

IN THE COURT OF FIRST INSTANCE
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

25 April 2024

CASE No: AIFC-C/CFI/2023/0035

CASHDRIVE LTD

Claimant/Appellant

v

ASTANA FINANCIAL SERVICES AUTHORITY

Defendant/Respondent

JUDGMENT

Justice of the Court:

Justice Sir Stephen Richards

ORDER

The appeal is dismissed.

JUDGMENT

Introduction

1. Private Company Cashdrive Ltd (“Cashdrive”), a subsidiary of Seif-Lombard LLP, is a company registered in the AIFC and licensed by the Astana Financial Services Authority (“the AFSA”) to conduct regulated activity in relation to the provision of credit. By these proceedings it appeals against a written directive issued by the AFSA on 15 March 2023 imposing specified requirements on the conduct of its business (“the Written Directive”).
2. Cashdrive’s licence was issued on 2 September 2021 (“the Licence”). The activity authorised by the Licence was: *“Providing Credit without permission to provide Credit Facilities to natural persons unless assessed as Professional Clients.”* The criteria for assessment of persons as Professional Clients are set out in the AIFC Conduct of Business Rules (“the COB Rules”) and require, in summary, that the Client has net assets of at least USD 100,000 and is assessed, on reasonable grounds, to have sufficient experience and understanding of relevant Financial Products, Financial Services, Transactions and any associated risks. Whether Cashdrive complied with the COB Rules is one of the main issues in the appeal.
3. No other restriction was expressed in the Licence (though the accompanying Authorisation Letter stated that the Licence was granted subject to the Risk Assessment Programme requirements annexed). Moreover, under the AIFC legislation in force at the date of issue of the Licence, credit facilities could lawfully be provided to natural persons resident in the Republic of Kazakhstan. Legislation adopted soon afterwards, however, prohibited the grant of loans to natural persons resident in Kazakhstan: loans could be granted only to *legal entities* of the Republic of Kazakhstan (and even then only in foreign currency) and to natural persons resident outside Kazakhstan. That was the effect of the AIFC Rules on Currency Regulation and Provision of Information on Currency Transactions in the AIFC (“the Currency Rules”), adopted on 10 November 2021 and coming into force on 1 December 2021. The application of the Currency Rules to Cashdrive’s conduct of business pursuant to the Licence is another of the main issues in the appeal.
4. On 24 May 2022 the AFSA informed Cashdrive that it satisfied the AFSA conditions and recommendations specified in the Risk Management Programme. It was then open to Cashdrive to commence its operational activities, which it did on 26 August 2022.
5. On 28 October 2022 Cashdrive sent to the AFSA returns for the third quarter of 2022 from which it appeared to the AFSA that Cashdrive had entered into 15 loan agreements with natural persons since August 2022 and that in every case the natural person was resident in Kazakhstan and was not a Professional Client. On 30 November 2022 the AFSA requested assessment reports for each of the clients assessed as Professional Clients and any other relevant documents used in assessing them as Professional Clients. Cashdrive replied on 8 December 2022, providing further documents from which

it appeared that Cashdrive had by then entered into at least 44 loan agreements. In a WhatsApp exchange on 13 December 2022 the AFSA case officer asked about additional documents considered by Cashdrive during client classification and was told that Cashdrive observed all AIFC requirements. The AFSA case officer commented that the AFSA might request additional documents if needed. In the event, however, the AFSA team considered that available documents were sufficient and no further request was made. On 30 January 2023 the AFSA received Cashdrive's returns for the fourth quarter of 2022 which confirmed that Cashdrive had given loans to 44 clients who appeared to be natural persons.

6. Following review of the material provided to it, the AFSA concluded that Cashdrive was in breach of the Currency Rules and the COB Rules. This led to the issue of the Written Directive on 15 March 2023, in the following terms:

*"Having considered the quarterly conduct and prudential returns of CASHDRIVE Ltd ('the Firm') for the 3rd quarter 2022 and explanatory notes to them as well as client documents (request dated 30 November 2022), **the AFSA directs the Written Directive and imposes the requirements** specified below pursuant to sections 95, 100(1)(a) and 103 of the AIFC Financial Services Framework Regulations ('FSFR').*

The Firm had been licensed to perform activity of Providing Credit without permission to provide Credit Facilities to natural persons unless assessed as Professional Clients.

After review of the above returns and client documents, the AFSA has identified that in 3rd quarter 2022 the Firm has been providing loans to natural persons assessed as professional clients (total amount of issued loans – 15).

However, the Firm's approach in identifying and classifying clients as professionals is superficial, informal and does not meet requirements set out in [the COB Rules]. Moreover pursuant to [the Currency Rules] the Firm can provide loans only to legal entities of the Republic of Kazakhstan, who are not AIFC participants, but not to natural persons who are residents of Kazakhstan.

Consequently, this raises doubts on Firm's awareness of applicable requirements and knowledge in the area of Client classification. Formal approach of copying and pasting clauses from COB into declaration form, which is then simply signed by the clients claiming that they are Professional Clients is unacceptable and does not represent the Firm's ability to classify its Clients comprehensively and with due care. Also, as part of Client on-boarding procedure, the Firm does not request supporting documents from its Clients which can be used as a proof of evidence of client being a Professional Client (diplomas, extracts from bank account, past working history, etc.).

In particular, the Firm has breached the following AIFC Rules – Currency Rules and COB:

- Currency Rules section 3.1.1 ...
- Currency Rules item 1.2 of Schedule 2 ...

- COB 2.5.1 ...
- COB 2.3.1 ...

Therefore, the Firm is required to bring loan and conduct of business procedures into compliance with the Currency Rules and COB and fulfil the following requirements:

No	Requirements	Due Date
1.	<i>To terminate all loan agreements conducted with natural persons who are residents of Kazakhstan in violation of the Currency Rules and COB</i>	14 April 2023
2.	<i>To provide appropriately revised conduct of business procedures, including provision on assessment of Professional Clients and prohibition for offering loans to natural persons who are residents of the Republic of Kazakhstan</i>	7 April 2023

7. This was followed by substantial exchanges between the parties in the form of meetings and correspondence as detailed later in this judgment. The outcome was that the AFSA maintained its position with respect to Cashdrive's breaches of the Rules but extended to 1 September 2023 the deadline for terminating loan agreements concluded with natural persons who were residents of Kazakhstan.
8. Cashdrive's appeal against the Written Directive was brought by Claim Form issued on 24 October 2023. The subsequent procedural steps included a case management hearing and various written directions. The formal pleadings consisted finally of an Amended Claim Form, an Amended Defence and an Amended Reply. At the hearing of the appeal, which took place by video-link, the Court had before it a pleadings bundle, bundles of legislative and regulatory material and of legal authorities, a large bundle of witness statements and exhibits, and a small bundle containing documents the admissibility of which was disputed.
9. The witnesses for Cashdrive were Mr Gennady Kim, the company's Chief Operating Officer; Mr Vyacheslav Pak, Head of the Lending Department; and Ms Zhaukar Rakhimbekova, Deputy CEO. Cashdrive also put in, on a precautionary basis, the late witness statement of a client in response to notes of an interview with her by the AFSA, those notes being one of the documents the admissibility of which was disputed. The witnesses for the AFSA were Mr Anuar Kaliyev, Director of the Financial Conduct Division of the AFSA and formerly Director of the Prudential Division during the period relevant to this case; and Mr Olzhas Baisagatov, a Senior Associate of the Prudential Division with responsibilities as the relationship manager of Cashdrive during the relevant period. All the witness statements stood as evidence in the case, subject to limited cross-examination of Ms Rakhimbekova, Mr Kaliyev and Mr Baisagatov on the day of the hearing. Ms Rakhimbekova's evidence was unconvincing in some respects, as touched upon later in this judgment, but subject to that reservation I found the witnesses to be honest and trying to assist the Court.

10. Cashdrive was represented by Mr Bakhyt Tukulov, assisted by Ms Mariya Petrenko. The AFSA was represented by Mr Ben Jaffey KC. The Court is grateful to all counsel for the clarity and economy of their written and oral submissions.

Jurisdiction and governing law

11. Article 13(4) of the Constitutional Statute of the Republic of Kazakhstan on the Astana International Financial Centre confers exclusive jurisdiction on the AIFC Court in relation to the hearing and adjudication of disputes between AIFC Participants and AIFC Bodies, with the exclusion of jurisdiction in criminal and administrative proceedings. More specifically, Article 26(5) of the AIFC Court Regulations provides that the Court of First Instance has jurisdiction to hear and determine an appeal from the decision of an AIFC Body *“as provided for in the AIFC Constitutional Statute, AIFC Regulations, AIFC Court Rules, or other AIFC Rules where the appeal relates to: (a) a question of law; (b) an allegation of a miscarriage of justice; (c) an issue of procedural fairness; or (d) a matter provided for in or under AIFC law”*; and it provides further that decisions of the Court of First Instance referred to in the article are final and shall not be subject to further appeal.

12. The provision of AIFC law of immediate relevance to the present case is section 11 of the AIFC Financial Services Framework Regulations (“the FSFR”) which reads:

“Appeals against decisions of the AFSA ...

- (1) A Person aggrieved by a decision of the AFSA may appeal to the AIFC Court against the decision.*
- (2) The grounds of an appeal under this section are that:*
- (a) the decision was ultra vires or there was some other error of law;*
 - (b) the decision was unreasonable;*
 - (c) the decision was made in bad faith;*
 - (d) there was a lack of proportionality; or*
 - (e) there was a material error as to the procedure.”*

13. The grounds of appeal in section 11(2) reflect those applied in judicial review at common law. As it is put by Justice Sir Jack Beatson at paragraph 14 of the judgment dated 24 January 2024 in Case No. AIFC-C/CFI/2023/0024, *Mr Moriel Carmi v Astana Financial Services Authority*:

“I note that the grounds enacted in Article 11(2) are those available in a common law application for judicial review which are used to supervise governmental and regulatory bodies and the legality and procedural fairness of their decisions. The supervisory jurisdiction is the means by which the exercise of power by a public authority is ‘strictly limited to the scope and purposes of the [legislation granting it authority] and to the common law’s insistence on rationality and fairness’ Article 11(2) does not provide for an appeal on the substantive merits of a decision but on whether the decision-maker has made a recognisable public law wrong.”

14. It was argued in Cashdrive’s Amended Reply that the Court should not apply English common law judicial review standards in the context of the AIFC but should develop its own approach taking into account such matters as the local realities of Kazakhstan, the quality of governance by AIFC Bodies

and the level of sophistication of local business. The argument was directed at persuading the Court to lower the bar for appellants challenging decisions of the AFSA. But the bar is set by section 11(2) itself. The focus of the grounds of appeal set out in that provision, as in judicial review at common law and as made clear in *Carmi v AFSA*, is on whether the decision-maker has made a recognisable public law error and not on the substantive merits of the decision. (Mr Tukulov appeared to object to Mr Jaffey's reliance on *Carmi v AFSA*, on the basis that it was a new point. The case relates, however, to an issue raised clearly in the pleadings and Mr Tukulov had a fair opportunity to make submissions on it.)

The appeal process

15. By section 11(3) of the FSFR, the procedure to be adopted by parties to an appeal and by the AIFC Court on such an appeal is set out in Schedule 2 to the FSFR. Paragraph 1 of Schedule 2 provides that *"[a]n appeal under section 11 may be instituted: (a) within a period of 28 days immediately following the date of the Decision Notice issued by the AFSA, and (b) by serving a Claim Form on the AFSA, in accordance with the service provisions of the AIFC Court Rules, stating the grounds and material facts on which the appellant relies"*. Paragraph 3 of Schedule 2 sets out the powers of the Court to set aside or confirm the decision, in whole or in part.
16. Appeals are also the subject of Part 29 of the AIFC Court Rules. By Rule 29.1(2), the rules in Part 29 are expressed to apply to appeals to the Court of First Instance pursuant to Article 26(5) of the AIFC Court Regulations, i.e. including appeals of the present kind. Rule 29.3 provides, however, that Part 29 is subject to any Rule, enactment or Practice Direction which sets out further provisions with regard to any particular category of appeal. One obvious such provision is the 28 day time limit laid down by the FSFR, which must be taken to displace the 21 day time limit generally applicable under Rule 29.10(2) of the AIFC Court Rules. A further point is that the right of appeal under Article 26(5) of the AIFC Court Regulations is not expressed to be subject to a *permission* requirement, nor is any such requirement expressed in section 11 of the FSFR. This must be taken to displace the general provision in Rule 29.5 of the AIFC Court Rules that an appellant requires permission to appeal except where the appeal is against a contempt order. Another procedural qualification is that the FSFR requires an appeal to be instituted by service of a Claim Form on the AFSA, whereas Part 29 of the AIFC Court Rules requires an appellant's notice (see e.g. Rule 29.23) and lays down procedural steps different from those applicable to an original claim brought by service of a Claim Form. In practice, however, the Claim Form procedure followed in this case has caused no problem for the preparation of the case for hearing and it has not been necessary to consider the potential applicability of other provisions of Part 29.
17. One question that does remain is whether the appeal was out of time and, if so, whether an extension of time should be granted. A time limitation point was taken originally by the AFSA but the Amended Defence made clear that the point was no longer pursued. Whether the conditions for an appeal are fulfilled is nevertheless a matter for the Court: a statutory time limit cannot simply be waived by agreement between the parties. Although Schedule 2 to the FSFR does not itself refer to the possibility of an extension of the time limit, it plainly lies within the power of the Court to grant such

an extension in application of, or by analogy with, Rules 2.14 and 29.10-29.12 of the AIFC Court Rules and/or pursuant to the general powers conferred by Articles 26 and 27 of the AIFC Court Regulations.

18. On the basis of the 28 day time limit, the Claim Form should have been served on the AFSA by mid April 2023 at the latest; and since it was not issued until 24 October 2023 it was many months out of time. The AFSA's stated reason for not taking a time limitation point is that, given that it did not comply with the requirement to notify Cashdrive of its right to appeal (an omission discussed below), it would not be appropriate as a matter of good regulation for the AFSA to take such a point. That is a relevant factor for the Court in deciding whether to extend time. So too is the extent of the post-decision exchanges, described below, in which Cashdrive sought clarification and withdrawal of the Written Directive. More important, however, is that the case concerns the correct procedural approach to decision-making by the AFSA and raises a number of issues which have been fully argued and on which it would be helpful for the Court to express a considered conclusion. For those reasons, it is appropriate to grant the necessary extension of time so that the appeal can be decided on its substance.

The grounds of appeal and the relief requested

19. The grounds of appeal as ultimately pursued by Cashdrive may be summarised as follows:

- (1) breach of the requirements of procedural fairness, specifically by failure to comply with the procedures laid down by the FSFR, including the right to be informed of the proposed decision and to make representations on it before the decision was taken;
- (2) error of law and/or breach of legitimate expectation in applying the Currency Rules to the conduct of Cashdrive's business in circumstances where the grant of loans to natural persons resident in Kazakhstan was in full compliance with the terms of the Licence and the legislation in force at the date when the Licence was issued; and
- (3) misinterpretation or misapplication of the COB Rules as regards the assessment of Professional Clients.

20. The Amended Claim Form requests the Court (a) to make an order that the AFSA breached the FSFR procedure while issuing the Written Directive, (b) to make an order setting aside the Written Directive, (c) to make an order declaring that Cashdrive has complied with COB Rules, (d) to make an order declaring that Cashdrive has the right to conduct business according to the terms of the Licence, and (e) to grant such other relief as the Court finds just and appropriate. Claims for relief in respect of damages and loss of profits were abandoned after Cashdrive's attention had been drawn to the statutory immunity of the AFSA under section 11(4) of the FSFR.

The relevant powers of the AFSA

21. Article 12 of the AIFC Constitutional Statute established the AFSA and provides that it is responsible for the regulation of financial services and related activities in the AIFC. The AFSA has very broad powers of authorisation and supervision pursuant to the FSFR. Its main functions, powers and

objectives are set out in section 7 of the FSFR. The objectives listed in section 7(3) (the Regulatory Objectives) include “(b) ensuring that financial markets in the AIFC are fair, efficient, transparent and orderly; (c) creating fair, transparent and non-discriminatory conditions for Centre Participants; (d) fostering and maintaining confidence in the AIFC’s financial system and regulatory regime; ... (f) preventing, detecting and restraining actions that may cause damage to the reputation of the AIFC or to the financial activities carried out in the AIFC by taking appropriate measures, including by imposing sanctions; (g) protecting interests of investors and users of financial services ...”.

22. By section 35(1)(a) of the FSFR the AFSA may grant an application for a Licence, variation or withdrawal of a Licence either without conditions, restrictions or requirements or with such conditions, restrictions or requirements as it considers appropriate. By section 95(1) it may exercise any of the powers set out in Chapter 1 of Part 8 at any time where it considers it necessary or desirable to do so in accordance with its Regulatory Objectives. The powers set out in Chapter 1 of Part 8 include, in section 100(1)(a), the power to require an Authorised Person to take or refrain from taking such action as the AFSA considers appropriate. Pursuant to section 103, where the AFSA makes an order, issues a direction or prohibition, or makes any requirement in relation to an Authorised Person pursuant to a provision of the FSFR or Rules or legislation administered by the AFSA, such Authorised Person must, unless he has a reasonable excuse, comply with such order, direction, prohibition or requirement.

The Currency Rules

23. The Currency Rules were developed in furtherance of Article 5 of the AIFC Constitutional Statute which provides that the terms of, and procedures for, currency transactions related to the provision of financial and professional services in the territory of the AIFC are to be regulated by AIFC Acts which are to be made with the agreement of the National Bank of the Republic of Kazakhstan. Under this procedure, the Rules were executed by the Governor of the National Bank and the Governor of the AIFC. The relevant provisions of the Rules are these:

“3.1.1: Unless otherwise prohibited under the Acting Law of the AIFC and(or) the legislation of [the Republic of Kazakhstan], AIFC participants have the right to provide financial and related services to residents that are not AIFC participants only in accordance with Schedule 2 to these Rules.

Schedule 2: List of Financial Services provided by AIFC Participants to Residents that are not AIFC Participants

<u>No.</u>	<u>Name of the service</u>	<u>Currency</u>
...		
1.2	loans to legal entities of the Republic of Kazakhstan	Foreign currency”

24. It was explained in Mr Jaffey’s written submissions (in a passage to which Mr Tukulov took objection on the ground that the point was not pleaded but to which I consider it appropriate to have regard as explaining the public interest behind the Rules) that the Currency Rules were made for regulatory,

currency control and fiscal reasons. It would be undesirable if all financial services could be provided to residents of Kazakhstan outside the existing local regulatory regime without being subject to any applicable currency controls and with the benefit of the taxation regime of the AIFC. The Rules delineate what financial services can be provided from the AIFC to residents of Kazakhstan. The key point for present purposes is that loans to natural persons are not included in the Schedule 2 list of financial services that may be provided to residents of Kazakhstan.

The COB Rules

25. The COB Rules contain a provision (COB 2.1.1) that an Authorised Firm providing any Financial Services to any Person must classify that Person as one of the following categories of Client: a Retail Client, a Professional Client, or a Market Counterparty. By COB 2.3.1, an Authorised Firm may classify a Person as a Professional Client if that Person (a) meets the requirements to be a Deemed Professional Client, or (b) meets the requirements to be an Assessed Professional Client, in accordance with COB 2.5.1 or 2.5.5, provided that Person has not been classified as a Retail Client in accordance with COB 2.6. This case concerns classification as an Assessed Professional Client in accordance with COB 2.5.1, which provides:

“2.5.1. Assessed Professional Clients: Individual Clients

For the purposes of COB 2.3.1, an Authorised Firm may treat an individual Client as an Assessed Professional Client if:

(a) the Client has net assets of at least USD 100,000; and

(b) either:

(i) the Authorised Firm assesses the Client, on reasonable grounds, to have sufficient experience and understanding of relevant Financial Products, Financial Services, Transactions and any associated risks; or

(ii) the Client works or has worked in the previous two years in an Authorised Firm or any other authorised or regulated financial institution, including a bank, securities firm or insurance company, in a position that requires knowledge of the type of Financial Products, Financial Services or Transactions envisaged; and

(c) the following procedure is followed:

(i) the Client must confirm in writing to the Authorised Firm that it wishes to be treated as Professional Client either: (1) generally; (2) in respect of a specific Financial Product, Financial Service, or Transaction; or (3) in respect of a type of Financial Product, Financial Service, or Transaction;

(ii) the Authorised Firm must give the Client a clear warning in writing setting out the protections that the Client may lose as a result of giving up its classification as a Retail Client; and

(iii) *the Client must confirm in writing, in a separate document from the client agreement or other contract, that it is aware of the consequences of losing such protections.*

COB 2.5.2 provides that for the purposes of COB 2.5.1(a), the calculation of an individual Client's net assets (a) must exclude the value of the primary residence of the Client, and (b) may include any assets held directly or indirectly by the Client.

The factual history in greater detail

26. There are several steps to the authorisation process before a Licence is granted. After a preliminary meeting or call with the AFSA case officer and receipt of informal feedback the applicant sends a draft application for review. After receipt of further feedback at that stage, the applicant proceeds with submission of a formal application package. The AFSA case officer prepares a Risk Assessment report based on analysis of the documents provided in the application package and then submits the papers to the Authorisation, Waivers and Modifications Committee. Approval may be subject to implementation of conditions and requirements.
27. In the present case, upon review of Cashdrive's draft application package, the AFSA provided feedback in a letter of 15 June 2021. Cashdrive's formal application package followed on 27 July 2021 and included representations that, in summary, the company's immediate focus in its operational activities would be on providing credit facilities to legal entities; natural persons would be on-boarded only after completion of precautionary measures including verification of financial statements and other information extracted from open sources aimed to attest the client's financial soundness. Future target markets were both legal entities and natural persons. A Banking Business Supplement Form was submitted on the same date and included representations that Cashdrive would not be involved in micro financial activities and would be dealing with medium and high net worth individuals and high revenue legal entities; legal entities would be the major type of client, although providing credit to high net worth individuals would also be an integral part of the business. A further document was the proposed Credit Policy and Procedure Manual which described the role of Cashdrive's Credit Committee in examining and approving loan applications. The AFSA's Risk Assessment report on Cashdrive's application reflected that material, including the identification of legal entities as the major client type.
28. On 23 August 2021 the AFSA issued an In-Principle Approval Letter requiring Cashdrive to provide evidence of incorporation within the AIFC within 30 calendar days. An AFSA certificate of incorporation was duly submitted by Cashdrive. AFSA then issued the Licence dated 2 September 2021. The accompanying Authorisation Letter stated not only that the Licence was granted subject to the Risk Management Programme requirements annexed but also that Cashdrive should ensure upon commencement of operations that *"it is familiar with applicable provisions of the AIFC Regulations and Rules and the various requirements they contain"*.
29. Events between then and the issue of the Written Directive have been sufficiently described in paragraphs 4-5 above: the AFSA's confirmation that Cashdrive satisfied the provisions of the Risk

Management Programme, the commencement of operations by Cashdrive, and Cashdrive's provision of documents to the AFSA between October 2022 and January 2023, by way of quarterly returns and in response to a request by the AFSA. The terms of the Written Directive then issued on 15 March 2023 have been set out in paragraph 6 above.

30. A meeting with the AFSA was held at Cashdrive's request on 27 March 2023, at which the AFSA explained the requirements of the Written Directive and the need for compliance with it and indicated that if justified a short extension to comply could be granted. This was followed by a lengthy letter from Cashdrive dated 28 March 2023, requesting clarification on the applicability of the Currency Rules and arguing that Cashdrive was operating within the scope of the Licence. The letter also sought clarification on the COB Rules specified in the Written Directive. It stated that in response to the AFSA's request dated 30 November 2022, documents on 44 clients were provided, *"disclosing a thorough analysis of the client's understanding of the financial product provided to them and the risks associated with it, verifying their experience in similar loan transactions, understanding of the risks involved in these types of transactions and meeting their obligations under such deals, with supporting documents obtained from the client"*. It pointed out that the Written Directive mentioned 15 clients, asked for a list of them and asked whether Cashdrive understood correctly that the remaining 29 clients (out of the list of 44) had been assessed correctly. It further stated that to comply with the COB requirements Cashdrive conducted a three-step verification of customer data, details of which were set out and an example of which was given. The letter went on to state that *"[a]ll clients, without exception, are analyzed, and interviewed by the Company and the necessary document packages are prepared under the requirements of the COB and other AFSA and AIFC regulations or RK legislation"* and that *"[a]ll documents, as well as reports on the Company's client classification decision for all 44 clients, were provided as part of the AFSA request dated 11/30/22"*. In addition, it included a table providing *"data on the availability of experience in the service of borrowing from each of the 44 clients, as evidenced by reports from the credit bureau, provided by customers of the Company, which had previously been sent to AFSA as part of the request dated 11/30/22"*. It asked for further specifics of the violations of the COB Rules, requesting *"a written explanation of such violation, attaching each fact of such breach in every 15 cases and stating the defined clause of the COB"*. The rest of the letter concerned Cashdrive's request for an extension of time for compliance with the Written Directive.
31. The AFSA's reply dated 12 May 2023 dealt briefly with the points raised by Cashdrive, though without referring to specific clients. On the applicability of the Currency Rules it recited the relevant provisions of the Rules and their effect. On the COB Rules it focused on the requirement to have net assets of at least USD 100,000, stating:

"After review of client dossiers, the AFSA has not seen evidence that CASHDRIVE Ltd has (i) performed any calculation of clients' net assets or (ii) has kept client dossiers that contain any supporting documents that will prove that clients indeed own net assets of at least USD 100,000. Instead, CASHDRIVE Ltd provided clients with a copy-pasted declaration form for signing and confirming that the client has net assets of at least [USD] 100,000 which does not comply with requirements of COB Rules 2.5.1 and 2.5.2. Merely submitting a declaration that someone has net assets of at least USD 100,000 does not mean that the person in fact

possesses net assets of at least USD 100,000. Consequently, this demonstrates that CASHDRIVE Ltd has superficial approach in classifying clients and that legislation requirements are seen by CASHDRIVE Ltd more as a bureaucratic matter than a regulatory necessity which should be taken seriously by the firm. In this regard, the AFSA does not consider CASHDRIVE Ltd and its management team to be acting with due skill, care and diligence. Effective compliance is a way of operating and not just check-listing formal statements and declarations.

Based on the above, in the AFSA's view CASHDRIVE is violating the above-mentioned COB Rules by:

- *failing to conduct proper calculation of clients' net assets;*
- *failing to collect supporting documents from clients which will prove their ownership of net assets of at least USD 100,000."*

The letter also contained a 4 month extension of the deadline for complying with the Written Directive.

32. Cashdrive sent a further letter, dated 3 July 2023, expressing disagreement with the AFSA's arguments and asking for further clarification. It questioned the "retroactive" application of the Currency Rules. It pointed out that the provisions of COB 2.5.1 "*do not contain any requirements for the Company to independently calculate the value of assets and/or obtain supporting documents on the value of assets, or to verify these documents*", and that the calculation may include assets directly or indirectly owned by the client. It argued that clients could not provide supporting documents for assets indirectly owned, owing to the need for third party consents. It stated that "[t]he asset valuation methodology" was provided to clients, who used it to calculate the value of assets and who could independently calculate or apply for such calculations to consulting companies; and that "[e]valuation results with a guarantee that the assessment is made according to the calculation method, clients sign and attach to the package of documents for classification by professional clients, or provide supporting documents for asset valuation, which is reflected in the Company's client classification report, which we provided in December [2022] for each of our clients". It complained that the AFSA had not yet provided a list of the 15 clients found to have been in breach of the COB Rules. More generally it expressed strong disagreement with the AFSA's comments about lack of professionalism and diligence, and insisted that all the COB requirements were fulfilled properly and in full. It also included a further request for extension of the deadline for compliance with the requirements set out in the Written Directive.
33. The AFSA's reply, dated 9 August 2023, concentrated on the application of the Currency Rules, stating *inter alia* that "[a]ll financial organisations falling under the Currency Rules should align their activities with the requirements of the Currency Rules" and that Cashdrive had commenced its business activities only in July 2022 "*and therefore should have straightforwardly complied with the Currency Rules*". It pointed out that Cashdrive might still provide credit to natural persons assessed as Professional Clients who were not residents of the Republic of Kazakhstan, and to legal entities regardless of whether they were residents of Kazakhstan (but only in foreign currency in the case of legal entities resident in Kazakhstan). Taking into account the arguments advanced by Cashdrive,

however, it did agree to extend to 1 September the deadline for terminating (or transferring to a newly established company) all loan agreements concluded with natural persons who were residents of Kazakhstan.

34. At a meeting between Cashdrive and the AFSA on 4 October 2023, the AFSA confirmed its position with regard to the Currency Rules and the COB Rules. Understanding that there was no prospect of an amicable solution, Cashdrive filed its Claim Form later in the same month.

Procedural fairness

35. The duty on a decision-maker to act fairly is given effect in the FSFR by way of a detailed procedural code. Section 10(1) of the FSFR provides: *“Where a provision in these Regulations or Rules made thereunder requires the AFSA to make a decision, the AFSA will follow the decision making procedures set out in Schedule 1”*. Paragraph 2 of Schedule 1 states that the Schedule applies, subject to paragraph 3 (which is irrelevant for present purposes), where a provision in the Regulations or Rules requires or enables the AFSA to make a decision.
36. The provisions of the Schedule are detailed. Otherwise than in cases of urgency, considered below, the required procedures are as follows:

“4. Opportunity to make representations before a decision

- (1) If the AFSA proposes to make a decision to which this Schedule applies, it must first give the Relevant Person:*

(a) a written notice (a “Preliminary Notice”) containing the information in paragraph (2); and

(b) an opportunity to make representations to the AFSA in Person and in writing concerning the decision the AFSA proposes to take.

- (2) The Preliminary Notice must:*

(a) specify the proposed decision;

(b) specify the reasons for that proposed decision, including any proposed findings of fact;

(c) include a copy of the relevant materials which were considered in making the proposed decision;

(d) inform the Person that they may make representations to the AFSA concerning the proposed decision; and

(e) specify how and by when any representations may be made.

- (3) For the purposes of sub-paragraph 2(c), the AFSA:*

(a) may refer to materials (instead of providing a copy) if they are already held by the Relevant Person or are publicly available; ...

....

(5) If the AFSA receives representations within the period specified in the Preliminary Notice, it must consider the representations in making the decision.

(6) If, after considering the representations, the AFSA decides:

(a) to make the proposed decision (either as proposed or with variations), then it must give the Person a Decision Notice under paragraph 5 ...

....

5. Decision Notice

(1) If the AFSA decides to make a decision to which this Schedule applies, it must, as soon as practicable, give the Relevant Person a written notice (a “Decision Notice”) specifying:

(a) the decision;

(b) the reasons for the decision, including its findings of fact;

(c) the date on which the decision is to take effect;

(d) if applicable, the date by which any relevant action must be taken by the Person; and

(e) the Person’s right to seek review of the decision by the AIFC Court.

(2) The Decision Notice must include a copy of the relevant materials which were considered in making the decision.

(3) For the purposes of sub-paragraph (2), the AFSA:

(a) may refer to materials (instead of providing a copy) if they are already held by the Relevant Person or are publicly available ... ”

37. Limited provision is made in paragraphs 4(7) and 6 for the AFSA to dispense with the requirements of paragraph 4(1)-(6) if it concludes that any delay likely to arise as a result of complying with the procedures would be prejudicial to the interests of users or of the AFSA, but in that event an opportunity has to be provided for representations to be made and considered after issue of the Decision Notice. The relevant provisions read as follows:

“4(7) If the AFSA concludes that any delay likely to arise as a result of complying with the procedures in this paragraph would be prejudicial to the interests of direct or indirect users of financial services or otherwise prejudicial to the interests of the AIFC:

(a) the requirements of sub-paragraphs (1) to (6) do not apply; and

(b) the AFSA must provide the Person with an opportunity to make representations in accordance with the procedures in paragraph 6 after it has made the decision.

6. Opportunity to make representations after a decision

(1) If this paragraph applies under paragraph 4(7), the AFSA must:

(a) provide the Relevant Person with an opportunity to make representations to the AFSA in Person and in writing within a period of 14 days, or such further period as may be agreed, from the date on which the Decision Notice is given to the Person under paragraph 5; and

(b) inform the Relevant Person in the Decision Notice that they may make representations concerning the decision and specify how and by when any representations may be made.

....

(2) If the AFSA receives representations within the period specified in the Decision Notice, it must consider the representations in deciding whether to confirm, withdraw or vary the decision.

(3) If after considering representations received the AFSA decides:

(a) to confirm the decision, it must as soon as practicable notify the Person in writing that the decision is to stand (subject to any right of the Person to refer the matter to the AIFC Court for review)”

38. Those procedural requirements are not only designed to ensure that the basic elements of procedural fairness are met in the decision-making process, but they also serve to promote properly informed and reasoned decision-making. A troubling feature of this case, however, is the complete absence of any attempt by the AFSA to engage with this statutory procedure in relation to the issue of the Written Directive. Mr Kaliyev states frankly in his witness statement: *“At the time, we did not apply the procedure in Schedule 1, because the AFSA thought that it did not apply to a Written Directive. That was an error of interpretation and the correct position has since been clarified in the rules”*. The clarification takes the form of an amendment to section 100 of the FSFR (the section under which the requirements in the Written Directive were imposed) whereby it is stated expressly in a new section 100(3) that *“The decision-making procedures in Schedule 1 apply to a decision made by the AFSA under this section”*. But it is accepted by the AFSA that the procedures in Schedule 1 did apply as a matter of law even before that clarifying amendment; and the AFSA has apologised through counsel for the procedural errors that occurred in this case. What, then, was the extent of those errors?

39. Mr Jaffey submits that the AFSA was in error in failing to inform Cashdrive of a right to make representations *after* the Written Directive was issued but that there was no requirement to give Cashdrive the opportunity to make representations *before* the Written Directive was issued because, in lawful application of paragraph 4(7) of Schedule 1, the AFSA considered that the delay likely to arise as a result of prior notification and consultation would be prejudicial to the interests of customers and the interests of the AIFC. The argument is that delay would have meant that more customers (who on AFSA’s case were not Professional Clients) would be taken on and lent money they should not have received, and delay would harm the interests of the AIFC in permitting

continued lending in obvious and serious breach of the Currency Rules and the COB Rules: Cashdrive's conduct was prejudicial to the interests of the AIFC as a properly regulated financial centre where the regulatory perimeter is properly enforced. A further argument is that lending to natural persons who were not Professional Clients was outside the scope of the Licence and put Cashdrive in breach of the General Prohibition in section 24 of the FSFR, with serious potential consequences for the enforceability of its lending agreements and for its own solvency.

40. Some factual support for those arguments is to be found in the evidence of the AFSA's witnesses. For example, Mr Kaliyev states that "[t]he AFSA's reputation and the integrity of its perimeter had been put at risk by Cashdrive's serious misconduct. A delay would have been prejudicial to the AIFC and to Cashdrive's customers"; and "it was important to act with immediate effect to minimise further harm to consumers". There is, on the other hand, nothing to show that the General Prohibition played any part in the AFSA's thinking at the relevant time. Moreover, the fact that three months were allowed to elapse between the last communication with Cashdrive about relevant documents, on 13 December 2022, and issue of the Written Directive on 15 March 2023 – a period during which no concerns were expressed at all to Cashdrive about the conduct of its business – casts some doubt on the need to act without giving Cashdrive an opportunity to make representations before a decision was made. I note, too, that the Written Directive itself says nothing about urgency. Indeed, the first mention of urgency and the need to avoid delay came in the AFSA's Amended Defence many months later. In any event, the fact that the procedural requirements of Schedule 1 were thought not to apply at all meant, as it seems to me, that minds were simply not directed to whether a conclusion should be reached within the terms of paragraph 4(7), such as to justify the disapplication of the Preliminary Notice procedure and the opportunity to make representations before a decision was made.
41. Had there been a considered conclusion within the terms of paragraph 4(7) of Schedule 1, the Court would be slow to question the regulatory authority's judgment on such an issue. In the circumstances of the present case, however, I find it difficult to accept the argument as to urgency and I think it right to proceed on the basis that the full procedural safeguards were engaged, including the giving of a Preliminary Notice and an opportunity to make representations under paragraph 4(1)-(6) before a decision was made, followed by a Decision Notice complying with paragraph 5.
42. The failure to follow that procedure was highly regrettable but I do not accept that it was necessarily, as Cashdrive submits, a fundamental defect which rendered the decision arbitrary and could not be remedied afterwards. Whether it gave rise to a *material* breach depends on the contents of the Written Directive itself, the extent to which it complied with the requirements of a Decision Notice, the extent to which Cashdrive was able to make post-decision representations in relation to the decision, whether those representations were given fair consideration by the AFSA, and whether anything raised in the post-decision representations or in the present proceedings undermines or is capable of undermining the reasoning on which the decision was based.
43. Cashdrive's complaints about the contents of the Written Directive are, for the most part, best examined in conjunction with the substantive issues concerning the application of the Currency Rules and the COB Rules, dealt with in the next sections of this judgment.

44. It is accepted by the AFSA that the Written Directive failed to include a statement about Cashdrive's right to seek review of the decision by this Court, as required by paragraph 5(1)(e) and/or paragraph 6(3)(a) of Schedule 1. That error was plainly immaterial. Cashdrive evidently had legal advice from an early stage and should have known about its right of appeal. In any event it went on to exercise that right, albeit out of time, and has obtained the extension of time that enables the right to be exercised in full.
45. Although Cashdrive was given no invitation to make representations about the decision, it can be seen from the factual history in paragraphs 30 to 34 above that extensive representations were in fact made by Cashdrive and considered by the AFSA, which made substantial responses to them. Mr Tukulov submitted that because of the mind-set of administrators whose experience lies within the Kazakh system, coupled with concerns about the adverse effect on authority and public image, it is impossible in practice for a public institution to withdraw a decision once it has been made. Whatever may be the position more widely, upon which I am not qualified to judge, I do not accept that any such assumption should be made about the AFSA or its employees. The factual history does not give me the impression that the AFSA approached the matter with a closed mind. On the contrary, where the weight of the argument was seen to favour an amendment to the requirements laid down in the Written Directive, as was the case in relation to an extension of the deadline for terminating or transferring relevant loan agreements, the amendment was made. The fact that the AFSA otherwise maintained its decision is entirely consistent with its being satisfied that, notwithstanding the representations to the contrary, the decision was correct: whether that was a justified conclusion is examined in the next sections of this judgment. Furthermore the procedural structure laid down in Schedule 1 to the FSFR (including the possibility of post-decision representations in an urgent case and an obligation to consider any representations received in deciding whether to confirm, withdraw or vary the decision) presupposes and requires a greater flexibility of mind and willingness to change course in the light of representations received than Mr Tukulov's submission would allow.
46. As to whether anything raised in the post-decision representations or in the present proceedings undermines or is capable of undermining the reasoning on which the decision was based, that again is best examined in conjunction with the substantive issues concerning the Currency Rules and the COB Rules.
47. To the extent that it is possible to form a view on the matter thus far, the matters discussed tend towards a finding that the procedural failures in this case were immaterial. A final conclusion on that point, however, must depend on what emerges from consideration of the issues concerning the Currency Rules and the COB Rules.

The application of the Currency Rules

48. It is common ground that under the legislation in force at the date of issue of the Licence it was lawful to provide credit facilities to natural persons resident in Kazakhstan. The Currency Rules came into force on 1 December 2021, after the date when the Licence was issued but many months before Cashdrive commenced operations pursuant to the Licence. The relevant provisions of the Rules are

set out at paragraph 23 above. The relevant effect of the provisions is *inter alia* to prohibit the provision of credit facilities by AIFC Participants to natural persons who are residents of Kazakhstan.

49. Cashdrive contends, however, that the prohibition does not apply to it, or should not be applied to it by the AFSA, because the Licence predated the Currency Rules and permitted the provision of credit facilities without such a restriction. It is said that Cashdrive conducted its business in full compliance with the terms of the Licence and AIFC Acts that were in force as of the date when the Licence was granted, and that the Currency Rules did not have retroactive effect.
50. In my judgment, Cashdrive's submissions on this issue lack substance. It is no part of the AFSA's case that the Currency Rules had retroactive effect, and plainly they did not do so: they did not apply to the provision of credit facilities *prior to* their commencement date of 1 December 2021. The AFSA's case, which I accept, is that they applied prospectively to the provision of financial services by AIFC Participants *on or after* their commencement date and that they therefore applied to the provision of loans by Cashdrive. The fact that the Licence contained no such express restriction and that no such restriction existed under the AIFC legislation in force at the date when the Licence was issued did not create an exemption from, or exception to, the effect of subsequent legislation or entitle Cashdrive to do business without compliance with such subsequent legislation. A licence-holder is bound to operate in accordance with the AIFC legislation in force from time to time. If that legislation imposes restrictions on the future conduct of business pursuant to an existing licence, it is no defence that such restrictions were not included in the terms of the licence or that they did not exist under the previous legislation: they must still be complied with. (Mr Tukulov objected that Mr Jaffey's reference to the prospective effect of the Currency Rules was a new point, but the point seems to me to have been inherent in the AFSA's case from the outset and to be in any event an obvious one.)
51. In what is effectively an alternative argument in respect of the Currency Rules, Cashdrive submits that the AFSA's enforcement of those Rules against it by way of the Written Directive was in breach of legitimate expectation. It is submitted that the AIFC promised to establish favourable conditions for the development of new financial technologies and to create a flexible and predictable regulatory environment, giving rise to key expectations of transparency, clarity and predictability of legal regulation and protection of investors' interests. Cashdrive expected support from the AIFC jurisdiction when starting its business and looked forward to mutually beneficial cooperation with the regulator. It is also said that Cashdrive's reasonable and legitimate expectations were formed on the basis of the AIFC legislation in force at the time of making a decision to invest in the AIFC.
52. Those submissions are supported in general terms by the witness statement of Mr Gennady Kim and the first witness statement of Ms Zhaukhar Rakhimbekova, but it is unnecessary to go into the detail of the evidence on the point. The case gets nowhere near one where enforcement of a legislative provision of this nature might be prevented by the existence of a legitimate expectation. As Mr Jaffey submitted, to claim a legitimate expectation Cashdrive would need to show it had received a promise not to make relevant changes to the regulatory regime applicable to it; but there was no such promise, let alone one that was "*clear, unambiguous and devoid of relevant qualification*" (*R v Inland Revenue Commissioners, ex p. MFK Underwriting Agents Ltd* [1990] 1 WLR 1545 at 1569g). Even if such a promise had been made, further restrictive conditions would have to be met before effect

was given to it on grounds of legitimate expectation (see, for example, *R (on the application of Aozora GMAC Investment Ltd) v Her Majesty's Revenue and Customs* [2020] 1 All ER 803). There are strong public interest reasons why a regulatory authority should be free in principle to make changes over time to the regulatory regime, and the particular change in this case was made for solid reasons of public interest. Such considerations would weigh heavily against a finding of legitimate expectation justifying an exception to the general application of such legislation. (Mr Tukulov objected to Mr Jaffey's introduction of that judicial review case-law into his written submissions, but the material is of direct relevance to the pleaded case and Mr Tukulov had sufficient opportunity to respond to it.)

53. It follows that there was no error of law in the AFSA's finding in the Written Directive that Cashdrive was in breach of the Currency Rules. The finding itself and the resulting imposition of requirements to bring Cashdrive's procedures into compliance with the Currency Rules were legally sound. Nothing that Cashdrive put forward in its post-decision representations or that it has put forward in the present proceedings is capable of undermining the finding. On this point, therefore, the AFSA's failure to follow the correct procedures in relation to the making of the Written Directive was plainly not material and the grant of relief in relation to the point would be neither justified nor useful.

The application of the COB Rules on the assessment of Professional Clients

54. The relevant COB Rules are set out in paragraph 25 above.
55. Cashdrive's procedures for granting a loan, and specifically its procedures for classifying clients as Professional Clients, are described at some length in the witness statements of Ms Rakhimbekova and Mr Pak. I will refer to some salient points rather than setting out the detail. The process of granting loans is regulated by Cashdrive's "Rules for issuing loans secured by a vehicle", itself a lengthy document available on the company's website. To get a loan a potential client must study those Rules, which include a provision that loans are available only to Professional Clients; study the "Standard Terms and Conditions of a Loan Agreement" which again include a provision that a loan will be issued only if a client meets the requirements of a Professional Client, with the client giving confirmation by signing that he or she is a Professional Client; study the "Notification of Client Classification" which encloses the client classification methodology; provide Cashdrive with a signed "Application-questionnaire Form – AIFC Client Classification" where the client declares in terms that he or she has net assets of at least USD 100,000 and also meets the condition as to relevant experience and understanding, and confirms that he or she has read and fully acknowledges the Notification of Client Classification; provide Cashdrive with a signed "Application form for granting a loan secured by a vehicle" which includes a client's confirmation that he or she has studied the Standard Terms and requirements of the AIFC and that he or she complies with all the criteria of a Professional Client; and, when the loan is approved, sign and submit an "Application for adherence to the Standard Terms of the Loan Agreement" which again includes confirmation that the client has studied the Agreement itself (Standard Terms) and is a Professional Client and agrees with all the clauses of the Agreement. It should be noted that all of this involves certification by the clients themselves that they meet the relevant requirements. It is of course only a limited part of the information provided: other matters include personal details, the amount and term of the loan

requested, the purpose of the loan, details of the vehicle on which the loan is to be secured, income, debts, credit history and the like.

56. According to Cashdrive's witness statements, Cashdrive in its turn requests reports and data on the client and his or her assets from databases available to the company (credit bureau reports, state databases of individuals, tax service websites, etc.) and has the right to request bank statements and account information, reports of independent valuation experts, and purchase and sale agreements (if any) to understand that the client has provided reliable information about assets. Cashdrive also verifies, in open sources or accessible databases, documents provided by the client and declared information about participation in a business or ownership (direct or indirect) of movable or immovable property. The credit department conducts an additional interview with clients to verify the data provided by them and requests any necessary documents, including employment contracts, certificates, bank statements and other documents confirming experience in the financial market (including obtaining and fulfilling loans), as well as the documents for a motor vehicle provided as collateral. Although relied on by Cashdrive in relation to classification of clients as Professional Clients, I have to say that much of that process of checking appears to me to be directed not so much to that issue as to the separate questions of security for a loan and a client's ability to repay the loan.
57. The reasons given by the AFSA in the Written Directive for finding breaches of COB 2.3.1 and COB 2.5.1 were that Cashdrive's approach in identifying and classifying clients as Assessed Professional Clients was "*superficial, informal and does not meet the requirements set out in the [COB Rules]*"; that "*[f]ormal approach of copying and pasting clauses from COB into declaration form, which is then simply signed by the clients claiming that they are Professional Clients is unacceptable and does not represent the Firm's ability to classify its Clients comprehensively and with due care*"; and that "*as part of Client on-boarding procedure, the Firm does not request supporting documents from its Clients which can be used as a proof of evidence of client being a Professional Client (diplomas, extracts from bank account, past working history, etc.)*" (see paragraph 6 above). In essence, the complaint was that it was left to clients to self-certify that they met the relevant conditions, and Cashdrive did not do enough to check the clients' claims and to obtain supporting documents so as to ensure that the COB requirements, in particular those of COB 2.5.1(a) and (b)(i), were in fact met.
58. The Written Directive referred to the AFSA's identification that in the third quarter of 2022 Cashdrive had been providing loans to natural persons assessed as Professional Clients; and it added "*total amount of loans – 15*". The concerns expressed in the decision were based, on the face of it, on those 15 transactions. But the AFSA had in fact received by this time, in response to its request of 30 November 2022 and in the returns for the fourth quarter of 2022, information as to a total of 44 loan agreements entered into with natural persons; and the evidence shows that all 44 transactions were taken into account in the decision to issue the Written Directive. Cashdrive's post-decision representations sought to make much of the difference between the figure of 15 and the figure of 44, claiming not to know which were the 15 clients mentioned in the Written Directive and purporting to understand that the remaining 29 had been assessed correctly as Professional Clients. In responding to those representations the AFSA drew no distinction between the 15 and the rest of the 44 and made sufficiently clear in my view that its concerns related to review of client dossiers generally. Although Cashdrive continued to press for a list of the 15 clients referred to in the Written

Directive, pursuing it as far as a formal request for information served (and duly answered) in the course of the appeal proceedings, I am satisfied that the true position was sufficiently clear from the terms of the Written Directive itself and that Cashdrive understood or should have understood that the 15 were the clients appearing in its own returns for the third quarter of 2022.

59. The AFSA's concerns have been spelled out more fully in the post-decision exchanges and in the appeal proceedings than they were in the Written Directive. It is said that the limitation on lending to non-professional clients was imposed for reasons of consumer protection and because of the high existing debt burden of retail customers in Kazakhstan. Contrary to Cashdrive's original representations that the focus of its business would be on lending to legal entities, it did not take on any legal entities as clients. Instead, it generally provided relatively modest loans to natural persons resident in Kazakhstan, usually secured on their cars (often very old) and at very high rates of interest (an interest rate of 44% was applied to all loans, regardless of value). The purpose of the loans is generally described in Cashdrive's documentation as "*consumer credit*" and many of the loan documents contain customer representations that they were "*applying for a consumer loan for non-business purposes*". One of the development strategy documents describes the business as an "*auto pawnshop*" for "*car owners who have a temporary need for money, mainly to close the gap on a business transaction or to purchase goods*". Loans were made semi-automatically using an automated scoring system. Cashdrive simply accepted a client's unverified self-declaration that he or she fulfilled the conditions to be a Professional Client, in circumstances where that self-declaration was inherently unlikely to be true. Why would a person with *net* assets of USD 100,000 (excluding the value of their primary residence) require a loan of a few thousand dollars at extremely high rates of interest? Was it likely that the only collateral they could offer was a modest vehicle whose age was often measured in decades? Cashdrive did not conduct a proper calculation of clients' net assets or collect supporting documents to prove that they had net assets of at least USD 100,000. There was no evidence that the financial assets condition was satisfied. Further, Cashdrive had no reasonable basis for concluding that the condition as to experience and understanding of relevant financial products and any associated risks was satisfied. The fact that a client had taken out a previous loan and repaid it was not sufficient to establish a professional level of knowledge. The purpose of the requirements is to ensure that a customer is sophisticated and can reach his or her own informed view about the appropriateness of lending.
60. Cashdrive, on the other hand, submits that it did comply with the requirements for assessment of clients as Professional Clients. The COB Rules establish a system of checks and controls that protects vulnerable clients from purchasing financial products that they do not understand. Cashdrive was guided by the literal meaning of the relevant rules and developed a thorough due diligence system to classify its clients that proved to be effective. It consolidated all the relevant information in various documents; clients expressed their agreement and their fulfilment of the requirements by signing the documents; all of them were experienced entrepreneurs, some were accountants or directors; and all of them understood the essence of the financial product in question. The number of defaults and overdue loans was in practice zero. It is said that the AFSA did not understand how Cashdrive's business worked and should not have been telling it how to conduct its business rather than establishing general guidelines. The procedure adopted by Cashdrive, directed towards a specific financial product and a specific category of client, was a reasonable one. Cashdrive further contends

that it could have presented more documents and proof on the correctness of clients' classification if it had been given the opportunity to do so before the Written Directive was issued and that the Written Directive itself did not explain what was wrong in the process of client classification. It complains too that AFSA was not responsive to Cashdrive's post-decision representations and questions about the nature of the alleged breaches.

61. I accept that the reasons given on this issue in the Written Directive, and the relevant findings of fact, are expressed in rather thin and general terms. There was a corresponding lack of specificity as to what was required by way of "*appropriately revised conduct of business procedures*" as regards the assessment of Professional Clients. I have no doubt that the matter would have been dealt with more fully and in greater detail if Cashdrive had been given the opportunity it should have been given to make representations before the decision was made. One sees, for example, the way in which reasons relating to the requirement of net assets of at least USD 100,000 were developed in the AFSA's letter of 12 May 2023 (paragraph 31 above). The Written Directive did, however, identify the essence of the AFSA's concerns and refer to the documents on which they were based, all of which had been provided to it by Cashdrive itself; and since the documents were all held by Cashdrive, there was no requirement to provide copies of them.
62. The COB Rules set out the conditions to be met before a client may be treated as an Assessed Professional Client but they do not specify what steps have to be taken by an Authorised Firm to ensure that clients meet those conditions. They do not state, for example, that an Authorised Firm must carry out the calculation of a client's net assets for itself, or that it must obtain supporting documents, rather than leaving it to the client to certify that the condition is met. There appears to be considerable room for flexibility in the way the rules are applied. I therefore have some sympathy for the approach taken by Cashdrive when faced with the bare wording of the rules and in the absence of guidance from the AFSA. Ultimately, however, it is for the AFSA as the regulatory authority to determine in the light of the policy context and regulatory objectives how the rules are to be applied. The AFSA is an expert body on which broad powers of supervision are conferred by the FSFR, as mentioned at paragraph 21 above. It has to be satisfied that the conditions have been met and has to form a judgment on what needs to be done for that purpose. To put it another way, the answer to the question whether the relevant COB Rules have been complied with depends not just on a simple interpretation of the rules but on an exercise of judgment by the AFSA - an exercise of judgment with which the Court will be slow to interfere. The AFSA, not the Court, is the primary decision-maker on such an issue, and it is to be recalled that section 11 of the FSFR "*does not provide for an appeal on the substantive merits of a decision but on whether the decision-maker has made a recognisable public law wrong*" (see *Carmi v AFSA*, paragraph 11 above).
63. I am satisfied that on the basis of the documents it had received by the time of the Written Directive, and in particular the 15 loan agreements specifically referred to in the Written Directive, the AFSA was entitled to form the view it did, that Cashdrive's approach involved a failure to comply with the COB Rules. In relation to the requirement of net assets of at least USD 100,000, the AFSA neither misinterpreted COB 2.5.1(a) nor misapplied the rule in holding that Cashdrive's approach to assessment was inadequate and that more needed to be done by way of calculating a client's net assets and obtaining documentary support. Similarly, in relation to the requirement to assess the

client, on reasonable grounds, to have sufficient experience and understanding of relevant financial products and any associated risks, the AFSA was entitled to hold Cashdrive's approach to be inadequate: the AFSA's judgment that the matters relied on by Cashdrive did not provide reasonable grounds for the assessments made was a judgment lawfully open to it.

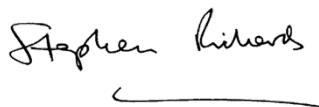
64. Would it or might it have made a difference to the outcome if Cashdrive had been given the opportunity it should have been given to make representations before the Written Directive was issued? As I have said, the matter would in my view have been dealt with more fully in the light of such representations, but the essence of the AFSA's concerns would have remained the same and would have remained justified. I have not seen anything in the post-decision representations or the evidence in these proceedings to cause me to think that the decision might have been different or that a sustainable ground of challenge to it might have emerged. I accept the AFSA's submissions on this.
65. I have borne in mind Cashdrive's case, including the evidence of Ms Rakhimbekova in the course of cross-examination, that Cashdrive could have provided additional documents relating to client classification but the AFSA had not requested them. Yet as far back as 30 November 2022 the AFSA requested assessment reports for each of the clients assessed at that time as Professional Clients and any other documents used in assessing them as Professional Clients (see paragraph 5 above); Cashdrive provided documents in response to that request as well as by way of its quarterly returns, and also had ample opportunity to provide any further documents as part of its post-decision representations and in the course of the appeal proceedings. There can in my view be no serious possibility that Cashdrive could now produce additional documents capable of throwing significant new light on the matter and of changing the outcome.
66. I should mention that I have left out of account the AFSA's notes of recent interviews of two clients, together with the witness statement obtained from one of those clients by Cashdrive in response: such material is too recent and too thin to have a material bearing on the issues before the Court. I have also left out of consideration, as being unnecessary for my decision, the other documents in the bundle of documents the admissibility of which was disputed.
67. I attach no significance to the mere fact that the focus of Cashdrive's lending business was originally stated to be loans to legal entities but the entirety of loans was made in practice to natural persons. Cashdrive has explained this shift in business model by changes in market conditions, in particular that after the Russian invasion of Ukraine lending to legal entities became very risky. Whether or not that is a satisfactory explanation, it does not matter. The possibility of loans to natural persons was contemplated from the outset and was permitted by the Licence, provided that the clients were properly assessed as Professional Clients. If they were so assessed, it was permissible in principle for all of Cashdrive's business to be by way of loans to natural persons, though the separate effect of the Currency Rules was that such persons had to be resident outside Kazakhstan. That remains the case today. As the AFSA has made clear, Cashdrive's Licence has not been suspended and it is still open to Cashdrive to provide loan facilities to natural persons provided that they are resident outside Kazakhstan and are properly assessed to be Professional Clients.

68. In conclusion on this issue, however, here too the AFSA was entitled to reach the decision it did in the Written Directive; the failure to comply with the procedural requirements of Schedule 1 to the FSFR was not material; and the grant of relief would be neither justified nor useful.

Conclusion

69. For the reasons set out above, the Written Directive was issued in breach of the relevant procedural requirements but the breaches were ultimately immaterial, and on the issues of failure to comply with the Currency Rules and failure to comply with the COB Rules the AFSA was entitled to reach the decision it did. Cashdrive's appeal against the Written Directive therefore fails and the relief sought by it must be refused.

By the Court,



The Rt Hon. Sir Stephen Richards

Justice, AIFC Court



Representation:

The Claimant/Appellant was represented by (1) Mr Bakhyt Tukulov, Partner, and (2) Ms Mariya Petrenko, Associate, both of Tukulov Kassilgov Shaikenov Disputes LLP.

The Defendant/Respondent was represented by Mr Ben Jaffey KC, Blackstone Chambers, as instructed by Mr. Ishaq Burney, Chief Legal Officer, AFSA.