "listed issuers" (under the FSMA 2000 Part 6) in their capacity as "consumers" of the regulated financial services of issuing securities or other financial instruments in regulated financial markets.

C. Additional Nuanced Differences between the Two Consumer Definitions

Between the CIDDA 2012 (and the CRA 2015) and

defines consumers as current and past and potential users of financial services, or persons who have relevant rights or interests in relation to any of those services. Further interpreted in section 425A(3)(b), financial services include those provided by "authorised persons who are investment firms". The "investment firms" can be either legal persons or natural persons as per the definition in Article 4.1(1) of the Markets in Financial Instruments Directive 2004/39/EC (known often as the "MiFID" and effective until replacement by "MiFID II" i.e. Directive 2014/65/EU) implemented in the UK through the Commission Regulation (EC) No. 1287/2006. Resultantly, it became clearer that users/consumers of financial services include investors, which could be either natural persons (hence individual investors) or legal persons (hence investment firms or even institutional investors).

64 Financial Services and Markets Act 2000, section 425A(2)(c), as revised in 2012.

65 Financial Services and Markets Act 2000, section 425A(2)(d), as revised in 2018.

66 Financial Services and Markets Act 2000, section 425A(7), as revised in 2018.

67 Benchmark Regulation (EU) 2016/1011, Article 3(3).

68 Financial Services and Markets Act 2000(rev.2013), sections 1G(1)(c) and 1G(1)(d).

the FSMA 2000 definitions of consumer(s), in addition to the clearest difference pointed out in the Introduction, there are other nuanced differences which are also practically and legally relevant. Firstly, under the CIDRA 2012 an insurance consumer is strictly an individual who is, or proposes to become, a party to an insurance contract, whereas financial or insurance "consumers" under the FSMA 2000 are not limited to a party to financial services contracts. Instead, under the FSMA 2000 financial "consumers" extend to persons having "relevant rights or interests in relation to any [regulated] financial services"[69] or "relevant rights, interests in the financial instruments",[70] or "rights, interests obligations that are affected by the level of a regulated benchmark"[71] but nonetheless are not a party to the relevant financial services contract. Due to such a broad consumer definition, far more insureds or policyholders could be protected under the FSMA 2000 as broadly defined "consumers" than under the CIDRA 2012 and the CRA 2015 as "consumers" narrowly defined under an individual and a contractual party to insurance policies. For example, a firm having business insurance, a beneficiary of a life insurance but is not the policyholder, and an heir to a life insurance policy are not protected as (insurance) consumers under the CIDRA 2012 and the CRA 2015. This is because they are not consumers as narrowly defined thereunder: the firm is not an individual, whereas the beneficiary and the heir are not even a party to the life insurance contract. In contrast, the firm is a person using insurance, the beneficiary and the heir have "relevant rights, interests" in the life insurance contract, and therefore they are all consumers in the FSMA 2000 and are protected thereunder.

Secondly, by the CIDRA 2012 section 1(b),[72] the "consumer" status of the insurer's counterparty does not hinge upon whether the insurer carries out its insurance business with or without authorisation as per regulation under the FSMA 2000, whereas the financial "consumer(s)" status is tied to the financial services provider's regulated status in relation for example to the "regulated financial services"[73] or "regulated activities"[74] of the financial services provider. This difference means that, unlike under the CIDRA 2012, a person in financial transactions with its counterparty which has none of the regulated status would *not* at all be a "consumer" under the FSMA 2000.

Ⅳ. Bifurcated Understanding of the Differences between Two Consumer Definitions

Why does the FSMA 2000 give so broad a definition whereas the CIDRA 2012 a narrow one? The key to answering this question is to see the different nature of the two statutes which are oriented toward two different approaches to consumer protection. This can be generalised and juxtaposed as below and explained in this Part with more details.

A. The Judicial Approach to Consumer Protection

In the judicial approach to consumer protection, a claimant who actually or arguably is a consumer brings disputes with traders to a court, making substantive claims against the traders mainly on the basis of the contract which sets out their respective rights and obligations in the dealings between them. The immediate purpose of this approach is the judicial resolution of consumer disputes brought before the court. The judicial approach is an *ex post* response to such disputes. Judicial resolution of contractual disputes is not based upon a judicial agenda of protecting either party to the disputes. This is because the UK judiciary are duty-bound to be apolitical, neutral, impartial. Any agenda of protecting either party to disputes could be pre-set in law mainly by the legislature and through legislation, not by or through the judiciary. Courts only apply such laws which have the legislatively pre-set

69 Financial Services and Markets Act 2000, section 1G(1)(b).

70 Financial Services and Markets Act 2000, section 1G(1)(d).

71 Financial Services and Markets Act 2000, section 1G(1)(e).

72 Under the CIDRA 2012 section 1(b), the insurer as a party to the consumer insurance contract is "a person who carries on the business of insurance and who becomes a party to the contract by way of that business (*whether or not in accordance with permission for the purposes of the Financial Services and Markets Act 2000*)." Emphasis in italics added.

73 Financial Services and Markets Act 2000, section 1G(a)(i).

74 Financial Services and Markets Act 2000, section 1G(a)(ii). Similarly, "the level of a regulated benchmark" and "an activity which is specified", as per the FSMA 2000 sections 1G(e) and 1G(f) respectively.

Table 1. Comparing the two sets of statutes defining "consumer(s)" in relation to insurance

CIDRA 2012; CRA 2015	FSMA 2000
(largely) contract/private law	Regulatory/public law
consumer rights to bring legal action thereunder	generally, no consumer rights to bring legal action thereunder
ex post	*ex ante*
judicial resolution of disputes	regulatory protection
remedial	preventative

agenda, and the judicial decisions, particularly the judicial reasoning therein, could be followed by lower courts as judicial precedents. However, depending on the particular facts and circumstances of the disputes brought to courts, the judicial application of consumer-protective statutes whose *legislative intention* is to protect consumers does not necessarily have the *judicial effect* of protecting an apparent consumer or even an actual consumer when such consumers lose their cases in courts. This is so even if the relevant statute is intended to be consumer-protective.

The Court of Appeal case *Ashfaq v International Insurance Company of Hannover Plc*[75] illustrates the gap between the legislative intention and the judicial effect. On 1 February 2012, Ashfaq entered into an insurance contract with the insurer under a one-year Residential Let Property Insurance Policy. The property actually under letting and insurance coverage was damaged in a fire in June 2012. In response to Ashfaq's claim for insurance money, the insurer made interim payment, but refused to pay further because it discovered that Ashfaq had lied in the insurance proposal form about his past criminal conviction. Such information was one of the Statement of Facts which, by the terms, "will form the basis of any contract entered into with Insurers." So this lie was a breach of the "basis of contract" clause. As per the then effective common/case law of insurance thereon, such a breach by insured persons could entitle the insurer to avoid/cancel the contract and to reject insurance claims.[76] In the High Court trial, this legal rule was applied, leading to judgment against Ashfaq. In appeal, Ashfaq argued that he was a consumer as defined in the UTCCR 1999 and that a "basis of contract" clause in insurance contract was an unfair term that the UTCCR 1999 rendered non-binding to consumers.

Each of the Court of Appeal judge (also known as Lord of Justice) hearing the case agreed with Lord Justice Flaux's lead judgment against Ashfaq. The applicable law was not the CIDRA 2012 (or the much later CRA 2015) but the UTCCR 1999 which was in force when the insurance contract in question was entered into more than one year before the CIDRA 2012 took effect in April 2013. Under the UTCCR 1999, "consumer" means any natural person acting for purposes which are outside his trade, business, or profession.[77] On the face of the documentation evidencing Ashfaq's application for insurance and also of the Residential Let Property Insurance Policy itself, the purpose of the insurance was to protect the property against fire and other risks. Ashfaq was using the property for the business of letting to students for rent. Therefore, although in layperson's eyes he apparently seemed to be a consumer of the insurance, the purpose of the insurance was related to Ashfaq's business of property-letting, and hence the Court held that Ashfaq was actually *not* a consumer[78] under the UCTTR 1999.

As a corollary, the then existing and effective common/case law on "basis of contract" clauses in insurance contract would *not* be rendered non-binding to Ashfaq, because he was not a consumer. Resultantly the insurer was entitled to reject Ashfaq's insurance claim due to Ashfaq's breach of such clauses through Ashfaq's lie about his criminal conviction. It is also very noteworthy that if Ashfaq's insurance contract/policy in question had been entered into after the CIDRA 2012 took effect and then CIDRA 2012 would apply, but considering other facts mentioned above Ashfaq would still lose the case,[79]

[75] *Ashfaq v International Insurance Company of Hannover Plc* [2017] EWCA Civ 357.

[76] *Genesis Housing Association Ltd v Liberty Syndicate Management Ltd* [2013] EWCA Civ 1173, paras. 50-57 summarising the case law from the early 1920s to late 1990s.

[77] Unfair Terms in Consumer Contracts Regulations 1999, reg 3(1).

[78] [2017] EWCA Civ 357, para. 46.

[79] Ashfaq would still not be an insurance "consumer" under the CIDRA 2012. The abolition under the CIDRA 2012 section 6(2) of the insurance

even if under the CIDRA 2012 he were an insurance consumer.[80]

The legal basis of the judicial approach to consumer protection is largely contract law and private law. As a matter of general legal principle, contract-law doctrines, and rules, including legal definitions, are and should be applicable to (insurance) contract disputes brought to courts. The consumer definitions in the UTCCR 1999, the CIDRA 2012 and the CRA 2015 are binding to both parties to consumer insurance contract and courts are bound to apply them. In reaching (consumer) contract dispute resolution decisions, courts are bound more by contract law doctrines/rules than by rules and principles in regulatory law such as the FSMA 2000. Although judges may take into account the regulatory scheme as the relevant legal background for interpreting contractual terms and implying terms into contract,[81] the regulatory rules and principles are not decisive for, but only at most complementary to, judicial decision-making in contract cases.

The narrow scope of the conventional consumer definition in the CIDRA 2012 and the CRA 2015 is related also to the contractual and contract-law basis of the judicial resolution of consumer disputes. The business deal (including insurance) disputed before court is almost always based on a contract. The consumer seeking judicial resolution of the dispute over the deal and contract must in principle be a party to or a privy to the contract. This follows from the legal principle of the privity of contract, under which only a party or privy to the contract can sue (and/or enforce its rights against) the other party, and can be sued (and/or be subject to enforcements of rights) by the other party.[82] So, unlike the broad consumer definition in the FSMA 2000, other persons "who have relevant rights or interests in relation to"[83] the financial contract and/or "who have rights, interests or obligations that are affected by a regulated benchmark"[84] are not consumers in relation to the contract-based judicial resolution of disputes, because such a person is not actually a party to the contract as is a consumer of the narrow definition under the CIDRA 2012 or the CRA 2015.

Last but not least important, the judicial resolution of financial disputes is available to all financial consumers and is by no means limited only to the narrowly defined consumers. That is why in relation to financial services including insurance, not only almost all individuals in transactions for business, profession, or trade purposes, but also almost all non-individuals for such purposes can also bring lawsuits in courts to seek judicial intervention to protect their rights and interests.

B. The Regulatory Approach to Consumer Protection Applicable to Insurance

1. The FSMA 2000 for Financial Consumer Protection through Regulation

Under the FMSA 2000, "the protection of consumers" is one of the three "operational objectives"[85] which the regulator i.e. the Financial Services Authority ("FSA", in 2001-2013) and its rebranded successor the Financial Conduct Authority ("FCA", as of 2013) must meet in discharging its general functions.[86] Unlike the contract-law statutes such as UTCCR 1999, the CIDRA 2012 and most parts of the CRA 2015, the FSMA 2000 does not set out substantive rules about the private-law rights and obligations of its defined (financial) consumers and their counterparties. Nor is the FSMA 2000 intended for

contracting practice of "basis of contract clause" in consumer insurance contracts and the related old rules would not be applicable to Ashfaq's policy—in other words, Ashfaq would still be subject to the old rules about "basis of contract clause" and would still lose his case.

80 Although the abolition of "basis of contract clause" would be applicable to his consumer policy and he would not be subject to the old rules about "basis of contract clause", he would still lose the case. This is because his lie was very probably a 'deliberate or reckless misrepresentation' under the CIDRA 2012, Schedule 1 para. 2 which entitles the thus misrepresented insurer to 'avoid the contract and refuse all claims'.

81 *Bank of Credit & Commerce International SA v Ali* [2001] UKHL 8, at [39] per Lord Hoffmann. See also *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd* [2019] EWCA Civ 718 at [154] per Leggatt LJ and *British Telecommunications Plc v Telefónica O2 UK Ltd* [2014] UKSC 42, at [37] and [38] per Lord Sumption.

82 For the statutory exceptions to this principle, see Contracts (Rights of Third Parties) Act 1999.

83 Financial Services and Markets Act 2000, section 1G(1)(b) and 1G(1)(d).

84 Financial Services and Markets Act 2000, section 1G(1)(e).

85 Financial Services and Markets Act 2000, section 1B(3); previously known as "regulatory objectives" as per the Financial Services and Markets Act 2000 (original) section 2(2) until amended in 2012.

86 Financial Services and Markets Act 2000 (original), section 2(1). See also Financial Services and Markets Act 2000 (rev.2012), section 1B(1).

judicial resolution of (financial) consumer disputes,[87] as those contract-law statutes are.

In a strong sense, the FSMA 2000 is predominantly a public-law statute of regulatory nature. It sets out regulatory principles, objectives, powers, procedures for financial regulators, which as of 2013 are the conduct regulator i.e. the FCA, and the prudential regulator i.e. the Prudential Regulation Authority ("PRA")—for this purpose being the Bank of England, and the PRA's powers do not directly concern consumer.[88] The FSMA 2000 also prescribes more compliance obligations than rights for regulated financial services institutions and activities. In essence, the FSMA 2000 regulates the relationship of powers and obligations between the financial regulators and the regulated/authorised persons. Where this regulated relationship does not work well for the regulators, they can exercise and escalate their enforcement powers against the regulated/authorised persons concerned. Where it works to the substantial detriment of the regulated/authorised persons, these persons can file a lawsuit for judiciary review of the regulators' exercise of regulatory powers, as was so for example in *R (On the Application of Bluefin Insurance Services Ltd) v Financial Ombudsman Service Ltd*[89] where Bluefin the regulated insurance broker, which was regulated under the FSMA 2000, filed the lawsuit for judicial review of a decision of the Financial Ombudsman Service, which under the FSMA 2000 provides non-judicial resolution of consumer financial disputes.

The regulatory approach to protecting finance (including insurance) consumers is primarily *ex ante* and preventative: by regulating the solvency standards for and the business conduct of the financial services providers, this approach protects financial consumers *before* losses would incur to them. It provides indirect protection to financial consumers, indirect in that it does not directly grant remedies thereto like under the judicial approach. They are indirectly protected, broadly speaking by the PRA "promoting the safety and soundness of PRA-authorised persons"[90] and by the FCA ensuring that the relevant financial markets function well on good financial business conducts and advancing its three operative objectives of competition, integrity[91] and consumer protection which are interconnected.[92]

In contrast to regulators' little role in the judicial approach to consumer protection, they have a variety of regulatory powers exercisable for their consumer-protection objective. One of the major regulatory powers is for the FCA (formerly the FSA) to make general rules and specific rules, to make technical standards, to prepare and issue codes, to give general guidance, and to determine the general policy and principles for performing particular functions.[93] For the FCA's power to make general rules, "there need not be a direct relationship between the authorised persons to whom the rules apply and the consumers who are protected by the rules"[94] and this is confirmed in the FSMA 2000 section 137A(3). In addition, the FCA has the power make general rules "to protect the interests of beneficiaries of trusts".[95] This, as an example, shows why the consumer definition under the FSMA 2000(rev. 2012) includes not only financial services users and financial investors but also those other persons (such as trust beneficiaries) "who have relevant rights or interests in relation to"[96] the regulated financial services that are used and investments made.

All the statutory factors which the FCA must consider for meeting the consumer protection objective and the

87 An exception thereto is private person's suit for a firm's breach of an FSA/FCA rule. See FMSA 2000, section 138D; Financial Services and Markets Act 2000 (Rights of Action) Regulations (SI 2001/2256); *Sivagnanam v Barclays Bank Plc* [2015] EWHC 3985 (Comm).

88 Except in the FSMA 2000 section 2C only for the PRA in relation to policyholders who are consumers, probably broadly defined, and also section 3B(1)(d) and 3B(1)(e) for both the PRA and the FCA in relation to broadly-defined consumers' responsibility for their consumer-decisions and the responsibilities of the senior management in relation to requirements affecting consumers broadly defined.

89 [2014] EWHC 3413 (Admin).

90 Financial Services and Markets Act 2000, section 2B(2).

91 i.e. the integrity objective "of protecting and enhancing the integrity of the UK financial system" and the competition objective "of promoting effective competition in the interests of consumers in the financial markets"; see the Financial Services and Markets Act 2000, sections 1B, 1C, 1D and 1E.

92 Financial Services and Markets Act 2000, section 1B(4): "The FCA must, so far as is compatible with acting in a way which advances the consumer protection objective or the integrity objective, discharge its general functions in a way which promotes effective competition in the interests of consumers."

93 Financial Services and Markets Act 2000 (rev.2012), section 1B(6).

94 UK Parliament, (2000). *Explanatory Notes to the Financial Services and Markets Act 2000*. para. 253.

95 UK Parliament, (2000). *Explanatory Notes to the Financial Services and Markets Act 2000*. para. 253.

96 Financial Services and Markets Act 2000, section 1G(1)(b) and 1G(1)(d).

competition objective inevitably involve a broad range of consumers, who are not limited only to contracting individuals as consumers conventionally defined in the UTCCR 1999, the CIDRA 2012 and the CRA 2015. Those statutory factors under the FSMA 2000 are the different consumers' differing degrees of financial sophistication,[97] their needs for the timely provision of information and advice,[98] the level of care appropriate in relation to their capabilities that is owed and provided to them by financial services providers[99] and their differing expectations.[100] This variety of such factors reflects the variety and broad scope of the ambit of financial consumers.

Ⅴ. Caution against Bifurcating too Far and Wide: Examples in Relation to Insurance

It must be noted that the differences between the two consumer definitions cannot and shall not be pushed too far and wide or water-tightly compartmentalised into the judicial approach and the regulatory approach to financial/insurance consumer protection respectively and exclusive to each other. This is in the first place generally because insurance consumers as narrowly defined certainly are also protected, as are the broadly defined financial consumers, through financial regulation applicable to insurance, and likewise, the judicial approach is also open to protecting broadly-defined financial consumers in the insurance sector, only not as insurance "consumer" defined narrowly in the CIDRA 2012 and the CRA 2015. In addition, there are other three specific reasons for which insurance can be an example, or specific to insurance, or in relation to insurance.

A. Financial Markets Test Case Scheme: the COVID-19 Insurance Case

In the judicial approach to consumer protection, owing to judicial independence from interference, there is usually no space or role for regulatory participation or intervention in cases brought to courts. Exceptionally, however, since late 2015 in the UK, there was opportunity available for cooperation between a financial regulator and the High Court to resolve financial disputes and protect at least the broadly defined consumers in finance. Specifically, with the permission of the Chancery Division or the Commercial Court of the High Court, a financial regulator can join a financial markets test case as a party to the case or to be represented in such a case.[101] This is part of the Financial Markets Test Case Scheme ("FMTCS"), which is applicable "to a claim started in the Financial List which is a Financial List claim and which raises issues of general importance in relation to which immediately relevant authoritative English law guidance is needed".[102]

A more recent example in this regard is the COVID-19 business interruption insurance test case[103] under the FMTCS. During the pandemic, the Financial Conduct Authority, as the relevant regulatory body and hence an eligible party to the case, filed a lawsuit at the High Court. In this case, the FCA argued for thousands of small-business policyholders whose business was interrupted by the COVID-19 pandemic. Although not consumers under the CRA 2015 because the insurance in question was for business purposes, these policyholders or insureds undoubtedly were "consumers" as broadly defined under the FSMA 2000. Hence, they were under the regulatory protection of the FCA which as a financial regulatory body could bring the lawsuit under the civil procedure

97 Financial Services and Markets Act 2000, section 1C(2)(b).
98 Financial Services and Markets Act 2000, section 1C(2)(c).
99 Financial Services and Markets Act 2000, section 1C(2)(e).
100 Financial Services and Markets Act 2000, section 1C(2)(f).

101 CPR: Rules and Direction, Practice Direction 63AA.6.5.A, see https://www.justice.gov.uk/courts/procedure-rules/civil/rules/financial-list/practice-direction-63aa-financial-list, updated 7 February 2023, last visit 23 February 2023.

102 CPR: Rules and Direction, Practice Direction 63AA.6.1, see the same webpage ibid. "Financial List claim" means any claim which principally relates to designated types of financial products or financial transactions for more than £50 million or equivalent, or requires particular expertise in the financial markets, or raises issues of general importance to the financial markets; see CPR: Rules and Direction, Part 63A, 63A.1(2), see https://www.justice.gov.uk/courts/procedure-rules/civil/rules/financial-list, updated 30 January 2017, last visit 23 February 2023.

103 *The Financial Conduct Authority v Arch Insurance and others* [2020] EWHC 244 (Comm). The appeal was fast-tracked to the UK Supreme Court, and the FCA substantially won the case. For the press summary of the UKSC judgment, see <https://www.supremecourt.uk/press-summary/uksc-2020-0177.html>. For the UKSC judgment, see *The Financial Conduct Authority v Arch Insurance and others* [2021] UKSC 1.

rules quoted above even though the FCA was never a contractual party to those insurance policies. In its judgments, the UK Supreme Court interpreted the standardised insurance policy/contract terms in question in favour of the policyholders. This had wider protective effects for all similarly situated insurance consumers broadly defined in the FSMA 2000 and beyond the numerable policyholders who were business parties to the insurance policies/contracts concerned in the test case.

B. The FSMA 2000-mandated ICOBS and its Insurance Consumer Definition

Specifically for the UK insurance sector, the FSA made *Insurance: Conduct of Business*—also known as the 'ICOB', effective as of 14 January 2005 until 5 January 2008—and the subsequent ICOBS for non-investment insurance product sales. In addition, the FSA also made the *Conduct of Business Sourcebook* ("COBS") mostly for designated (non-insurance) investment business and to relatively less extent also for long-term insurance business in relation to life insurance policies. The FCA has been administering and constantly updating the ICOBS and the COBS. The ICOBS is the set of rules and guidance made by the FSA/FCA under the mandate of the FSMA 2000. In spite of the general and broad consumer definition in the FSMA 2000 section 1G, the ICOBS distinguishes the consumers falling under the narrow definition from those falling outside. In the ICOBS (paragraph) 2.1, "consumer" is only a sub-category of "customer". "Only a policyholder or a prospective policyholder who makes the arrangements preparatory to him concluding a contract of insurance (directly or through an agent) is a *customer*. In this source book, *customers* are either *consumers* or *commercial customers*."[104] "A *consumer* is any natural person who is acting for purposes which are outside his trade or profession."[105] "A *commercial customer* is a *customer* who is not a *consumer*."[106]

The fine difference between the ICOBS 2.1 definition of consumer and the narrow definition in the CIDRA 2012 (and also the CRA 2015) is eased out by the ICOBS 2.1 rule that "If it is not clear in a particular case whether a customer is a consumer or a commercial customer, a firm must treat the customer as a consumer."[107] The fine difference lies in the text of the CIDRA 2012 (and also the CRA 2015) definition, which has the wording "wholly or mainly for purposes unrelated to the individual's trade, business or profession." The wording "wholly or mainly" expressly provides for situations where an insurance policy covers some private and some business use of the property that is insured. In such scenarios, one needs to consider the *main* purpose of the insurance. For example, private motor insurance covering a limited amount of business use would be "consumer" insurance, so would home contents insurance covering some business equipment; however, insurance on a car used mainly as a taxi which is used occasionally for private trips would be a "non-consumer" insurance.[108] Fine as the difference is, in difficult scenarios it is resolved by the rule in the ICOBS 2.1.2 quoted above.

The legal basis of the regulatory protection of financial (including insurance) consumers is the FSMA 2000 and the relevant black-letter norms, including the ICOBS, which are set according to the FSMA 2000. Although the FSMA 2000 and the ICOBS impose statutory duties of insurers and intermediaries,[109] they are not applicable for determining the *contractual* rights and obligations of the parties in financial/insurance disputes. This is partly because some of the ICOBS written norms in their nature are not legally binding rules. For example, the ICOBS 2.1 classification and definitions of "customers" and "consumers" are guidance, made by the FCA as per the FSMA 2000 section 139A(1). However, any such guidance, including the ICOBS definitions, "is not binding on those to whom the FSMA applies, or the courts, nor does it have any evidential effect".[110] As part of the financial regulation regime, these guidance definitions are only the regulatory scheme or legal background which courts may take into account in interpreting contractual terms and implying terms into contract.[111] They are not decisive

104 ICOBS 2.1.1(2), emphasis original.
105 ICOBS 2.1.1(3), emphasis original.
106 ICOBS 2.1.1(4), emphasis original.
107 ICOBS 2.1.2.
108 LC and SLC, (2009). Consumer Insurance Law: Pre-contract Disclosure and Misrepresentation (Cm 7758). Law Commission and Scottish Law Commission. p 147 (para. A5).
109 Birds, J., & Richards K., (2022). *Birds' Modern Insurance Law*. Sweet & Maxwell, p 17.
110 Robert Merkin, *Lowry, Rawlings and Merkin's Insurance Law: Doctrines and Principles* (Hart Publishing 2022) pp 33-34.
111 *Bank of Credit & Commerce International SA v Ali* [2001] UKHL

for judiciary decision-making in resolving financial contract disputes. For example, although in addition to applying the consumer definition under the applicable UTCCR 1999, the Court of Appeal in the *Ashfaq* case also considered[112] the consumer definition in the ICOBS 2.1, such considerations were made not because courts are generally obliged to apply the ICOBS 2.1 as a legally binding rule—it was not. Instead it was mainly because Ashfaq invoked the ICOBS to argue his case and the judges would better respond to that line of argument. It does not mean that courts are legally bound to (pro)actively consider or invoke the ICOBS 2.1 definitions, whose nature, as pointed out above, is a guidance which courts are not obliged to consider or apply as law.

C. The FSMA 2000-mandated FOS and Insurance Dispute Resolution

Under the regulatory approach to the protection of financial/insurance consumers, the original FSMA 2000 section 225(1) has authorized the then Financial Services Authority to set up an "ombudsman scheme" "under which certain disputes may be resolved quickly and with minimum formality by an independent person." Accordingly the FOS is set up in 2001 as an independent, non-judicial, informative alternative to courts for resolving financial disputes including those in the insurance sector. On the one hand, to financial/insurance disputes resolution, the FOS does not take the judicial approach by which the contract law rules are strictly applied. On the other hand, although the mandate of FOS non-judicial decision-making powers lies in the regulatory FSMA 2000 Part XVI (sections 225 to 234B) and Schedule 17, the FOS is not regulatory in law, but it is regulated by the FSA/FCA.

As a mechanism for alternative dispute resolution, the FOS is for *ex post* protection to financial consumers, but it is different from the also ex post judicial approach: it is non-judicial, informal, and more importantly it operates under the broad definition of consumers in financial services. The person who brings to the FOS the financial/insurance disputes with a financial service provider is a "complainant" and the latter is the "respondent". The FCA Handbook, for regulatory purposes for and regulatory powers over the FOS, set the complainant eligibility rule[113] under which an eligible complainant must, generally speaking, be a person that is a consumer, or a micro-enterprise, or a charity or trustee of a trust, or a small business, or a guarantor. For this rule, the FCA Handbook describes consumer as including both as narrowly defined consumers in European Union consumer laws which have been accepted into UK statutes and also as broadly defined consumers in the FSMA 2000.

It must be noted that the FOS was not entirely new when it was set up in 2001: apparently similar ombudsman scheme had existed, for example the Insurance Ombudsman Bureau ("IOB") had been set up in 1981 and the Pensions Ombudsman in 1991. The FOS brought most of the private-sector financial ombudsman schemes together under one single umbrella for financial consumer protection via non-judicial disputes resolution. The FOS jurisdiction over consumer insurance disputes has its root in the dominant role of the former IOB in non-judicial resolution of consumer insurance disputes. The IOB was founded and incorporated by UK insurers in January 1981. In subsequent years most life insurers in the UK voluntarily became IOB members, whose dispute with consumer insureds/policyholders were within the IOB's jurisdiction.

The IOB model had a few key features,[114] which the FOS also has generally and is applicable to the FOS resolution of insurance disputes. First, the IOB scheme would be paid for by insurers, and access to the ombudsman would be free for consumers. Similarly, under the FSMA 2000 section 234, the FOS is funded by financial services providers as per the requirement of the financial regulators. Second, the IOB would be a private dispute resolution scheme, confidential between parties. Its decisions were not published, as were judicial judgments. Likewise, the FOS also has this private and confidential nature. Although the FOS does regularly publish summary cases and deci-

8, at [39] per Lord Hoffmann. See also *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd* [2019] EWCA Civ 718 at [154] per Leggatt LJ and *British Telecommunications Plc v Telefónica O2 UK Ltd* [2014] UKSC 42, at [37] and [38] per Lord Sumption.

112 *Ashfaq v International Insurance Company of Hannover Plc* [2017] EWCA Civ 357, para. 48.

113 FCA Handbook DISP 2.7.3; see also https://www.handbook.fca.org.uk/handbook/DISP/2/7.html#

114 Tyldesley, P., (2003) The Insurance Ombudsman Bureau—the early history. *Journal of Insurance Research and Practice*. 18(2), p 39. The five IOB features described in this paragraph and the next two paragraphs are based on and paraphrased from this excellent historic paper. In the meantime, the author of this current paper makes the comparison with the FOS.

Table 2. Special features of the FOS

FOS (independent, free, non-legalistic, user-friendly informal procedure, 'fair and reasonable' solution)	
• mandated by and based on the FSMA 2000	• *ex post*
• operation by the FCA Handbook	• non-judicial
• complainant eligibility rules aligned with broad consumer definition (FSMA 2000)	• remedial

sions, such publications are invariably anonymised for confidentiality. Third, consumer insurance complaints could be examined by the IOB ombudsman only after the insurer had given the consumer a final decision on a complaint. Similarly, the FOS will handle a consumer complaint only if the consumer has made the complaint to the financial firm in question and the financial firm has communicated its final decision to the consumer.[115] Fourth, the IOB ombudsman's decision would bind the insurer only if the consumer accepted the decision, but would not so bind if it was not accepted by the consumer. Likewise, as per the FSMA section 228(5), this is also the same for the FOS. In addition, for the remedy award to (insurance) consumers, a monetary limit would apply, which was £100,000 from an IOB award, and initially £150,000 but now £375,000 (as of 1 April 2022, subject to adjustment as per the Consumer Price Index) from an FOS award.

Fifth and finally, in resolving the disputes and complaints, the IOB ombudsman until 1992 was enjoined to consider the terms of the contract, the applicable law and judicial authority, good industry practice as expressed in trade association codes and statements, and regulatory rules—and since 1992 to look for solutions that would be "fair and reasonable" in all the circumstances. By the FSMA 2000 section 228(2), the FOS is obliged to make its decisions also "by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case." It is not 'fairness and reasonableness' in the opinion of judges who made decisions in similar disputes, or of the legislation or of any other public authorities, but of the ombudsman of the FOS. Nor is it 'fairness and reasonableness' in particular circumstances but 'in all circumstances' of the case. So, for example, the fairness standard in the CRA 2015 s 62(5), which is both legalistic and relatively limited, is not relevant or binding to the FOS dispute resolution. Similarly, nor the UCTA 1977 Schedule 2 which sets the "Guidelines" for application of reasonableness test.

For that approach which seeks "fair and reasonable" results, a most notable example of the IOB's non-legalistic, non-formalist, and consumer-friendly resolution of consumer insurance disputes was in the 1990s. Having realised that commercial shipping insurance law was too harsh when applied to consumers and to retail insurance contracts like motor insurance or travel insurance, the IOB developed and applied a proportionate remedy in cases where the consumer's non-disclosure or misrepresentation was found and accepted not to have been deliberate. Under the proportionality, there was an adjustment in the premium or in the level of cover, rather than a cancellation of the insurance policy and the retention of the premium and insurer's recovery of any amount that had already been paid to the consumer policyholder.[116] The FOS has continued to take this approach when dealing with insurance disputes involving pre-contractual non-disclosure or misrepresentation, and this proportionate approach was adopted by the CIDRA 2012.

During its twenty years of life, the IOB maintained both the confidence of the public[117] and consistent standards and practices of independence from the insurance industry[118] which sponsored this ombudsman scheme. Considering that, it is natural that IOB has had a new lease of life in the FOS which amassed all financial om-

[115] See the FOS webpage: https://www.financial-ombudsman.org.uk/consumers/how-to-complain last update 4 January 2023. In non-technical and reader-friendly language and format, the FOS website 'Who we are' pages and 'For consumers' pages very helpfully describe relevant information for these two purposes.

[116] Mitchell, C., (2012). 'Protecting the Public: The Ombudsman's Impact Is "Just"' in Charted Insurance Institute (eds), *Upon the Door of Every Cottage: Protecting the Public through General Insurance*. p 34.

[117] Clarke, M., (2005). *Policies and Perceptions of Insurance Law in the Twenty-First Century*. Oxford University Press. p 204.

[118] Clarke, M., (2005). *Policies and Perceptions of Insurance Law in the Twenty-First Century*. Oxford University Press. p 239; see also Munro, N., (1994). The Insurance Ombudsman Bureau and Financial Services Disputes: An Obituary?. *Journal of Financial Regulation and Compliance*. 2(3), p 225.

budsman schemes under one umbrella.

Like the IOB, the FOS independently offers free and impartial dispute-resolution services for consumer complaints. Though its authority resides in the FSMA 2000 which is an Act of Parliament, as per the original FSMA 2000 section 225(2) the FOS is not a government agency, therefore consumers do not have to be bound by FOS decisions. If dissatisfied with the FOS decision, the consumer is free to reject it—this is the end of the FOS involvement in its non-judicial resolution. Then the consumer is also free take legal action against the financial firm (such as the insurer), and the FOS will not be involved in such judicial proceedings. Nevertheless, if the consumer complainant accepts an FOS ombudsman's decision, then the decision is binding on both the consumer and the financial firm involved, hence the firm (such as the insurer) has to do what the FOS decision has told it to do.

Ⅵ. Conclusion

This paper has explained why the UK statutory definition, in the Consumer Insurance (Disclosure and Representations) Act 2012 and also in the Consumer Rights Act 2015 applicable to insurance, of consumer is so different from and much narrower than the broad definition of "consumers" in the Financial Services and Markets Act 2000. The technical and formalist reason for the definitional differences is that a statutory definition of a terminology is in principle limited only to that particular statute in which the terminology is defined and not extendable by default to the same terminology in the other statutes.

More importantly, the substantive reason for the definitional differences lies in the bifurcation of "financial consumer protection". Although this phrase and conception is most often referred to generically, in the real-world financial consumer protection practices are largely bifurcated into the judicial approach thereto and the regulatory approach. The judicial approach operates largely within the confines and the intricate common-law technicalities of private law, especially of contract law, to offer *ex post* and remedial protection in financial/insurance consumer disputes. The rights of financial/insurance consumers are based on their financial/insurance contracts with their insurers or their providers of the financial services in question, and the judiciary solve such disputes by applying contract law to identify and enforce the contract-based rights of both parties to the contract at issue.

In contrast, operating within the regulatory statutes which set out the power of financial regulators and the corresponding compliance obligations of financial services providers but hardly set rights for financial consumers the regulatory approach offers *ex ante* and preventative protection: it protects financial/insurance consumer mainly by preventing, through financial solvency/prudence regulation and financial conduct regulation, disputes from befalling on consumers. This preventative protection shall be and indeed is legislatively intended to cover very broadly almost all users of financial services and interested persons, regardless of whether or not they are individuals (or natural persons) and regardless of whether or not their engagements in the financial services are mainly for purposes related to their business, trade, or profession. This is why for the regulatory approach to financial consumer protection; the broad consumer definition is adopted.

These two approaches to financial/insurance consumer protection are very different, and it is only natural that the narrow consumer definition is oriented toward the judicial approach that is aligned with the technical and narrow rules of contract law whereas the broad definition is oriented toward the regulatory approach under which financial/insurance-users-as-consumers of much wider scope are protected ex ante through regulation. The narrow consumer definition serves the judicial approach whereas the broad consumer definition serves the regulatory approach.

In explaining the differences in the two approaches to financial/insurance consumer protection, this paper also has two unintended effects. First, it has generally justified the differences in the two UK statutory definitions of consumer(s); second and more importantly, but also it has in effect argued that for financial/insurance consumer protection, we need to think more about the approaches to the protection before thinking about what or which consumer definition is applicable thereto: this is because, as explained, the narrow consumer definition and the broad consumer definition each serves a different approach to (financial/insurance) consumer protection.

This bifurcated substantive understanding of the differences between the narrow and the broad statutory definitions of financial/insurance consumers in the UK would

help to understand similar statutory consumer definitions in any other particular country of civil law, or of common law such as Ireland.[119] The extent and degree of the helpfulness in the particular country depends on the relevant details of its financial regulation law and its (consumer) contract law.

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[119] See footnote 17 to the relevant text in the Introduction.

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