



Neutral Citation: : [2024] UKUT 00229 (TCC)

Case Number: UT/2023/37

**UPPER TRIBUNAL  
(Tax and Chancery Chamber)**

By hybrid hearing with the Tribunal and the Respondents in person at the Rolls Building, London, and Applicant attending by video link from HMCTS premises in Manchester

*FINANCIAL SERVICES – registration of non-genuine trading names as trading names of the Applicant on the Financial Services Register – issue of supervisory notice requiring removal of non-genuine trading names – whether actions of Authority were reasonable and proportionate – yes – reference dismissed - s55L(3)(a) Financial Services and Markets Act 2000*

**Heard on:** 30 and 31 January 2024

**Judgment date:** 05 August 2024

**Before**

**JUDGE NICHOLAS ALEKSANDER  
MARTIN FRAENKEL  
JEAN PRICE**

**Between**

**PROMETHEAN FINANCE LIMITED**

**Applicant**

**and**

**THE FINANCIAL CONDUCT AUTHORITY**

**The Authority**

**Representation:**

For the Applicant: Eliot Maddison, director of the Applicant

For the Authority: Mark Fell KC, Counsel, instructed by the Financial Conduct Authority

## DECISION

### INTRODUCTION

1. The Applicant (“Promethean”) has been regulated by the Authority since 25 July 2016. It has Part 4A Financial Services and Markets Act 2000 (“FSMA”) permissions to carry out a range of regulated consumer activities, including credit broking, debt adjusting and debt counselling (the latter two permissions are limited to exclude the administration of debt management plans) and agreeing to carry on a regulated activity.

2. In November 2022, the Financial Conduct Authority (“the Authority”) identified alleged non-compliance by Promethean in relation to rules and principles in financial promotions made by Promethean and its appointed representatives. In the course of correspondence with Promethean about the alleged non-compliance, the Authority became aware that Promethean had registered a large number of trading names of third-party insolvency practitioners on the Financial Services Register (“the Register”). It is not disputed that these third parties (with two exceptions) are not themselves registered under FSMA and are not appointed representatives of Promethean. The term “non-genuine trading names” (“NGTNs”) was defined in the Authority’s Supervisory Notices as meaning the “trading names listed on the [Financial Services] Register which are not (a) owned; and/or (b) controlled; and/or (c) used in the carrying out of debt counselling” by Promethean. The reference to “non-genuine” is to the fact that these names are not names under which Promethean itself trades, rather they are the trading names used by the third parties.

3. This reference relates to the Authority’s Second Supervisory Notice dated 1 June 2023 by which the Authority imposed the following requirements on Promethean pursuant to section 55L(3)(a) FSMA with immediate effect:

- (1) By 4.30pm on 12 April 2023, Promethean must remove all NGTNs registered on the Authority’s Financial Services Register;
- (2) Promethean must not register and/or use any Trading Names without the prior written consent of the Authority;
- (3) Within 10 days of the Requirements coming into force, Promethean must provide, in a form to be agreed with the Authority, data confirming the number of customers that have been referred to Promethean by its trading names registered with the Authority (including all previous registrations of trading names no longer used) from March 2022 to the date of the Second Supervisory Notice;
- (4) Within 14 days of the Requirements coming into force, Promethean must conduct a review of all Promethean’s financial promotions and communications, and those of its Appointed Representatives (“ARs”);
- (5) Promethean must make amendments to any financial promotions and/or communications identified at (4) above to ensure they comply with all relevant FCA Handbook Rules within 5 days of their review;
- (6) Promethean must provide a written report to the FCA detailing the number of financial promotions and communications withdrawn/amended in accordance with (4) and (5) within 7 days and provide the Authority with a list of breaches identified and amendments, or, if no such breaches are identified, provide written confirmation to the Authority that the Firm’s financial promotions (and those of its ARs) comply with the relevant requirements;
- (7) Promethean must conduct a review of its (i) systems and controls, and (ii) policies and procedures in relation to all financial promotion activities for which it is

responsible, including the activities of all its Appointed Representatives, and provide a written report of the outcome of the review to the Authority within 3 weeks of the Requirements coming into force;

(8) Promethean must secure all books and records and preserve all information and systems in relation to all activities carried on by it, including but not limited to regulated activities, and must retain these in a form and at a location within the UK, to be notified to the Authority in writing by no later than within 7 days of the Requirements coming into force, such that they can be provided to the Authority, or to a person named by the Authority, promptly on its request;

(9) By close of business within 2 days of the Requirements coming into force, Promethean must publish in a prominent place on its website (<https://www.prometheanfinance.co.uk/>) in a form to be agreed in advance with the Authority, a notice setting out the terms and effects of these Requirements;

(10) Promethean must as soon as possible, and by no later than close of business within 14 days of the Requirements coming into force, notify in writing all customers who have been referred to Promethean through its Non-Genuine Trading Names since March 2022 of the imposition of the terms and effects of the Requirements. This must be in a form to be agreed in advance with the Authority; and

(11) Once the notifications referred to in sub-paragraph (10) have been made, Promethean must provide to the Authority within 24 hours:

(i) Copies of the template notifications sent to all recipients referred to in sub-paragraph (10);

(ii) A list of all parties to whom notifications have been sent pursuant to sub-paragraph (10); and

(iii) Confirmation that, to the best of its knowledge, Promethean has sent notifications pursuant to sub-paragraph (10) to all relevant parties.

4. We heard evidence from:

(1) Nick McGruer, head of the Authority's Department in Consumer Investments, Supervision, Policy and Competition. Mr McGruer was the person responsible for authorising the making of the Second Supervisory Notice that is the subject of this reference; and

(2) Eliot Maddison, the sole director and shareholder of Promethean. Mr Maddison holds the SMF3 (executive director) and SMF16 (compliance oversight) roles in Promethean.

Both provided witness statements and gave oral evidence on oath, on which they were cross examined. We found both witnesses to be reliable.

5. In addition, a core bundle of 219 pages and a supplemental bundle of 2523 pages were produced in evidence.

6. At the hearing, Promethean was represented by Mr Maddison and the Authority was represented by Mark Fell KC.

#### **PROCEDURAL MATTERS**

7. In November 2023, following correspondence between the parties and with the Tribunal, Promethean made an application

(a) to require amended pleadings;

- (b) for the Authority to provide the names and email addresses of the individuals who had made complaints to the Advertising Standards Authority (“ASA”);
- (c) for permission to serve amended witness statements; and
- (d) for the hearing listed in London for 30 and 31 January 2024 to be vacated and the hearing relisted either at a venue closer to Manchester (where Promethean is based) or conducted by remote video link.

8. Judge Aleksander refused the application for amended pleadings, but gave consent for the service of supplemental witness statements. He also refused the application that the Authority disclose the names and email addresses of the individuals who had complained to the ASA, on the grounds that the Authority was not relying on these complaints, and therefore the Tribunal did not have jurisdiction to require disclosure. Further, Promethean had given no explanation of why these names and email addresses were relevant to the issues under reference.

9. The grounds for the application to vacate the hearing were that Promethean’s financial resources had been depleted as a consequence of the Authority’s actions, and that it could not afford to pay for travel and accommodation for a hearing in London. Judge Aleksander directed that the hearing should not be vacated. However, having had regard to Promethean’s submissions about the cost of attending a hearing in London and the fact that it was not professionally represented, he directed that Promethean should have the option of either attending the hearing in person in London, or attending by remote video link from HMCTS premises in Manchester. Having conducted a large number of hearings by video link (including hearings in circumstances where the reliability of witness evidence was in dispute), Judge Aleksander was satisfied that – notwithstanding the limitations of video technology – the Tribunal could, and would, give equal respect to individuals attending by video link as it gives to individuals attending in person.

10. At the hearing, Mr Maddison attended by remote video link from Manchester and gave evidence by video link.

11. Following the hearing, Mr Maddison made a written application to admit fresh evidence and to make related written submissions. We set out the reasons why we refused this application later in this decision<sup>1</sup>.

## **THE LAW**

### **Threshold Conditions**

12. Section 19 FSMA provides that a person must either be authorised by the Authority or exempt from authorisation in order to carry on regulated activities in the UK by way of business. Regulated activities include advising borrowers about the liquidation of a debt owed under a credit agreement or consumer hire agreement.

13. Section 24(1) FSMA provides that it is an offence if a person:

- (a) describes himself (in whatever terms) as an authorised person;
- (b) describes himself (in whatever terms) as an exempt person in relation to the regulated activity; or (c) behaves, or otherwise holds himself out, in a manner which indicates (or which is reasonably likely to be understood as indicating) that he is–
  - (i) an authorised person; or

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<sup>1</sup> See [129]

(ii) an exempt person in relation to the regulated activity.

14. Schedule 6, FSMA sets out the threshold conditions that must be met in order to be authorised by the Authority. Section 55B(3) FSMA requires the Authority to:

ensure that the person concerned will satisfy, and continue to satisfy, in relation to all of the regulated activities for which the person has or will have permission, the threshold conditions.

As regards Promethean, the relevant threshold condition is that set out in paragraph 2E(c) of Schedule 6, namely that the firm “must be a fit and proper person having regard to all the circumstances” including “the need to ensure that [its] affairs are conducted in an appropriate manner, having regard in particular to the interests of consumers”.

### **Consumer protection**

15. The Authority’s general duties are set out in s1B FSMA, these include at subsection (3) (a) the “consumer protection objective”. This objective is addressed in s1C(1) FSMA, which requires the Authority to have, as one of its objectives, “securing an appropriate degree of protection for consumers”. Section 1C(2) requires the Authority to have regard to the “needs that consumers may have for the timely provision of information and advice that is accurate and fit for purpose”.

### **The Register**

16. Section 347 FSMA requires the Authority to maintain a record of authorised persons and certain appointed representatives, which includes such information as the Authority considers appropriate. The record is publicly accessible.

17. On 21 October 2022, the Authority published guidance about the use of trading names by authorised persons. This states that:

You should only add genuine trading names that your firm uses [to the Register].

### **FCA Handbook**

18. The Authority has power to make rules under s137A FSMA. These rules are published in its Handbook. The rules apply not only to authorised firms, but also to their appointed representatives – under s39 FSMA, an authorised firm is responsible for the activities of its authorised representatives, and anything done by an authorised representative is treated as if it were an act of the authorised firm.

### **High level standards**

19. The PRIN, SYSC and GEN sourcebooks within the Handbook apply to all authorised firms.

20. PRIN 2.1.1R sets out, at a high level, principles for business. These include<sup>2</sup>:

3 Management and control: A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.

6 Customers' interests: A firm must pay due regard to the interests of its customers and treat them fairly.

7 Communications with clients: A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.

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<sup>2</sup> Since 31 July 2023, principle 12 has been added to the principles, which relates to retail consumers. As it was not in effect at the relevant dates, we have not set it out here.

21. SYSC 3.1.1R and 3.2.6R require an authorised firm to take reasonable care to establish systems and controls appropriate to its business, including for compliance with the requirements and standards applicable under the regulatory system. SYSC 3.1.4G and 3.2.3G provide guidance that an authorised firm has specific responsibilities regarding its authorised representatives, in respect of whom appropriate safeguards should be in place.

22. GEN 4.5 deals with requirements relating to statements about the authorisation and regulation of businesses by the Authority. GEN 4.5.3R and 4.5.4R require that an authorised firm must not indicate or imply that it is authorised, regulated or otherwise supervised in respect of businesses for which it is not authorised or regulated by the FCA. GEN 4.5.6G provides guidance that it is likely to be misleading for a firm that is not authorised by the FCA to state or imply that it is.

### ***Specialist sourcebooks***

23. CONC is the consumer credit sourcebook, which includes rules and guidance that apply to firms, such as Promethean, that provide debt-counselling services to consumers. These included rules and guidance that:

- (1) require communications and financial promotions to be clear, fair, and not misleading (CONC 3.3.1R, 3.1.4R and 3.3.10G);
- (2) specify required content for financial promotions and certain other communications with customers (CONC 3.9.3R and 8.2.4R);
- (3) require clarity in communications and financial promotions as to whether a firm is (i) a for-profit or (ii) a governmental, charitable, or non-profit operation (CONC 3.9.5R(2) and CONC 3.9.7R); and
- (4) in its first communication with a customer, include a statement that free advice is available, and that the customer can find out more, by contacting MoneyHelper, and must include a link to the MoneyHelper website (at [www.moneyhelper.org.uk](http://www.moneyhelper.org.uk)) (CONC 8.2.4R)

### **Other Guidance**

24. The Authority published guidance on the use of trading names on the Register on 21 October 2022. It was reissued in February 2023 with minor editorial changes. Both state that

Your firm can add its own trading names to the Financial Services Register. The Register displays firms' names so that anyone is able to check their details. You should only add genuine trading names that your firm uses.

[...]

Registering a trading name with us has no legal effect. Adding a third party as a trading name does not change that person's regulated status and does not mean that an unauthorised person can carry out regulated activities. If that person carries on regulated activity without being authorised or exempt, such as an appointed representative, it's likely that they're carrying out unlawful authorised business. Trading names are not an alternative to being appointed as an appointed representative.

[...]

Adding your trading names to the [Register] helps consumers check they're dealing with an authorised firm, however having multiple trading names can be difficult for consumers to follow. Consider whether having large numbers of trading names could cause consumer confusion and affect your ability to communicate with customers in a clear, fair and not misleading way.

## Requirements

25. Section 55L FSMA gives the Authority power to impose such requirements on authorised firms as the Authority considers appropriate. Section 55L(2) provides that the Authority may exercise its power to impose requirements in relation to an authorised person (“A”):

if it appears to the FCA that—

- (a) A is failing, or is likely to fail, to satisfy the threshold conditions for which the FCA is responsible,
- (b) A has failed, during a period of at least 12 months, to carry on a regulated activity to which the Part 4A permission relates, or
- (c) it is desirable to exercise the power in order to advance one or more of the FCA's operational objectives.

## Debt Counselling

26. Some confusion arose as a result of the relevant legislation (such as s21 FSMA) referring to “investment activities”, and whether this included debt counselling. Subsections 21(8), (9) and (15) give the Treasury power make orders defining the scope “investment activities” for the purposes of FSMA. In consequence of paragraph 5B, Schedule 1, Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (SI 2005/1529) (“FPO”) “debt counselling” is treated as falling within the definition of “investment activity”:

### 5B Debt-counselling

- (1) Advising a borrower about the liquidation of a debt due under a relevant credit agreement is a controlled activity.
- (2) Advising a hirer about the liquidation of a debt due under a consumer hire agreement is a controlled activity.

## BACKGROUND FACTS

27. The background facts are not in dispute, and we find them to be as follows.

28. Promethean’s business is as a “debt packager”. It provides advice to indebted consumers who have vulnerable characteristics. Its advice takes the form of “debt solutions”, namely advice on ways in which its clients can discharge or liquidate their debts. Promethean does not itself provide those “debt solutions”.

29. Promethean advertises its business using, *inter alia*, financial promotions published on the internet.

30. Promethean has been authorised by the Authority to perform regulated activities since 25 July 2016. It has permissions relating to regulated consumer credit activities – including credit brokering, debt adjusting and debt counselling (but excluding the administration of debt management plans), and agreeing to carrying on a regulated activity.

31. Prior to the events subject to this reference, the Authority had been in contact with Promethean in respect of breaches of the financial promotion rules. In October 2020, the Authority wrote to Promethean about financial promotions that failed to make it clear that Promethean was not qualified to offer debt solutions directly, and that its signposting to free debt advice was not sufficiently prominent. These concerns were resolved by Promethean at the time.

32. On 6 December 2022, Google updated its advertising policy, to require businesses advertising financial services (including debt advice to consumers) either to be authorised by the Authority, or included in the Register as an exempt professional firm or a recognised

investment exchange. It further specified that insolvency practitioners would no longer be able to place advertisements on the basis that they were regulated by a recognised professional body (“RPB”) for the purposes of the Insolvency Act 1986.

33. In consequence of Google’s new advertising policy, Promethean entered into commercial arrangements with a number of insolvency practitioners (“the IPs”) who offer types of debt solutions. The IPs were not authorised by the Authority, but were authorised as insolvency practitioners by an RPB. Because of the changes to Google’s policies, the IPs were no longer able to advertise to consumers using the Google platform. Under these commercial arrangements, Promethean included the relevant IP’s website domain name on the Register as one of its trading names.

34. Promethean entered into these commercial arrangements with a number of IPs (some of whom traded under multiple names and had multiple websites). In addition, Promethean was Principal to six ARs. The contract between Promethean and an IP authorised the IP to make use of a specified trading name (in practice the web address(es) for the IP’s website(s)) so that the IP “may continue to advertise to consumers for the purposes of debt advice as defined by [FSMA] as it pertains to insolvency practitioners’ exemption.” The IP was required under the terms of the contract (amongst other things) to comply with the Authority’s rules and with Promethean’s procedures. It was required to refer customers to Promethean if their indebtedness was less than £6000 and they had at least two creditors.

35. We note that the operation of the Register (at least as regards the inclusion of trading names) is automated – and that trading names can be added to (and removed from) the Register by an authorised firm without any intervention by the Authority. Under the contract the IPs had concluded with Promethean, Promethean added the web addresses of the IPs to the Register as trading names of Promethean. Because the IPs’ websites now appeared as trading names on the Register, the IPs were able to advertise to consumers using the Google platform for the purposes of providing debt advice.

36. We note also that Promethean’s entry on the Register included warnings that, as well as Promethean undertaking regulated activities, it also undertook activities that are not subject to regulation by the FCA.

37. Typically, a customer would first engage with the IP, having identified the IP’s website through a Google search or a Google advertisement (the IP’s website was operated by the IP and not Promethean). If the IP was unable to advise the customer, the IP would refer him or her to Promethean.

38. In October 2022, a consumer complained to the ASA that a website using a Promethean trading name was promoting its services on Google as a “government approved service”. The ASA referred the complaint to the Authority. The Authority’s Supervision Division in consequence reviewed Promethean’s activities, and identified further concerns about Promethean’s financial promotions. The Supervision Division was concerned that Promethean appeared to be in breach of the Authority’s financial promotion requirements in a relatively short period following its previous engagement with the Authority.

39. On 7 November 2022, the Authority sought to arrange a telephone call with the Promethean, but Mr Maddison instead asked the Authority to put its questions in writing. Later that same day, the Authority wrote to Promethean with concerns about its financial promotions, which appeared not to be fair, clear and not misleading. A number of issues were identified by the Authority, including that there were two websites that stated on their face that they were operated by authorised representatives, but were in fact operated by insolvency practitioners using NGTNs.



40. The Authority's letter identified the following concerns:

*A. Google promotions – Annex 2<sup>3</sup>*

1. CONC 3.9.7R of the Handbook states that in relation to on-line promotions of debt solutions, a firm must not:

*(2) seek to use internet search tools or search engines so as to mislead a customer into visiting its website when the customer is seeking free, charitable, not-for-profit or governmental or local governmental debt advice.*

We have identified several Google promotions placed by Promethean (under its various registered trading names) that are the top listed results when searching for government-based debt solutions. We are concerned with the firm's use of search engines in this manner, where the following examples of promotional language are used; "government debt write off," "government debt help" and "government approved service" "gov legislated solution." These terms are used in the headline of the adverts as well as in the descriptors. Use of these terms is considered misleading, as the firm is purposefully encouraging consumers to engage in its services under the mistaken belief and false reassurance of receiving information/advice that has been approved or endorsed by the government. Seeking to use internet search tools in this manner suggests that CONC 3.9.7R is not being complied with.

2. Further, the statement of "*IVA Providers – Government IVA Available here*" is used by Promethean in its Google promotions. As above, this appears in contravention of our rules in implying government endorsed solutions. Further, CONC 3.9.3R(4) requires that a firm must "*state whether any aspect of the services is provided by a third party.*" We consider that using this language falls foul of this rule where the firm falsely implies the scope of its services as an individual voluntary arrangement ("IVA") provider in the Google promotion and fails to subsequently qualify on the landing page of [<https://onlinedebtoptions.co.uk/>] that it is not within scope of the firm's services to arrange IVAs directly.

We would like to stress that we wrote to you previously (19 October 2020) regarding similar concerns around failure to make clear on the website of [<https://www.prometheanfinance.co.uk/>] that the firm did not offer IVA debt solutions directly and while the firm addressed this point at the time, this same breach has been repeated on other websites operated by Promethean.

3. We also identified that Google promotions direct consumers to a misleading domain name that contains the term '*government*' within its URL, which for the reasons mentioned above, also appears to contravene CONC 3.9.7R, and expect to be removed as such - [www.onlinedebtoptions.co.uk/government](http://www.onlinedebtoptions.co.uk/government).

4. CONC 3.3.1R(1) requires that "*a firm must ensure that a communication or a financial promotion is clear, fair, and not misleading.*" Terms such as "*no fees*" and "*no upfront fees*" are used across several advert descriptors. While there might be no charge for the initial enquiry, firms should not use terms that could mislead consumers, in the absence of clarity, around the charges payable should they proceed with a debt solution arrangement as set out in CONC 3.9.3R(4).

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<sup>3</sup> Annex 2 set out screenshots of the Google advertisements and website promotions to which reference was made in the letter.

5. Examples of practices that are likely to contravene the clear, fair and not misleading rule includes at CONC 3.3.10 (6) *“in relation to debt solutions, claiming or implying that a customer will be free of debt in a specified period of time or making statements emphasising a debt-free life or that a debt solution is a stress free or immediate solution.”* We are therefore concerned with the firm’s use of unsubstantiated claims around the quantity of achievable debt write-off used in its promotions. You promote the following claims *“write off 100% debt”* and *“85% of debt written off takes 60 secs”* which direct consumers to the same landing page of [<https://onlinedebtoptions.co.uk/>]. The advert fails to qualify the type of debt solution which is being referred or that any write-off in this context refers to unsecured debts only. Upon entering the landing page, there are numerous pop-ups prompting the consumer to click-through directly to *“see if you qualify to write off up to 85% of debt.”* The landing page fails to subsequently put these figures into context with supporting evidence around achievability of these claims. In the absence of robust documented evidence, we consider it misleading to exaggerate claims in order to persuade consumers to engage with the advertising.

6. We are also concerned about the use of *“it takes 60 secs”* and *“stop making creditor payments from today”* in Google promotion descriptors, which could appear to overstate the speed and ease of agreeing and entering into a debt solution arrangement. We consider such terms as another example of the unfair practices falling foul of our fair, clear and not misleading rule (CONC 3.3.10 (6)), that claim eligibility can be checked quickly and imply that the service is suitable/available to anyone.

*B. Website promotions – Annex 2 - <https://onlinedebtoptions.co.uk/>*

7. The firm’s services are promoted on Google as offering advice across the full range of available debt solutions. However, the information presented on the home page of [Online Debt Options] is overwhelmingly promoting the benefits of IVAs. Where IVA ‘benefits’ are stated, it is not made clear that some of these are in relation to other types of debt solutions (for example, *“all debt written off in 12 months”* and *“no up-front costs or set up fees”* cannot relate to IVAs). There is also a table stating *“what debts can be included”* which, again, does not state which debt solution is being considered. There are references to *“other debt solutions”* towards the foot of the page but the information is minimal and the option for the consumer to click-through to *“more info”* only redirects the consumer back to the head of the same page and is not providing any additional information relevant to those solutions. We do not consider that this mismatch of information, both in its ordering and presentation, meets our clear, fair and not misleading rule. Information should be presented in a way that is likely to be understood by the average target consumer in identifying what statements relate to which debt solution. CONC 3.9.3R(9) also requires that *“where the financial promotion or communication sets out detail of how a customer might resolve debt problems by explaining options, the most important actual or potential advantages, disadvantages and risk of each option...”* should be stated.

8. As stated above, the home page of [Online Debt Options] heavily promotes the advantages of entering into an IVA, but with no statement of the risks and disadvantages of this arrangement, which is required under CONC 3.9.3R(14). This rule sets out a prescriptive set of risks that should be clearly and prominently displayed. It is concerning that the consumer can pursue an eligibility check at the very start of the customer journey, without an understanding of the relevant risks.

9. Further, the consumer must choose to click-through to a separate landing page in order to view frequently asked questions of [Online Debt Options]. While the FAQs would appear to prompt statements outlining the risks/considerations of entering into an IVA, they fail to do so sufficiently and in some cases are misleading.

i) For example, the section on *“who will know I have an IVA and will it be made public.”* While the firm states that *“details are put onto a public register”* this is followed by *“but it is highly unlikely that anyone will check it”* which downplays the impact of the public statement of notice. This is also followed by statements such as *“this is one of the reasons why an IVA is favoured over Bankruptcy as it is more private.”* We are concerned that the firm is using promotional language to promote the IVA option as a favourable debt solution.

ii) Similarly, the section on *“why should creditors write off some of my debt”* states that *“an IVA is simply a better deal for you and your creditors. If you were bankrupt the creditors would get less money, you could lose your home, car and not be able to serve as a company director.”* This appears to inflate the benefits of an IVA as a favourable arrangement, and also directly contravenes our rule that requires explicit statements that failure to make IVA payments could lead to bankruptcy as required under CONC 3.9.3R(14)(a). Furthermore, the section on *“what happens if I miss an IVA payment”* fails to state the direct consequences of bankruptcy resulting from missed IVA payments.

iii) The section on *“what if some creditors don’t agree”* states that *“there are a small number of lenders who vote against IVAs almost as a matter of principal [sic]. We know who they are and we will be able to advise you when we prepare your income and expenditure statement whether any of your creditors are on the awkward squad list.”* We are concerned that such statements could imply that the firm can guarantee a favourable outcome in negotiations with a lender concerning the customer's debts, in contravention of our rule under CONC 3.9.5R(4).

10. There is a call-to-action (pop-up) on the home page of [Online Debt Options] requesting the consumer to click-through to get a *“free debt check.”* The pop-up is refreshed and prompted at one-minute intervals. It states, *“take the debt quiz to see what help you qualify for...its free and takes less than 60 seconds”* which we consider could be interpreted as unfair, unclear and misleading. Promoting eligibility checking in the form of a ‘quiz’ could be considered trivialising the important decisions around debt management. The statement used also implies that there is a debt solution available to the enquirer should they pursue the next stage of the customer journey, which cannot be guaranteed. It is also unclear whether the information required to input in the *“see if you qualify/free debt check”* is sufficient for the firm to commence an initial enquiry where it is limited to contact details and *“amount of debt”* only. The firm should consider the examples of unfair practices outlined in our Guidance of CONC 3.3.10G with specific reference to (7) *“providing online tools, which recommend a particular debt solution as suitable for a customer, such as, budget calculators or advice websites; (a) which do not carry out a sufficiently full assessment of a customer's financial position; or (b) which fail to provide clear warnings to a customer that financial data entered into a tool has to be accurate.”*

11. The interactive video used on the home page of [Online Debt Options] as an *“IVA example”* states a *“95% acceptance rate”* for IVAs without any

sufficient or prominent qualifying information to substantiate this claim. Failing to do so, could fall foul of our fair, clear and not misleading rule.

12. The “*IVA example*” both in interactive video format and storyboard format, uses an example of the monthly payments before and after an IVA agreement (“*reduced to £100*” or “*could be as low as £70*”). It is potentially misleading to omit information on both examples regarding the fees payable to the Insolvency Practitioner for entering into the IVA (CONC 3.9.3R(4)) and that the service is arranged by a third party (CONC 3.9.3R(2)).

13. The disclaimer at the foot of the home page of [Online Debt Options] states “*We do not sell or buy IVA/Debt leads*” which we believe is potentially misleading as we understand that the firm packages the advised debt solution (primarily IVAs) and refers the consumer on to an insolvency practitioner for a fee.

*Website promotions – Annex 2 <https://avoid-bankruptcy.org/>*

14. A paid-for advert stating, “*see if you can get debt relief – includes council tax*” directs consumer to the landing page of [Avoid Bankruptcy], one of the trading names of Promethean, which is promoting “*get debt free in 12 months using a debt relief order*” and “*write off all your unsecured debts.*” On the basis of minimal information concerning eligibility or key considerations, the consumer is then requested to “*find out now if you qualify.*” The lack of any substantive information particularly concerning the risks to consider before entering into a debt relief order (DRO) falls foul of our expectations under CONC 3.9.3R(9).

15. IVA arrangements are suggested as an alternative solution on this landing page of [Avoid Bankruptcy] described as “*our solution*” that “*we are required to review your financial situation first [...] we then help you send a proposal to your creditors that includes all eligible debts.*” As far as we understand, Promethean refers customers to a third party arranger to carry out this assessment. In which case, it is misleading to imply that the firm is qualified to do this in-house. This is a common theme of confusion across the websites operated by Promethean whereby it is not made clear “*whether any aspect of the services is provided by a third party or at extra cost*” as required under CONC 3.9.3R(4) as well as “*the relationship with a business associate which is relevant to the services offered in the promotion*” as per CONC 3.9.3R(2).

16. Similarly, the disclaimer information provided at the foot of website of [Avoid Bankruptcy] neither provides a clear statement of the regulated services the firm offers (CONC 3.9.3R(1)) nor a clear unconflicted statement regarding the relationship between Promethean and Quality Insolvency Services Ltd (CONC 3.9.3R(2)). The language used appears to suggest that this website is being operated through the unauthorised entity under the trading name of Promethean, which it cannot do. CONC 3.3.1R(1A)(d) requires that communications must be “*sufficient for, and presented in a way that is likely to be understood by, the average member of the group to which it is directed, or by which it is likely to be received.*” We expect the firm to consider and mitigate any conflicting statements across all websites operated by Promethean under its registered trading names.

17. In addition, aligned to the concerns expressed in paragraph 7, the firm fails to state eligibility for the IVA and importantly does not state any of the risks involved as required in CONC 3.9.3R(14).

18. The signposting to Money Helper at the very foot of the page, in the disclaimer section, is not sufficiently prominent to meet the requirements

under CONC 8.2.4R. It is very possible that a consumer could bypass this key information. We would stress that this prominence point was also raised with you on 19 October 2020.

C - Website promotions by Appointed Representatives – Annex 2  
<https://www.unitedinsolvency.com/>

19. Promethean as a Principal is responsible for the financial promotions of its Appointed Representatives. United Insolvency Ltd is an AR of the firm and there are misleading statements on the website of [United Insolvency], it is misleading to state the advantages of entering into an IVA as “*no upfront fees*” where a fee is payable for entering into the IVA agreement. It is also misleading to state that it “*helps you avoid bankruptcy*” as the direct consequence of failing to keep up with payments could lead to bankruptcy, which is also stated as a risk (CONC 3.9.3R(14)(a)).

20. Aligned to paragraph 5, it is misleading to list the advantages as “*write off up to 81% of your debt*” without robust documentary evidence to qualify this claim.

21. The signposting to Money Helper at the very foot of the page, in the disclaimer section, is not sufficiently prominent to meet the requirements under CONC 8.2.4R. It is very possible that a consumer could bypass this key information.

22. The disclaimer on this website states that “*United Insolvency Ltd is authorised and regulated by the FCA under reference 832916, as an appointed representative of Promethean Finance Limited.*” This is not correct as Appointed Representatives are not authorised persons and should not be stated as such.

23. We have identified that the following websites operated under trading names of Promethean (added on 26/10/22) are falsely stating to be Appointed Representatives of Promethean:

‘ukdebtplan.co.uk’ (<https://www.ukdebtplan.co.uk/>) and ‘stopbailiff.co.uk’ (<https://www.stopbailiff.co.uk/>). We understand the recently added names to be other operated trading names and not new Appointed Representatives, therefore such statements should be rectified to this effect.

24. We expect the firm to conduct a review of the financial promotions of all its Appointed Representatives and mitigate any breaches of the applicable rules, including but not limited to the breaches identified in this letter.

D - Website domains as trading names

25. We understand that Promethean has added ‘www.MoneyAdvice.co.uk’ as a registered trading name (effective 24/10/22) and has the associated website. The firm should set out how it has considered its obligations under CONC 3.9.7R(2) regarding the use of this trading name, given the potential to imitate similar named charitable organisations (such as Money Helper and the former Money Advice Service) and its resulting positioning on search platforms. Our position on how authorised firms may use trading names is set out at <https://www.fca.org.uk/firms/firm-details/trading-names>.

26. We also understand that Promethean has added ‘www.rainbowloans.org.uk’ as a registered trading name (effective 26/10/22) and has the associated website. Promethean also has “www.avoid-bankruptcy.org” as a trading name (effective 28/07/22) and has the associated website. The use of “org” within a trading name is not permitted unless the firm is either a charity or not-for-profit organisation. We do not

consider that Promethean is either of these and therefore the trading name and website is misleading. We expect this to be removed accordingly.

E - Promotions under other trading names of Promethean

27. We understand that Promethean places Google promotions and operates a number of websites under various other trading names. We expect the firm to address any breaches of our rules, including but not limited to the breaches identified in this letter, across all forms of advertising under its operation.

41. Promethean was invited to agree to a “voluntary imposition of a requirement” (“VREQ”) which included, amongst other things, a requirement that it must conduct a review of its systems and controls, and its policies and procedures in relation to both its own financial promotions and those of its ARs. The terms of the VREQ were attached to the letter as Annex 1.

42. Also attached to the letter, as Annex 2, were screenshots of the Google advertisements and of the websites that were discussed in the letter. Mr Maddison did not dispute that the screenshots were accurate copies of the advertisements and websites, and we find that the description of the advertisements and websites in the letter was accurate (we address the evaluative conclusions drawn in the letter in the discussion below).

43. Promethean responded on 14 November 2022 declining to enter into the proposed VREQ on four grounds. These were:

- (1) It had removed two domain names from the Register and that it planned to commence work to ensure another trading name complied “within guidelines”. It had amended disclaimers on three websites, and it had also “brought up to standard” the content of another trading name relating to an AR’s website.
- (2) Promethean stated that most of the issues identified by the Authority related to independent IPs, authorised by an RPB, and with whom Promethean had a commercial relationship:

All the website properties that the authority has highlighted, apart from those of some ARs & rainbowloans.org, as a concern to the firm are all professional entities, by virtue of the Insolvency practitioner’s authorisation by their respective RPB’s who rely on their powers granted by the Secretary of State for BEIS. These are:

- www.avoid-bankruptcy.org.uk IP name: Adam Boys
- www.debthelperteam.co.uk IP name: Adam Boys
- www.swiftdebthelp.co.uk IP name: Adam Boys
- www.ukdebtplan.co.uk IP name: Mark Littleton-Gray
- www.stopbailiffs.co.uk IP name: Mark Littleton-Gray
- www.moneyadvice.co.uk IP name: Gregory Mullarkey
- www.onlinedebtoptions.co.uk IP name: Catherine Varney

In reply to point 2, the authority makes regarding Promethean Finance not offering debt solutions directly, this is true, but in consideration of the point made above, the firms which ultimately operate and own the trading names are able to, therefore not misleading.

The Firm has a commercial relationship with these IPs where the websites in question, generate some enquiries for Promethean Finance Limited.

We are aware of the rules around trading names, specifically, that having a trading name is not a work around from becoming a full Appointed

representative. But the firms in question are exempt and a trading name confers no legal status on its own.

On the contrary, there is no need for the firms in question to become ARs in full status, due to the exemption in FSMA Part 2 Chapter 17 Article 72H.

The reason why these sites have become Trading Names in the first instance, is because Google/Alphabet, is due to change its rules around debt advice servicing on its platforms from 6th December 2022 onwards. Specifically, where all advertisers must also be approved for the Financial Services and Products policy which requires sites to follow FCA rules and guidance for financial promotions.

As already stated, we have a commercial relationship with the firms preceding the change, so for them to be able to keep supplying us, it was deemed appropriate the sites, would have to fall under our compliance framework in due course.

The sites are still in the control of the IPs listed above and all promotions fall within their scope, we are in the process of bringing the trading names within our compliance structure, in time for the change of policy by google on the 6th of December.

We thought it was prudent to issue the sites on the register now, so as not to risk any potential lag up to 6th December, as there may be a marked increase in applications to google and the Authority respectively.

The financial promotions of the sites also fall under the exemptions in the FSMA Financial Promotions Order 2005, Part 6 Article 55B by virtue of FSMA Regulated Activities Order 2001 Part 2 Chapter 17 Article 72H.

We have also relied upon COBS 4.10.10 R when deciding whether the promotions highlighted by the authority in question and any others, are within the firms' financial promotions rules and guidelines.

The Rules in COBS seem to the firm, to predominantly relate to unauthorised entities, but as the Authority surely will appreciate, Insolvency practitioners are exempt from authorisation as per FSMA Article 72H, as follows, promotions that fall within this scope are also exempt.

With the facts stated above, there appears to be a measured amount of ambiguity between conflicting regulatory status's, which the firm has tried to find a middle ground between.

We think that, in hindsight, in consideration of the dual regulatory nature of the entities in question that it would be advisable to have a more precise regulatory statement on the website so as not to confuse consumers about who is responsible for areas of compliance. Which can be rectified, we think, with relative ease.

(3) As regards consumer detriment, Promethean considered that no such detriment had occurred. No complaints had been upheld against Promethean or the ARs. The IPs were regulated by RPBs and had robust procedures in place to ensure compliance with their own rules and guidance.

(4) As regards specific domain names, there have been restrictions on the use of the ".org" domain name for the last 15 years. However, in the interests of good faith, it had applied to remove the websites using the ".org" domain names from the Register pending further discussions with the Authority. As regards "moneyadvice.co.uk", Promethean did not regard the name as misleading, especially as the legal name of the owner was "Money Advice Limited". It was open to the Money Advice and Pensions

Service (“which is a body corporate and are not crown employees”) to take civil proceedings in relation to its intellectual property rights if it wanted to.

44. Promethean stated that it was willing to enter into an undertaking to adhere to the contents of the voluntary requirements relating to amending financial promotions and communications across websites under its operation, conducting a review of its systems and controls and policies and procedures in relation to its own financial promotion activity, providing the Authority with details of the outcome of the review, and providing a report of the number of financial promotions withdrawn or amended - but subject to whether the requirements would be amended. However, it was not prepared to amend or withdraw all financial promotions across all trading names operated by it and those of its ARs that failed to comply with the Authority’s Handbook of Rules and Guidance.

45. It was only as a result of Promethean’s letter of 14 November 2022, that Authority became aware of the fact that the websites registered as Promethean trading names were not in fact websites operated by Promethean or for which it was responsible. It was only at this stage, therefore, that the Authority became aware that Promethean was registering trading names on the Register which were not names (other than the firm’s official registered name) being used by Promethean to carry out its own business. It was also at this stage that the Authority became aware that many of the financial promotions rule breaches raised in its 7 November letter in fact related to promotions for or on websites operated by independent IPs, (with the exception of some also related to Promethean’s ARs and one to itself).

46. The Authority was also concerned that Promethean’s explanation for registering IPs’ trading names may not have been accurate, as the first such trading name was registered in March 2022, seven months before Google announced its new policy (October 2022) and nine months before the policy came into effect (6 December 2022). Mr Maddison’s evidence was that the operators of the websites registered prior to Google’s announcement may not have had a full-time (or any) IP, so they “packaged cases out”, and referred their customers to Promethean. Mr Maddison said that this was a “commercial opportunity” and he “just sold the opportunity on”, paying the originator a percentage of the amount Promethean obtained from the case. So, in the case of onlinedebtoptions.co.uk, it was “purely a lead generator”.

47. Mr Maddison was asked why he used the websites of IPs to generate referrals, rather than advertise Promethean (or its ARs) on Google itself. Mr Maddison’s evidence was that Google’s previous policy was not to allow authorised firms to advertise unless they were authorised to hold client money, so Promethean could not advertise itself. In consequence, Promethean relied on referrals from IPs to generate references through Google advertisements.

48. The Supervision Division of the Authority decided not to take forward Promethean’s suggestion of an undertaking instead of a VREQ, because it considered that a VREQ was the appropriate and proportionate action given the scale and severity of the issues.

49. On 17 November 2022, the Authority sought to arrange a telephone call with Promethean, but it declined the call and offered to communicate by email instead.

50. The Authority wrote again to Promethean on 30 November 2022 requesting details of how Promethean would address all of the issues raised in the 7 November letter, clarification on the use of trading names by insolvency practitioners, and details of the contractual arrangements in place with them. The Authority noted that Promethean had registered 20 trading names (excluding its own legal name), and requested information about them (to the extent not previously provided). Promethean was reminded that it must not use the Register to record trading names owned, controlled, or used by third parties as trading names of Promethean.



51. Promethean replied on 7 December 2022 (although the letter attached to Promethean’s covering email is dated 14 November 2022) stating it had addressed the risks identified by the Authority or considered that the further steps envisaged in the proposed VREQ were unnecessary. Promethean stated that a VREQ would have serious reputational consequences for the firm, potentially affecting its viability and that it considered the Authority could be biased towards Promethean and the debt packager industry due to a Consultation Paper it had recently published (CP21/30) to potentially end the debt packager market. Promethean stated that it had removed non-compliant advertisements from Google, had adequate systems and controls in place, and “all the sites apart from some ARs (where only minor points were made about disclaimers and such were made) are all dual regulated”.

52. As regards the NGTNs, Promethean stated that

[...] the trading names is a facilitation service, which is required to maintain the [insolvency practitioners’] current marketing services, brought about by a non-regulated entity, which is a private organisation and has no regard to consulting any of the parties the change affects, Authorised firms, [insolvency practitioners], regulators, RPB’s and most importantly consumers.

We will not be using the trading names, the trading names are used by parties where there is a commercial contract between us and them, the trading name element of the contract is to facilitate the sites’ continued advertising practices.

Having them as a trading name does not confer a legal or regulatory status on the firms who own them or the sites themselves as per the Authorities rules.

It was this firm’s intention to bring the trading names in line with the firm’s financial promotions policy as per our first letter of 7th November, but on consideration of the RPBs guidance it appears to us this is not necessary.

53. A copy of the form of commercial agreement concluded between IPs and Promethean was attached to the letter. Relevant provisions of the form of agreement include the following:

2.2 Under this Agreement, [Promethean] authorises the Firm to:

2.2.1 Make use of the trading names listed below, so that it may continue to advertise to consumers for the purposes of debt advice as defined by the act, as it pertains to insolvency practitioners’ exemption.

XXXXXXXXXXXXXXXXXXXX

2.3 The Firm undertakes that it shall not during the appointment:

2.3.1 Provide or offer to provide any form of Debt Counselling, Credit Broking advice or any other regulated activity as defined by the act to consumers. Unless advice is given in reasonable contemplation of an Insolvency Appointment, as the firm is a licensed insolvency practice.

Pursuant to the following handbook guidance: Paragraph 52 of the Schedule to the Financial Services and Markets Act 2000 (Exemption) Order 2001, as amended by The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013 Article 3(1) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, as amended by The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2014

2.3.2 Pledge the credit of [Promethean], sign documents on behalf of [Promethean] or otherwise purport to represent or commit [Promethean];

2.3.3 Without the prior written approval of [Promethean] issue any Debt Counselling & Credit Broking Advertisement or financial promotion, or other document relating to [Promethean], its services or its appointed representatives;

2.3.4 Give cover on behalf of the [Promethean] for any risk;

[...]

3.1 Under this Agreement, the Firm agrees:

3.1.1 To conduct the Business in accordance with the terms of this Agreement;

3.1.2 That it and its Staff shall comply to [Promethean's] satisfaction with the Procedures;

3.1.3 That it shall and shall procure that its Staff shall at all times, comply with the Rules, the Act and any applicable legislation or regulations or codes of practice insofar as they relate to the carrying out of its obligations under this Agreement (together, the "Legislation and Regulations");

[...]

Business stationery and advertising

3.2 The Firm agrees to comply with the FCA Rules in relation to the disclosures required to be made on all stationery which it uses in conducting the Business on behalf of [Promethean].

3.3 The Firm agrees to use the stationery, notices, advertisements or other similar material supplied and/or approved by [Promethean] and not to display or use any such material in connection with the Business which has not been so approved.<sup>4</sup>

54. Mr McGruer's evidence was that he did not believe that Promethean had conducted a review of its financial promotions or those of its ARs, or otherwise conduct a review of its policies and procedures governing financial promotions following the Authority's request of 7 November 2022 (although Promethean made some changes to an AR's website that the Authority had specifically identified, he believed that Promethean had not conducted a more holistic assessment of its financial promotions or those of its ARs). Mr Maddison was cross-examined on this point, and his evidence was that as Google was a dynamic platform, it was difficult to review the Google advertisements themselves. If an IP was running several hundred advertisements, it was not possible to see them all. He did check the Google advertisements if they appeared when he undertook his review, and he checked the home pages of the websites listed as Promethean trading names. Mr Maddison's view was that the IPs were outside the perimeter of regulation by the Authority, as they were regulated by the RPBs, and were either exempt or excluded from regulation by the Authority.

55. As it appeared to the Authority that Promethean had not conducted a proper review of its (and its ARs) financial promotions, nor conducted a review of its policies and procedures, and its actions had not addressed all of the issues of concern, the Authority wrote again to Promethean on 15 December 2022 with a second proposal for a VREQ. The letter reaffirmed that where a registered trading name is used in communication with a customer, Promethean

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<sup>4</sup> Mr Maddison's evidence was that the arrangements were later changed to provide for Promethean to be paid a fixed monthly fee by the IP – however copies of the updated contract were not produced in evidence.

had to ensure that the communication was clear, fair, and not misleading. Further, the Authority was concerned that Promethean's use of trading names was intended to allow unregulated entities to circumvent Google's advertising policy. The letter noted that Promethean had registered a further 15 trading names since the 7 November letter, despite being aware that the Authority had serious concerns about this practice. The proposed VREQ set out the following requirements:

### **Requirements**

1. The Firm must remove all non-genuine trading names registered with the Authority that are separate legal entities and not reflective of the business activities of Promethean Finance Limited within 48 hours of the Requirements coming into force;
2. The Firm must cease all regulated activity until doing so, without the prior written consent of the Authority;
3. The Firm must not use any new trading names without the prior written consent of the Authority;
4. The Firm must provide data confirming the number of referrals generated from all registered trading names (including previous registration) to the Firm effective 10/03/22 to date within 5 days of the Requirements coming into force.

56. On 20 December 2022, Promethean wrote to the Authority declining to enter into the second proposed VREQ on the grounds that the trading names were exempt from authorisation, and the financial promotions "also fall under the exemptions in the FSMA Financial Promotions Order 2005, Part 6 Article 55B by virtue of FSMA Regulated Activities Order 2001 Part 2 Chapter 17 Article 72H". Further, trading names are not separate legal entities. Promethean suggested that the Authority's concerns could be addressed by including the following statement on websites to clarify which activities are regulated and which are not:

when making an enquiry on this website, if your debt level after further investigation which may include a phone call, is less than £6,000, we may transfer you to Promethean Finance Limited, which is our preferred FCA regulated partner to continue your enquiry, with your consent.

57. Promethean stated it thought there was actually no need for such a statement because it considered that the IPs are "exempt", and that the listing of the trading names on the Register did not imply regulatory status. Further, there was no risk of consumer harm because the trading names "cannot be found by the consumer on a layman's search of the internet". Promethean also stated that it believed the Authority was acting unreasonably.

58. Between 15 December 2022 and 21 March 2023, Promethean registered a further 19 trading names, which the Authority considered to be further websites operated by IPs and not by Promethean. By 21 March 2023, Promethean had 32 trading names registered, of which 30 were the active website domain names of IPs, and two were genuine trading names. In the course of reviews of Promethean's financial promotions and communications conducted by the Authority in January 2023 and March 2023, the Authority identified further concerns of the kind identified in the 7 November 2022 letter. The following examples were given in Mr McGruer's witness statement:

- (1) Failing to signpost to free impartial advice in one instance ([www.debtadvicenow.co.uk](http://www.debtadvicenow.co.uk)) as well as lack of prominence when doing so in another instance and using an outdated referral to the previous Money Advice Service;

- (2) Making unsubstantiated claims of “up to 81% write off of unsecured debt with government legislation” and “write off up to 75% of unsecured debts” (contrary to CONC 3.3.10G(6));
- (3) Stating advantages of IVAs as “no upfront fees” (a breach of CONC 3.3.1R(1));
- (4) Lacking balance when promoting the benefits of IVAs and Trust Deeds without stating the relevant disadvantages (a breach of CONC 3.9.3R(14));
- (5) Falsely stating the name of an AR as a trading name of Promethean, as opposed to the AR (a breach of CONC 3.3.1R(1); and
- (6) Stating the entity issuing the promotion is an AR, when it is in fact registered as a trading name of Promethean (a breach of CONC 3.3.1R(1)).

Screenshots of these websites were included in the Hearing Bundle.

59. Mr McGruer authorised the issue of the First Supervisory Notice on 11 April 2023 under s55L FSMA. A bundle of evidence was also served on Promethean. Mr McGruer’s grounds for imposing the requirements were to advance the Authority’s operational objective of securing an appropriate degree of protection for consumers (section 55L(2)(c) and section 1B(3)(a) FSMA), and because it appeared to him that Promethean was failing, or was likely to fail, to satisfy the threshold conditions in Schedule 6, FSMA (section 55L(2)(a)). In particular, it appeared to him that Promethean was failing, or likely to fail, the suitability threshold condition that it must be a fit and proper person (paragraph 2E of Schedule 6). Mr McGruer also considered that Promethean was failing to comply with the requirements of the PRIN sourcebook, in particular Principle 6 (customer interests) and Principle 7 (communications with clients), as well as other rules and guidance contained in the Authority’s Handbook and guidance published on the Authority’s website. He considered the matter sufficiently urgent that the requirements should be imposed with immediate effect, and with specified dates. The fact that the IPs might be “exempt” under article 55B, Financial Services and Markets Act 2000 (Financial Promotion) Order or article 72H, Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 was irrelevant to the question of whether IPs’ websites registered as trading names were indeed genuine trading names of the Promethean.

60. In summary, Mr McGruer’s reasons for imposing the requirements set out in the First Supervisory Notice were that (a) the trading names registered by Promethean on the Register were not owned, controlled, or used in the carrying out of debt advice by Promethean, and (b) Promethean’s ARs had issued financial promotions which appeared to contravene the Authority’s rules and guidance. Mr McGruer was concerned that the registration of NGTNs could result in consumers being misled into believing that they are dealing with a business authorised and regulated by the Authority (and benefiting from the protections available to customers of authorised firms), when in fact they are dealing with an entity which is not regulated under FSMA. As regards Promethean’s ARs, the Authority had identified breaches of its rules relating to financial promotions, which Promethean had failed to identify or remedy. Mr McGruer was concerned that that the breach of the Authority’s rules and guidance may result in consumer harm – for example as a result of consumers entering into transactions which they would not have otherwise entered into. In Mr McGruer’s opinion, Promethean had failed to address the Authority’s concerns, despite the Authority having communicated their significance and the risk of harm to consumers on a number of occasions.

61. The requirements set out in the First Supervisory Notice are virtually identical to those in the Second Supervisory Notice. As it is the Second Supervisory Notice (and not the First)

that is the subject of this Reference, we have not set out all the terms of the First Notice in this decision.

62. Requirement 1 of the First Supervisory Notice required Promethean to remove all NGTNs from the Register by 4.30pm on 12 April 2023. As it had not done so, on 18 April 2023 Mr McGruer decided that the NGTNs should be removed from the Register in order to prevent further risk of consumer harm. In consequence, the Register still included the NGTNs but showed that the names were no longer in use. According to Mr McGruer, this is consistent with how they would be displayed on the Register had Promethean complied with Requirement 1. The Authority notified Promethean that it had taken this action on 18 April 2023.

63. The deadline for making representations in respect of the First Supervisory Notice was 25 April 2023. As no such representations had been received, the Authority wrote to Promethean on 28 April 2023 noting that Promethean was in breach of the requirements – and potentially, as a consequence – of the Threshold Conditions.

64. The First Supervisory Notice was referred to the Tribunal by Promethean on 5 May 2023, and the reference included an application to suspend its effect.

65. Mr McGruer granted Promethean an extension of time for the submission of representations, and Promethean submitted written representations to the Authority on 18 May 2023. In these representations Promethean:

- (a) challenged the imposition of Requirements 1, 2, 9, 10 and 11;
- (b) confirmed that it was not in fact challenging Requirements 3 to 7, but was requesting an extension of time for compliance with these Requirements (without stating how long it needed in order to comply); and
- (c) stated that it had sought clarity from the Authority in respect of Requirement 8, but that all records and books as a matter of course are stored in the UK.

66. The Authority's Supervision Division considered the representations and made recommendations to Mr McGruer. He decided not to amend any of the requirements, and issued the Second Supervisory Notice on virtually identical terms to the First Supervisory Notice. Mr McGruer considered that the imposition of Requirements continued to be desirable in order to secure an appropriate degree of protection for consumers, or, alternatively, that Promethean was continuing to fail, or continuing to be likely to fail, to satisfy the suitability threshold condition. In addition, he considered that events since the First Supervisory Notice was issued indicated a continuing failure by Promethean to address the concerns that had been raised by the Supervision Division.

67. The Second Supervisory Notice was issued on 1 June 2023. The Notice was referred to the Tribunal by Promethean on 15 June 2023 and the reference included an application to suspend its effect. Promethean later withdrew the suspension application.

68. Correspondence took place between Promethean and the Authority following the issue of the Second Supervisory Notice concerning compliance with the various requirements, including the terms of the notice to appear on Promethean's website under Requirement 12 and the notifications to be made to customers under Requirement 13.

69. The Authority was concerned about the effect on consumers of the length of time during which Promethean had not complied with notification provisions contained in Requirements 9 and 10, and that some of the IPs' websites continued to state that they were trading names of Promethean despite having been removed from the Register on 18 April

2023. The Authority was concerned that consumers may be misled that they were dealing with an authorised firm. In addition, the Authority considered that the IPs may be in breach of s24 FSMA, which makes it an offence for an unauthorised person to describe themselves as, or hold themselves out in a manner which indicates that they are, authorised. On 9 June 2023, the Authority informed Promethean that it intended to publish a consumer warning in relation to the NGTNs, and that it would also notify the operators of the relevant NGTNs that it is a potential breach of s24 FSMA to purport to be a trading name of an authorised firm where that is no longer the case. Promethean objected to the Authority's proposed course of conduct. But on 15 June 2023, the Authority published a consumer warning stating that it had removed the NGTNs from the Register. The text of the warning is as follows:

We have removed several trading names relating to Promethean Finance Limited (Promethean) from the Financial Services Register. We explain what this means for you and what you should do next.

Between March 2022 and March 2023, Promethean registered several trading names which were listed on the Financial Services Register but which they either did not own or control. The third-party firms who owned or controlled these trading names were not authorised to carry out regulated activities. Promethean currently has permissions for debt counselling, debt adjusting and credit broking.

We do not consider these websites to be genuine trading names of Promethean. If you have referred to these websites and used the third-party firms for debt solutions, you are highly unlikely to have access to the Financial Ombudsman Service if you want to complain.

On 18 April 2023, we removed the following active trading names of Promethean from the Financial Services Register:

[list of 30 website domain names omitted]

Promethean has referred the matter to the Upper Tribunal, which will consider representations from Promethean and us. The Tribunal will either dismiss Promethean's reference or ask us to reconsider our decision.

Promethean Finance Limited has also published a statement [hotlink to statement on Promethean's website].

What you should do next

If you have used, or are intending to use, one of these websites to obtain debt solutions or other services, you should contact the third-party firms directly first to check if they are authorised by us.

You can also check our Financial Services Register to make sure a firm has the relevant permission for the service it is offering you. We also have a Warning List of firms to avoid.

If you need more help, please contact us by phone on:

0800 111 6768 (freephone)

0300 500 8082 (from the UK)

+44 207 066 1000 (from abroad)

Or visit our contact us page for more information.

70. The warning included a statement that Promethean had referred this matter to the Upper Tribunal, which would consider representations from the Authority and Promethean, and either dismiss the reference or ask the Authority to reconsider its decision. On 16 June the

Authority wrote to the various IPs that it had identified as continuing to state on their websites that they were trading names of Promethean, drawing their attention to the removal of the trading names from the Register, and referring to s24 FSMA. Further letters were sent in some cases on 7 and 10 July 2024. On 16 June 2024, the Authority wrote to one of the NGTNs which was continuing to state that it was an AR of Promethean, when it had ceased to be so on 31 May 2023.

71. It is not disputed, and we find that:

(1) at all material times, the IPs' websites recorded as NGTNs remained under the control of the IPs, and not of Promethean.

(2) as at 21 March 2023, Promethean had registered 32 active trading names on the Register. Two of the trading names were used by Promethean itself. 30 of the trading names were NGTNs, namely active website names of the IPs. There were a further 21 trading names registered by Promethean between March 2022 and 21 March 2023 which were no longer active as at 21 March 2023. These were also NGTNs. Some of the NGTNs were included on the Register for 24 hours before being removed by Promethean.

(3) as at the date of the Second Supervisory Notice (1 June 2023), despite having been under a legal obligation to comply with the requirements that took immediate effect on 11 April 2023 under the terms of both the First and Second Supervisory Notices, Promethean had failed to comply with any of the requirements, other than partial compliance with Requirement 8 (to secure books and records).

(4) As Promethean had not removed the NGTNs in accordance with Requirement 1 of the First and Second Supervisory Notices, the Authority did so itself.

(5) Promethean eventually complied with Requirements 3, 9, 10 and 11 between 12 and 14 June 2023. Promethean has placed a notice on its website and issued a notice to consumers in a form agreed with the Authority, and has provided the Authority with the information and confirmations as required by requirements 9 to 11 – although it only complied with these requirements after the deadline imposed by the Requirements. Promethean has provided the information and confirmations required by requirement 3 and has complied in part with requirement 8.

(6) As at the dates of the hearing of the reference, Promethean has not complied with requirements 4 to 7, notwithstanding that it withdrew its application to suspend the Second Supervisory Notice and is under an obligation to comply with the First and Second Supervisory Notices.

#### **THE TRIBUNAL'S JURISDICTION**

72. The Authority's decision to impose requirements under s55L may be referred to the Tribunal pursuant to s133 FSMA.

73. In resolving any issues, the burden of proof lies on the Authority, and is to the usual civil standard (balance of probabilities).

74. There is a distinction between the powers of the Tribunal on what is described in s133 as a "disciplinary reference" and other references. In relation to non-disciplinary references (such as this one), the powers of the Tribunal are set out in ss133(6) and (6A) as follows:

(6) [...] the Tribunal must determine the reference or appeal by either—

(a) dismissing it; or

(b) remitting the matter to the decision-maker with a direction to reconsider and reach a decision in accordance with the findings of the Tribunal.

(6A) The findings mentioned in subsection (6)(b) are limited to findings as to—

(a) issues of fact or law;

(b) the matters to be, or not to be, taken into account in making the decision; and

(c) the procedural or other steps to be taken in connection with the making of the decision.

75. The decision-maker for the purposes of s133(6)(b) is the Authority (acting by Mr McGruer).

76. The powers of the Tribunal in relation to non-disciplinary references are supervisory. The law relating to supervisory references was described by this Tribunal in its decision in *Markou v FCA* [2023] UKUT 101 (TCC):

61. The Tribunal in *Hussein v FCA* [2018] UKUT 0186 (TCC) described the Tribunal’s jurisdiction as “a supervisory rather than a full jurisdiction; in that unless the Tribunal believes the reference to have no merit and therefore dismisses it, its powers are limited to remitting the matter to the Authority with a direction to reconsider its decision in accordance with the findings of the Tribunal.”

62. Unless the Tribunal believes the matter to have no merit and is dismissed, its powers are limited to remitting the matter to the Authority with a direction to reconsider their decisions in accordance with the findings of the Tribunal: *Carrimjee v FCA* [2016] UKUT 0447 (TCC) (“*Carrimjee 2016*”) at [39] and [40].

38. *If, having reviewed all the evidence and the factors taken into account by the Authority in making its decision, and having made findings of fact in relation to that evidence and such other findings of law that are relevant, the Tribunal concludes that the decision to prohibit is one that is reasonably open to the Authority then the correct course is to dismiss the reference.*

39. *Alternatively, if the Tribunal is not satisfied that in the light of its findings that the decision is one that in all the circumstances is within the range of reasonable decisions open to the Authority, the correct course is to remit the matter with a direction to reconsider the decision in the light of those findings. For example, that course would also be necessary were the Tribunal to make findings of fact that were clearly at variance with the findings made by the Authority and which formed the basis of its decision. That course would also be necessary had there been a change of circumstance regarding the applicant which indicated that the original findings made on which the decision was based, for example as to his competence to undertake particular activities, had been overtaken by further developments, such as new evidence which clearly demonstrated the applicant’s proficiency in relation to the relevant matters. Such a course would not usurp the Authority’s role in making the overall assessment as to fitness and propriety but would ensure that it reconsidered its decision on a fully informed basis. In our view such a course is consistent with the policy referred to at [31] and [32] above as it*



leaves it to the Authority to make a judgment as to whether a prohibition order is appropriate.

[Emphasis Added]

63. The effect of the above, is that the Upper Tribunal must dismiss the Reference unless it makes findings of fact and/or law which lead to a conclusion that the Decision (whether the prohibition order or withdrawal of approval) was not one that was reasonably open to the Authority.

64. Even in the case where the Tribunal has not accepted all of the factors that led the Authority to conclude that a prohibition order (or withdrawal of approval) was appropriate and it might therefore be said that the Authority has taken into account irrelevant considerations in deciding whether to impose a prohibition order, it would not be appropriate to remit the decision to the Authority for further consideration where the seriousness of the matters which the Tribunal has found would lead inevitably to the Authority reaching the same decision were that course to be followed: *Palmer v FCA* [2017] UKUT 313 (TCC) at [270].

65. Therefore, even if the Tribunal finds flaws in the Authority's decision-making process, for example by making findings of fact which contradict or are inconsistent with the findings on which the Authority based its decision, it should not remit the Reference if it is of the view that despite such failings, it is inevitable that if the matter were remitted, the Authority would come to the same conclusion.

77. It follows that whilst we conduct a full rehearing of the issues, we can only determine the reference by either dismissing it or by referring it to the Authority for reconsideration. We have no power to determine what action the Authority ought to have taken.

78. We must dismiss the reference unless we make findings which lead us to the conclusion that the decision reached by the Authority was one that was not reasonably open to it.

79. Even if we decide that the Authority made an error in reaching its decision, it would not be appropriate to remit the reference to the Authority for further consideration if our overall findings meant that it was inevitable that the Authority would make the same decision.

#### **SUBMISSIONS**

80. We note that there was a degree of confusion around the use of the phrase "non-genuine" by the Authority in relation to the trading names included on the Register. Some of the confusion relates to the fact that the Authority only first appreciated that the NGTNs were not trading names of Promethean, but of independent IPs, in consequence of Promethean's letter of 14 November 2022. In particular there was confusion around the use of the term "non-genuine trading names", as the names on the Register were genuine trading names used by the IPs. However, we find that the use of the term "non genuine" by the Authority was rather to the fact that the relevant websites domain names recorded on the Register were not *bone fide* trading names used by Promethean itself.

81. Mr Fell submitted that the Authority has two areas of concern. The first is the inclusion of NGTNs on the Register. The second is the use of non-compliant financial promotions by Promethean's ARs.

82. As regards the NGTNs, the Authority's case is that Promethean was adding trading names to the Register that were not genuine trading names used by Promethean. They were in fact website domain names used by independent third-party IPs. This compromised the purpose of the Register under s347(1) FSMA as a user of the Register would be under the

impression that these NGTNs were trading names used by an authorised firm. This could result in consumers:

- (1) failing to appreciate that a person they are receiving promotions from (namely, the IP) is outside the regulatory perimeter under FSMA;
- (2) receiving and acting on financial promotions and other communications which do not comply with the Authority's rules and principles;
- (3) being exposed to business practices of a firm which is failing to take proper steps to ensure it has adequate systems, controls policies and procedures to ensure compliance in this regard; and
- (4) incorrectly assuming that they would receive the same protections when dealing with one of the IPs as would be the case if they were dealing with Promethean.

This gave rise to a risk that a consumer would make a decision that he would not otherwise have made. These risks are heightened by the fact that many of the consumers of the services provided by the IPs and Promethean are likely to be vulnerable by reason of heavy indebtedness, low income and/or limited financial understanding.

83. The inclusion of the IPs' websites as trading names of Promethean on the Register (as well as any such description on the website) may be in breach of s24 FSMA. The Authority submitted that the use of NGTNs was in breach of principles 6 and 7 of PRIN 2.1.1R and of GEN 4.5.6G. We were also referred to the Authority's guidance on the use of trading names (see [16] above).

84. As regards the non-compliant financial promotions, the breaches were set out in section C of the Authority's letter of 7 November 2022. Mr Fell conceded that the breaches might be regarded as technical in nature, but the contraventions were material, and provided a backdrop to the Authority's actions.

85. Mr Fell referred to the complaints received by the Authority from the ASA. Whilst these might have been the origin of the Authority's concerns, they were not the basis of the Authority's case. The issue before the Tribunal is the use of the NGTNs and the problematic content of the NGTN websites.

86. Mr Fell submitted that it reasonably appeared to the Authority that Promethean does not meet the suitability threshold condition, namely that it "must be a fit and proper person having regard to all the circumstances" including "the need to ensure that [its] affairs are conducted in an appropriate manner, having regard in particular to the interests of consumers". Further, it reasonably appears to the Authority that Promethean's actions undermine the consumer protection objective.

87. In consequence Mr Fell submits that the powers under s55L FSMA are engaged, and the requirements imposed by the Second Supervisory Notice are within the range of reasonable regulatory/supervisory judgments that the Authority could make in response to the circumstances. He submitted that it was highly proportionate (and therefore reasonable) for the Authority to require its written permission before Promethean enrolled new trading names on the Register, and for the Authority to require Promethean to review its financial promotions and systems, and to report back to the Authority.

88. Mr Maddison's first submission related to the prohibition in s21 FSMA to non-authorised persons making financial promotions. Mr Maddison submitted that IPs benefitted from the exemptions in art 72H, Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) ("RAO") and art 55B, FPO. It therefore followed that

the Google advertisements placed by the IPs and the IPs' websites did not breach s21 FSMA (or any other law).

89. Secondly, the NGTNs registered on the Register are not legal entities, but rather are website domain names. And because the NGTNs are not legal entities, the inclusion of these names on the Register does not breach the Authority's guidance on trading names, and there can be no implication for consumers using the websites that they are dealing with authorised firms. Further, the Authority is using its guidance to formulate a breach of regulatory rules where no such breach has occurred.

90. Thirdly, Mr Maddison submitted that the Authority acted in breach of the human rights of Promethean. The issue of the Second Supervisory Notice and the publication of the consumer warning was disproportionate and unfair and gave rise to financial damage to Promethean. Mr Maddison submitted that the Authority did not appreciate that Google's policy allowed IPs to benefit from someone else's authorised status. Promethean had contracts with IPs to provide a service to provide trading names on the Register, and the IPs agreed to include regulatory language on their website.

91. Further, it was unfair that the Authority took nearly four months to respond to Promethean between Promethean's response of 20 December 2022 to the Authority's second proposal for VREQ, and the issue of the First Supervisory Notice on 11 April 2023. It is not reasonable for a firm to have to wait for this length of time if (as the Authority alleges) the issues are so serious.

92. Mr Maddison referred us to Promethean's rights under Article 1 of Protocol 1 ("A1P1") of the European Convention on Human Rights. A1P1 provides as follows

**Protection of property**

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

93. Mr Maddison submits that that the right to carry out an economic activity is a "possession" for the purposes of A1P1, and referred us to the decisions of the European Court of Human Rights and of the English Courts, including *R (oao Malik) v Waltham Forest NHS PCT* [2007] EWCA Civ 265, *Tre Traktor Aktiebolag v. Sweden* (App. no. 10873/84) [1989] ECHR 10873/84, and *O'Sullivan McCarthy Mussel Development Ltd v Ireland* (Application No 44460/16) (2018) 68 EHRR 509.

94. He submits that the publication of the consumer warning by the Authority gives rise to breaches of Article 6 and of A1P1. By publishing the consumer warning, the Authority has damaged Promethean's goodwill and reputation – especially as the Authority's guidance is not law, and it is not reasonably foreseeable that breach of the guidance gives rise to a breach of rules or law. He submits that the effect of the notice was to publish the Authority's opinion on the genuineness of the NGTNs, and by publishing that opinion, Promethean's reference to this Tribunal was prejudiced.

95. Mr Maddison submits that the Authority's procedures are not compliant with Article 6 of the Convention (namely the right to a fair trial), as there are no safeguards against

arbitrariness on the part of the Authority – especially as regards alleged breaches of guidance, which the Authority can use to allege a breach of rules.

96. Mr Fell submitted that the Authority's procedures and the regime prescribed by FSMA does not breach any of Promethean's rights. As regards Article 6, Promethean has a right to refer the First and Second Supervisory Notices to this Tribunal – which right it has exercised. And the reference to this Tribunal is Article 6 compliant.

97. As regards A1P1, Mr Fell submitted that there had been no interference with Promethean's possessions, and in any event the actions taken by the Authority were proportionate. He referred us to the decision of the Court of Appeal in *Batra v FCA* [2015] EWCA Civ 394 in which one of the grounds for permission to appeal was that proper consideration had not been given to the Appellant's A1P1 rights. Vos LJ, refusing permission said:

**Ground 8: was proper consideration given to the appellant's A1P1 rights?**

[17] This is a makeweight which has no foundation. It was not argued before the Upper Tribunal and cannot be raised before the Court of Appeal since it has no foundation whatever.

98. Mr Fell submits that the right to future income is not a possession for A1P1 purposes (see *R (oao Bloomsbury Institute) v Office for Students* [2020] EWHC 580 (Admin)). In *Bloomsbury*, the applicant accepted that neither registration nor expected future income are possessions for A1P1 purposes. However marketable goodwill is a possession, and that a decision which causes a loss of marketable goodwill is an "interference" for the purposes of A1P1. Cavanagh J held while it was not easy to reconcile the domestic authorities with the ECtHR authorities, it was bound (as are we) by the authorities of the Court of Appeal and the guidance given by Lord Bingham in *Countryside Alliance* [2007] UKHL 52 that registration does not have an impact on marketable goodwill:

325. I have dealt with this at some length. However, in my view it is clear that the decision not to register Bloomsbury was not an interference with Bloomsbury's possession for the purposes of A1/P1 because:

(1) Registration cannot be sold or transferred to a new provider, if a new provider were to buy or take over Bloomsbury's business. This means that any loss of future earnings resulting from the decision not to register did not result in a diminution of marketable goodwill, for A1/P1 purposes: the future earnings that are dependent on registration are not part of the marketable goodwill; and

(2) There is a second and free-standing reason why future earnings from future students do not count as a possession for A1/P1 purposes. This is because the Court of Appeal in *Breyer* made clear that existing enforceable contracts with current students are part of the goodwill for this purpose, but potential future contracts with prospective students are not. The decision not to register Bloomsbury only affected prospective students, not current students.

99. Mr Fell submits that even if A1P1 is engaged, the actions of the Authority are proportionate, and are within the scope of paragraph 2 which allow the UK to enforce laws to control the use of property in accordance with the general interest. He referred us to the decision of the Supreme Court in *Bank Mellat v HM Treasury* [2013] UKSC 39 at [20] where the Court set out the following four requirements in order to determine whether the action of a public authority is rational and proportionate:

- (i) whether its objective is sufficiently important to justify the limitation of a fundamental right;
- (ii) whether it is rationally connected to the objective;
- (iii) whether a less intrusive measure could have been used; and
- (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them.

100. Mr Fell submits that the purpose of the consumer warning was to notify consumers about the reasons for the removal of the NGTNs from the Register, as otherwise they may not understand that these names are not (and have never been) trading names of Promethean itself. He submits that (i) the objectives of the Authority are important – namely the protection of consumers; (ii) it is self-evident that the Authority’s actions are rationally connected with the objectives; (iii) whether there were other less intrusive measures that could have been used by the Authority involves a value judgment, and he submits that the measures taken are “not that intrusive”; and (iv) overall the Authority has struck a fair balance.

101. In this context, Mr Fell referred us to the decision of the House of Lords in *Wilson v First County Trust (No 2)* [2004] AC 816 which addressed, inter alia, whether A1P1 was engaged when the rights of a lender to enforce recovery of a debt were limited by the Consumer Credit Act 1974. Lord Scott said:

169. Second, the purpose or policy underlying the statutory bar on enforceability of a regulated loan agreement where no document containing all the prescribed terms has been signed by the debtor cannot, in my opinion, be categorised as disproportionate. The need to control moneylending transactions is as old as our civilization and I know of no legal system that has not imposed such controls. Indeed in some legal systems any lending of money on interest terms is barred. In this country there were strict statutory controls under the Moneylenders Acts 1900 to 1927. The 1974 Act represented a relaxation of the rigidity of the controls. The discretion allowed to the courts by section 127(1) of the Act was not to be found in its predecessors (see section 6 of the 1927 Act ). These controls recognise the vulnerability of those members of the public who resort to pawnbrokers and moneylenders when in dire need of funds to make ends meet. They are open to exploitation; their bargaining power is minimal; their understanding of legal procedures and remedies is likely to be sparse. They need protection and part of the protection is the insistence by the Act that the "prescribed terms", representing the important terms of the loan transaction, must be set out in a document to be signed by the debtor if the repayment of the loan is to be enforceable. I do not accept that this protection, harshly though it may in some cases bear upon lenders, is disproportionate.

170. In my opinion, even if the [Human Right Act 1998] were applicable to the loan transaction between FCT and Mrs Wilson there would have been no infringement of FCT's Convention rights.

Mr Fell submitted that *Wilson* demonstrated the importance of consumer protection as a matter of public policy, and that similar important concerns arise in this case.

102. Mr Fell noted that the supervisory notices took effect immediately (s55Y(4)(b) FSMA), and that when a supervisory notice takes effect, the Authority is required to publish such information about the matter to which the notice relates as it considers appropriate (s391(5) FSMA). However, the Authority did not immediately publish the contents of the supervisory notices, but instead negotiated with Promethean the terms of a notice that would appear on Promethean's website. To the extent that publication of the terms of the requirements is required under s391 FSMA, publication of references to those requirements cannot be unfair. In this context, Promethean applied to the Tribunal for the requirements to be suspended, but subsequently did not pursue that application.

103. Mr Fell submitted that it cannot be unfair for the Authority to publish a reference to the requirement in the supervisory notices for the trading names to be removed from the Register, and the fact that this requirement had been referred to the Tribunal. It was necessary that the movement of the IPs' trading names from the "active names" to the "previous names" sections of the Register be explained.

104. Fourthly, the allegations raised by the Authority are matters of opinion, and not of fact – and should be tested. Mr Maddison noted that neither Promethean nor the IPs had received any complaints from consumers in respect of the trading names listed on the Register. There was no evidence that there had been any consumer detriment.

105. Fifthly, Promethean's entry on the Register included a notice that not all of its activities were subject to authorisation by the FCA, and that consumer protections may not be available for the non-authorised activities. Consumers would therefore be aware that they might not be able to benefit from the consumer protection that is otherwise available to customers of authorised entities.

106. Sixthly, the October 2022 and February 2023 guidance issued by the Authority in respect of trading names was defective, as no consultation about the guidance had been carried out in accordance with s139A(5) FSMA. Mr Maddison notes that the guidance states that the addition of trading names to the Register has no legal effect, and relies on this in support of Promethean's position that the inclusion of the NGTN's does not give rise to any breach of FSMA.

107. Seventhly, the change in the commercial arrangements between Promethean and the IPs (moving from a referral model to a fixed monthly fee) affected the commercial relationship and regulatory requirements with the IPs.

108. Finally, the Authority's statement in paragraph 26 of their 7 November 2022 letter that the use of "org" domain names is limited to charities and not-for-profit organisations is wrong. Mr Fell's response is that the use of "org" domain names is not central to the Authority's case, and the use of the "org" domain can carry the connotation that a domain is linked with a philanthropic endeavour.

## **DISCUSSION**

109. We agree with the submissions of Mr Fell and find that the inclusion of NGTNs by Promethean in the Register is in breach of s24 FSMA. We accept Mr McGruer's evidence that there was a risk that consumers might be misled into believing that when they engaged with one of the websites listed as a NGTN, they would have the protections available to consumers dealing with authorised firms. We find that the use of NGTNs by Promethean was likely to give consumers the impression that the websites listed on the Register were those of an authorised firm and the risk that a consumer would make a decision that he would not otherwise have made. These risks are heightened by the fact that many of the consumers of the services provided by the IPs and Promethean are likely to be vulnerable by reason of

heavy indebtedness, low income and/or limited financial understanding. We find that this gives rise to a breach of principles 6 and 7 of PRIN 2.1.1R and of GEN 4.5.6G.

110. We find that the inclusion of the NGTNs in the Register by Promethean gives rise to a risk that Promethean is in breach of the threshold condition in paragraph 2E(c), Schedule 6, FSMA having regard to Promethean's need to ensure that its affairs are conducted in an appropriate manner having regard to the interests of consumers.

111. We find that Mr Maddison's submission that the NGTNs are not legal entities does not engage with the Authority's concern that the inclusion of the NGTNs may result in consumers being misled into believing that the registered websites belong to an authorised firm. We find that the trading name guidance was issued by the Authority to assist authorised firms to comply with their legal obligations. We agree with Mr Maddison that breach of the guidance does not of itself give rise to a breach of the requirements of FSMA or the Authority's rules. But the breach of the guidance may have the consequence of such a breach arising – in this case a possible breach of s24 FSMA by the owners of the NGTN websites, and a breach by Promethean of principles 6 and 7 of PRIN 2.1.1R and of GEN 4.5.6G (and the risk of a breach of the threshold condition in paragraph 2E(c), Schedule 6, FSMA). We find that the fact that the NGTNs are not the names of legal entities is irrelevant. We also consider that Mr Maddison's reference to the Authority's guidance that the registration of trading names has no legal effect is misplaced. When taken in context, it is clear that the reference to "legal effect" in the trading name guidance is to the regulated status of the person using the trading name – in other words registering a trading name of a third party does not cloak the third party with any regulated status.

112. We find that the activities of the IPs using the NGTNs is not covered by any exemption from regulation. We find that art 72H RAO and art 55B FPO are limited in scope, and do not provide a blanket exemption for all activities and financial promotions of regulated insolvency practitioners. The broad exemption applying to insolvency practitioners under paragraph 52 of Schedule 1 to the Financial Services and Markets Act 2000 (Exemption) Order 2001 (SI 2001/1201) was revoked in 2014 by article 8 of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2014 (SI 2014/366). Art 72H RAO provides that specific activities listed in the article carried on by insolvency practitioners are excluded from regulation. Art 55B FPO provides that restrictions on certain financial promotions made by insolvency practitioners do not apply to activities which would be regulated but for art 72H RAO. However, none of the activities listed in art 72H RAO are engaged in relation to the matters before us. It follows that, as none of the activities listed in art 72H RAO are engaged, the exemption in art 55B FPO (which is limited to the art 72H activities) cannot be engaged. We find that the "exemptions" in art 72H RAO and art 55B FPO do not apply to any of the activities of the IPs that are relevant to this reference. As none of the IPs are authorised representatives of Promethean, we find that they cannot benefit from Promethean's authorised status in relation to these financial promotions either.

113. We find that the fact that the Register entry includes a warning that not all of Promethean's activities are regulated is irrelevant. The inclusion of the NGTNs on the Register carries with it the implication that these websites form part of Promethean's regulated business. We note that Promethean itself had websites that it did not include on the Register as these related to its unregulated activities<sup>5</sup>. So, Promethean must have understood that the inclusion of the NGTN on the Register carried the implication that these trading names related to its regulated business. Indeed, the whole purpose of including the NGTNs on the Register was in order to satisfy Google that these website domains related to FCA authorised businesses.

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<sup>5</sup> see [129(b)]

114. We find that the fact that some of the NGTN websites included references and links to MoneyHelper’s website does not exonerate Promethean. This is because there were examples included in the evidence of other NGTN websites where there was no such reference, or the relevant link was to the “Money Advice Service” which was outdated. In the case of one of the websites to which Mr Maddison referred in his submissions, the evidence of Mr McGruer was that the reference to MoneyHelper was insufficiently prominent, as it was included in a footer in small print. Whilst Mr Maddison challenges Mr McGruer’s evidence about prominence, we prefer Mr McGruer’s evidence and find that the references were insufficiently prominent to meet the requirements of CONC 8.2.4R. In any event, the existence of links to MoneyHelper in some of the NGTN websites is not an answer to the Authority’s concern that consumers were at risk of being misled about the regulatory status of the NGTNs, nor to its other concerns about the NGTNs as set out by Mr McGruer in his evidence<sup>6</sup>.

115. We agree with Mr Fell, for the reasons given by him, that AIP1 is not engaged, and that the actions of the Authority do not give rise to any breach of Promethean’s rights under the European Convention (including Protocol 1). If Promethean sold its business (including its goodwill), the purchaser would not acquire Promethean’s authorisations under FSMA, but would need to apply afresh to the Authority for authorisation. It follows from *Bloomsbury*, and we find, that any loss of future earnings which somehow relate to Promethean’s authorised status do not deprive Promethean of its possessions under AIP1.

116. But even if the rights of Promethean under the Convention are engaged, we find that the actions of the Authority are reasonable and proportionate. The NGTNs included on the Register were not trading names used by Promethean itself and in that sense were not “genuine” (and that anyone reading the consumer warning would understand that is what the Authority meant). We accept Mr McGruer’s evidence that there was a risk that consumers might be misled into believing that when they engaged with one of the websites listed as a NGTN, they would have the protections available to consumers dealing with authorised firms. The fact that no complaints had been made to Promethean, to the IPs or to the Authority (otherwise than via the ASA) is irrelevant. Also irrelevant is the absence of any evidence of actual consumer detriment. We find that it is legitimate for the Authority to take actions intended to ensure that circumstances that might lead to breaches (and complaints) would not arise. We find that there was no breach of any duty owed to Promethean by the publication of the consumer warning, and that its publication did not prejudice Promethean’s case before us. We note that the Authority was under a duty to publish the requirements imposed on Promethean pursuant to s391(5) FSMA, and we find that it must follow that reference to Requirement 1 in the consumer warning cannot give rise to a breach of any duties the Authority might owe to Promethean and must be fair.

117. We find that the actions of the Authority are consistent with its consumer protection objective under s1C(1) FSMA.

118. We find that the process followed in respect of the Second Supervisory Notice complies with Promethean’s Article 6 rights. Promethean has the right to refer the Authority’s actions to this independent Tribunal – and by doing so, Promethean has taken advantage of its Article 6 rights.

119. We also find that Mr Maddison’s submissions about “opinions” are misplaced. We agree with Mr Fell that the operation of the scheme of regulation under FSMA involves the Authority having opinions – and this is apparent from the language used in s55L and s133 FSMA. The issue we need to address in respect of this reference is whether the opinions held

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<sup>6</sup> See [58]



by the Authority are “reasonable” and whether the decision reached by the Authority was one that was reasonably open to it.

120. We find that that no consultation is required under s139A(5) FSMA in respect of the trading names guidance. These provisions only apply in respect of guidance given in relation to “rules”. We agree with Mr Fell that as the guidance in respect of trading names was not given in respect of a specific rule or rules (such as the guidance included in the Handbook using the suffix “G”), it follows that there is no obligation on the Authority to undertake a consultation in accordance with s139A(5).

121. We find that any change in the commercial relationship between Promethean and the IPs has no relevance to any of the issues before us.

122. However, we find that it was unfair for the Authority to take nearly four months to respond to Promethean’s message of 20 December 2022 – the response being the issue of the First Supervisory Notice on 11 April 2023. We also find that the Authority were mistaken in their belief that “org” domains carry an implication that the owner is a charity or not-for-profit entity. We also agree with Mr Fell that the breaches by Promethean’s authorised representatives in respect of their financial promotions were technical (although we agree they are not immaterial).

123. Overall, we find that the Authority’s powers under s55L FSMA were engaged, and the requirements imposed by the Second Supervisory Notice were within the range of reasonable regulatory/supervisory judgments that the Authority could make in response to the circumstances. We agree with Mr Fell that it is reasonable and proportionate for the Authority to require the NGTNs to be removed from the Register, for its written permission to be obtained before Promethean enrolled new trading names on the Register, and for the Authority to require Promethean to review its financial promotions and systems, and to report back to the Authority.

124. We have to consider if we remitted the reference to the Authority whether, in the light of our other findings, it would be inevitable that the Authority would make the same decision. We find that none of the errors are central to the Authority’s case, and it follows, and we find, that it would be inevitable that the Authority would reach the same decision if we were to remit the reference to it. We therefore decline to remit the reference in respect of any of the errors.

125. In exercising a supervisory jurisdiction, we are required to dismiss the reference unless we make findings which lead us to the conclusion that the decision reached by the Authority was not one that was reasonably open to it. As we have found that the decision reached by the Authority was within the range of reasonable regulatory/supervisory judgments that the Authority could make, we must dismiss the reference.

### **Further observations**

126. We make some further observations.

127. First – the Tribunal has no jurisdiction to require the Authority to remove or amend the consumer warning. This was addressed by Judge Herrington in his decision released on 12 July 2023. The jurisdiction of the Tribunal is confined to the particular decisions referred to in the Financial Services and Markets Act 2000 which the legislation says may be referred to the Tribunal. The issue of a consumer warning is not a decision referred to in that legislation as being a decision that may be referred to the Tribunal, and we therefore have no jurisdiction to require the Authority to remove or amend it.

128. Secondly, Promethean made an application on 23 April 2024 for the admission of further evidence and submissions. The Authority filed its response on 7 May 2024, and Mr Maddison filed a reply on 13 May 2024. The new evidence was:

(a) screenshots from the Register. The Register now includes a warning that the Financial Ombudsman Service and the Financial Services Compensation Scheme are unlikely to consider complaints relating to the approval of financial promotions. These changes are consequential on amendments made in September 2023 to s21 FSMA which came into effect on 7 February 2024. We find that whether the Financial Ombudsman Service or the Financial Services Compensation Scheme are likely to consider complaints about authorisations of financial promotions is irrelevant to the issues before us, and the new regime post-dates the matters the Second Supervisory Notice addressed. In any event, there is nothing in the new regime that legitimises the registration of trading names that are not *bone fide* trading names used by the authorised firm itself.

(b) correspondence between the Authority and Promethean after the end of the hearing of this reference. The correspondence related to the ownership and content of a website that Promethean used for its unregulated activities. The website was not referred to in any of the correspondence leading up to the issue of the Second Supervisory Notice and was not included on the Register as a trading name of Promethean. We find that this correspondence has no bearing on any of the issues before us.

(c) documents relating to the Authority's recent consultation on whether it should make a public announcement when it opens a statutory enforcement investigation. The documents are the consultation paper (CP24/2) and a letter to the Authority from the House of Lords Financial Services Regulation Committee dated 18 April 2024. The Authority submits that its proposals to publicly announce the opening of enforcement investigations is not relevant to the Authority's separate practice of publishing of consumer warnings in appropriate cases. But in any event, we find that the Authority's proposals have no relevance to this reference. The Second Supervisory Notice is a supervisory notice, not an enforcement notice, and is issued following a different procedure.

129. We find that nothing in the new evidence is relevant to the issues before us. We therefore dismiss Promethean's application and decline to admit the new evidence.

#### CONCLUSIONS

130. We dismiss the reference.

**NICHOLAS ALEKSANDER  
DEPUTY UPPER TRIBUNAL JUDGE**

**Release date: 05 August 2024**

Amended on 5 August 2024 under Rule 42 to correct error referring to unconnected website and a typographical error.