Neutral Citation: **[2024] UKUT 00035 (TCC)**

Case Number: UT/2023/000092

UPPER TRIBUNAL
(Tax and Chancery Chamber)

By remote video hearing

FINANCIAL SERVICES – procedure – supervisory notices imposing requirements taking immediate effect in relation to e-money institution's new and existing business and its assets - application under Rule 5(5) of UT Rules to suspend effect of notice pending determination of reference dismissed

Heard on: 17 January 2024
Judgment date: 5 February 2024

Before

UPPER TRIBUNAL JUDGE SWAMI RAGHAVAN

Between

NVAYO LIMITED

Applicant

and

THE FINANCIAL CONDUCT AUTHORITY

Respondent

Representation:

For the Applicant: Stephen Auld KC, instructed by Trowers & Hamlins LLP

For the Respondent: Adam Temple, Counsel, instructed by the Financial Conduct Authority

DECISION

INTRODUCTION

1. The applicant, "Nvayo" is an e-money institution authorised by the Financial Conduct Authority ("the Authority") under the Electronic Money Regulations 2011 ("the EMRs"). E-money issuers such as Nvayo are subject to various regulations including obligations in relation to anti-money laundering ("AML") and the Payment Services Regulations ("the PSRs").

2. In May 2023, the US Department of Justice ("USDoJ") arrested Christopher Scanlon, Nvayo's ultimate beneficial owner ("UBO"), on charges of conspiracy to control and own an unlicensed money transmitting business in violation of US federal law. The Authority issued Nvayo three decisions in the form of Supervisory Notices. The two in August 2023 (the First Supervisory Notice of 8 August 2023, and the Second Supervisory Notice ("SSN") of 24 August 2023) were in response to the arrest and various failings alleged by the Authority regarding the way Nvayo had dealt with that and the preceding USDoJ investigation. Subsequently, on 21 November 2023, the Authority issued a Further Second Supervisory Notice ("FSSN"). That followed an AML review on Nvayo which the Authority considered revealed significant deficiencies in Nvayo's AML regulatory compliance. Nvayo made timely referrals to the Upper Tribunal ("UT") (which the parties agreed on 20 December 2023 should be consolidated) of the SSN and FSSN and the requirements those imposed on Nvayo.

3. Those requirements took immediate effect from the date of the relevant notice. In broad summary, they stop Nvayo carrying out new business and restrict Nvayo's dealings of its own assets until the Authority considers their concerns in respect of the UBO and AML are satisfied. The requirements also stop redemptions by existing customers unless the appropriate AML due diligence in relation to the customer has been remediated to the satisfaction of a Skilled Person (an independent third party appointed under s166 Financial Services Markets Act 2000 ("FSMA")).

4. This decision deals with Nvayo's application for suspension of the effect of those requirements under Rule 5(5) of The Tribunal Procedure (Upper Tribunal) Rules 2008 ("the UT Rules"), pending the substantive hearing of Nvayo's reference. In summary, Nvayo argues the requirements should be suspended as they are disproportionate to the concerns raised for a number of reasons including that: Nvayo swiftly removed Mr Scanlon from any management responsibilities following his arrest and a sale of his holding is imminent, the USDoJ charges are in any case simply unproven allegations in relation to matters in the US and prior periods and do not concern Nvayo's business, the AML issues are not as serious as the Authority make out and that Nvayo has taken sufficient steps to address them such that there is no significant risk to consumers if the restrictions imposed were lifted.

5. For the reasons set out below, Nvayo's suspension application is refused.

BACKGROUND

6. E-money is defined in the EMRs as monetary value, represented by a claim on the issuer, stored electronically (including magnetically), issued on receipt of funds for the purpose of making payment transactions, and which is accepted as a means of payment by someone other than the issuer.

7. Nvayo provides e-money and pre-paid cards. Nvayo's customers can transfer their e-money to others or spend it, for instance, with a number of retailers who accept MasterCard payments. Nvayo is owned by AU Card Limited (a company incorporated in the UK), which is wholly owned by AU Card LLC (a company registered in the State of Utah, USA). AU Card LLC is in turn owned by PMA Media Group Inc. (a US company) in relation to which Mr Scanlon is the 100% shareholder. There is no dispute Mr Scanlon has a "qualifying holding"

for the purposes of the fit and proper requirements contained within the EMRs, Regulation 6(5) and (6) of which provide, so far as relevant, as follows:

> '(5) The applicant must satisfy the Authority that, taking into account the need to ensure the sound and prudent conduct of the affairs of the institution, it has—…
>
> (b) effective procedures to identify, manage, monitor and report any risks to which it might be exposed; …
>
> (6) The applicant must satisfy the Authority that—
>
> (a) having regard to the need to ensure the sound and prudent conduct of the affairs of an authorised electronic money institution, any persons having a qualifying holding in the institution are fit and proper persons;
>
> (b) the directors and persons responsible for the management of its electronic money and payment services business are of good repute and possess appropriate knowledge and experience to issue electronic money and provide payment services;…
>
> (d) it has taken adequate measures for the purpose of safeguarding electronic money holders' funds in accordance with regulation 20…'

8. Regulation 7 of the EMRs enables the Authority to include such requirements as it considers appropriate when authorising the firm. Regulation 11, read in conjunction with Regulation 7, gives the basis for the Authority to impose subsequent requirements on a number of bases such as protection of consumers, including where:

> "…it appears to the Authority that – (a) the person no longer meets, or is unlikely to continue to meet any of the conditions set out in regulation 6(4) to (8) or the requirement to maintain own funds, or does not inform the Authority of a major change in circumstances which is relevant to meeting those conditions or that requirement, (as required by regulation 37)".

9. Regulation 20 of the EMRs requires the firm to safeguard clients' funds. Nvayo does this using a segregated bank account (pursuant to Regulation 21 of the EMRs).

10. Nvayo is also subject to the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 ("the MLRs"). In brief, these impose various requirements regarding rating the risk of money-laundering and terrorist financing, and customer due diligence (with enhanced due diligence in any case identified as high risk). The MLRs also impose ongoing obligations in relation to monitoring of transactions and suspicious activity reports.

The requirements sought to be suspended:

11. The key requirements Nvayo seeks suspension of are requirements that:

> (1) Nvayo must not, without the Authority's prior written consent, carry out any electronic money services until the Authority's concerns in respect of Mr Scanlon, the current ultimate beneficial owner of Nvayo, have been adequately mitigated; Nvayo has remediated its systems and controls failings to the satisfaction of the Authority, taking into account any findings of the Skilled Person to be appointed; and Nvayo's client files have been assessed as 'adequate' overall by the Skilled Person.
>
> (2) Nvayo must not transfer sums to its customers, except where the Skilled Person is satisfied that the client's file is adequate from an AML standpoint.

(3) Nvayo must not, without the Authority's prior written consent, in any way dispose of, withdraw, transfer, deal with or diminish the value of any of its own assets, until broadly the same conditions as above have been met.

12. Accordingly, it can be seen that the first requirement affects Nvayo's ability to transact new business, the second requirement impacts its existing business, and the third concerns Nvayo's use of its *own* assets for instance in relation to Nvayo's dealings with shareholders and third parties (i.e. the third requirement does not cover the assets which are safeguarded separately for clients).

Evidence and findings of fact for purposes of this application

13. In this section I aim to briefly introduce some further background findings on Nvayo and the particular topics the parties raised in relation to Nvayo's suspension application, and in their evidence, setting out further detail as necessary in the discussion sections which follow. The time to make definitive findings of fact will of course be following the hearing of the substantive references in this matter.

14. As regards the evidence, Christopher Jacklin, who is Nvayo's Interim, Co-Chief Executive Officer (appointed 1 June 2023) and Chief Banking Officer (appointed 1 March 2020) filed two witness statements on behalf of Nvayo. Those statements dealt briefly with the history of the company, the events leading up to the issue of the Supervisory Notices, the effects of those on Nvayo, and Nvayo's systems and controls, remediation and Nvayo's response to the Authority's concerns. On behalf of the Authority, Gregory Ohm, a manager in one of the Authority's E-Money Portfolio Teams, and whose team is responsible for the supervision of Nvayo, filed two witness statements. Those covered the communications from Nvayo's bank regarding closure of its safeguarding account, the Authority's continued engagement with Nvayo, and the issue of the FSSN. Neither witness was required by the opposing party to be cross-examined but further to my request Mr Jacklin answered my questions about the day-to-day operation of Nvayo's business. He also gave brief oral evidence in relation to the impact of the skilled persons requirement on Nvayo and regarding Nvayo's actions taken in response to the Authority's AML concerns. I found Mr Jacklin to be a helpful and credible witness of fact.

Nvayo's history and business

15. Nvayo was acquired by the PMA Media Group Inc. via AU Card Ltd. on 31 July 2017. It recommenced business in 2018 (having been previously dormant) following a transfer of a customer book to it from Paysafe Group (which had previously provided outsourced services to AU Card Ltd). Nvayo was authorised as an E-money institution on 8 May 2018. Mr Scanlon was employed as CEO of Nvayo from 21 November 2022 until May 2023.

16. Mr Jacklin explained how Nvayo does not solicit customers directly. All customers must first be members of one of Nvayo's UK based affiliated companies who provide membership and concierge services (for instance travel booking). Mr Jacklin's oral evidence set out that out of the total 30,000 accounts, 13,400 were active with balances distributed as follows: 13,400 have a balance of more than zero, 4,700 less than £10, 5000 between £10 and £100, 2,700 between £100 and £1000, 500 between £1000 and £5000 with the remaining 500 having balances of over £5000.

USDoJ Investigation and criminal complaint against Mr Scanlon

17. The USDoJ's criminal complaint, filed in the United States District Court (New Jersey) and made public at the time of Mr Scanlon's arrest on 25 May 2023 alleges the defendant, Mr Scanlon, conspired to control and own an unlicensed money transmitting business in violation of US federal law from 2015 at the earliest to in or around 2019. The facts on which the

complaint is based are set out in a 14-page affidavit sworn by a US Attorney's Office official and detail a number of events taking place between Mr Scanlon and five customers of AU Card LLC (which did business under brands including "Aurae Lifestyle"). The affidavit refers to Nvayo as a company licensed in the UK to provide "e-money wallets on behalf of Aurae Lifestyle customers". It sets out that Mr Scanlon "acted as the primary "relationship manager" (i.e., a customer service representative) for several high-net-worth customers of the "AU Entities" [*PMA, AU Card LLC, AU Card Ltd. and Nvayo*] operating under the Aurae Lifestyle brand." It refers to the fact of various criminal and fraud charges, and in some cases convictions in the US, of such customers. It also refers to Mr Scanlon continuing to assist a particular customer with financial transactions despite Nvayo having relayed issues to its regulator in the UK in or around July 2019 regarding the customer. The customer, who is later said to have told Mr Scanlon that the customer was going to modify a source of funds letter that a lawyer had provided to him and then get that notarized, continued to conduct transactions through his account until February 2020.

18. The USDoJ's complaint was not made public until 23 May 2023, but was preceded by an investigation in the US. It is a matter of dispute between the parties as to when Nvayo became aware of any issues with Mr Scanlon. Nvayo say they were not aware until 25 May 2023 whereas the Authority maintain Nvayo became aware from December 2019 when the US entities received information requests in relation to Nvayo clients and in any event from March 2021 when Nvayo became aware of a subpoena. It is not necessary for me to address the detail of that dispute for the purposes of resolving this suspension application. What is of more relevance to Nvayo's case for present purposes are the actions Nvayo then took. Mr Scanlon was suspended as an employee and all access he had to Nvayo systems was removed. Nvayo's notification letter of 30 May 2023 to the Authority mentioned Nvayo had always had an independent board formed of two directors: Mr Jacklin and Mr Amadeo Pellicce. On 7 August 2023, Nvayo's solicitors told the Authority that Mr Scanlon had decided to dispose of his shares until such time as the US proceedings were resolved. As at the date of the hearing before me no sale had taken place.

Safeguarding bank accounts

19. Nvayo had four safeguarding accounts. After telling the relevant banks of Mr Scanlon's arrest, three were closed and the final one placed under review on 18 July 2023. On 28 December 2023 that last bank ("the Bank") notified Nvayo that it would close Nvayo's account on 90 days' notice.

20. In its notification of withdrawal of services form to the Authority (exhibited to Mr Ohm's statement and dated 29 December 2023) the Bank explains that Nvayo's earlier responses of 15 August 2023 and 22 December 2023 were not sufficient to alleviate the bank's concerns and that the bank had decided to "exit" the customer. The notification of withdrawal stated:

> "In particular, UBO has not been changed, criminal proceedings and restrictions of activity are still on-going and a EU license is not currently in Nvayo's medium-term plans to operate in Europe."

21. By way of background, the last point referred to (lack of EU license) is not a matter which is pursued in the Supervisory Notices but relates to a concern on the part of the Bank in relation to "provision of the regulated services to EU domiciled customers" through Nvayo's reliance on "reverse solicitation for its business as usual". Nvayo dispute this issue is a concern.

AML review

22. In February 2023, Nvayo was in the process of implementing a remediation plan for AML controls and processes following an annual review by an independent compliance firm FSCom Ltd. Mr Scanlon met with the Authority together with Nvayo's compliance officer and

its directors to discuss the ongoing remediation project and provide additional information to the Authority following an information request by the Authority. Following the receipt of Nvayo's audit report on 24 July 2023 and its MLRO's report on 4 August 2023 the Authority decided to undertake its own review of Nvayo's financial crime systems and controls. In particular, the Authority were concerned with the extent to which Nvayo's clients' risk scores had changed upwards.

23. On 17 October 2023, Nvayo's solicitors reported Nvayo had been remediating the deficiencies identified by FSCom and that it had already made good progress. The letter also stated that Nvayo had engaged an additional independent compliance consulting firm, to assist with day-to-day compliance support and that additional compliance staff had been recruited and hired with relevant experience of Nvayo's business activities.

24. The Authority requested that Nvayo provide copies of ten client files which were provided by Nvayo on 23 October 2023. The files had been selected by the Authority on the basis they were the top clients by transactional volume and/or value data. The Authority then reviewed these files against the relevant regulatory requirements, completing the review on 1 November 2023. The Authority considered every file inadequate, noting issues which included inappropriate risk ratings, lack of client risk assessments and failures to verify identities.

LAW IN RELATION TO SUSPENSION APPLICATION

25. Rule 5(5) of the UT Rules gives the UT the power to direct that the effect of the decision in respect of which the reference or appeal is made (in this case the giving of the SSN and FSSN) is to be suspended pending the determination of the reference. The pre-condition is expressed as follows:

> "…if [the UT] is satisfied that to do so would not prejudice
>
> (a) the interests of any persons (whether consumers, investors or otherwise) intended to be protected by that notice;
>
> (b) the smooth operation or integrity of any market intended to be protected by that notice; or
>
> (c) the stability of the financial system of the United Kingdom"

26. Both parties agree subparagraph (a) to be on point (although as will be seen the Authority emphasises that, given the AML context, the scope of persons intended to be protected is broader than simply the existing and future consumers of Nvayo). The Authority also say that subparagraph b) is relevant too, putting their submission in terms of the prejudice to the "integrity of the financial system".

27. There was no dispute that the relevant principles to be applied were those derived from the previous authorities as summarised by the UT in *Sussex Independent Financial Advisers Limited v FCA* [2019] UKUT 228 (TCC) at [14] and [15] as follows (with citations omitted):

> "[14] …
>
> (1) The Tribunal is not concerned with the merits of the reference itself and will not carry out a full merits review but will need to be satisfied that there is a case to answer on the reference…;
>
> (2) The sole question is whether in all the circumstances the proposed suspension would not prejudice the interests of persons intended to be protected by the notice…;
>
> (3) Detriment to the applicant, such as it being deprived of its livelihood, is not relevant to this test;

> (4) The burden is on the applicant to satisfy the Tribunal that the interests of consumers will not be prejudiced…; and
>
> (5) So far as consumers are concerned, the type of risk the Tribunal is concerned with is a significant risk beyond the normal risk of a firm that is doing business in a broadly compliant manner…The reference to consumers should for such purposes have the same meaning as in section 1G of Financial Services Markets Act 2000 ("FSMA") which defines consumers to mean persons who use, have used, or may use among other things regulated financial services…
>
> [15] Additionally, as noted in the [cited] decisions, even if satisfied that granting a suspension would not prejudice the interests of consumers, the Tribunal is not obliged to grant a suspension. The use of the word 'may' in Rule 5(5) means that it is a matter of judicial discretion as to whether or not a suspension should be granted. It is necessary for the Tribunal to carry out a balancing exercise in the light of all relevant factors and decide whether in all the circumstances it is in the interests of justice to grant the application. The power is a case management power, which in accordance with Rule 2 (2) of the Rules must be exercised in accordance with the overriding objective to deal with the matter fairly and justly…"

28. Breaking that approach down further it involved, in essence, three stages. First considering whether there was a case to answer. Second (assuming stage 1 was passed) whether the tribunal could be satisfied that granting the suspension would not prejudice the persons and matters mentioned. Third, (assuming stage 2 was passed) carrying out a balancing exercise in the light of all relevant factors.

29. Mr Auld KC, who appeared for Nvayo, put particular emphasis on the need to carry out a balancing exercise at all stages of the analysis (including the second stage) and on the tribunal's overriding objective to deal with cases fairly and justly, highlighting within that the need to deal with cases proportionately to their complexity, the costs and resources of the parties, with flexibility, and avoiding unnecessary formality and delay. In his submission the rule was protective: it provided a discretion to ensure that (consistent with protection of consumers' interests) restrictions could be removed to enable a firm to continue trading successfully thus protecting staff and customers and preserving the business while at same time dealing with concerns of Authority. It would be deeply unfair if pending the substantive hearing the relevant restrictions pushed a firm into insolvency.

30. I agree the overriding objective of dealing with cases fairly and justly is of course relevant just as much to the consideration of prejudice in the second stage. That is clear from Rule 2(3)(b) of the UT Rules which requires the Upper Tribunal to "seek to give effect to the overriding objective when it- b) interprets any rule". While fairness and justice of course inform the way that Rule 5(5) is interpreted, I am not persuaded Mr Auld's submission on UT Rule 2 adds anything to the principles already apparent from the provisions as interpreted by the authorities referred to in *Sussex*. Considerations of fairness in respect of the firm subject to requirements is already, for instance, reflected by the acknowledgment in the principles that "the type of risk the Tribunal is concerned with is a significant risk beyond the normal risk of a firm that is doing business in a broadly compliant manner". That does not mean, however, as Mr Auld's submission appeared to me to suggest, that there some kind of starting presumption that the firm ought to be able to continue trading as normal. Rather, to the extent the rule embodies any presumption, it is that requirements the relevant regulator has imposed with immediate effect remain unless the tribunal can be satisfied that suspending them would not prejudice the relevant persons or matters mentioned in Rule 5(5) (and having been so satisfied that it goes on to exercise its discretion to grant to the suspension). Fairness and justice are

also reflected by the fact the tribunal is not bound by the Authority's views on prejudice and whether a significant risk arises but can, on the basis of the evidence before it, reach its own view on such issues.

31. Another legal point of contention concerns the extent of evidence an applicant must adduce by way of support. In *Gidiplus v FCA* [2022] UKUT 00043 (TCC) (at [45]) the UT pointed out that: "…for an application of this nature to have a chance of being successful the applicant must make detailed evidence available to the Tribunal as to how its business will be carried on in a broadly compliant fashion during the period up to the hearing of the appeal". A similar point was made by the UT in *Koksa (t/a Arcis) v FCA* [2016] UKUT 192 (TCC) at [69]. Mr Auld argues those statements are wrong and that they ask too much in the context of an application hearing such as this. I disagree. The need for detailed evidence is entirely consistent with the tribunal's task as set out in Rule 5(5). That plainly requires the tribunal to engage with the wider impacts on the particular persons and matters specified to be at stake before being able to accede to a suspension. It is difficult to see how a tribunal could meaningfully satisfy itself there was no prejudice to matters such as consumer protection, market integrity or financial stability without detailed evidence of matters concerning the firm's own regulatory compliance (matters which will or ought to be within the firm's knowledge). I therefore endorse the UT's statements. They are meant as helpful guidance to applicants preparing their suspension application.

32. As to Mr Auld's submission that the balancing exercise involves looking at all relevant factors is relevant to the second stage too, I agree with Mr Temple, for the Authority, that this argument is inconsistent with the drafting of the rule and the way it has been interpreted and applied in the authorities. As indicated in the propositions *Sussex* summarises above, Rule 5(5) contains a threshold condition that needs to be satisfied in relation to the relevant prejudice, *before* the issue of general case management discretion to suspend arises (see for instance the reference to "even if…" at *Sussex* [15] at [27] above). That is not to say that a variety of factors may need to be considered at that second stage, but that those must be factors relevant to the prejudice in question. To the extent the general balancing exercise (the third stage) involved the other kinds of factors Mr Auld advances, such as impacts on staff and preserving the firm's business these would only be capable of applying once the tribunal was satisfied the second stage (prejudice) was passed.

DISCUSSION

Case to answer?

33. In line with the framework suggested by the authorities referred to in *Sussex* the first question is whether there is a case to answer. This question was not pressed in Mr Auld's oral submissions which focussed on the key second stage of whether there was a significant risk posed by granting a suspension beyond that of a broadly compliant firm and the third stage of whether in the overall balancing the suspension should be granted. (As regards the submission embedded in Mr Jacklin's second witness statement that there was no case to answer because the AML deficiencies alleged in the FSSN were not serious enough to warrant the requirements imposed then I disagree with the analysis for the reasons set out below at [64]).

Can the Tribunal be satisfied that suspending the requirement would not prejudice the persons intended to be protected by the notice?

34. As regards identifying the persons intended to be protected by the notice, whereas Mr Auld's submissions spoke mainly to Nvayo's existing and future consumers, the Authority's case was that, to the extent the supervisory notices concerned AML failings, the notices were intended to protect those who were intended to be protected by the MLRs namely the general public. As Mr Temple pointed out, that was in accordance with how the UT approached the

issue in *Gidiplus v FCA* [2022] UKUT 00043 (TCC) (at [25]), a case where the decision notice was issued with the intention of protecting against AML risk. The UT accepted the Authority's submission that the persons intended to be protected were the public in general, and "in particular potential victims of criminal activity which may be facilitated or incentivised by a criminal's ability to launder money". The UT also referred to "the integrity of the UK financial system, in preventing it from being used to launder money".

35. Taking account that the analysis on who is sought to be protected may shift focus depending on the relevant requirement I will consider each requirement in turn acknowledging that there is a certain amount of overlap in the issues and concerns raised.

Requirement restricting Nvayo undertaking new business

36. In the Authority's submission prejudice would arise as follows if the new business requirement were suspended thus allowing Nvayo to transact with new customers. Firstly, allowing business to resume without any restriction would undermine the statutory scheme. That required those holding qualifying holdings to be fit and proper. Secondly, given the imminent withdrawal of Nvayo's banking facilities, new customers would suffer prejudice if they paid money to a firm who would shortly have to reimburse them unless the firm could obtain new banking facilities. Thirdly, Nvayo's lack of robust AML procedures prejudices the public at large and the integrity of the payment system.

37. Nvayo disagree that any of the above issues present a significant risk. Regarding Mr Scanlon being Nvayo's UBO and the charges against him, Mr Scanlon is presumed innocent. The charges against him did not concern his conduct as regards Nvayo, and in any case could well be dropped. He has since May 2023 played no management role with Nvayo, his access to Nvayo's systems was stopped, and a sale of his interest is in prospect. The issue with the safeguarding bank account only arose in the first place because of the Authority's actions. Nvayo is confident they can resolve matters with the Bank given any issue the Bank has with Mr Scanlon being the UBO will be addressed when his interest is sold. The AML remediation has been put in place, and the issues the Authority have raised with the client file review were not fundamental as the Authority maintain but administrative in nature. There is no reason why with a Skilled Person (whose appointment is anticipated to be agreed shortly) in place why Nvayo should not continue to take on new business.

Tribunal's views

38. The first point to address is the significance of Mr Scanlon's arrest and the criminal complaint brought against him. Nvayo's submissions seek to distance the alleged conduct from Nvayo's activities in the UK: the conduct related to former PMA Group and the period of complaint did not go beyond 2019 but largely concerned periods prior to Nvayo's business starting back up in 2018. Nvayo thus argues the complaint "with exception of any continuing involving of Mr Scanlon himself in Nvayo's business, [has] no relevance to Nvayo or the UK".

39. There is, rightly, no dispute that conduct referred to in the USDoJ complaint are at this point unproven allegations. However, looking at the complaint in its own terms, I consider it is wrong to downplay its relevance to Nvayo's business and Mr Scanlon's continuing status as UBO of Nvayo. As Mr Temple's submissions highlighted, the criminal complaint did refer to particular instances involving Nvayo. The complaint mentions a series of transactions undertaken for an Aurae Lifestyle customer in or around June 2019. Earlier, the complaint alleges that the AU Entities used various bank accounts to provide money transmitting services to their customers without properly registering with the relevant US regulatory body, FinCen. The example is given of a customer, referred to as "Customer-2", wiring approximately $3.5 million to an account controlled by the AU Entities for the purpose of purchasing bitcoin. The complaint mentions the customer had a previous 2001 conviction for wire fraud and had more

recently settled a Ponzi-related civil enforcement action with the SEC in 2023 in relation to violations occurring between 2015 and 2017. Mr Scanlon is said to have instructed several AU Entity employees "including the Financial Controller of Nvayo Ltd. (the "Nvayo Controller")", to wire money to through various Bank accounts to complete the transaction. It is said that "The Nvayo Controller later emailed Scanlon to confirm that a payment request of $2.6 million from Nvayo to Bank-2 had been requested". Read on its own terms it is not possible to say the conduct alleged to have taken place does not involve Nvayo.

40. Mr Auld argues that to the extent any of this presented a risk to Nvayo's new potential customers then that risk was dealt with by Mr Scanlon's removal from any management involvement in the business back in May 2023. I agree with the Authority however that these steps did not address Mr Scanlon's continuing status as UBO. Mr Temple was right to emphasise that the statutory scheme under the EMRs (analogous to the "controllers" regime under Part XII FSMA) envisages that owners, by virtue of their role as such, are expected to be fit and proper. Mr Scanlon, as owner, continues to have all the rights that status brings. The fact an owner is not involved in the management of the business does not divest them of their status as owner. In fact, it can be seen that the EMRs (see [7] above) specifically distinguish, on the one hand "the directors and persons responsible for the management of its electronic money and payment services business" from those with qualifying holdings on the other. Consumers, including potential consumers, of e-money institutions ought rightly to expect, given the regulatory framework which surrounds such institutions, that a firm they transact with is trading in a "broadly compliant manner". That would include the reassurance that the business's owner has been assessed to be fit and proper.

41. Nvayo's arguments that a sale of Mr Scanlon's interest is imminent, do not in my view provide sufficient comfort. Nvayo's skeleton (filed on 9 January 2023) expressed the understanding that a sale would be completed by the date of the hearing (17 January 2023) but that proved not to be the case. In his oral submissions Mr Auld said that Nvayo's solicitors, Trowers & Hamlin LLP, were instructed by AU Card LLC on the sale (which would effect the disposal of Mr Scanlon's interest in Nvayo) and that the change of control notice had been drafted. (He also clarified the sale would not involve a right to repurchase – something which had been a source of concern to the Authority). Nevertheless, and putting aside the lack of evidence put forward on these matters, the fact remains that as things stand, the sale is yet to be finalised. Mr Scanlon remains the UBO. Moreover, as the Authority reminds the Tribunal, any sale would be subject to any new owner being cleared by the Authority as fit and proper.

42. Mr Auld also indicated in submissions that Nvayo's legal team understood that the USDoJ and Mr Scanlon's lawyers were presently discussing whether there was (or was ever) any proper basis for the US charges and that there were discussions on dropping the charges altogether. Again, putting aside the lack of evidence in relation to this, as things stand at present, the US charges remain.

43. Mr Auld emphasises the matters in the criminal complaint are accusations not facts. The Authority rightly acknowledge the presumption of innocence and do not suggest the facts alleged in the complaint are proven. The Authority does however point out that Nvayo, in its solicitors' letter of 17 October 2023 to the Authority recognised that:

> "if Nvayo was submitting a new application for authorisation as an EMI (or a change in control notification in respect of [Mr Scanlon] becoming a UBO), both would likely be rejected by the FCA.
>
> …Furthermore, Nvayo has always recognised that it would need to assess [Mr Scanlon's] position once the disposition and outcome of the U.S. charges was known. As the matter stands at present, the Nvayo board would likely conclude that [Mr Scanlon] is no longer suitable to be its UBO."

44. The fact that the US charges remain to be determined should not be overlooked. But the nature of the criminal allegations are serious, and their context - money transmission - relates directly to the same type of business as carried out by Nvayo, and on some points specifically refers to Nvayo. Potential Nvayo customers and the public more generally would rightly be concerned if a firm ultimately owned by a person who remained subject to serious criminal allegations, relevant to the business type of the firm, could still take on new clients without any restriction.

45. It should also be noted that the relevant restriction on carrying out new business is not expressed in absolute terms. Incorporated within the requirement is a provision that Nvayo's activities may recommence when, amongst other matters, the Authority's concerns around Mr Scanlon being the UBO have been adequately mitigated. There is thus already recognition of the potential for the situation to evolve.

46. Another significant factor to consider in assessing whether consumers are not prejudiced by a suspension is the notification of withdrawal of service by Nvayo's last remaining bank account provider. The account will, pursuant to that notification, close on 28 March 2024. Prejudice would arise to the new customers who put their money into an account that would have to be closed and returned in short order. (The Authority also points out under Regulations 2 and 51 of the PSRs Nvayo must give payment services users two months' notice of termination of its contracts.) In the absence of any alternative bank offering the required safeguarding facilities the relevant focus shifts to assessing the prospect of the sole present safeguarding account with the Bank being retained. Mr Auld submitted, on behalf of Nvayo, that it was confident the Bank could be persuaded not to close the account.

47. There appears to me at present, however, no firm foundation for that confidence. The Bank advanced three reasons for closing the account (see [20]). Putting aside the Authority's requirements, the other two reasons the Bank referred to appear no closer to being resolved. As indicated above, Mr Scanlon remains as UBO and as things stand there is no firm indication as to when he will be able to divest his ownership. While I was told Nvayo had legal opinions addressing the Bank's concern (that reverse solicitation of customers raised EU regulatory licence issues) it was not clear to me what exactly had been provided to the Bank since 22 December 2023, that would not have been apparent earlier, or that whatever would now be provided would be sufficiently persuasive to assuage Bank's concerns and get it to reverse its stance.

48. Nvayo argue the Authority should not be able to rely on the bank account difficulties when it was the Authority's actions in imposing the supervisory requirements which precipitated those difficulties. However, as Mr Temple pointed out, the supervisory requirements represented only one of the three reasons for the Bank's notice of closure. Also, at this stage of the Rule 5(5) analysis, the tribunal is not concerned whether the Bank are right to adopt the stance they have, or who was responsible for them adopting that stance. It is *the fact* that the Bank have adopted such position, and the likely prejudice that will cause to consumers (in terms of the lack of ability to fulfil the required safeguarding of client funds) if the taking on of new business were to be resumed that is relevant.

49. In view of the combined concerns regarding the UBO and the bank account I am not satisfied the persons intended to be protected by the notice under Rule 5(5)(a) (who include future consumers of the firm) would not be prejudiced if the requirement were to be suspended and new business were to resume. This is not a situation where no significant risk arises because Nvayo would be able to take on business in a broadly compliant way. Its UBO, who has had serious criminal allegations made against him remains as UBO, and in addition the only remaining safeguarding bank account is set to close with no reasonable certainty at this point

that that concern will be reversed or addressed by alternative means of safeguarding. (As the effect on such persons intended to be protected (under Rule 5(5)(a) is reason enough to not be satisfied, I do not address the Authority's further concern that granting a suspension would prejudice the smooth operation and integrity of market (Rule 5(5)(b))).

50. As regards Nvayo's arguments that the Authority's AML concerns do not justify the restriction on taking on new business I am not persuaded those are made good on the basis of the evidence as explained below. Nvayo also argued that the presence of the Skilled Person would address any concerns but that argument, putting aside that the Skilled Person has not been appointed as at the date of the hearing, is premature. The Skilled Person's review, once completed, and crucially once the recommendations had been implemented, ought to give rise to a situation where any AML systems and controls concerns impacting on the taking on of new business are mitigated. But the mere presence of the Skilled Person in the business while their review is in progress would not address any concerns that remained in the interim pending the finalisation of the Skilled Person's review and the implementation of their recommendations. It also would not, in any case, address the prejudice in terms of the UBO not changing and the concern regarding the last safeguarding bank account closing.

Requirement restricting existing business

51. The effect of the requirements now imposed on the firm's existing business, mean customers can only get the money in their account back with the supervision of a Skilled Person. In the light of AML deficiencies, the Authority consider that payouts to existing persons, but without the supervision of a Skilled Person, would risk payments which facilitate financial crime.

52. In his evidence, Mr Jacklin spoke to the detrimental impact and frustration this restriction had on Nvayo's customers in terms of their being able to access their accounts as they would normally expect and the knock-on effect to Nvayo's relationship with its customers. The exception that redemptions could be made with the supervision of a Skilled Person did not in his view address that concern because of the delay that would involve.

53. I do not doubt that these are genuine concerns which are felt by Nvayo and its existing customers but at this stage of the analysis the particular question I must focus on is whether I can be satisfied that suspending the restriction on existing customer redemptions would not prejudice the persons intended to be protected. As discussed, in the context of AML risk, that constitutes the wider public.

54. The issue here is whether the evidence Nvayo have provided enables the tribunal to be satisfied that enabling customer redemptions without the supervision of the Skilled Person would not prejudice the concern of a risk that the payments had or would facilitate financial crime. To assess that evidence it is necessary to go into more detail into the Authority's review of the ten client files which took place in October/November 2023 and which led to the issue of the FSSN.

55. As mentioned, the Authority requested 10 files for review. Nvayo duly provided these on 23 October 2023 which the Authority then assessed against the MLRs and Joint Money Laundering Steering Group Guidance in relation to risk assessments, due diligence, ongoing monitoring, transaction monitoring and suspicious activity reporting. The reviews for the ten customers were appended to the FSSN.

56. Before referring to some of the detail of those I should mention that I did not understand Nvayo to be arguing, at least for the purposes of this application, that the underlying factual information set out in the reviews was inaccurate. In other words, if the review maintained a particular document stated a particular thing, or that a document was not in the particular client

file, it was not suggested to me that that was factually wrong. Rather Nvayo made various other points (considered below) querying the significance the Authority attached to the relevant points of non-compliance arguing they were essentially of an administrative nature and highlighting the limited scope of the review (both in terms of the numbers of files and the scope of information looked at) and therefore the wider inferences that could be drawn from it.

Authority's review of ten client files

57. The Authority considered all ten files to be inadequate. A summary of the Authority's findings (derived from the Authority's Statement of Case), with reference to the relevant regulation in the MLRs is set out below.

(1) *Risk assessments* (Regulation 28) – clients who should have been high risk were rated as medium. A jurisdiction was treated as medium risk when it should have been high risk (which would affect whether Enhanced Due Diligence applied). In three files there was no risk assessment in the file. In one file the risk assessment was dated two years after onboarding.

(2) *Customer due diligence* (Regulation 27/28)-

(a) There was insufficient verification of identity. Not all documents were certified as true, dated or translated. Proof of identity and proof of address was obtained for only some of the directors in relation to corporate clients.

(b) Inadequate proof of address was accepted in two files.

(c) The Client's occupation was unknown in four files. In others the Authority considered it vague and not properly verified.

(3) *PEP (Politically exposed persons) and sanctions screening* (Regulation 35) The MLRs requires that the firm have appropriate risk-management systems and procedures to determine where customer is a PEP, family member or known close associate of the PEP and if so to assess level of risk and for Enhanced Due Diligence to be applied.

(a) There were two files where the screening post-dated onboarding.

(b) Negative adverse media was not identified or if it was, was discounted with no explanation or further evidence.

(4) *Enhanced Due Diligence* (Regulation 33) Where this applies it requires the obtaining of further information such as the source of funds ("SoF") and source of wealth ("SoW") of the customer. In the seven files where this applied all were considered by the Authority to be inadequate. Several clients were rated as medium so Nvayo did not obtain the necessary information, or the file was upgraded to high but with no SoW or SoF. Documents were accepted that had not been translated or certified by a solicitor.

(5) *Ongoing monitoring* – (Regulation 28(11) - the Authority considered there was no clear evidential basis for change after onboarding, no evidence of risk reviews, or rescreening.

58. The review explained the Authority was not able to assess the adequacy of transaction monitoring as there was no evidence of the relevant alerts in the ten files, nor was it able to assess adequacy of suspicious transaction reporting. But the Authority considered because of the Customer Due Diligence failings Nvayo might be unable properly to monitor for suspicious transactions. (In other words, without the basic context on the nature of the customer, their business and what they needed the account for it would be difficult to assess what counted as suspicious activity).

59. Mr Temple took me through the review conclusions of several client files to illustrate the serious nature of the concerns. In relation to one, a customer was designated a medium risk customer but with no rationale. There was no evidence on file of any risk assessment having been completed at onboarding or at any point during the customer relationship. In relation to another it was noted, despite the information suggesting the individual was based in a country designated as high risk under Schedule 3ZA of the MLRs, that there was no rationale on file as to the impact of that on the risk score and why the risk rating remained medium. Mr Temple also pointed out in relation to one of the files that it had been noted that the Enhanced Due Diligence document had been completed by Mr Scanlon and that he had originally rated the customer medium risk, but the MLRO had upgraded it to high risk.

60. According to the review another customer, designated originally as medium risk, was then moved to high risk but there was not then any detail of the customer's occupation, position or income, though there was some evidence of screening using ComplyAdvantage. It is said that a simple Google search on the customer's name and location showed the customer operated in a high risk sector and that their business was the subject of an investor warning in 2018 by a financial regulator. The review said that no evidence of Enhanced Due Diligence, SoF or SoW was put forward (the document put forward as a SoF – a bank statement did not explain the source of the funds).

61. Nvayo's overall response is that it *does* have the required AML frameworks in place and that it *does* comply with the relevant obligations. It submits the alleged failings were administrative in nature and posed no risk to ongoing customers. As explained in Mr Jacklin's second witness statement Nvayo's solicitors responded to the Authority's letter of 16 November 2023 feeding back on the review and making representations on the FSSN on 13 December 2023. Referring to that he goes on say that "accordingly Nvayo believes that the failings relied upon by the FCA are not as serious as stated in the FSSN and the Feedback Letter." The letter included the following:

> "Nvayo believes that the conclusions reached in the FSSN do not fully represent the present position and that additional information had been provided to the FCA on policies risk scoring and risk assessments, including Nvayo's approach to conducting risk scoring, the consequential updates to risk assessments and ongoing remediation of client files. In the light of the additional context, Nvayo believes that the failings are not as serious as stated in the FSSN"
>
> "This also applies to actual evidence that has been obtained and or retained by Nvayo in respect to individual clients. Deficiencies identified by the FCA in the FSSN have explanations and/or have not taken into account the requirements detailed in Nvayo's policies technical solutions deployed during client due diligence, or other information that is held outside of the actual client files by Nvayo and not explicitly requested by the FCA during the review of client files."

62. In addition, Mr Jacklin raised the following points:

(1) A sample of 10 client files is a very limited number given Nvayo has some 30,000 accounts on its system. It is insufficient to form any wider conclusion regarding deficiencies.

(2) The ten client files were reviewed by an independent compliance specialist prior to submission and were not found to be materially deficient.

(3) The MLRs are based on a risk-based approach to AML compliance and controls which entails some element of subjectivity.

(4) Nvayo have been using external compliance consultation to help address those concerns.

63. Nvayo also responded to the criticisms levelled by the Authority's review through Mr Auld's oral submissions. He submitted, all customers were risk rated, there had been an updated enhancement to the risk score card following advice from independent advisers. The AML and PEP screening parameters had been provided by ComplyAdvantage, an independent provider of financial advice. Ongoing monitoring is provided by ComplyAdvantage and all customer documents are electronically certified through Jumio. Mr Auld also referred to the progress of the appointment of Skilled Person process. A shortlist of potential candidates had been drawn up one of whom was on the Authority's panel. Terms of reference could be drawn up in a matter of days and then the initial review of 4 weeks could start and then any remediation addressed. With the Skilled Person in place to establish the relevant facts there was no reason not to pay customers their money.

Tribunal's views

64. As already identified, in this context of AML, the persons intended to be protected by the Authority's notices are the public. A risk of facilitation of financial crime arises where checks and monitoring that ought to have been carried out to stop someone opening or using an account were not properly carried out. The concern is, for instance, that individuals whose identities were not verified, or who ought to have their source of funds and wealth verified will receive repayment. For the purposes of this application, and the reasons set out below I consider that the matters raised in review of the ten client files show, on their face, that there are sufficient concerns with Nvayo's AML compliance to justify customer redemptions only taking place with appropriate supervision by the Skilled Person. In agreement with Mr Temple, there is a lack of detailed evidence showing the AML concerns have been addressed.

65. It is true ten client files reviewed represent a tiny proportion of the total amount of clients, but the clients were selected as the top clients by transactional volume and/or value data Nvayo had provided. A risk-based approach, as Mr Jacklin's statement indicates, is fundamental to the AML system. That such deficiencies arise in these top ten files might be considered of concern purely in terms of redemption for those particular customers given they will include amongst them the highest value clients. One might also accordingly expect that the top ten files would illustrate the high-water mark of Nvayo's AML system and its implementation. However, the issues identified, which include lack of identity verification, and risk assessment and omitting to obtain information on source of funds and source of wealth are clearly fundamental. I reject the depiction of these deficiencies as merely administrative. The MLRs contain a number of requirements to carry out specified procedures and checks and obtain certain documents, which viewed in isolation and without context could be described as administrative, but they are no less significant because of that. The checks and assessments form the bedrock of the regime's protection. I am also not persuaded by the argument that the deficiencies can be accounted for by the subjective nature of risk-based analysis. Even assuming that is correct, there are clearly risk issues which require no value judgment such as whether a particular country is designated in the MLRs as high-risk. The review indicates that even in matters involving no subjectivity something went wrong in Nvayo's processes.

66. Nvayo argue the client files do not represent the whole of the picture and that there is information elsewhere in its systems which the Authority did not request (see [61]). However, in order to make good on this point it was incumbent on Nvayo to explain in its evidence before the tribunal how and where those gaps in compliance were filled. It ought not to have been an

unduly onerous task to explain how other material not present on the client files relating to ten clients, or at the very least a sample of those, addressed the deficiencies.

67. Nvayo also refer to "additional information with respect of Nvayo's policies, risk scoring, risk assessments, and ongoing remediation" which mean the AML failings are not as serious as stated. But it is not clear to me how further information on Nvayo's policies will resolve the concerns which have arisen regarding the *application* of those policies in practice. The review findings concern an inconsistency of application of the AML regime rather than a complete lack of system or policies (the findings refer for instance the use of various compliance and screening tools and to a positive intervention by the MLRO). The review findings suggest something has gone wrong in the way the policy has been implemented in practice. It is also not explained in sufficient detail what additional information on risk scoring and risk assessments meant the failings were not as serious as made out.

68. As regards the evidence Nvayo has put forward regarding remediation this is also too high level and lacks the necessary detail. Mr Auld argued in reply that Nvayo should not have to give detailed evidence in an application for suspension producing a massive witness statement going through some 13000 accounts. I have already rejected the point that as a matter of principle detailed evidence is not called for (at [31] above) but the circumstances of this case illustrate that detailed evidence (which should of course be relevant evidence) does not necessarily equate to voluminous evidence. Such detailed relevant evidence might for instance have sought to demonstrate to the tribunal that Nvayo had put in place a system that would uncover the sorts of fundamental MLR compliance issues identified in the review, and which addressed any non-compliance before a customer payout was made.

69. Nvayo's reference to the help it is getting from external providers also lacks detail and does not address the relevant concern. The file review of the ten clients refers to Nvayo using ComplyAdvantage and Jumio systems where it is clear they have been deployed as compliance tools with discrete functions. However, they quite clearly could not and did not address all of the relevant compliance obligations. Those required Nvayo's interventions and oversight too. Ultimately the concern is that such evidence as there is, which is in very general terms, does not explain how the remediation work carried out by the independent compliance firms will provide the necessary reassurance that existing files will be checked for MLR compliance and remediated *before* any payout is made. Similarly, the fact a Skilled Person, once they are appointed, is carrying out a review will not address the specific concern that a customer would be paid out on a non-AML compliant file. Also, the fact that Mr Jacklin says the ten files that were reviewed were checked and found to contain no material error by another independent compliance specialist prior to submission of those files to the Authority, taken at face value, is a reason to approach the further claim that the involvement of such consultant in the remediation with caution rather than as a point in Nvayo's favour.

70. In conclusion, in relation to this requirement, in the absence of sufficient evidence advanced by Nvayo, I am unable to be satisfied that the persons intended to be protected by the relevant Supervisory Notice (the public at large) would not be prejudiced if the requirement restricting the repayment to customers unless with the supervision of the Skilled Person, were to be suspended.

71. Nvayo also submit that, to the extent there were any AML concerns which would have been apparent earlier in February 2023, it is telling that the Authority did not at that point assert the consumer risks it now does or seek to impose the severe restrictions it has. Whether to take regulatory action and when are matters of discretion for the Authority and will be based on its own view of the facts. The particular question at this point in the Rule 5(5) analysis is whether the tribunal can be satisfied that no relevant prejudice would arise if a suspension would be

granted. I am not persuaded the tribunal can draw any particular inference in relation to that from the Authority's action or inaction at a given point of time. On a similar theme Mr Auld submitted as a general point that it must be the case that some regulatory matters will more appropriately dealt with by way of normal supervision or the involvement of a Skilled Person rather than the imposition of requirements. Again, that does not take the matter any further where, in a suspension application situation such as here, requirements, by definition, will already have been imposed.

Assets requirement on Nvayo's own assets

72. The terms of this requirement are that Nvayo must not:

> "without the prior written consent of the Authority, in any way dispose of, withdraw, transfer, deal with or diminish the value of any of its own assets".

73. It is provided that the requirement may be lifted when:

> "i) The Authority's concerns in respect of the UBO, such as are set out within the SSN and FSSN, have been adequately mitigated; and
>
> ii) [Nvayo] has remediated any systems and controls failings to the satisfaction of the Authority. The Authority's findings will take into account any findings of the appointed Skilled Person."

74. The requirement is subject to exceptions. It does not apply to "the disposal of assets made by [Nvayo] in the ordinary course of business, amounting to not more than £5000…and also does not apply to i) Usual and proper salary payments made by [Nvayo]; and ii) Payment of Nvayo's legal fees made by Nvayo.[1]

75. The requirement also specifies a list of payments that will not be regarded as payments in the ordinary course of business namely:

> "i. Payments of unusual or significant amounts to the [Nvayo]'s controllers, shareholders, directors, officers, employees or any connected persons.
>
> ii. The making of any capital distribution.
>
> iii. The making of any gift or loan by the Nvayo to any party.
>
> iv. Payments made as part of any financial restructuring or reorganisation of its business, of from the sale of any part of the [Nvayo]'s business (whether share or asset based)."

76. The Authority maintain an assets requirement will normally be imposed where there is a risk of the firm being wound down. Mr Temple explained that while the regulatory framework ensured that client money was safeguarded, the purpose of this assets requirement was to ensure as much money as possible remained to facilitate any wind down while allowing ordinary business expenses to be paid. The persons sought to be protected are thus existing accountholders who will want to be assured that should Nvayo wind down it will have the resources to effect the return of their funds. Nvayo argue the requirement is inappropriate, disproportionate and unnecessary. There has been no assets dissipation, nor is there any risk of asset dissipation.

77. I take account of the finding above to the effect there is no reasonable certainty at this point that the Bank will not, contrary to its notification, close Nvayo's account on 28 March

[1] I understand that the cross-reference in the FSSN (to Paragraph 1.1(1)) in the paragraph which sets out this exception should, from the context, refer to Paragraph 1.1(2) in order for the reference to assets to make sense as Paragraph 1.1(1) deals with carrying out and conducting electronic money services Nvayo's assets).

2024. The implication of that would be that Nvayo would not be able to carry on in business (because it will be unable to comply with the relevant safeguarding obligations). I therefore agree with the Authority's assessment of risk: despite Nvayo's arguments that it can resolve the matter I conclude that there is an impending risk of wind-down. With that backdrop in mind, and particularly given the short timeframe in which the risk may materialise, I am unable to be satisfied that there would be no prejudice to existing consumers (who will expect sufficient funds to be available to administer an orderly return of their safeguarded funds) if the assets requirement were lifted. (While Mr Auld sought to argue the assets requirement was unfair by analogy with assets freezing orders in the courts, that analogy does not hold good for the reasons Mr Temple explained. These include that the dispute is between a regulated entity and its regulator as opposed to between two litigants and the assets are restricted for the benefit of consumers not for the party imposing the restrictions.)

Other points

78. Nvayo make a number of other points in support of suspension. None, however, are relevant to the question of satisfying the tribunal that there is no prejudice to the relevant persons sought to be protected if the suspension application were to be granted. The evidence given on the impacts on others such as employees and contractors and on the business's worth if the requirements are not lifted, all fall into that category. Similarly, Mr Auld's submissions emphasising Nvayo's record of responsiveness and engagement with the Authority's concerns, while of course are to be welcomed, do not address the specific risks at issue, for instance of pay-outs on files that are AML non-compliant.

79. Mr Auld also emphasised that the body of Nvayo's customers is known, certain and confined. (This was based on the evidence Mr Jacklin gave regarding Nvayo's customers having to already be members of affiliate companies, and the fact that Nvayo did not directly market its services or solicit customers.) But I do not see how the point assists Nvayo's case. Insofar as there is an interest in protecting future consumers from the relevant risks (fitness and propriety concerns regarding the UBO and bank account closure) those risks are not mitigated because of the channel through which the customers have arrived to Nvayo. As regards AML risks there was nothing to suggest the filter of being pre-cleared as a member of the affiliate company's program or a consumer of its concierge services would lessen the relevant AML risk as regards the customer coming to Nvayo.

80. Finally, Mr Auld also invited the tribunal to consider, to the extent there was any concern over the uncertainty of particular events happening such as the sale of Mr Scanlon's interest, or retention of a bank account, whether an order for suspension could be granted but on a conditional basis. Putting aside whether an order drafted along such lines, which would effectively amount to the suspension of the suspension order would fall within the scope of the Rule 5(5) power, that did not seem to me to be necessary or desirable. As Mr Temple pointed out various contingencies are already catered for in the exceptions built into the requirements (which applied in essence where the Authority could be satisfied the relevant concerns it had could be met). Also, if it turns out that the issues which have stood in the way of a grant of suspension have been removed (but the Authority still disagree that justifies the requirements no longer applying or suspension of such requirements) it would remain open to Nvayo to make a fresh suspension application on the basis of the changed circumstances.

CONCLUSION

81. For the reasons above, I am unable to be satisfied that if the requirements considered were suspended, the interests of the relevant persons intended to be protected would not be prejudiced. The pre-condition for the exercise of the tribunal's power to suspend under Rule 5(5) is not therefore met. (That conclusion also means that a proposal which Nvayo put in the alternative which agreed to certain other requirements regarding preservation of records, ring-fencing, and restrictions on unusual payments, but on the proviso the requirements relating to new and existing business was suspended is unviable.)

82. Nvayo's suspension application is accordingly refused.

SWAMI RAGHAVAN
UPPER TRIBUNAL JUDGE

Release date: 05 February 2024