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

OPEN LETTER Monday, July 5th 2021, by Email only.

Re: CP21/13: FCA's responsibility to consult on a legally enforceable duty of care

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 consumers are treated fairly by the finance industry.

Thank you for your reply to me dated 18th June, I appreciate you taking the time to share your considered thoughts.

Having read it, I feel the need to restate some of my concerns and to add further thoughts in relation to them:

Frankly, I remain concerned that FCA may not be complying with the obligation placed upon it in terms of section 29 of the Financial Services Act 2021 to consult on the question of whether there should be established a general rule that authorised persons should owe a *duty of care* to consumers.

If correct, I am concerned that the consultation exercise currently being conducted by the FCA fails to address that issue and that, in consequence, the FCA is in breach of its statutory obligation.

The legal obligation:

Section 29 of the 2021 Act states (inter alia):

> "29. FCA rules about level of care provided to consumers by authorised persons

> (1) The Financial Conduct Authority must carry out a public consultation about whether it should make general rules providing that authorised persons owe a duty of care to consumers.
>
> (2) The consultation must include consultation about—
>
> (a) whether the Financial Conduct Authority should make other provision in general rules about the level of care that must be provided to consumers by authorised persons, either instead of or in addition to a duty of care,
>
> (b) whether a duty of care should be owed, or other provision should apply, to all consumers or to particular classes of consumer, and
>
> (c) the extent to which a duty of care, or other provision, would advance the Financial Conduct Authority's consumer protection objective (see section 1C of the Financial Services and Markets Act 2000)."

It should be noted that section 29(2)(b) specifically requires there to be conducted a consultation on whether a *duty of care* should be owed by authorised persons to consumers.

<u>The Consultation:</u>

The manner in which the Consultation seeks to focus the question of a general duty of care is found in Question 12, which states:

> Q12 Do you agree that what we have proposed amounts to a duty of care? If not, what further measures would be needed? Do you think it should be labelled as a duty of care, and might there be upsides or downsides in doing so?

This question proceeds upon the narrative given at paragraphs 2.31 and 2.32. In particular, paragraph 2.31 states:

> "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."

Both the question and the explanation are (literally) legally incoherent and inaccurate or, at any rate, severely misleading.

"The term "duty of care" does have a very specific meaning in law. It is of the essence of a duty that it creates an obligation on a party (A) which is owed to another party (B), breach of which creates a legal liability on the part of A to pay damages to B, in the event that B has suffered loss as a result of the breach of duty. It is clear that what section 29(2)(b) requires the FCA to do is to consult on whether such a duty ought to be imposed. As I understand it to say (as paragraph 2.1 says) that "'duty of care' may have different meanings" is, simply, wrong. It has only one meaning in law.

On page 2 of your letter to me, which can be downloaded here, second sentence down, you state:

> "We interpret the term in the context of section 29 of the Financial Services Act 2021 as a positive obligation on a person *to ensure that their conduct meets a set standard*" [emphasis supplied]

Of course, there may be issues as to the *standard* of the duty owed, and one can envisage several different standards which might be articulated in the creation of a new statutory duty, for example, the standard of the reasonable financial advisor, or some higher or some lower standard. In that context, it may well be an unremarkable observation that there should be a set standard and then suggest that this standard (to which a duty of care falls to be exercised) should be for example the standard of reasonable care. However, where the paper is at least severely misleading is in conflating the question of what should be the standard to which any duty should be exercised with the logically *a priori* question of whether a legal duty should exist at all.

To address that logically prior question: I am aware that not all of the rules set out in the COBS rules are actionable at the instance of persons adversely affected by a breach of those rules. Breach of some of these rules lead only to regulatory sanction at the hands of the FCA. That Parliament envisaged that there may be questions to be addressed about the setting of regulatory standards and the difference between that and the imposition of a duty of care, is focussed in section 29(2)(a) of the 2021 Act:

> "whether the Financial Conduct Authority should make other provision in general *rules* about the *level* of care that must be provided to consumers by authorised persons, *either instead of or in addition to a duty of care*," [Emphasis supplied]

It is clear that there are 2 options in 29(2)(a) and (b) – first, Rules about levels of care (breach of which might or might not be actionable) and, second, the imposition of a duty of care, which, by definition, would be actionable at the instance of a person harmed by a breach of that duty. Section 29(2)(a) and (b) read together focus the following 3 issues:

1. Should there be imposed a *duty* of care?
2. Should the FCA makes general rules as to the standard of care?

3. If the answer to 2 is in the affirmative, should the rules be instead of, or in addition to, the imposition of a duty of care?

This does cover the options as to the means of creating a consumer duty.

Against that background, it might appear that question 12 could have been set by a person having ignorance of both basic legal concepts and the precise statutory obligations imposed upon the FCA.

Let me analyse question 12:

1. *Do you agree that what we have proposed amounts to a duty of care?* First, the FCA is, or ought to be aware of what a duty of care is. It is not for the respondents to inform the FCA as to whether or not what it proposes is a duty of care; second, if it is not a duty of care, that the majority of respondents believe it to be does not make it so; third, if it is a duty of care, that the majority of respondents believe it not to be, does not mean that it is not; fourth if it is a duty of care, then the FCA has proposed such a duty *without asking the question specifically mandated by section 29(2)(b)* as to whether there should be such a duty; fifth, if it is not a duty of care, then the FCA has proposed that there should not be a duty of care *without asking the question specifically mandated by section 29(2)(b)* as to whether there should be such a duty.

2. *If not, what further measures would be needed?* This fails to address the issue of needed for what? If needed to create a legally enforceable duty of care, then there may be repeated the same observations made at 1 above. If needed to create a satisfactory consumer duty, then it may be that the question is an inept and incoherent attempt to ask the "instead of or in addition to a duty of care" question.

4. *Do you think it should be labelled as a duty of care?* This question would seem to betray profound ignorance. What something is labelled is not determinative of what it is. Changing the label does not change the reality. Whether or not the proposal amounts to a proposal to impose a duty of care is a matter of substance, not labelling.

5. *Might there be upsides or downsides in doing so?* There are, indeed, possible upsides and possible downsides in imposing a duty of care – that is an issue which falls within the scope of section 29(2)(b). However, the question does not seek opinions on the upsides and downsides of creating a duty of care, only opinions on the upsides and the downsides of *labelling* the FCA proposal as a duty of care.

The proposed Consumer Duty:

What the FCA has, in fact, proposed is a regulatory solution. To quote paragraph 3.1:

> "To achieve the outcomes we are seeking, we are proposing that the Consumer Duty will be comprised of a Consumer Principle, along with a set of rules and guidance that amplify the Principle and set out the detail of our expectations. This aims to ensure that the Duty is understandable, flexible and adaptable."

This proposal is, however, not a proposal to create a duty of care as that phrase is correctly understood. In effect, what the FCA has done is to propose "general rules about the level of care that must be provided to consumers by authorised persons... instead of a duty of care".

It is entitled to make such a proposal, but it is also statutorily obliged to consult on whether there should be imposed a duty of care. Therefore, it would have been consistent with the statutory obligation for the FCA to set out what it sees as the merits and demerits of a duty of care, the merits and demerits of a regulatory solution, then to set out its proposed solution and seek comment. Such a process would include a question "do you agree that there should not be imposed a duty of care?". That question is simply not asked, nor is the issue adequately explained. Instead, the FCA asks only "should our solution be *labelled* a duty of care?"

The reality is that it is not a duty of care:

- Principle 2 does not create a duty of care because breach of the FCA's Principles for Business does not give rise to a right of private action by parties injured by a breach thereof;

- Section 49 of the Consumer Rights Act 2015 does not create a general duty of care such as envisaged in section 29, 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 founded in tort (or, in Scotland, delict) would give such a right of action. This is the very issue which was addressed and solved by the articulation in the law of tort and of delict of the neighbourhood principle – that liability is not restricted to an injured party with whom there is a contractual relationship, but extends to all those who might reasonably be foreseen as likely to be injured by one's actions - as long ago as 1932 in Donoghue v Stevenson [1932] AC 562 (as it happens, in a case which involved a consumer, though the principle is of universal application);

- The major advantage which consumers would derive from the imposition of a duty of care is that it would give to consumers who have suffered reasonably foreseeable loss as a result of a failure of authorised persons to exercise the appropriate standard of care in acting, or failing to act, the right to sue those authorised persons for damages, whereas under the FCA's proposed Consumer Duty consumers would have no right to sue and any hopes they may have of receiving compensation would continue to be dependent on the FCA either imposing a restitution order under the powers conferred upon it by the Financial Services and Markets Act 2000 or in negotiating a voluntary redress, both of which are vanishingly rare occurrences

As a lawyer yourself, it should be readily apparent to you that that the FCA has failed clearly and explicitly to ask the questions which it has a statutory duty to ask, that it has fundamentally misunderstood what a duty of care is, that it has stated *ex cathedra* an erroneous and misleading statement as to what a duty of care is (which most, if not all respondents will take on trust) and, in consequence, consumer respondents, few if any of whom are likely to be legally qualified, will fail to appreciate that one of the options upon which Parliament mandated consultation – namely whether, in principle, there should be imposed a duty of care – has simply been left off the table, potentially leading respondents into acceptance (with or without suggested fine tuning) of the FCA proposals which, from the perspective of consumers, is materially less beneficial than the imposition of a duty of care. It may be that even sophisticated respondents, (unless they engage in their own forensic dissection of the consultation paper in light of the legislation) will fall into the like error.

Whilst CP21/13 does contain a section (5) on a possible private right of action in relation to the Principles, this is not the same thing as a general duty of care and, indeed, it is positioned as a separate matter to duty of care. It is made clear (paragraph 1.18) that there will be further consultation on any private right of action in a subsequent paper. Given that such a future paper will be published with the feedback to CP21/13, due by 31 December 2021, it is, in any event, unlikely that consultation on this will take place within the legally mandated time frame. Further, given the apparent misdirection of respondents over the distinction between a duty of care as that is properly understood and the proposed Consumer Duty, it may well be that the outcome of CP21/13 will be that there is little or no demand for the former. That may be likely to lead, in turn, to an apparent lack of support for the private right of action in relation to the Principles.

In short: the law requires the FCA to consult on whether a duty of care towards consumers should be imposed upon authorised persons. Quite simply, the FCA fails, in the consultation, to put that option on the table. In consequence, the consultation is fundamentally flawed.

Remedies sought

Upon this basis, 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 a duty of care would give rise to additional rights for consumers;
- Explains the reasoning process of the FCA in deciding not to recommend the creation of a duty of care;
- Deletes question 12 and asks the simple question of whether there should, in principle be a general duty of care, together with, an invitation to comment on the decision of the FCA not to recommend the creation of such a duty;
- 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 should welcome an opportunity to review and provide proposed changes to any draft revised discussion paper prior to publication.

Consequences of inaction

As originally stated to you, should the FCA refuse to take these steps and subsequently proceed with its plans on the basis of what is a flawed consultation process, which is not compliant with the statutory obligations incumbent upon it, in particular, should it fail properly to consult on the imposition of a duty of care as that expression is properly understood, there is a risk that it would be vulnerable 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 once again 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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