

# THE COMPLIANCE JOURNAL

Regulatory Round Up - August 2020



Over the last couple of months we've continued to see some important updates from the FCA regarding the treatment of customers during Covid-19, their High Court Test Case and more recently consultations on extensions to the Certification Regime and the treatment of vulnerable customers.

The ICO have also published some key steps for personal data, now that people are starting to return to work as lockdown eases, and the FOS published their Annual Complaints Data giving us some useful insight.

We hope you enjoy this latest Compliance Journal and summary of the topics below.

**Helen Holyoake, Risk Compliance and Agency Manager**



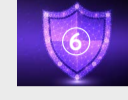
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## Financial Conduct Authority Update on the FCA Business Interruption Test Case



The FCA's Business Interruption Test Case concluded in the High Court at the end of July, during which the FCA and eight insurers put forward their arguments.

From the FCA's perspective their key aim is to seek a determination on contractual construction and principle, in respect of coverage and causation in relation to Business Interruption (BI) Insurance, and to resolve the contractual uncertainty around the validity of many BI claims.

The FCA published a number of documents for use during the trial; An Agreed List of Issues and Common Ground which summarised what is and isn't in dispute between the parties, Agreed Facts with supporting evidence which were necessary to resolve the issues in dispute, and an Assumed Facts document which contained factual scenarios for use by some parties in the trial to illustrate their views as to how coverage is triggered.

Ahead of the test case, the FCA put forward their claim that

subject to proof of loss and individual policy points such as sub-limits, all relevant wordings written by the eight insurer defendants do respond to the events of COVID-19 and the responding Governmental action. Each insurer submitted their own defences setting out that it was not the intention for their non-damage Business Interruption policy wordings to cover pandemics and providing their individual defences in response.

The exact date of the judgement is not known, although expected to be available by mid-September. After judgement, the parties to the test case could appeal the court's decision, in which case the parties have agreed that they will seek to have the appeal heard on an expediated basis, which includes the possibility of a 'leapfrog' appeal to the Supreme Court.

When finalised, the result of the test case will be legally binding on the insurers that are parties to the test case in respect of the interpretation of the representative sample of policy wordings considered by the court. It will also provide persuasive guidance

for the interpretation of similar policy wordings and claims, that can be taken into account in other court cases including in Scotland and Northern Ireland, by the Financial Ombudsman Service and by the FCA in looking at whether insurers are handling claims fairly.

The test case is not intended to encompass all possible disputes, but to resolve some key contractual uncertainties and 'causation' issues to provide clarity for policyholders and insurers. It will not determine how much is payable under individual policies but will provide the basis for doing so.

Further details can be found on the FCA's webpage: <https://www.fca.org.uk/firms/business-interruption-insurance>

## SM&CR – Extending implementation deadlines for the Certification Regime and Conduct Rules

The treasury has agreed to delay the deadline for solo-regulated firms to have undertaken the first assessment of the fitness and propriety of their Certified Persons from 9 December 2020 until 31 March 2021, due to the impact of Covid-19. To correspond with this, the FCA is also consulting on extending the deadline to 31 March 2021 for:

- the date the Conduct Rules come into force
- the deadline for submission of information about Directory Persons to the Register

Firms should continue with their programmes of work in these areas and if they are able to certify staff earlier than March 2021, they should do so. Firms should not wait to remove staff who are not fit and proper from certified roles. The FCA will still publish details of certified employees of solo firms starting

from 9 December 2020 on the Financial Services Register. Where firms can provide this information before March 2021, they are encouraged to do so.

For further details see <https://www.fca.org.uk/publications/consultation-papers/cp20-10-extending-implementation-deadlines-certification-regime-conduct-rules>





## Vulnerable Customer Guidance

The FCA has set out new best practice guidance for firms to do more to protect vulnerable consumers. In this Guidance Consultation paper, the FCA discusses the feedback received from its prior consultation papers and is seeking views by 30th September 2020.

The intention of the guidance is to provide a framework that allows all firms to accurately assess whether they are treating vulnerable consumers fairly, to ensure there is consistency across the financial services sector.

Supporting vulnerable customers continues to be a key focus for the FCA and its importance is highlighted due to the impact of Covid-19.

Depending on responses to the consultation, the FCA plan to finalise the guidance later in 2020 or early in 2021.

For further information and a copy of the consultation paper see <https://www.fca.org.uk/publications/guidance-consultations/gc20-3-guidance-firms-fair-treatment-vulnerable-customers>



## Data Protection

# Coronavirus recovery - six data protection steps for organisations

The ICO has set out some key steps organisations need to consider in respect of personal data as lockdown restrictions ease and people begin to return to work. The ICO reminds us that Data protection does not stop you asking employees whether they are experiencing any COVID-19 symptoms or introducing appropriate testing, as long as the principles of the law (transparency, fairness and proportionality) are applied:

- **Only collect and use what is necessary** - consider whether the additional data you intend to collect will keep the workplace safe, whether you really need it and whether the same result could be achieved without collecting personal information.
- **Keep it to a minimum** - only collect the information needed to implement safety measures appropriately and effectively. If it only needs to be held momentarily, don't create a permanent record.
- **Be clear, open and honest with staff about their data** - tell people how and why you wish to use their personal information, including what the implications for them will be. Let employees know who you will share their information with and for how long you intend to keep it.
- **Treat people fairly** - Decisions about staff based on health information must be fair, without detriment and without discrimination.

- **Keep people's information secure** - Personal data must be held securely and only for as long is necessary.
- **Staff must be able to exercise their information rights** - Organisations must inform individuals about their rights in relation to their personal data, such as the right of access or rectification. Staff must have the option to exercise those rights if they wish to do so, and to discuss any concerns they may have with organisations.

If implementing symptom checking and testing, there are additional requirements to follow which include identifying a lawful basis for using the information being collected and conducting a Data Protection Impact Assessment if processing health data on a large scale.

Keep in mind that, due to its sensitivity, health data has the protected status of 'special category data' under data protection law. The following link provides some key information on this matter, including some relevant case studies:

<https://ico.org.uk/global/data-protection-and-coronavirus-information-hub/coronavirus-recovery-data-protection-advice-for-organisations/>



## Financial Ombudsman Service Annual Complaint Data

The FOS has published its annual complaint data highlighting some of the trends from the last year and expectations for the coming year. Since 1 April 2019, the FOS have been able to handle financial complaints from more small and medium-sized enterprises, and the number they've been asked to investigate has increased steadily over the year. This includes complaints from a wide range of small businesses, including restaurants, shops, and consultancies and many business customers appear to face a lot of the same problems as individual consumers.

The FOS also issued some insight in respect of 'misrepresentation and non-disclosure'. The FOS regularly hear from people who haven't taken out sufficient cover, underinsuring their possessions or misrepresenting their circumstances, stating that many people simply don't understand the implications of not answering insurers' questions correctly. In some cases however, businesses haven't asked clear and specific questions at the point of sale in order to find out what the appropriate level of cover needs to be. The FOS have also found that businesses are not always referring to the provisions set out under the Consumer Insurance (Disclosure and Representations) Act 2012 ("CIDRA"). This law sets out the duty on a consumer to take reasonable care not to make a misrepresentation and the remedies available to businesses when there has been a

qualifying misrepresentation. The view from the FOS is that CIDRA is a relevant law that they consider alongside the terms of the policy, which usually states it is subject to English law. In particular the FOS confirm that the following areas are considered when they receive complaints from consumers in relation to claims that are declined or settled proportionately, or when a policy has been cancelled due to underinsurance, to ensure that the business has acted fairly:

- Whether the questions the insurer asked were clear and specific;
- Whether the information the consumer gave was accurate;
- Whether the insurer would have done anything differently if it had been given accurate information; and
- Whether the insurer has been fair in the way it has handled the misrepresentation.

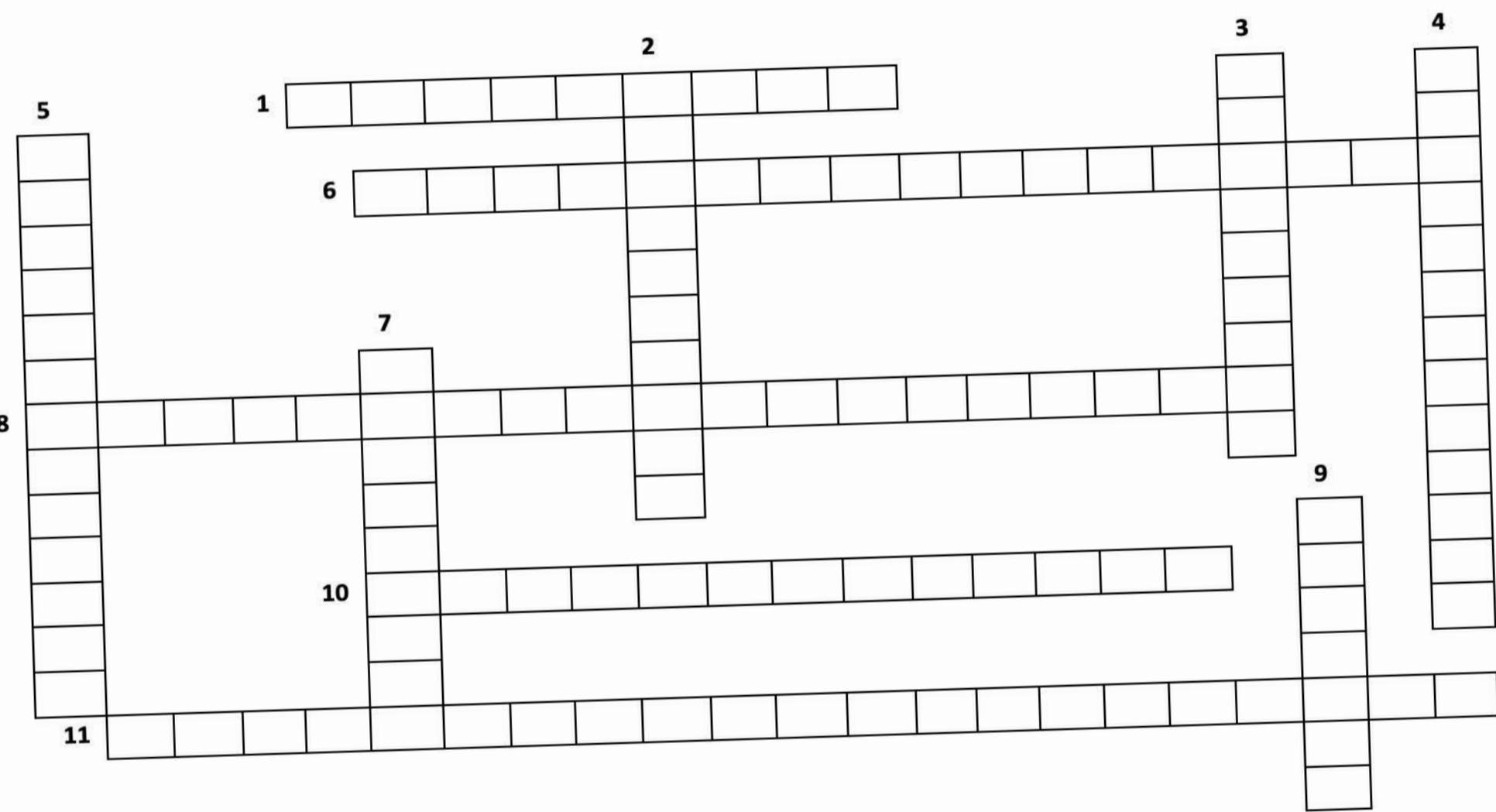
For the full report see: <https://www.financial-ombudsman.org.uk/data-insight/annual-complaints-data>



**Just for Fun**

 So, do you know the **11** Principles for Businesses?

Across		Down	
1	_____	2	Relations with _____
6	_____ and _____	3	Customers _____
8	_____	4	Customers: _____ of trust
10	_____	5	_____
11	_____	7	_____ Prudence
		9	Communications with _____

**Answers**

- |  |  |
|--|--|
| Across<br>1 Integrity<br>6 Management and Control<br>8 Conflicts of Interest<br>10 Clients Assets<br>11 Skill Care and Diligence | Down<br>2 Relations with Regulators<br>3 Customers Interests<br>4 Customers: relationships of trust<br>5 Market Conduct<br>7 Financial Prudence<br>9 Communications with clients |
|--|--|



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