



OPEN LETTER TO THE FINANCIAL CONDUCT AUTHORITY

Request for Response to Advertising Standards Authority Ruling A24-1236439

Request for Independent Legal Clarification of the definition of an Agent under the Payment Services Regulations 2017 (the PSRs)

Monday, 11th November 2024, by email only to:

- Chief Executive Officer of the Financial Conduct Authority, Nikhil Rathi
- Non Executive Chair of the Financial Conduct Authority, Ashley Alder

Plus cc'd key relevant stakeholders:

- Economic Secretary to the Treasury, Tulip Siddiq MP
- Shadow Economic Secretary to the Treasury, Richard Fuller MP
- Chair of the Treasury Committee, Meg Hillier MP
- Chief Executive of the Advertising Standards Authority, Guy Parker

ASA Ruling on CurrencyWave Ltd t/a CurrencyWave

 Upheld | 06 November 2024

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Background

Summary of Council decision:

Three issues were investigated, all of which were Upheld.

Dear Nikhil and Ashley,

I write to you in my capacity as Founder of the [Transparency Task Force](#) (TTF), regarding [this Advertising Standards Authority \(ASA\) ruling](#) which has just been published on the ASA website. The ruling concerns advertising by a firm called CurrencyWave and the complaint was brought by the Transparency Task Force.

For the avoidance of any doubt, CurrencyWave is not an isolated incident. We have simply used it as an example. In fact, there are dozens if not hundreds of companies operating in broadly the same way.

CurrencyWave is a small, independent company with a registered office in Leeds. Its business is to introduce the services of a large FCA-regulated firm called CurrencyCloud which provides regulated FX and payment services to businesses and individuals.

CurrencyWave is not regulated by the FCA in any way, nor does it provide any services of its own. Yet, it has been marketing and advertising itself as a provider of FX and payment services.

In August 2022, we brought this and other similar companies' advertising practices to the FCA's attention. We met with the FCA in London in February 2023. We met with the Head of Payment Services Jane Moore, and her team. We gave an evidenced presentation, explaining what this company and dozens like it were doing in terms of misleading and harming consumers and distorting competition. We asked the FCA to act.

However, the FCA did not act. The FCA eventually told us that it would not and indeed could not act because non-regulated firms were outside its perimeter. It said it did not regard them as Agents, notwithstanding that they were acting on behalf of regulated firms which were benefiting from the misleading practices. The FCA said the matter was outside of its perimeter and therefore was not its responsibility.

The process of reaching this point took a very frustrating 18 months during which time the misleading practices continued unabated.

In March 2024, we took the matter to the ASA, with [this result](#).

The ASA found the following breaches of advertising rules:

1. The ad gave the impression that the foreign exchange payment services and financial transactions were provided by CurrencyWave when that was not the case.

2. The ad implied that CurrencyWave were authorised by the FCA when that was not the case.
3. The cost comparison information was likely to mislead.

The ASA approached both CurrencyWave and CurrencyCloud for their comments. As expected, CurrencyWave vigorously defended its position but will be obliged to amend its website.

Of more concern was the reaction from the regulated entity, CurrencyCloud. Instead of accepting the ASA's findings with their obvious risk to consumers, CurrencyCloud argued with the advertising regulator about its findings.

CurrencyCloud's argument can be summarised as follows:

1. That the advertising is not misleading as to the real provider of the services, when evidentially it is;
2. That CurrencyWave is not presenting itself as FCA regulated when evidentially it is;
3. That other firms are behaving like this (with the implication that makes it acceptable); and
4. That the FCA is aware of the advertising messages by CurrencyWave and CurrencyCloud's arrangements with these unregulated "Introducers" and has approved them.

This attitude is deeply worrying. CurrencyCloud is obviously not concerned with the wrongdoing that has been found by the ASA, or in putting it right. It is not interested in presenting clear, concise information to consumers to allow them to make an informed decision.

Nor does it appear concerned about the regulations, including the Consumer Duty.

Instead, it appears intent on continuing the (highly lucrative) practices to the detriment of consumers and in contravention of the advertising rules. This appears to be a matter of embedded culture at CurrencyCloud, something that the Consumer Duty has clearly failed to address.

Of great concern is what this ruling reveals about CurrencyCloud's apparent ignorance of the regulations, particularly in relation to its relationship with CurrencyWave.

CurrencyCloud refers to CurrencyWave variously as an "introducer-broker" and an "authorised appointed person".

There is no such thing as an "authorised appointed person" in any regulatory regime including the payments sector. Authorised by whom and to do what?

An "Introducer Broker" is only relevant to designated investments which do not include FX or payments.

CurrencyCloud may mean "Introducer" but this is not an accurate description of the activities of CurrencyWave either. An "Introducer" may only make referrals and / or distribute non-real-time marketing material on behalf of the principal; clearly this is not what CurrencyWave is doing.

CurrencyWave is acting both as a pre-sale representative for CurrencyCloud to bring in new business, and then as a post-sale customer services representative on behalf of CurrencyCloud. It interacts with CurrencyCloud's end customers.

Please see this extract from CurrencyCloud's Terms and Conditions of Service for end customers

https://go.currencycloud.com/hubfs/Product/Legal/Currencycloud-Terms-UK-IKYC.pdf?_gl=1*_1egsykx*_gcl_au*MTI1NzEzODkzMS4xNzI5ODQ5ODQy*_ga*MTUzMzU0NTk3MS4xNzI5ODQ5ODQ0*_ga_GV96VCVBC6*MTcyOTg0OTg0My4xLjAuMTcyOTg0OTg1MS41Mi4wLjA

The T&C confirm that as a self-styled "Authorized Person" CurrencyWave is allowed to place instructions with CurrencyCloud on behalf of CurrencyCloud's customers and to handle customers' online accounts and transactions. These transactions include regulated payment service activities, yet CurrencyWave is entirely unregulated.

More worryingly, customers are bound to any instruction given to CurrencyCloud by this "Authorised Person" on their behalf. This places all the responsibility for any wrongdoing by an entirely unregulated third-party onto the end customer. It leaves them wide open to fraudulent activities by any bad actor "Authorised Persons".

CurrencyCloud actually refers to this "Authorised Person" as the customer's "agent". Yet, not only is CurrencyWave not registered as a CurrencyCloud agent with the FCA under the PSRs, these activities go far beyond the normal powers of even a registered agent.

This arrangement raises alarming questions of control, governance and probity.

I have the following comments:

The Payment Services Regulations 2018 (PSRs)

Under the PSRs, it is a criminal offence also punishable by imprisonment for a person to falsely claim or imply that they are a payment services provider.

False claims to be a payment service provider or exempt

139.—(1) A person who does not fall within any of sub-paragraphs (a) to (f) of regulation 138(1) may not—

(a) describe themselves (in whatever terms) as a person falling within any of those sub-paragraphs; or

(b) behave, or otherwise hold themselves out, in a manner which indicates (or which is reasonably likely to be understood as indicating) that they are such a person.

(2) A person who contravenes paragraph (1) is guilty of an offence and is liable on summary conviction to imprisonment for a term not exceeding three months or to a fine, which in Scotland or Northern Ireland may not exceed level 5 on the standard scale, or both.

CurrencyWave is evidentially making false claims to be a payment service provider to gain business. CurrencyCloud is responsible for the advertising messages put out by CurrencyWave on its behalf, and it benefits from that business, so it must also be implicated.

Both firms appear to be breaching the regulations.

The Role of the FCA under the PSRs

Monitoring and enforcement

108.—(1) The FCA must maintain arrangements designed to enable it to determine whether—

(a) persons on whom requirements are imposed by or under Parts 2 to 7 or regulation 105 (access to bank accounts) are complying with them;

[F1(aa) authorised payment institutions, small payment institutions or registered account information services providers on whom requirements are imposed by or under section 312R of the 2000 Act are complying with them;]

(b) there has been any contravention of regulation 138(1) (prohibition on provision of payment services by persons other than payment service providers), 139(1) (**false claims to be a payment service provider or exempt**) or 142(1)(a) or (2) (misleading a regulator).

(2) The arrangements referred to in paragraph (1) may provide for functions to be performed on behalf of the FCA by any body or person who is, in its opinion, competent to perform them.

(3) The FCA must also maintain arrangements for enforcing the provisions of these Regulations.

(4) Paragraph (2) does not affect the FCA's duty under paragraph (1)

It is clear that the FCA's statutory role and obligation to monitor and enforce the PSRs extends not only to all the direct marketing activities of the regulated firm, CurrencyCloud, but also to the indirect activities of the unregulated firm CurrencyWave insofar as it is falsely claiming to be a payment service provider.

Consumer Protection from Unfair Trading Regulations 2008 (CPRs)

The FCA Approach document states:

8.34 PSPs and e-money issuers should note that the CPRs apply to their payment service and e-money business with consumers. The CPRs are intended to protect consumers from unfair commercial practices by businesses.

"Commercial practices" include advertising and marketing or other commercial communications directly connected with the sale, promotion or supply of a product. Further information about the CPRs can be found on our website.

The CMA has also published guidance relating to the CPRs.

CurrencyCloud has confirmed that it is responsible for the advertising messages put out by its "Business Introducers" so it must be implicated in the ASA ruling.

The ASA Code of Advertising is based on the CPRs. Its website states:

One important piece of legislation that affects marketing communications is the Consumer Protection from Unfair Trading Regulations 2008 (the CPRs). For the purpose of the Regulations and in this Appendix, "consumers" refers to individuals acting outside the course of their business. The CPRs prohibit unfair marketing to consumers, including misleading or aggressive advertising. Whenever it considers complaints that a marketing communication misleads consumers or is aggressive or unfair to consumers, the ASA will have regard to the CPRs. That means it will take factors identified in the CPRs into account when it considers whether a marketing communication breaches the CAP Code.

Any breach of the advertising code must also be a breach of the CPRs, which is in turn a breach of the PSRs.

Under the Enterprise Act 2000, the FCA can enforce breaches of the CPRs:

Enterprise Act 2002

EG 19.10.101/03/2016

RP

The FCA, together with several other UK authorities, has powers under Part 8 of the Enterprise Act to enforce breaches of consumer protection law. Where a breach has been committed, the FCA will liaise with other authorities, particularly the Competition and Markets Authority (the CMA), to determine which authority is best placed to take enforcement action. The FCA would generally expect to be the most appropriate authority to deal with breaches by authorised firms in relation to regulated activities.

The Consumer Duty

All payment service providers are expected to comply with the Consumer Duty, which was implemented on 31 July 2023. The FCA sent a letter to all firms in the Payment sector on 21 February 2023 which stated:

For many firms, meeting the Duty will require a significant shift in culture and behaviour. We recognise that the implementation of the Duty comes at a challenging time. However, we believe that embedding the Duty effectively will help payments firms continue to build trust amongst consumers in using the expanding range of products and services and enable the sector to continue to grow in a way that delivers consistently good outcomes for customers.

How the Duty applies to payments firms

The Duty applies to products and services offered to retail customers, including to microenterprises and small charities with an annual turnover of less than £1 million, and to all firms who determine or have a material influence over consumer outcomes - not just those with a direct customer relationship. It is important that you consider how the Duty applies to your firm in light of its business model, customer characteristics and influence over consumer outcomes. We've set out some more information and examples about how the Duty applies to payments firms in Annex 1 to this letter.

CurrencyCloud does not have direct customer relationships – these are all managed by its “Business Introducers”. We believe there could be up to 350 of these. However, the above makes it clear that the Consumer Duty still applies.

I would have thought that 15 months was ample time for firms to have implemented the Consumer Duty, in fact it should have been implemented by 31 July 2023, yet CurrencyCloud does not appear to have done so.

Harm

It is indisputable that hundreds of unregulated, unknown companies operating unchecked in a supposedly regulated industry will have caused significant consumer detriment as well as materially distorting competition.

Unchecked, inexperienced and possibly unscrupulous individuals have been freely allowed to operate websites aimed solely at gaining customers for a multi-billion-pound e-money provider.

In doing so, they have made evidentially misleading claims both about their own status and their relationship with the real provider of the service, misleading consumers and small business customers in the process. The regulated provider has allowed this.

These unregulated entities have also been freely allowed to set pricing, provide regulatory, security and safeguarding information and to deal generally with end customers on behalf of the real provider.

Up to 350 individual firms have ridden on the back of one firm's regulatory licence, depriving the regulator of vital regulatory fees.

Spared the financial and operational burden of regulatory compliance, they have been able to undercut genuine, regulated firms, thus channelling ever more profits to themselves and their primary broker, whilst driving those genuine regulated firms out of business.

This has all been done with the apparent approval of the FCA.

Notwithstanding the evident irregularities, there is also the matter of national security to consider, particularly when unregulated actors are operating in a regulated environment and being allowed to do so.

Questions the FCA needs to answer

CurrencyCloud is one of the largest firms in the industry. It was acquired by Visa in 2021, by which time it had processed over \$100 bn of payments.

I understand that some of CurrencyCloud's unregulated "Business Introducers" are making profits in excess of £1m per year from their activities.

Given that CurrencyCloud has also claimed in its comments to the ASA that the FCA has discussed both its advertising practices and its arrangements with its "Business Introducers" and has, effectively, approved them, I have the following urgent questions:

Misleading advertising

1. How can the FCA not have known or acted on the false claims by CurrencyWave to be a payment services provider, given a) the statutory requirement for it to have monitoring systems in place and b) the fact that the TTF presented the evidence to it in August 2022 and again in February 2023? What arrangements does the FCA maintain to monitor and enforce this?
2. What action will the FCA take to ensure that this website and all other similar sites claiming to be payment services providers and / or FCA regulated are immediately removed?
3. What financial penalties or other legal action will the FCA seek against the firms and individuals involved in this apparent criminal behaviour? When will it do this?
4. What action will the FCA take to investigate misleading advertising activities by other large payment providers and / or their representatives, which the TTF has also reported on several occasions? When will it do this?
5. What public statement about its own role in this matter will the FCA make, including whether it considers that it has behaved unlawfully by apparently endorsing these practices? How will it restore consumers' faith in its ability to regulate the industry properly? When will it do this?

Definition of "Agent"

Further, when TTF brought this matter to the attention of the FCA over two years ago, we argued strongly that these unregulated companies were acting as Agents under the PSRs. The FCA dismissed our interpretation of the regulations and insisted that these businesses were merely "Introducers".

Yet here we have CurrencyCloud actually using the word "agent" in its T&C to describe the activities of its "Business Introducers".

It is inconceivable that during its due diligence processes the FCA was not aware of this arrangement involving the widespread facilitation of regulated payment services by unregulated third parties presenting themselves to customers as "agents". Yet the FCA has determined that these facts do not meet even the requirements of an Agent within PSRs 2017 and thus these firms remain outside the regulatory perimeter.

Most importantly and urgently, then, I now request that the FCA formally revisit this interpretation of “Agent” under the PSRs using an independent legal firm and I ask that both the detailed engagement letter and the findings are shared with TTF.

My concerns are driven by the very obvious economic necessity for the reputational integrity of the UK’s financial services sector and the reputational integrity of the FCA as its primary conduct regulator to be restored; currently, just 11 per cent of adults strongly agree that they have confidence in the sector (according to [the FCA’s own data](#), pp221 to 234). This sorry state of affairs is not surprising given that the sector the FCA regulates is the most violating of all industries in the UK economy, according to [the FCA’s own data shown in Violation Tracker UK](#). The [data suggests recidivism](#), pointing to the FCA’s apparent inability to reform the conduct of bad actors who seem to consider fines for malpractice as ‘just a cost of doing business’. None of this should surprise anybody when the FCA consistently fails to use its powers effectively; and consistently needs to be motivated by others to act.

Only when this 11 percent figure is raised substantially will the financial sector’s full potential contribution to the government’s growth objectives be realised.

I look forward to hearing from you without delay; meanwhile I am looking into whether other intelligence that TTF supplied to the FCA, but the FCA has so far failed to satisfactorily act on, may require a further open letter.

Yours sincerely,

Andy

Andy Agathangelou FRSA

Founder, [Transparency Task Force](#); a Certified Social Enterprise

Chair, Secretariat Committee, [APPG on Investment Fraud and Fairer Financial Services](#)

Founder, [The International League of Ethical Financial Services Leaders](#)

Founder, [The March for Justice](#)

Chair, [Violation Tracker UK](#) Advisory Board

Co-Founder, [The Woodford Campaign Group](#)

Founder, [RSA’s Responsible Finance for Good Network](#)

Governor, [The Pensions Policy Institute](#)

Associate Member, [Better Finance](#)