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REGULATORY

Focus on the Edinburgh Reforms

On 9 December 2022 the Chancellor of the Exchequer, Jeremy Hunt, announced a package of more than 30 individual regulatory reforms, collectively known as ‘The Edinburgh Reforms’.

The reforms are intended to drive growth and competitiveness in the financial services sector, including insurance, and centre around the government’s four ambitious objectives. They want the industry to be:

1. a competitive marketplace promoting the effective use of capital;
2. a world leader in sustainable finance;
3. a sector at the forefront of technology and innovation; and
4. a sector that delivers for both consumers and businesses.

Becoming a competitive marketplace that promotes the effective use of capital is the most ambitious objective. The government wants to take advantage of Brexit and provide a framework for financial services regulation within the UK market which is robust and competitive. The government announced a number of individual reforms and initiatives, including but not limited to:

- Publishing the Information Requirements in the Payment Account Regulations Consultation to remove unnecessary regulations on banks;
- Improving the functionality of the ring-fencing regime;
- Modernising corporate governance requirements in line with the Companies Act;
- Producing new remit letters for the FCA and PRA;
- Reviewing the Senior Managers & Certification Regime;
- Publishing the Markets in Financial Instruments (Investor Reporting) (Amendment) Regulations 2022 which will remove EU reporting requirements;
- Launching the Investment Research Review;
- Establishing an industry-led Accelerated Settlement Taskforce to explore the potential of faster settlement of financial trades; and
- Reforming Solvency II.

The government’s plans in relation to sustainable finance highlight the sector’s role in delivering the UK’s Net Zero target. The reforms announced

include publishing an updated Green Finance Strategy and consulting on bringing ESG ratings providers into the regulatory perimeter.

The government's desire to become a leader in technology and innovation involves setting up a Financial Market Infrastructure Sandbox and a wholesale market review to operate on an intermittent trading basis; legislating as part of the FSM Bill to establish a safe regulatory environment for stablecoins; publishing a response on expanding the Investment Manager Exemption to include cryptoassets; exploring the case for a central bank digital currency (a sovereign digital pound); and the Bank of England releasing a Technology Working Paper setting out technology considerations.

Finally, the government will continue to work with the regulators to make sure the sector is doing its job to deliver for consumers and businesses alike. Reforms involve publishing a consultation on reforming the Consumer Credit Act; consulting on reforms to remove performance fees from the pensions regulatory charge cap; and working with the FCA to examine the boundary between regulated financial advice and financial guidance.

The Chancellor's statement did not contain anything substantive about the reforms; it simply announced them. More details of individual reforms will follow, but what is clear at this stage is that the government intends to make significant changes in the coming months so firms should watch out for further updates and scrutinise their details. As regards the Solvency II reforms, the PRA is expected to consult on the details of the reforms and aspects that fall to the PRA directly.

It remains to be seen whether these reforms will yield the 'smarter regulatory framework' the government has promised.

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Supporting customers in financial difficulty – FCA consults on new guidance

In light of the cost of living crisis, and in particular its effect on the poorest households, the FCA is proposing to extend and replace its guidance for insurers on supporting customers in financial difficulty due to the pandemic, so that it will apply to all customers in financial difficulty. At the beginning of this year, the FCA published [Consultation Paper 23/1](#) seeking comments.

The consultation paper, which sets out the FCA's plans to protect policyholders further, applies to both retail and commercial customers of non-investment insurance policies. The guidance will set out expectations for firms regarding actions they should be taking to support customers, including how they can meet their obligations under ICOBS and the new Consumer Duty.

The guidance aims to:

1. reduce the impact of financial difficulty on customers;
2. help customers maintain an appropriate level of insurance they can afford; and
3. reduce the risk of customers losing appropriate insurance cover that is important to them.

The draft indicates that the main trigger point for the guidance (as with the COVID guidance) is when a customer contacts the insurer because they are in financial difficulty, such as where they cannot make payments, or want to reduce or change cover for the same reason. However, if an insurer

identifies that a customer is likely to be in difficulty (for example has missed payments) the insurer must take reasonable steps to make the customer aware of help and support available, even where a customer does not make contact with the firm. The 2021 guidance for firms on the treatment of vulnerable customers may be relevant in some circumstances.

The actions that insurers should consider taking include: reassessing the customer's risk profile (for example they may have sold items covered by insurance); considering whether other products might provide appropriate cover at an affordable price (for example removing add-ons); adjusting cover for a short or long-term period; working to avoid the need to cancel important cover (perhaps by exercising forbearance where payment is made by instalments); and where a policy is cancelled or adjusted considering whether it is appropriate to require customers to pay all contractual fees or charges associated with that.

The key takeaway from the consultation paper is that firms are expected to support customers in financial difficulty, regardless of the reasons. The paper is open for responses until 11 March 2023.

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“For general insurers there will be a continuation of pressure on claims inflation, and uncertainty around future claims settlement costs.”

The PRA's insurance sector priorities for 2023

The PRA has published a Dear CEO letter dated 10 January 2023, with its insurance supervision priorities for the year ahead.

It has indicated that insurers need to adapt to changes that threaten to disrupt business models, whilst maintaining high standards of governance, risk management and resilience.

The PRA's key priorities for 2023 are set out below.

- **Financial resilience.** The PRA notes that the pressures presented by inflation will present challenges. For general insurers, there will be a continuation of pressure on claims inflation, and uncertainty around future claims settlement costs. Insurers are expected to factor general and social inflation risk drivers into underlying pricing, reserving, business planning and capital modelling.
- **Risk management.** There are multiple uncertainties facing insurers at the moment and insurers must take proactive steps to assess the adequacy of risk management and control frameworks.
- **Implementing financial reforms.** The PRA will be seeking to engage with affected firms on the technical details of Solvency II reform, and with the life insurance sector on the extent to which the stress testing framework may need to adapt.
- The PRA expects to complete its assessment of any outstanding branches in the Temporary Permissions Regime in 2023 and set out its proposed supervisory approach to branches.
- **Reinsurance risk.** The PRA notes that it is paying close attention to whether the continued high level of longevity reinsurance and the emergence of “funded reinsurance” in the UK life market reduces the protection for UK policyholders beyond the risk tolerance;

- **Operational resilience.** The PRA retains its focus on this issue due to the increase in crystallised operational incidents. A large part of this will be continued assessment of firms against the operational resilience rules (SS 1/21). Over the next three years insurers must demonstrate their ability to operate within the impact tolerances that they have set under a range of severe but plausible scenarios.

- **Ease of exit for insurers.** The PRA continues to work on this area, as many smaller firms remain without any plans for exit. The PRA will consult in 2023 on requirements for insurers to prepare exit plans.

The PRA will also focus on:

- **Non-natural catastrophe risk** (including cyber risk). The PRA intends to work with the industry to enhance practice.
- **Financial risk arising from climate change.** In 2022, the PRA began to supervise firms actively against its supervisory expectations (See SS3/19) and it will continue to assess firms via supervisory engagement, firm-specific deep dives and thematic work as well as keeping a range of supervisory tools under review where firms are making insufficient progress.
- **Diversity, equality and inclusion.** The PRA plans to issue a consultation paper in 2023 setting out proposals for a new regulatory framework in this area.
- **Supervisory approach.** Amongst other things, the PRA notes that the Financial Services and Markets Bill will introduce a new secondary competitiveness and growth objective for the PRA, and if appropriate the PRA will update its supervisory approach in accordance with any changes.

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Global Investigations and Enforcement – Pick of the Top Trends and Business Tips Around the World

HFW's Global Investigations and White Collar Defence team helps clients manage the risks associated with investigations and enforcement actions around the world advising corporations and individuals on the full range of business crime and misconduct.

The team has recently written on the global compliance themes it expects to see in January 2023 [here](#).



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“The coverage implications of COVID-19 are still one of the major talking points in the insurance industry”

DISPUTES

Insurance cases to look out for in 2023

2023 promises to be another important year of insurance developments, with the ongoing Covid-19 issues and claims arising from the Russian invasion of Ukraine key issues for the insurance market. Below, we highlight some of the insurance cases on the horizon this year that could have wide-reaching impacts for both insurers and policyholders

Covid-19 business interruption claims

The coverage implications of Covid-19 are still one of the major talking points in the insurance industry and we do not expect this to change in 2023. Details of some of the ongoing Covid-19 cases are set out below.

First, we have the well-publicised *Stonegate*, *Greggs* and *Various Eateries* cases. The decisions on key preliminary issues such as aggregation, causation, and the treatment of government support in assessing an insured's loss (e.g., furlough) were handed down in October 2022. Permissions to appeal in relation to these decisions have been granted, and hearings are expected later this year. We wait to see which precise issues will be taken

forward, but no doubt these cases will continue to be closely followed by the market.

One of the issues still outstanding in relation to COVID-19 is whether diseases on the premises wordings can respond to the pandemic, but a number of cases this year should finally consider the point. We are also seeing more cases on Denial of Access cover in the courts, which will consider similar issues to those raised in *Corbin & King*.

World Challenge Expeditions v Zurich is listed for a hearing in April 2023 and concerns an attempt by the claimant, a student travel company, to claim for business interruption losses under their corporate travel policy.

Russia-Ukraine war

Some of the largest cases going to the courts this year by quantum concern claims from aircraft leasing companies on the issue of whether there is insurance coverage for leased planes operating in Russia which were re-registered in Russia following the outbreak of the war. The first of these was *AerCap v AIG and Lloyd's*, and it has been followed by *Dubai Aerospace Enterprises v Lloyd's and others*. We are aware that

similar proceedings have also been commenced in Ireland and the USA.

The Russia-Ukraine war will also potentially provoke marine insurance claims with vessels and cargo trapped in Ukrainian ports during the invasion. Further, as the number of cyber incidents increase following the conflict, we expect to see more cyber insurance claims this year as well.

Late payment of insurance claims

The appeal hearing in *Quadra Commodities v XL Insurance and others*¹ goes to court at the end of February 2023. At first instance, this case concerned a dispute over insurable interest and damages under s 13A of the Insurance Act 2015 (reasonableness of late payment). It was notable as the first case on s 13A. The appeal will be watched closely across the industry. You can see our briefing on the first instance judgment in our March 2022 Insurance [Bulletin](#).

Non-avoidance clauses

Part permission to appeal to the Supreme Court was granted in the complex case of *Edge Brokers v RSA*² and a hearing is currently fixed for mid-July 2023. In summary, the court considered whether a standard non-invalidation clause prevented insurers from not only relying on a misrepresentation in relation to a trade credit clause, but

also from founding estoppel based on the same misrepresentation, which would otherwise preclude the insured from enforcing the clause. You can see our previous briefing on the appeal and first instance decision in our December 2021 [Briefing](#).

Professional indemnity insurance

Finally, we have the appeal in *RSA v Tughans*³. This case concerned whether solicitor's fees are recoverable under a professional indemnity policy where the solicitor was found liable to its client to return its own fees. The hearing is expected in the Autumn. You can see our briefing on this first instance decision in our November 2022 Insurance [Bulletin](#).

Conclusion

Of course, this is only a selection of the cases coming up this year, and new and interesting questions are constantly appearing for insurers and policyholders.

We wait to see what other issues will emerge in 2023.

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Exclusion Clauses In Insurance Policies Revisited By Court Of Appeal

In *Brian Leighton (Garages) Ltd v Allianz*, the Court of Appeal considered whether an exclusion for pollution or contamination included cover for damage which itself caused pollution and contamination. The result, in favour of the insured, might come as something of a surprise to insurers. Some of the Court's comments will also be of interest to brokers, particularly those advising SME insureds.

Our briefing on the case is available [here](#).



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1 [2022] EWHC 431 (Comm)

2 [2021] EWCA Civ 1789 / UKSC 2022/0008

3 [2022] EWHC 2589 (Comm)

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