Charles Randell CBE
Chairman
The Financial Conduct Authority
12 Endeavour Square
London, E20 1JN.

OPEN LETTER Wednesday June 9th 2021, by Email only.

Re: CP21/13: Is the FCA deliberately breaching a legally binding obligation to Parliament?

Dear Mr Randell,

I am writing to you in my capacity as Founder of the Transparency Task Force, a Certified Social Enterprise dedicated to helping ensure that consumers are treated fairly by the financial services sector.

My overall intention is to establish whether the FCA is deliberately breaching a legally binding obligation to Parliament; and if so, to have the FCA swiftly and publicly put matters right.

I set out below what I believe to be true, but in the event that I am mistaken in any way please don't hesitate to put me straight.

If my assessment is correct, I ask that you withdraw, amend and then reissue the above consultation as I believe that, in its current form, the consultation paper is grossly misleading and that it will result in the Financial Conduct Authority breaching a legally binding obligation.

Grossly misleading

Paragraph 2.31 contains the following claims:

What constitutes a 'duty of care' may have different meanings, and our existing rules already create different duties of care for firms. The generally accepted legal meaning of a duty of care is an obligation to exercise reasonable care and skill when providing a product or service and this is, for example, reflected in Principle 2's requirement that a firm must conduct its business with due skill, care and diligence. In addition, section 49 of the Consumer Rights Act 2015 (CRA) implies into every contract for a trader supplying a service to a consumer a term saying that the trader must perform the service with reasonable care and skill.

I believe that this passage contains the following misrepresentations:

- The term 'duty of care' has a very specific meaning in law, but it is not as described above. It is a legal obligation on one party to avoid reasonably foreseeable harm to another, even though there may be no contractual relationship between them, breach of which gives rise under tort law to a right to claim monetary damages. It therefore goes materially further than a requirement to 'exercise reasonable care and skill when providing a service' by turning any failure to do so into a right of private action exercisable by any party who has suffered reasonably foreseeable financial loss as a result of breach;
- Principle 2 does not constitute a duty of care because breach of the FCA's Principles for Business does not give rise to a right of private action;
- Section 49 of the Consumer Rights Act 2015 does not amount to a duty of care because while it does give rise to a right of private action where a consumer is a party to a contract, that right does not extend to a consumer who is not a party to a contract but where the service provider could reasonably have foreseen that a consumer would be harmed by its actions. To give just one example, should a firm authorised by the FCA approve a promotion for an unauthorised firm which then uses it to attract customers, if those consumers subsequently discover that the promotion was misleading, the CRA does not give them a right of action against the firm that approved it (because there is no contractual relationship between the consumers and the authorised firm), whereas a duty of care would;
- The key attraction for consumers of a genuine duty of care is therefore that it would empower consumers who have suffered reasonably foreseeable loss as a result of the actions or inactions of authorised persons to sue them for damages, whereas under your proposed Consumer Duty any hopes they have of receiving compensation would

continue to be dependent on the FCA either imposing a restitution order under the powers bestowed on it by the Financial Services and Markets Act 2000 or it negotiating a voluntary redress, both of which are vanishingly rare occurrences

As a lawyer yourself, you must know that it would appear the FCA has misdirected respondents to this consultation about the true meaning of the term 'duty of care', and that, unless remedied, the consequence is likely to be that consumer respondents, few if any of whom are likely to be legally qualified, will not notice what looks like an artful bait and switch by the FCA that could dishonestly lead them into acceptance of a materially less beneficial set of proposals.

Breach of legally binding obligation

Section 29 of the Financial Services Act 2021 places on the FCA a legally binding obligation to carry out a consultation, 'about whether it should make general rules providing that authorised persons owe a duty of care to consumers' by 1 January 2022. I do not believe that CP21/13 fulfils that requirement, because it does not provide a satisfactory explanation of the features and benefits of a duty of care or solicit feedback of the relative merits of such an arrangement and the FCA's preferred alternative, namely a Consumer Duty (in effect, changes to the wording of certain of its Principles for Business), as a result of which it is really a consultation about a package of changes to the Principles, branded by the FCA as a Consumer Duty.

While CP21/13 does contain a section (5) on private right of action in the context of the Principles, it is positioned as a separate matter to duty of care and makes it clear (paragraph 1.18) that there will be further consultation on any private right of action in a subsequent paper. Given that this will be published with the feedback to CP21/13, due by 31 December 2021, it is unlikely that it will take place within the legally mandated time frame. And, given the apparent misdirection of respondents over the distinction between a genuine duty of care and the proposed Consumer Duty, it is in my view more likely than not that the outcome of CP21/13 will be that there is little or no demand for the former, so a right of private action won't happen.

Remedies sought

If I am correct in my assessment, I ask that the FCA:

- Immediately issues a notification to all likely recipients of CP21/13 putting them on notice that a revised version of the discussion paper will shortly be released, so they

should not submit responses to the original version (or, if they have already done so, should submit revised versions reflecting changes to the FCA paper);

- As soon as possible thereafter, issues a revised version of CP21/13 containing in place of paragraph 2.31 a correct legal definition of the concept of duty of care, written in plain English, together with an explanation of how your proposed Consumer Duty differs from this and examples of how the former gives rise to additional rights for consumers;
- Extends the deadline for responses to the consultation to provide a minimum of 12 weeks from publication of the revised paper to the closing date for submission of feedback

Given the importance of getting these changes right, I would welcome an opportunity to review and provide proposed changes to any draft revised discussion paper prior to publication.

Consequences of inaction

If I am correct in my assessment and the FCA refuses to take these steps and subsequently endeavours to push through rule changes that fall short of a *genuine* duty of care, I believe it will lay itself open to a successful judicial review of its actions. Furthermore, it may find itself in some legal jeopardy, and will certainly incur the wrath of Parliamentarians, should it be held to be in breach of Section 29 of the Financial Services Act 2021.

I welcome your swift response to all of the points raised above.

I look forward to hearing from you.

Yours sincerely,

A.P. Agathangelou

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