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"In the report, the FCA proposes a package of remedies."

FCA reports on general insurance pricing practices – changes are coming

The FCA has published its final report on its market study on general insurance pricing practices. The report concludes that general insurance markets are not working well or delivering good outcomes for all consumers, and the FCA has indicated that it will take action to remedy this.

The FCA launched the market study in order to examine whether current pricing practices for home and motor insurance are operating to support effective competition, provide long-term fair value for all consumers (particularly in the digital age) and to protect and enhance the integrity of the UK financial system.

The report concludes that pricing practices are not currently achieving this aim. The reasons for this include:

1. **Price walking** – firms use opaque and complex pricing techniques to gradually increase the price for customers who are loyal and likely to renew with them year on year.
2. **Increased barriers for consumers to switch from existing provider(s)** – firms use practices that discourage consumers from making informed decisions, shopping around and switching providers.
3. **Automatic renewal** – firms make it difficult for consumers to stop their policy from automatically renewing.
4. **Lack of awareness amongst consumers** – consumers who pay high premiums are less likely to understand insurance products or the impact that renewing with their existing provider has on their premium.

In the report, the FCA proposes a package of remedies. These include a pricing intervention aimed at tackling harmful pricing practices in home and motor insurance (e.g. preventing firms systematically increasing prices), and measures which ensure that firms offer fair value to all customers in the future, improve competition and strengthen the FCA's ability to supervise firms' behaviour in this area (e.g. stopping automatic renewal being a barrier to switching).

The FCA has also published a **consultation paper** which sets out its proposed remedies in detail. This consultation is open until January 2021, following which the FCA intends to publish a policy statement in Q2 2021. Based on the report and the consultation, the policy statement is likely to result in significant changes to how insurers and intermediaries can, or rather should, price general insurance products.

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"It is essential that firms use this time to implement effective systems and controls to demonstrate regular, thorough and consistent assessments and meet the requirements of the SMCR."

The FCA indicators for assessing fitness and propriety (Senior Managers and Certification Regime)

On 9 December 2019, the Senior Managers and Certification Regime (SMCR) replaced the Approved Persons Regime for most solo-regulated firms. Accordingly, firms must assess employees performing a Senior Management or Certification function at least once a year, to ensure they are fit and proper for their role.

The FCA has, before now, offered limited guidance for assessing fitness and propriety (F&P). However, this has recently been bolstered by the FCA's publication of "positive" and "negative" indicators [1] which guide how firms should assess the F&P of their Senior Managers and Certified Persons.

Full details of the indicators are set out in the FCA's publication. By way of summary, the key indicators are as follows:

- Certification should not be a "rubber stamp" exercise with little or no scope for current certified employees to fail. There should be scope for new issues to be identified.
- The FCA expects development plans to be put in place as a result of the outcome of F&P assessments.
- There is an expectation that appropriate senior managers "actively oversee" the certification process and managers should have adequate training so that it is clear what is expected of them in relation to F&P assessments. Where marginal cases arise, the FCA expect F&P panels, which should include senior managers, to be involved.
- Assessments should be tailored to specific roles. A general "one-size fits all" assessment is not considered appropriate.
- The processes for assessing F&P should be formally introduced and incorporated into existing HR/management processes, such processes should not be considered to already be covered within existing review systems.
- Regulatory references should disclose misconduct/relevant concerns and should be produced without delay.

Before this publication, solo-regulated firms were given until 9 December 2020 to undertake the first assessment of the F&P of Certified Persons; however, this has now been extended to 31 March 2021. It is essential that firms use this time to implement effective systems and controls to demonstrate regular, thorough and consistent assessments and meet the requirements of the SMCR.

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1 https://www.fca.org.uk/firms/senior-managers-certification-regime/solo-regulated-firms#revisions

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COVID-19 Business Interruption Losses: English High Court confirms loss of use is not equivalent to physical loss of property

One issue not considered in the recent FCA business interruption test case was whether the presence of COVID-19 could constitute physical damage so as to trigger BI wordings covering interruption arising out of "damage" to insured property.

This was not a point that had been argued by the FCA, but it remained open to other insureds to do so. However, the recent decision in *TKC London Limited v Allianz Insurance Plc* ([2020] EWHC 2710 (Comm)), handed down on 15 October, appears to confirm the difficulties for insureds seeking to conflate COVID-19 with physical damage. Although this decision did not specifically consider the meaning of "Damage" per se, it does confirm that where "loss of property" in a wording refers to physical loss, this trigger will not be satisfied by a mere inability to use the premises.

The decision has been considered in further detail in an **article** by HFW's Jonathan Bruce and Alison Tasker.

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English Supreme Court confirms principles for determining the governing law of an arbitration agreement

***Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* ([2020] UKSC 38) is an important decision in an area where there have been conflicting judgments, and will be of interest to all who wish to make use of arbitration.**

The principle of separability that applies to arbitration agreements under the English Arbitration Act 1996 enables them to stand-alone from the main contract, and survive defects in the main contract by, in effect, creating a 'contract within a contract'. In so doing it has created issues where the governing law of the agreement is not expressed. This Supreme Court decision clarifies those issues.

Whilst the case arose from a construction dispute, the principles for determining governing law will apply irrespective of the underlying sector.

In essence, the Supreme Court held that:

- where the arbitration agreement is silent on the law governing it, but the main contract contains a governing law clause this will generally apply by extension to the arbitration agreement and that governing law will apply to the arbitration.
- in the absence of a governing law clause in the main contract as well as in the arbitration agreement, the governing law in the arbitration agreement will be deemed to be the law most closely connected to the parties' choice of seat of arbitration.

The decision has been considered in further detail in an **article** by HFW's Damian Honey and Nicola Gare.

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