

THIS WRITTEN DECISION HAS BEEN APPEALED TO THE IRISH FINANCIAL SERVICES APPEALS TRIBUNAL (IFSAT) AND, DEPENDING ON THE OUTCOME OF THE APPEAL TO IFSAT, IS ALSO SUBJECT TO CONFIRMATION BY THE HIGH COURT IN ACCORDANCE WITH SECTION 33AW OF THE CENTRAL BANK ACT 1942 (AS AMENDED)

An Inquiry pursuant to Part IIIC of the Central Bank Act 1942 (as amended) concerning Mr David Guinane

Written Decision

Mr Peter Hinchliffe

23 April 2025

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Note on Redactions

The Written Decision has been redacted, as follows, for the purposes of publication:

- Paragraph 7.127 and footnote 150 of the Written Decision contain redactions in accordance with the provisions of section 33BC(4)(b) of the Central Bank Act 1942, as amended.
- All other redactions throughout the Written Decision have been implemented for the purposes of protecting material over which PTSB asserts a claim of legal professional privilege. Certain of these redactions contain reference to legal advice that was available to PTSB and about which Mr Guinane received reports prior to 19 January 2009. Where that arises, it is noted in the side margin of the relevant paragraph, specifically at paragraphs 1.3(f), 6.15, 6.16, 7.1D, 7.32, 7.41, 7.55, 7.59, 9.1, 9.9, 9.62, 9.70, 9.71, 9.75 and Annex A to Appendix 1.

EXECUTIVE SUMMARY

INTRODUCTION

1. The Inquiry Member has prepared this Written Decision in accordance with section 33AQ(8) of the Central Bank Act 1942 (as amended), as it was in force during the Relevant Period, (the **1942 Act**) which provided as follows:

“(8) At the conclusion of an inquiry relating to the conduct of a person concerned in the management of a regulated financial service provider, the Bank shall notify the person of its decision. The decision must set out—

- (a) its finding as to whether or not the person is participating or has participated in the commission of the prescribed contravention to which the inquiry relates, and*
- (b) the grounds on which the finding is based, and*
- (c) if the Bank finds that the person is participating or has participated in the contravention, the sanctions (if any) imposed under this section in respect of the participation.”*

2. The Written Decision comprises:

- (a) this Executive Summary;
- (b) the Written Findings (as issued to Mr Guinane, Enforcement and PTSB on 8 November 2024) contained at **Part A** of this document; and
- (c) the Decision on Sanction (contained at **Part B** of this document).

3. This Executive Summary sets out the background to the Inquiry together with a brief overview of the Inquiry’s finding and the sanctions imposed by the Inquiry. The Inquiry’s finding and the reasons for same are included in the Written Findings at **Part A**. Full details of the sanctions imposed by the Inquiry and the reasons for same are included in the Decision on Sanction at **Part B**. The Executive Summary is a summary document only. The operative parts of the Written Decision are contained in Part A

(Written Findings) and Part B (Decision on Sanction). The Glossary at Appendix 5 applies to the Written Decision as a whole.

4. This Written Decision is an “appealable decision” for the purposes of Part VIIA of the 1942 Act. The Written Decision may be appealed to the Irish Financial Services Appeals Tribunal (**IFSAT**) in accordance with section 33AW of the 1942 Act, within 28 days of the date on which this Written Decision was notified to the Person Concerned or within such other time as IFSAT may allow.

BACKGROUND TO THE INQUIRY

5. In December 2018, the Enforcement Directorate of the Central Bank (**Enforcement**) commenced an investigation concerning Mr Guinane, and his alleged participation in an alleged breach by PTSB¹ of Chapter 1, General Principle 1 of the Consumer Protection Code 2006 (**2006 Code**). Enforcement suspected that PTSB had decided to only offer the original and more favourable tracker interest rate to those customers with a particular contract term (special condition 706 (**SC706**)) in their mortgage loan agreements if those customers specifically requested this lower interest rate, or queried or complained about the interest rate they were offered by PTSB.
6. The Central Bank’s investigation concluded that there were reasonable grounds for suspecting that the breach of Chapter 1, General principle 1 of the 2006 Code had been committed by PTSB and that Mr Guinane had participated in the commission of this suspected prescribed contravention (**SPC**) by PTSB. A Central Bank decision maker considered the Investigation Report and decided to refer the matter to the Regulatory Decisions Unit (**RDU**) in June 2021 for the purposes of convening an Inquiry under section 33AO of the 1942 Act, to determine whether or not Mr Guinane participated in the commission by PTSB of the SPC (the **Inquiry**).
7. It is relevant to note that on 30 May 2019, the Central Bank entered into a settlement agreement with PTSB in accordance with section 33AV of the 1942 Act in respect of a number of matters including the prescribed contravention that is the subject of this Inquiry. Under the settlement agreement the Central Bank reprimanded PTSB and imposed a financial penalty of €21million in respect of 42 regulatory contraventions.

¹ PTSB was the trading name of the banking division of Irish Life & Permanent Group Holdings plc (IL&P Group) during the period from 19 January 2009 to April 2010 (the **Relevant Period**) when the prescribed contravention occurred.

8. The Deputy Governor appointed Mr Peter Hinchliffe as the sole Inquiry Member (**Inquiry Member**) to conduct the Inquiry. On 9 November 2021, the Inquiry Member wrote to the legal representatives of PTSB and Mr Guinane, informing them of the Central Bank's decision to hold an inquiry under Part IIIC of the 1942 Act and providing the Notice of Inquiry.
9. The prescribed contravention which PTSB is suspected of having committed and in which the Central Bank suspects Mr Guinane of having participated, is set out in Annex A to the Notice of Inquiry, which is set out in full at Appendix 1² to the Written Findings located at Part A of this document. The purpose of the Inquiry was to decide whether the SPC by PTSB described in the Notice of Inquiry had been committed; whether Mr Guinane was a person concerned in the management of PTSB; and, if so, whether he participated in the prescribed contravention by PTSB.
10. The Notice of Inquiry outlined the allegation that Mr Guinane had participated in the SPC by PTSB in the following terms:

"Mr Guinane participated in PTSB's contravention of Chapter 1, General Principle 1 of the 2006 Code (a prescribed contravention) by signing off on the proposal made to him on 19 January 2009 i.e. the strategy to only give the more favourable rate back to those customers who specifically requested their original and lower interest rate, or queried or complained. At that time Mr Guinane was CEO of PTSB and a member of PTSB's Group Senior Management Team which reported directly to Irish Life & Permanent plc's CEO. The Central Bank thus suspects on reasonable grounds that David Guinane was, during the Relevant Period, a person concerned in the management of PTSB.

The Central Bank suspects on reasonable grounds that Mr Guinane made the decision on 19 January 2009 at a time when he was fully aware of the factual position i.e. that 400 customers would be immediately impacted, and

² See Appendix 1.

11. Following the issuing of the Notice of Inquiry, the Inquiry Member then convened a number of Inquiry Management Meetings (**IMMs**) to deal with essential procedural matters. A total of six IMMs took place from 9 February 2022 to 13 October 2023. The first four IMMs took place in private as these involved discussions of material subject to PTSB's claim of legal professional privilege. An oral hearing to address relevant legal issues was held on 11 and 12 October 2023. Disclosure of all relevant documents to Mr Guinane was completed by 22 November 2023. The hearing of oral evidence from witnesses was held in February/March 2024 over a period of 13 days. Witness evidence was heard in public but went into private session when required to do so under the Inquiry Privilege Protocol agreed with Mr Guinane, Enforcement and PTSB i.e. when discussing the substance and detail of matters in respect of which PTSB asserted its claim of legal professional privilege.

INQUIRY FINDINGS

12. The Inquiry Member prepared the Written Findings which set out his finding and the reasons for the finding together with certain background information and relevant documentation. The Written Findings were delivered to Mr Guinane, Enforcement and PTSB on 8 November 2024 and, as mentioned above, are contained at Part A of this document.
13. The Inquiry Member concluded on the balance of probabilities that:
 - (a) The prescribed contravention described in Annex A to the Notice of Inquiry that was suspected by the Central Bank in respect of PTSB, did occur and that PTSB committed the SPC as so described.
 - (b) Mr Guinane had participated, while being a person concerned in the management of IL&P Group, in the prescribed contravention by PTSB i.e. the breach of Chapter 1, General Principle 1 of the 2006 Code arising from PTSB's failure to ensure that in its dealings during the Relevant Period it acted fairly and in the best interests of those customers whose mortgage loan agreements contained SC706.

14. The Written Findings set out the basis on which the Inquiry Member concluded that Mr Guinane had “participated” in the prescribed contravention by PTSB. In summary, the Inquiry Member concluded that:
- (a) On 19 January 2009 Mr Guinane signed off on a proposal made to him on 16 January 2009 to give a more favourable tracker interest rate to which those customers with mortgage loan agreements containing SC706 were entitled only if they specifically requested this more favourable interest rate, or if they queried or complained about the tracker interest rate they had been offered by PTSB (the **Proposal**).
 - (b) Mr Guinane had sufficient knowledge to understand the issue that he was being asked to consider and decide and to assess the implications of the decision for PTSB and the relevant customers. However, the Proposal lacked clarity on what it was asking Mr Guinane to approve. This lack of clarity was evident from the text of the email dated 16 January 2009 setting out the Proposal.
 - (c) When Mr Guinane reviewed and responded to the Proposal he considered the “exposure” of PTSB before giving his approval, but he did not have any regard to the consequences for customers. This was despite him being in a position to understand the significance of the Proposal for customers and the risk that customers could be charged a higher interest rate than they were contractually obliged to pay. By signing off on the Proposal without taking due care over, or paying any attention to, the consequences for customers, despite being in a position to understand the risk that customers could be overcharged, and thereafter failing to take any steps to check that customers were being treated fairly and in their best interests, Mr Guinane’s conduct was culpable and blameworthy.
 - (d) In the particular circumstance of this Inquiry, participation under section 33AO(2) and section 33AQ(8) of the 1942 Act in a breach of the 2006 Code can arise from conduct that was carried out recklessly or negligently rather than intentionally. Mr Guinane’s lack of care, attention or diligence is indicative of negligence.

- (e) The Written Findings do not conclude that Mr Guinane was aware of the risk that PTSB could be in breach of its regulatory obligations to its customers if he signed off the Proposal. There was no input from other managers and professionals in PTSB that alerted him to this risk. He should have been aware of his regulatory obligations, but he was not. In this respect he was negligent.
- 15. The Inquiry's finding and the reasons for same are set out in full in the Written Findings at **Part A**.

DECISION ON SANCTION

- 16. As the Inquiry Member made a finding that Mr Guinane did participate in the prescribed contravention by PTSB, the Inquiry Member was required under section 33AQ(5) of the 1942 Act to consider what (if any) sanction or sanctions should be imposed on Mr Guinane. Accordingly, the Inquiry Member held a sanctions hearing in public on 29 January 2025. Mr Guinane and Enforcement provided written submissions on sanction to the Inquiry in advance of the sanctions hearing (as invited by the Inquiry Member). Mr Guinane and Enforcement made oral submissions to the Inquiry at the sanctions hearing.
- 17. The Inquiry Member has determined that the following sanctions be imposed on Mr Guinane as a consequence of his participation in the prescribed contravention by PTSB:
 - (a) a reprimand; and
 - (b) a monetary penalty of €80,000.
- 18. The Inquiry's Decision on Sanction and reasons for same are set out in full in the Decision on Sanction at **Part B**.

PART A

WRITTEN FINDINGS

**An Inquiry pursuant to Part IIIC of the Central Bank Act 1942 (as
amended) concerning Mr David Guinane**

Written Findings

Mr Peter Hinchliffe

8 November 2024

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CHAPTER 1¹

INTRODUCTION

- 1.1 This Inquiry is being held under Part IIIC of the Central Bank Act 1942 (as amended) (**1942 Act**) concerning the banking business currently operated by permanent tsb p.l.c. (**PTSB**) and Mr David Guinane (from time to time referred to as the **Person Concerned**).
- 1.2 A Notice of Inquiry² was issued by the Central Bank of Ireland (**Central Bank**) on 9 November 2021 to Mr Guinane and thereafter to PTSB.³ The Notice of Inquiry explained that the Central Bank had determined that it had reasonable grounds to suspect that PTSB had committed a prescribed contravention and that Mr Guinane had participated in the commission of a prescribed contravention by PTSB during the period from 19 January 2009 to April 2010 (the **Relevant Period**) whilst he was a person concerned in the management of PTSB.
- 1.3 The prescribed contravention which PTSB is suspected of having committed and which the Central Bank suspects Mr Guinane of having participated in is set out in Annex A to the Notice of Inquiry, which is set out in full at Appendix 1. For ease of understanding, the prescribed contravention can be summarised as follows:

The Central Bank suspects that:

- (a) From January 2009, PTSB understood that Special Condition 706 (a special condition in PTSB's tracker mortgage loan agreements relating to certain customers' enduring right to a tracker rate (**SC706**)) was ambiguous. It is also suspected that PTSB was advised that this issue could affect up to 10,000 customers, but was immediately applicable to 400 such customers who were at that time on a fixed rate and had SC706 in their mortgage loan agreements.

¹The [Glossary at Appendix 5](#) contains defined terms used throughout the Written Findings.

² [Notice of Inquiry, dated 9 November 2021, Appendix 1.](#)

³ Irish Permanent plc was authorised by the Central Bank on 21 September 1994 as a credit institution and a regulated financial services provider. In April 1999, Irish Permanent plc merged with Irish Life plc resulting in a combined banking and life assurance company named Irish Life & Permanent Group Holdings plc (**IL&P Group**). IL&P Group acquired the Trustee Savings Bank (**TSB**) in 2001. In 2002, IL&P Group's re-branded retail banking operation known as PTSB was launched following the integration of Irish Permanent and TSB bank operations. PTSB was the trading name of IL&P Group for banking purposes from 19 January 2009 to April 2010.

- (b) During the Relevant Period, PTSB decided to apply, and/or decided to continue to apply, an interest rate for tracker mortgage customers (who were coming to the end of a temporary fixed rate) that was less favourable to its customers, unless individual customers raised specific queries about the rate they were to be charged.
- (c) PTSB treated those customers who did not complain about the tracker rate that was applied after the fixed rate period, unfairly and contrary to their best interests, when compared to those that complained i.e. by only giving the more favourable tracker rate to those who complained or queried.
- (d) This approach was a breach of General Principle 1 of the Consumer Protection Code 2006⁴ (**2006 Code**) which required PTSB to:

“ensure that in all its dealings with customers and within the context of its authorisation it acts honestly, fairly and professionally in the best interests of its customers and the integrity of the market”.

- (e) Mr Guinane, in his role as Chief Executive Officer (**CEO**) of PTSB, was a person concerned in the management of PTSB, a regulated financial service provider.
- (f) Mr Guinane participated in PTSB’s breach of the 2006 Code by signing off on a proposal made to him on 19 January 2009 to only give the more favourable rate back to those customers who specifically requested their original and lower interest rate, or who queried or complained. He did so at a time when he was fully aware that 400 customers would be immediately impacted and [REDACTED]

The redacted content in paragraph 1.3(f) contains reference to legal advice that was available to PTSB and about which Mr Guinane received reports prior to 19 January 2009.

1.4 The purpose of the Inquiry is to decide: whether the suspected prescribed contravention (**SPC**) by PTSB described in the Notice of Inquiry has been committed; whether Mr Guinane was a person concerned in the management of PTSB; and, if so, whether he participated in the prescribed contravention by PTSB.

⁴ [Consumer Protection Code 2006 \(Core Book 5 Tab 4\)](#).

CHAPTER 2

STATUTORY BASIS FOR THE INQUIRY

ESTABLISHMENT OF THE INQUIRY

Relevant Legislation

- 2.1 Part IIIC of the 1942 Act provides that the Central Bank may hold an inquiry if it suspects on reasonable grounds that a regulated financial service provider (**RFSP**) is committing or has committed a prescribed contravention or that a person concerned in the management of a RFSP is participating or has participated in the commission of a prescribed contravention by the RFSP. The holding of an inquiry by the Central Bank is part of the Central Bank's Administrative Sanctions Procedure (**ASP**). The holding of an inquiry will be subsequent to an investigation by the Enforcement Directorate of the Central Bank (**Enforcement**) into the matter.

Investigation by Enforcement

- 2.2 In December 2018, the Central Bank decided to commence an investigation by way of an investigation letter dated 28 December 2018⁵ in respect of Mr Guinane. The letter concerned Mr Guinane's suspected participation in a suspected breach by PTSB of the 2006 Code arising from the treatment of certain customers with SC706 in their mortgage loan agreements. The Central Bank issued a second investigation letter, dated 20 August 2020,⁶ amending the particulars of the SPC. This letter stated that the investigation concerned an allegation that Mr Guinane participated in PTSB's suspected breach of Chapter 1, General Principle 1 of the 2006 Code by making a decision to only offer a more favourable tracker interest rate to those customers with SC706 in their mortgage loan agreements who specifically requested the lower interest rate, or queried or complained about the interest rate they were offered by PTSB.⁷
- 2.3 As previously outlined, the Relevant Period for the purposes of the investigation was from 19 January 2009 to April 2010, which is the time period during which Enforcement suspected that PTSB decided to apply and/or decided to continue to apply a tracker interest rate in mortgage loan agreements containing SC706 that was less favourable

⁵ [Letter from Enforcement to David Guinane regarding the commencement of an investigation pursuant to section 33AO\(2\) of the 1942 Act, dated 28 December 2018 \(Doc ID: PTSB_COM_000356, Core Book 1 Tab 108\).](#)

⁶ [Letter from Enforcement to David Guinane c/o Patrick Ward & Co. solicitors in respect of amending the prescribed contraventions outlined in the Investigation letter dated 28 December 2018, dated 20 August 2020 \(Doc ID: PTSB_COM_001180, Core Book 1 Tab 149\).](#)

⁷ On 30 May 2019, the Central Bank entered into a settlement agreement with PTSB in accordance with section 33AV of the 1942 Act. Further details are included in Chapter 3.

to customers, save in circumstances where the customer specifically requested a lower interest rate, or queried or complained about the interest rate they were offered by PTSB.

- 2.4 On completion of its investigation, Enforcement prepared its Investigation Report.⁸ On consideration of the Investigation Report, the Central Bank⁹ concluded that there were reasonable grounds for suspecting that a prescribed contravention had been committed by PTSB and that Mr Guinane had participated in the commission of the SPC by PTSB, and it decided to hold an inquiry under section 33AO of the 1942 Act to determine the foregoing.

Referral to Regulatory Decisions Unit (RDU)

- 2.5 On 8 June 2021, Enforcement referred the investigation to RDU for the purposes of convening an inquiry under Part IIIC of the 1942 Act. Enforcement provided the Investigation Report to RDU, which set out the grounds for suspecting that a prescribed contravention had been committed by PTSB and that Mr Guinane had participated in the SPC by PTSB.

Appointment of the Inquiry Member

- 2.6 Following Enforcement's referral of the investigation, RDU requested the Deputy Governor (Prudential Regulation) of the Central Bank to appoint a sole inquiry member to carry out the Inquiry.
- 2.7 On 30 July 2021, the Deputy Governor appointed Mr Peter Hinchliffe as sole inquiry member (**Inquiry Member**). Mr Hinchliffe's appointment became effective on 2 August 2021.
- 2.8 On 9 November 2021, the Inquiry Member wrote to the legal representatives of PTSB and Mr Guinane, informing them of the Central Bank's decision to hold an inquiry under Part IIIC of the 1942 Act. This letter¹⁰ enclosed the Notice of Inquiry, which outlined the SPC, and a number of other relevant documents. Mr Guinane was notified that the grounds on which the Central Bank's suspicions were based were set out in the Investigation Report which was contained in Annex B to the Notice of Inquiry. This was the first time that Mr Guinane had been provided with the Investigation Report. The

⁸ [Investigation Report \(Core Book 6 Tab 2\)](#).

⁹ A Central Bank decision maker was appointed to consider the Investigation Report and decide whether an inquiry should be held.

¹⁰ [Letter from RDU to Patrick Ward & Co solicitors, enclosing Notice of Inquiry, dated 9 November 2021](#).

Notice of Inquiry informed Mr Guinane that an inquiry is comprised of one or more impartial decision-maker(s) appointed by the Central Bank, with no prior involvement in the subject matter of the inquiry or supervision or authorisation of the regulated entity, known as the inquiry member(s). The Notice of Inquiry also informed Mr Guinane that the Central Bank had, pursuant to section 33BE of the 1942 Act, appointed Mr Peter Hinchliffe to act as the sole member of the Inquiry.

INQUIRY FRAMEWORK

Relevant legislation, guidelines and procedures

2.9 Chapter 3 of Part IIIC of the 1942 Act sets out the legislative framework for the conduct of the Inquiry. In particular, section 33AY provides as follows:

- (a) The Inquiry Member shall conduct the Inquiry with as little formality and technicality, and with as much expedition, as a proper consideration of the matters before him allow.
- (b) The Inquiry Member shall observe the rules of procedural fairness, but is not bound by the rules of evidence.

2.10 Chapter 3 of Part IIIC of the 1942 Act also sets out the functions and powers of the Inquiry Member including (but not limited to) the following:

- (a) Section 33BA(1) gives the Inquiry Member the power to summons witnesses to give evidence at and/or produce specified documents to the Inquiry.
- (b) Section 33BA(6) provides that the Inquiry Member has the same powers that a judge of the High Court has when hearing civil proceedings that are before that court with respect to the examination of witnesses.
- (c) Section 33BB allows the Inquiry Member to refer a question of law arising at the Inquiry to the High Court.

- (d) Section 33BD allows the Central Bank to prescribe guidelines with respect to the conduct of inquiries. Insofar as relevant to this Inquiry, the applicable guidelines are the 2014 Inquiry Guidelines.¹¹

Also of note is the Central Bank's Outline of the Administrative Sanctions Procedure,¹² which indicates the procedure the Central Bank would generally follow for its ASP, including inquiries.

2.11 While these documents offered an important framework for the Inquiry Member in the conduct of the Inquiry, more detailed case-specific procedures were required. In that regard, the Inquiry Member adopted an Outline Procedure for the conduct of this Inquiry,¹³ which was to be read in conjunction with the 1942 Act, the 2014 Inquiry Guidelines and the Outline of the Administrative Sanctions Procedure.

2.12 The Inquiry Member, in consultation with the Inquiry Participants, also adopted the following additional protocols to ensure the fair conduct of the Inquiry:

- (a) The Inquiry Evidence Protocol;
- (b) The Inquiry Correspondence Protocol;
- (c) The Inquiry Privilege Protocol; and
- (d) The Inquiry Hearing Protocol.

These protocols are explained in more detail in Chapter 4, paragraphs 4.14 to 4.18, of these Written Findings.

Inquiry Participants

2.13 In addition to the Inquiry Member, the following are the key participants in the Inquiry:

¹¹ [2014 Inquiry Guidelines prescribed pursuant to section 33BD of the Central Bank Act 1942 \(Core Book 5 Tab 2\)](#).

¹² [2018 Outline of the Administrative Sanctions Procedure \(Core Book 5 Tab 3\)](#). This document provides a general overview of the Central Bank's ASP, but does not purport to represent a definitive legal interpretation of Part IIIC of the 1942 Act.

¹³ [Inquiry Outline Procedure, dated 22 April 2022 \(Core Book 6 Tab 7\)](#).

Mr Guinane

- 2.14 Mr Guinane is the Person Concerned whom Enforcement suspected of participating in the SPC by PTSB. Mr Guinane was legally represented throughout the Inquiry process by solicitors and senior and junior counsel. He was entitled to see all relevant documents relied upon by Enforcement in reaching its conclusions in the Investigation Report, to seek any other documents that were relevant to the Inquiry, to attend Inquiry hearings and to make written or oral submissions to the Inquiry Member. He was also entitled to lead the examination of witnesses called by him, and to re-examine them, and to cross-examine any witnesses not called by him. Mr Guinane, through his legal team, availed of those entitlements throughout the Inquiry.

Enforcement

- 2.15 Enforcement participated throughout the Inquiry and were represented by senior and junior counsel. Enforcement was available during the Inquiry hearings to provide assistance, information and evidence as required by the Inquiry Member. Enforcement was also given the opportunity to cross-examine witnesses and make oral submissions to the Inquiry Member, as appropriate. Enforcement engaged in cross-examination of Mr Guinane, and made written and verbal submissions in the course of the Inquiry.

PTSB

- 2.16 PTSB is the RFSP referred to in the Notice of Inquiry. PTSB participated throughout the Inquiry and was represented by solicitors and senior counsel. PTSB made it clear that it was content to confine its participation to ensuring that its claim to legal professional privilege (**LPP**) in respect of legal advice which formed part of the background of the relevant decisions made during the Relevant Period, be maintained. PTSB was also given the opportunity to make submissions at the Inquiry hearings on any matter that could have adverse consequences for it, including evidence and submissions from any other inquiry participant. PTSB was not permitted and did not seek any role in commenting on the substance of the allegation against Mr Guinane. PTSB did not engage in the examination or cross-examination of witnesses.

Other Participants

Legal Practitioner Team

- 2.17 The Inquiry Member appointed a Legal Practitioner Team (**LPT**), as provided for by section 33AY(3) of the 1942 Act, to provide legal assistance and advice to him, as required, during the Inquiry process. To assist the Inquiry Member in obtaining evidence and information which was, or which appeared to be, relevant to the outcome of the Inquiry, the LPT also led the examination of witnesses on behalf of the Inquiry Member and cross-examined Mr Guinane and the two witnesses called on his behalf.

RDU

- 2.18 RDU provided administrative support to the Inquiry, acted as registrar to the Inquiry and as the point of contact within the Central Bank in relation to all Inquiry matters. RDU did not provide legal advice to the Inquiry Member but provided assistance on procedural matters and arranged for the day-to-day running of the Inquiry, including management of hearings when required. RDU issued all correspondence on behalf of the Inquiry Member in respect of the Inquiry, and was responsible for ensuring that all communications by a participant in the Inquiry with RDU or the Inquiry Member were shared with and communicated to the other participants.
- 2.19 Reference to the 'Inquiry Participants' throughout the Written Findings is a reference to Mr Guinane, Enforcement and/or PTSB.

CHAPTER 3

PURPOSE OF INQUIRY

NOTICE OF INQUIRY – OUTLINE OF THE SPC

- 3.1 The Inquiry was constituted under section 33AO(2) of the 1942 Act,¹⁴ which provides as follows:

“(2) Whenever the Bank suspects on reasonable grounds that a person concerned in the management of a regulated financial service provider is participating or has participated in the commission of a prescribed contravention by the financial service provider, it may hold an inquiry to determine whether or not the person is participating or has participated in the contravention”.¹⁵

- 3.2 Section 33AP(1) of the 1942 Act¹⁶ provides that before holding an inquiry, *“the Bank shall give notice in writing of the proposed inquiry to the financial service provider or other person concerned”*. Pursuant to this requirement, the Notice of Inquiry was issued by the Central Bank to Mr Guinane on 9 November 2021 and thereafter to PTSB. A copy is attached at Appendix 1.

- 3.3 The prescribed contravention which PTSB is suspected of having committed, and in which Mr Guinane is suspected of having participated, is set out in Annex A to the Notice of Inquiry. Annex A is headed *“Outline of the Suspected Prescribed Contraventions”* and it provides:

“Following an investigation, the Central Bank suspects on reasonable grounds that from January 2009, PTSB understood that Special Condition 706 (a special

¹⁴ This Inquiry is being conducted pursuant to Part IIIC of the 1942 Act, which sets out the statutory framework for the Central Bank's ASP. The Central Bank (Individual Accountability Framework) Act 2023 (the **2023 Act**) introduced a number of amendments to Part IIIC, and to Part VIIA in respect of appeals. All of the new or amended provisions apply to inquiries in which the notice of inquiry issued after 19 April 2023. In inquiries in which the notice of inquiry issued prior to 19 April 2023, only some of the amendments apply, by way of transitional provisions. The Notice of Inquiry for this Inquiry issued on 9 November 2021 and it is therefore an ongoing inquiry which is subject to the transitional provisions. As such, the amendments introduced by the 2023 Act in respect of the following matters under Part IIIC and Part VIIA of the 1942 Act apply:

(a) High Court confirmation of Inquiry Decisions; and
(b) Appeals to the Irish Financial Services Appeals Tribunal (IFSAT).

The Central Bank has published guidance regarding the amendments arising from the 2023 Act. Part 7 of the ASP Guidelines 2023 explains the procedures that may apply in respect of High Court confirmation of Inquiry Decisions and appeals to IFSAT, having regard to the changes introduced by the 2023 Act.

¹⁵ [Part IIIC, Central Bank Act 1942 \(as amended\) \(Core Book 5 Tab 1\)](#).

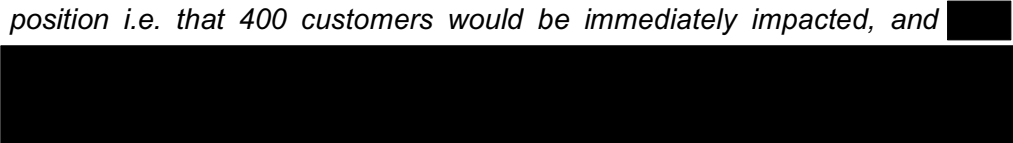
¹⁶ [Part IIIC, Central Bank Act 1942 \(as amended\) \(Core Book 5 Tab 1\)](#).

condition in PTSB's tracker mortgage contracts relating to certain customers' enduring right to a tracker rate, (SC706)) was ambiguous. It is also suspected that PTSB was advised that this issue could affect up to 10,000 customers, but was immediately applicable to 400 such customers who were at that time on a fixed rate and had SC706 in their mortgage contracts. From 19 January 2009 to April 2010 (the Relevant Period), it is suspected that PTSB decided to apply and/or decided to continue to apply a rate that was less favourable to customers, save in circumstances where individual customers raised specific queries in relation to that rate.

The Central Bank suspects on reasonable grounds that PTSB treated those customers who did not complain about the tracker rate that was applied after a fixed rate period, unfairly and contrary to their best interests compared to those that did i.e. by only giving those who complained or queried a more favourable tracker rate. It is suspected that this approach was in breach of the principle contained in Chapter 1, General Principle 1 of the Consumer Protection Code 2006 (the 2006 Code) which required PTSB to "ensure that in all its dealings with customers and within the context of its authorisation it acts honestly, fairly and professionally in the best interests of its customers and the integrity of the market."

The Central Bank also suspects on reasonable grounds that Mr Guinane participated in PTSB's contravention of Chapter 1, General Principle 1 of the 2006 Code (a prescribed contravention) by signing off on the proposal made to him on 19 January 2009 i.e. the strategy to only give the more favourable rate back to those customers who specifically requested their original and lower interest rate, or queried or complained. At that time Mr Guinane was CEO of PTSB and a member of PTSB's Group Senior Management Team which reported directly to Irish Life & Permanent plc's CEO. The Central Bank thus suspects on reasonable grounds that David Guinane was, during the Relevant Period, a person concerned in the management of PTSB.

The Central Bank suspects on reasonable grounds that Mr Guinane made the decision on 19 January 2009 at a time when he was fully aware of the factual position i.e. that 400 customers would be immediately impacted, and



- 3.4 The detail of the Outline of the SPC derives from the Investigation Report contained in Annex B of the Notice of Inquiry. In particular, Chapter 7 of the Investigation Report, entitled “Concluding Analysis”, at paragraphs 7.6 and 7.7, states:

“7.6 ENF also suspects on reasonable grounds that Mr Guinane participated in the Firm’s contravention of Chapter 1, General Principle 1 of the 2006 Code (and prescribed contravention) by signing off on the proposal made to him by Mr O’Grady on 19 January 2009 i.e. the strategy to only give the better rate back to those customers who specifically requested the lower interest rate, or queried or complained. At that time Mr Guinane was CEO of PTSB and a member of the Firm’s Group Senior Management Team reporting directly to the Firm’s CEO. ENF thus suspects on reasonable grounds that David Guinane was, during the Relevant Period, a “person concerned in the management” of the Firm”.¹⁷

and

“7.7 ENF suspects on reasonable grounds that Mr Guinane made the Decision on 19 January 2009 at a time when he was fully aware of the factual position i.e. that 400 customers would be immediately impacted, that the condition was, in the opinion of PTSB, ambiguous, and [REDACTED]

[REDACTED] Furthermore, at interview on 22 May 2019, Mr Guinane admitted that the Decision was not fair”.¹⁸

STATUTORY PURPOSE OF THE INQUIRY

- 3.5 It is necessary to set out the statutory parameters of the decision which the Inquiry Member must reach. Section 33AQ(1) of the 1942 Act¹⁹ provides:

“At the conclusion of an inquiry held under section 33AO, the Bank shall make a finding as to whether the financial service provider concerned is committing or has committed the prescribed contravention to which the inquiry relates.”

¹⁷ [Investigation Report, page 68 \(Core Book 6 Tab 2\)](#). In this extract ‘ENF’ means Enforcement.

¹⁸ [Investigation Report, page 69 \(Core Book 6 Tab 2\)](#). In this extract ‘ENF’ means Enforcement.

¹⁹ [Part IIIC, Central Bank Act 1942 \(as amended\) \(Core Book 5 Tab 1\)](#).

Section 33AQ(2) of the 1942 Act²⁰ relates to an inquiry where it is alleged that a person concerned in the management of a RFSP has participated in the RFSP's breach. It provides:

“At the conclusion of an inquiry relating to the conduct of a person concerned in the management of a regulated financial service provider, the Bank shall make a finding as to whether the person is participating or has participated in the prescribed contravention to which the inquiry relates”.

- 3.6 If a finding or findings are made that the person concerned in the management of the RFSP participated in the prescribed contravention, the inquiry may impose a range of sanctions. These sanctions are set out at section 33AQ of the 1942 Act. The sanctions differ as between those which may be imposed on the RFSP (section 33AQ(3) and (4)) and those which may be imposed on the person concerned in its management (section 33AQ(5) and (6)). However, some sanctions are common to both the RFSP and the person concerned in its management. These sanctions include a caution or reprimand, a direction to pay a monetary penalty and/or a direction to pay all or part of the Central Bank's costs in holding the inquiry and conducting the investigation.
- 3.7 An important question which arises in the context of this Inquiry is whether the finding to be made by the Inquiry should relate solely to Mr Guinane, or whether the Inquiry must also make a finding about PTSB's commission of the SPC. In this regard, it is relevant to note that on 30 May 2019, the Central Bank entered into a settlement agreement with PTSB in accordance with section 33AV of the 1942 Act. Of necessity this involved PTSB making certain admissions with regard to the contravention alleged against it in this Inquiry.
- 3.8 The Inquiry Member received legal advice about this issue from the LPT. This advice was shared with the Inquiry Participants. In an opinion dated 15 October 2021,²¹ the LPT advised that admissions made by PTSB should not be treated as relevant to the question of whether the elements of the alleged prescribed contravention have been established against Mr Guinane.
- 3.9 The advice highlighted the plain wording of section 33AO(2) of the 1942 Act, which clearly points to the need to reach a conclusion about the commission of the SPC by PTSB. This is an inquiry into whether a person concerned in the management of a RFSP *“is participating or has participated in the commission of a prescribed*

²⁰ [Part IIIC, Central Bank Act 1942 \(as amended\) \(Core Book 5 Tab 1\).](#)

²¹ [LPT Legal Opinion, dated 15 October 2021 \(Core Book 8 Tab 1\).](#)

contravention by the financial service provider.²² [Emphasis Added]. Accordingly, there are three essential elements which need to be established:

- (a) That the person was concerned in the management of the RFSP;
- (b) That the activity of the RFSP described in the Notice of Inquiry amounted to the commission of a prescribed contravention; and
- (c) That the person participated in the activity alleged in the Notice of Inquiry to be the prescribed contravention committed by the RFSP.

3.10 The LPT's legal advice²³ referred, amongst other things, to the case of *Purcell v Central Bank of Ireland*,²⁴ which concerned an inquiry (which is ongoing) that was commenced in relation to the alleged commission of prescribed contraventions by Irish Nationwide Building Society (**INBS**) and the alleged participation in these prescribed contraventions by a number of persons concerned in the management of INBS. INBS entered into a settlement agreement with the Central Bank and made a number of admissions in that context. One of the parties alleged to have participated in the commission by INBS of the contraventions brought proceedings seeking to stop the inquiry. He sought discovery of materials relating to the settlement agreement, which was refused by the High Court and the Court of Appeal. Hogan J., giving the judgment of the Court of Appeal, had regard to the relevance of the material when dismissing the application, and stated at paragraph 23:

"23. In arriving at this conclusion, I do not overlook the fact that Mr. Purcell contends with some force that the settlement with INBS is a pure contrivance and is wholly artificial. Yet it must be stressed that that settlement is a complete irrelevance so far as either the prosecution or defence of the Notice of Inquiry which he is facing under the administrative sanctions procedure is concerned. It is clear from the correspondence between the present management of INBS and the Central Bank which has been opened that the present directors and officers of the Society have no direct knowledge of the conduct of the legacy directors such as Mr. Purcell. Insofar, therefore, as the present management of INBS have accepted that there were, historically, "multiple failings" on the part of the Society and – perhaps - by implication, its legacy directors, this could have no probative value whatever so far as the Central Bank's case under the

²² [Part IIIC, Central Bank Act 1942 \(as amended\) \(Core Book 5 Tab 1\).](#)

²³ [LPT Legal Opinion, dated 15 October 2021 \(Core Book 8 Tab 1\).](#)

²⁴ [Purcell v Central Bank of Ireland \[2016\] IECA 50.](#)

administrative sanctions procedure against Mr. Purcell is concerned”.
[Emphasis added]

- 3.11 The LPT also addressed a subsequent challenge by another individual in the same inquiry, in which the Court of Appeal returned to the issue of the effect of the settlement agreement vis-à-vis the position of the person concerned in the management of the RFSP. This was the Court of Appeal decision in *Fingleton v Central Bank of Ireland*.²⁵ Irvine J. dismissed an argument that the Central Bank had acted unlawfully in accepting the admissions of INBS and entering a settlement agreement with it. She held, at 33:

“33. Further, whilst Mr. Fingleton alleges that he is prejudiced in the inquiry pending against him by reason of the acceptance by the Central Bank of the acknowledgement of the contraventions proffered by INBS, he does not explain the nature of such alleged prejudice. In circumstances where the inquiry is not entitled to rely upon the admissions made by INBS as evidence in the inquiry and the same are therefore not determinative of any wrongdoing on it or his part and do not limit or impair the defences which he may advance, I am satisfied that this aspect of Mr. Fingleton’s appeal must fail”.

- 3.12 In light of the foregoing, the Inquiry must reach a conclusion in these Written Findings about PTSB’s alleged commission of the prescribed contravention set out in the Outline of the SPC, contained in Annex A of the Notice of Inquiry, prior to reaching a decision as to whether the person concerned in the management of PTSB (Mr Guinane) participated in any such contravention in the manner alleged in the Outline of the SPC. Indeed, the Inquiry Hearing explicitly proceeded on this basis without objection from any participant. As the Inquiry Member noted in his opening remarks at the commencement of the Substantive Inquiry Hearing:²⁶

*“this Inquiry is required to consider all matters within its scope afresh and will reach its own conclusions based on the evidence and submissions put before the Inquiry.”*²⁷

²⁵ [Fingleton v Central Bank of Ireland \[2018\] IECA 105 \(Core Book 7 Tab 46\)](#).

²⁶ See [Glossary](#) for defined term.

²⁷ [Opening Statement of Mr Peter Hinchliffe, dated 21 February 2024](#).

SOME ISSUES TO BE ADDRESSED IN THE COURSE OF THE INQUIRY

3.13 There are a number of elements which the Inquiry Member sought to understand and assess in determining if Mr Guinane was a person concerned in the management of PTSB and “*participated in the commission of a prescribed contravention by the RFSP*”.[Emphasis Added]. These elements include matters of fact and law. At the outset, the Inquiry sought to ensure that it was in a position to obtain the evidence and submissions required to permit it to form a judgment on the following matters that are set out in the Outline of the SPC, as well as all other issues that are relevant to its finding:

- (a) Whether from January 2009, PTSB had, whilst acting within the context of its authorisation, entered into a significant number of mortgage loan agreements with customers that contained SC706, a condition in certain of PTSB’s tracker mortgage loan agreements providing an enduring right to a tracker rate.
- (b) Whether PTSB understood that SC706 was ambiguous.
- (c) Whether, on its proper construction, SC706 was ambiguous.
- (d) Whether PTSB was advised that this issue over the ambiguity of SC706 could affect up to 10,000 customers, but was immediately applicable to 400 such customers who were at that time on a fixed rate and had SC706 in their mortgage loan agreements.
- (e) Whether during the Relevant Period, PTSB decided to apply and/or decided to continue to apply a tracker interest rate under mortgage loan agreements containing SC706 after a period in which customers had paid a fixed interest rate that was less favourable to those customers who did not complain or raise specific queries in relation to that rate.
- (f) Whether PTSB treated those customers who did not complain or raise specific queries about the tracker rate that was applied to their loan after a period in which they had paid a fixed interest rate, unfairly and contrary to their best interests compared to those that did i.e. by not giving a more favourable tracker rate to them unless they complained or queried the tracker rate they were offered.
- (g) Whether, if such treatment took place, this approach was in breach of the

principle contained in Chapter 1, General Principle 1 of the 2006 Code²⁸ which required PTSB to “*ensure that in all its dealings with customers and within the context of its authorisation it acts honestly, fairly and professionally in the best interests of its customers and the integrity of the market*”.

- (h) Whether, at the time, Mr Guinane was CEO of PTSB and a member of PTSB's Group Senior Management Team which reported directly to IL& P Group's CEO.
- (i) Whether Mr Guinane was, during the Relevant Period, a person concerned in the management of PTSB.
- (j) Whether, if PTSB contravened the principle contained in Chapter 1, General Principle 1 of the 2006 Code during the Relevant Period, Mr Guinane participated in PTSB's contravention (a prescribed contravention) by signing off on a proposal made to him on 16 January and followed up on 19 January 2009 to implement a strategy to only give the more favourable interest rate to those customers who specifically requested their original and lower tracker interest rate, or queried or complained.
- (k) Whether, if Mr Guinane made a decision on 19 January 2009 of the nature or type referred to in (j) above, he was fully aware of the factual position i.e. that 400 customers would be immediately impacted and [REDACTED]

3.14 It is apparent from the Outline of the SPC that the Inquiry is required to make separate findings in relation to suspected contraventions by PTSB and by Mr Guinane and that each such decision would need to be assessed and considered on an individual basis, based upon the evidence and submissions that are relevant and necessary for the Inquiry to reach a finding.

²⁸ [Consumer Protection Code 2006 \(Core Book 5 Tab 4\)](#).

CHAPTER 4

SUMMARY OF INQUIRY PROCESS

INQUIRY HEARINGS – PARTICIPANTS AND PROCESS

- 4.1 After the Notice of Inquiry was issued, the Inquiry Member convened a number of Inquiry Management Meetings (**IMMs**) to deal with various procedural matters in order to ensure the fair and efficient progress of the Inquiry in accordance with the 1942 Act. A total of six IMMs took place from 9 February 2022. The first four IMMs took place in private as these involved discussions of material subject to PTSB's claim of LPP. Following the finalisation of the Inquiry Privilege Protocol, the IMM on 26 June 2023 and the subsequent IMM on 13 October 2023 were held in public.
- 4.2 The Inquiry Member decided that the Inquiry should proceed by way of oral hearing. The oral hearing was originally fixed for October 2023. In July 2023, Mr Guinane sought an adjournment of the oral hearing from October 2023 to February 2024, in circumstances where he was required to engage a new firm of solicitors as a result of the High Court permitting the Law Society to administer the practice of Mr Guinane's former solicitors. The Inquiry Member granted the adjournment, substantially on the basis sought, in order to allow Mr Guinane's new solicitors sufficient time to obtain and review the work undertaken by his previous solicitors and so as to maintain procedural fairness in the Inquiry. In that regard, the Inquiry Member directed that the oral hearing of the witness evidence (the **Substantive Inquiry Hearing**) be set down for February 2024 and that a separate oral hearing to address relevant legal issues (the **Legal Issues Hearing**) be held on 11 and 12 October 2023 (together referred to as the **Inquiry Hearings**).
- 4.3 At the Legal Issues Hearing the Inquiry Participants were provided with an opportunity to make submissions on relevant legal issues and, following this hearing, the Inquiry Participants reached consensus on seven legal issues. The Legal Issues Hearing is addressed in more detail in Chapter 7 of these Written Findings.
- 4.4 The Substantive Inquiry Hearing took place over 13 days in February and March 2024. Witness evidence was heard in public but went into private session when required to do so under the Inquiry Privilege Protocol agreed between the Inquiry Participants i.e.

when discussing the substance and detail of matters in respect of which PTSB asserted its claim of LPP.

4.5 During the course of the Inquiry Hearings,²⁹ the Inquiry heard oral evidence from eleven witnesses as follows:

- (a) Nine current or former employees of PTSB (two of whom were witnesses called directly by Mr Guinane);
- (b) A Central Bank witness at the request of Mr Guinane; and
- (c) Mr Guinane

All of the above (apart from Mr Guinane) had also prepared witness statements in advance of the Substantive Inquiry Hearing. Witness Statements were received from an additional three individuals who were not required to give oral evidence. The Inquiry also heard submissions on behalf of Mr Guinane and Enforcement and, where appropriate, on behalf of PTSB.

4.6 All documentation that Mr Guinane, Enforcement or the Inquiry Member believed to be relevant to the Inquiry was assembled into electronic folders referred to as the Core Books. All of the participants had access to these Core Books and relevant documents from the Core Books were referred to and displayed on the screens in the hearing venue during the course of the hearing.

4.7 The Inquiry was assisted by the LPT³⁰ comprising of John Breslin SC and Claire Hogan BL, who provided legal advice, when requested, during the Legal Issues Hearing and who led the examination of a number of the witnesses and cross-examined Mr Guinane and the two witnesses that Mr Guinane called to give evidence on his behalf, during the Substantive Inquiry Hearing. At the Substantive Inquiry Hearing the LPT also made an opening statement summarising the progress of the Inquiry to date and assisted the Inquiry on matters of law, where required.

4.8 Mr Guinane and Enforcement were invited to make opening submissions at the commencement of the Substantive Inquiry Hearing. Counsel for Mr Guinane made

²⁹ Further details of the hearings, including the relevant dates, witnesses and type of hearing, are set out in the [Table of Hearings included at Appendix 2](#).

³⁰ Rory Mulcahy SC was originally part of the LPT until March 2023.

opening submissions and Enforcement chose not to do so. Closing submissions were made by both counsel for Mr Guinane and counsel for Enforcement at the conclusion of the Inquiry Hearings.

- 4.9 Some of the specific functions and powers bestowed upon the Inquiry Member have been set out earlier in these Written Findings. It is now helpful to describe some of the steps taken to fulfil the requirements of fair procedures to which the Inquiry is subject.

THE DUTY TO OBSERVE THE RULES OF PROCEDURAL FAIRNESS

- 4.10 Section 33AY of the 1942 Act³¹ provides as follows:

“(1) The Bank shall conduct an inquiry with as little formality and technicality, and with as much expedition, as a proper consideration of the matters before it will allow.

(2) At an inquiry, the Bank shall observe the rules of procedural fairness, but is not bound by the rules of evidence”.

- 4.11 The Inquiry Member fully understands the duty resting upon the Inquiry to observe at all times the rules of procedural fairness, and the Inquiry Member has endeavoured to adhere to this overriding duty in conducting the Inquiry. The following sections describe the procedures which were employed in order to assist in meeting these duties. By way of example, there were five procedural protocols adopted through a process of consultation with the Inquiry Participants. The procedures employed demonstrate that notwithstanding the latitude given to the Central Bank, and thereby to the Inquiry Member, to conduct an inquiry in an informal way, a comprehensive series of procedures were developed and agreed upon by the Inquiry Participants.

- 4.12 In the closing submissions made on behalf of Mr Guinane, on 14 March 2024, it was submitted that the procedure adopted at the Inquiry was “*extraordinary in multiple respects*”.³² However, the basis for these submissions on behalf of Mr Guinane centred on the questioning which occurred at the Substantive Inquiry Hearing. Accordingly, the Inquiry pays particular attention to this aspect when describing the procedures which governed the Inquiry.

³¹ [Part IIIC, Central Bank Act 1942 \(as amended\) \(Core Book 5 Tab 1\).](#)

³² [Transcript of Inquiry Hearing, dated 14 March 2024, page 146, line 13.](#)

Inquiry Protocols and Procedures

- 4.13 The Inquiry Member adopted the following protocols, procedures and agreed documents throughout the process, to ensure the efficient and fair conduct of the Inquiry:

Inquiry Outline Procedure³³

- 4.14 The Inquiry Member adopted an Outline Procedure for the conduct of the Inquiry which was to be read in conjunction with the 1942 Act, the 2014 Inquiry Guidelines and the Outline of the Administrative Sanctions Procedure 2018.

Inquiry Correspondence Protocol³⁴

- 4.15 This protocol was adopted by the Inquiry to ensure the efficient management and sharing of all correspondence amongst the Inquiry Participants.

Inquiry Evidence Protocol³⁵

- 4.16 This protocol was agreed in conjunction with the Inquiry Participants. It dealt with the manner by which evidence was to be received and admitted in the Inquiry.

Inquiry Privilege Protocol³⁶

- 4.17 This protocol was agreed between the Inquiry Participants to govern the treatment of material over which PTSB claimed LPP at the Inquiry Hearings. It dealt with the practicalities of ensuring that PTSB's claim to LPP was not prejudiced by the disclosure of material over which privilege was claimed in the course of the hearing.

Inquiry Hearing Protocol³⁷

- 4.18 The Inquiry Member engaged with the Inquiry Participants to agree an Inquiry Hearing Protocol. It set out the intended process and procedures for the Inquiry Hearings, such as the role each participant would have at the hearing, the sequencing of the hearing and the document display process.

³³ [Inquiry Outline Procedure, dated 22 April 2022 \(Core Book 6 Tab 7\).](#)

³⁴ [Inquiry Correspondence Protocol, dated 18 May 2022 \(Core Book 6 Tab 8\).](#)

³⁵ [Inquiry Evidence Protocol, dated 15 December 2022 \(Core Book 6 Tab 9\).](#)

³⁶ [Inquiry Privilege Protocol, dated 23 May 2023 \(Core Book 6 Tab 11\).](#)

³⁷ [Inquiry Hearing Protocol, dated 28 June 2023 \(Core Book 6 Tab 12\).](#)

Narrative of Agreed Facts³⁸

- 4.19 The Inquiry Member engaged with the Inquiry Participants to identify the factual issues that were in dispute in the Inquiry in the hope of narrowing these issues and allowing for a more efficient process. The result of this engagement was a Narrative of Agreed Facts document, which is set out at para 7.1 below.

STANDARD OF PROOF

- 4.20 Paragraph 4.3 of the 2014 Inquiry Guidelines³⁹ provides:

“The Inquiry Members shall make findings as to whether the regulated entity is committing or has committed the prescribed contravention(s) to which the Inquiry relates on the balance of probabilities”. [Emphasis added]

- 4.21 The Inquiry received legal advice from the LPT on the standard of proof to be applied in the Inquiry. The advice, embodied in an opinion dated 16 September 2022,⁴⁰ was shared with all Inquiry Participants. The Inquiry was prompted to seek this advice because it was contended in correspondence dated 15 July 2022, on behalf of Mr Guinane, that the criminal standard of proof, i.e. proof beyond reasonable doubt, applied.
- 4.22 The advice was to the effect that paragraph 4.3 of the 2014 Inquiry Guidelines and the application of the civil standard of proof was in keeping with the general thrust of the legislation scaffolding the ASP, and that the only High Court decision which directly addresses the question – *McCaffrey v Central Bank of Ireland*⁴¹ (**McCaffrey**) – confirmed that position. The advice also concluded that it remained open to Mr Guinane to contend that the specific circumstances applicable to him required a higher standard of proof to be adopted.
- 4.23 In oral closing submissions on behalf of Mr Guinane, on 14 March 2024, it was submitted that the position regarding the burden of proof was “*entirely opaque*”.⁴² Furthermore, in respect of the standard of proof, it was submitted in written closing submissions that the lawfulness and constitutionality of a standard of proof being on the balance of probabilities was not to be taken as being accepted by Mr Guinane,

³⁸ [Narrative of Agreed Facts, dated 31 March 2023 \(Core Book 6 Tab 10\).](#)

³⁹ [2014 Inquiry Guidelines prescribed pursuant to section 33BD of the Central Bank Act 192, page 10 \(Core Book 5 Tab 2\).](#)

⁴⁰ [LPT Legal Opinion, dated 16 September 2022 \(Core Book 8 Tab 6\).](#)

⁴¹ [McCaffrey v Central Bank of Ireland \[2017\] IEHC 546 \(Core Book 7 Tab 43\).](#)

⁴² [Transcript of Inquiry Hearing, dated 14 March 2024, page 87, line 19.](#)

and, in the event of an adverse finding on the substantive charge against him, his position on that point was reserved “*should it be necessary to go elsewhere*”.⁴³ Notwithstanding this objection, and while reserving his position, Mr Guinane made his legal submissions on the assumption the standard was the balance of probabilities.

4.24 In light of the position of Mr Guinane, it is necessary to consider the burden and standard of proof in further detail. The *McCaffrey* decision, set out in the legal advice the Inquiry received, contains an analysis of both matters.

4.25 In *McCaffrey*, two applicants sought to judicially review the notice of inquiry served upon them by the Central Bank following the collapse of an insurance company. The fact that the civil standard of proof was applied by the inquiry was added as a further ground on which the applicants contended that the notice of inquiry should be set aside. Noonan J. concluded that the judicial review was brought outside the relevant time limit and that the applicants had not established a basis for the grant of an extension of time to seek judicial review.

4.26 Nonetheless, Noonan J. proceeded to consider the various arguments raised on the substantive issues stating, at paragraph 70:

*“If I were to be wrong in reaching that conclusion and in deference to the arguments advanced by the parties, I propose to consider the other issues that have been raised”.*⁴⁴

4.27 From paragraph 122⁴⁵ onwards, Noonan J. sets out his own reasoning as to why it was not necessary to apply a criminal standard of proof to all inquiries commenced under Part IIIC of the 1942 Act and why the case law relied upon by the applicants did not mean that the criminal standard should apply:

“122. It seems to me that the inquiry is patently not a criminal process. It is not a trial or a lis inter partes. There is no prosecutor and no onus of proof on the Bank. It is an inquiry and thus by definition inquisitorial rather than adversarial.

As befits such a process, the Act at s. 33BA provides that the Bank shall have power to summon witnesses to give evidence or to produce documents. Indeed the section permits a witness to give evidence by means of a written statement, something that would be entirely impermissible in the criminal context. It is of

⁴³ [Outline closing written submissions on behalf of the Person Concerned, dated 14 March 2024.](#)

⁴⁴ [McCaffrey v Central Bank of Ireland \[2017\] IEHC 546, paragraph 70 \(Core Book 7 Tab 43\).](#)

⁴⁵ [McCaffrey v Central Bank of Ireland \[2017\] IEHC 546, paragraphs 122 to 129 \(Core Book 7 Tab 43\).](#)

course correct to say that the High Court judgment of Keane J. (as he then was), in *O'Laoire* held that the appropriate standard of proof in a fitness to practice inquiry before the Medical Council was the criminal standard. A small number of other professional bodies adopt the same standard in disciplinary inquiries but it is by no means universal and other disciplinary inquiries adopt the civil standard.

123. As the IMs' decision points out, there are significant judicial dicta expressing reservations about the criminal standard being applied outside the confines of the criminal law. Indeed, in *O'Laoire* itself, although the Supreme Court did not overturn the decision of Keane J. in the High Court, it did express some misgivings in that regard. Thus O'Flaherty J. observed (*Unreported*, Supreme Court, 25th July, 1997, at pp. 5-6):

'In the first place, it is better that the standard of proving a case beyond reasonable doubt is confined to criminal trials. This is because the concept of 'reasonable doubt' is peculiarly appropriate to a criminal trial...

*It seems to me that it is better that we preserve the civil standard for all civil proceedings and leave the criminal standard to the arena to which it is best suited. As Barrington J. (speaking for the Court) said in *Mooney v. An Post*... "to attempt to introduce the procedures of a criminal trial into an essentially civil proceedings serves only to create confusion."*

124. In *O'Keeffe v. Ferris* [1997] 3 I.R. 463, the court was concerned with the provisions of s. 297 of the Companies Act, 1963 which provided for the establishment of civil liability for fraudulent trading. The plaintiff, who was a director of the company, sought a declaration that the section was unconstitutional because it purported to amount to the trial of a criminal offence without due procedures for a criminal trial. In particular it was argued that the criminal rather than civil standard of proof should be applied. The Supreme Court rejected this argument, O'Flaherty J. saying (at p. 472):

*'It is clear, in the first instance, that the subsection in question does not create a criminal offence. To hold that it did would be to disregard the provisions of both subs. 3 and subs. 4 of s. 297. Further, none of the indicia of a criminal offence identified in *Melling v. Ó Mathghamhna* [1962] I.R. 1 are present: there is no prosecutor; there is no offence created; there is no mode of trial of a criminal offence prescribed and there is no criminal sanction imposed. Indeed,*

the court did not understand counsel for the plaintiff to press this point. Rather, the plaintiff's case was put on the basis that the civil proceedings were really a disguise for what was truly an attempt by the Oireachtas to impose a criminal sanction in a civil context. The Court rejects this construction of the section. It holds that the section is clearly within the policy entitlement of the Oireachtas to enact, it is designed to protect creditors and others who may fall victim of people engaged in fraud.'

125. In Georgopoulos v. Beaumont Hospital Board [1998] 3 I.R. 132, the plaintiff was a doctor against whom a disciplinary process was initiated by his employer, the hospital. The outcome was potentially serious for the plaintiff and in fact resulted in his dismissal. However, the Supreme Court held that the seriousness of the issues involved for the plaintiff did not mandate the engagement of the criminal standard of proof. In delivering judgment, Hamilton C.J. said (at p. 149-150):

'As already pointed out in this judgment, the proceedings before the defendant were in the nature of civil proceedings and did not involve any allegations of criminal offences. The standard of proving a case beyond reasonable doubt is confined to criminal trials and has no application in proceedings of a civil nature.

It is true that the complaints against the plaintiff involved charges of great seriousness and with serious implications for the plaintiff's reputation.

This does not, however, require that the facts upon which the allegations are based should be established beyond all reasonable doubt. They can be dealt with on 'the balance of probabilities' bearing in mind that the degree of probability required should always be proportionate to the nature and gravity of the issue to be investigated.'

126. It seems to me that in coming to its decision, the IMs correctly recognised the importance of s. 33AY in the context of the standard of proof to be applied. The wording of the section is in itself strongly suggestive that the legislature did not intend to import into the ASP the criminal standard requiring as it does strict adherence to the rules of evidence and strict and formal proof of every matter in issue. By contrast, s. 33AY expressly provides that at an inquiry the Bank shall not be bound by the rules of evidence. That seems to me to be entirely inconsistent with the wholesale importing of the paraphernalia of a criminal trial into an ASP inquiry.

127. *It must be borne in mind that the ASP applies across a huge range of potential infringements ranging from the relatively simple and trivial to the complex and serious, as here.*

128. *The evidence suggests that the majority of ASP inquiries will fall into the minor end of the spectrum. Indeed the giving of oral evidence in an ASP inquiry is very much the exception rather than the rule with most inquiries being determined on paper. It is impossible to see how such inquiries could be undertaken if the criminal standard is to apply to each and every one of them, which is the case made by the applicants.*

129. *I am therefore of the view that the applicants' argument on the standard of proof issue fails on the merits".* [Emphasis Added]

- 4.28 Whilst the foregoing comments on the burden and standard of proof appear to be *obiter dicta*, they are clearly relevant, and are made following a review of relevant jurisprudence. The Inquiry Member finds this analysis highly persuasive with regard to the standard of proof. The submissions of Mr Guinane, have been carefully considered and while of course it is his entitlement to argue "*elsewhere*" that the civil standard is inappropriate, these submissions did not provide a basis for reconsidering the position set out in paragraph 4.3 of the 2014 Inquiry Guidelines. The Inquiry Member concludes that Mr Guinane's alleged participation in PTSB's alleged commission of the prescribed contravention falls to be established on the balance of probabilities.

BURDEN OF PROOF

- 4.29 In respect of the burden of proof and the assertion by Mr Guinane's counsel in closing submissions that the position was "*entirely opaque*", the Inquiry Member is of the view that the position regarding the burden of proof in an ASP inquiry is self-evidently that, in the following phrase from Noonan J.'s judgment in *McCaffrey*:

*"It is an inquiry and thus by definition inquisitorial rather than adversarial".*⁴⁶

- 4.30 The Inquiry Member is satisfied that there is no burden of proof on any Inquiry Participant, precisely because this is an inquiry, and not an adversarial procedure. The Inquiry Member's role is, *inter alia*, to inquire into and decide upon the facts that are relevant in determining whether the person that the Central Bank suspects on reasonable grounds is a person concerned in the management of a RFSP has

⁴⁶ [McCaffrey v Central Bank of Ireland \[2017\] IEHC 546, paragraph 122 \(Core Book 7 Tab 43\).](#)

participated in the commission of a prescribed contravention by the RFSP. It would be inappropriate and unhelpful if the Inquiry was constrained in inquiring into and deciding upon such facts by any presumptions that preceded the Inquiry or by any procedure that gave preference to one view of the facts over another. Where the Inquiry properly concludes that in order to ensure that the Inquiry has considered all relevant evidence and submissions, it is necessary to raise fresh matters, the Inquiry must be able to do so. Where this has happened, the Inquiry Member ensured that the Inquiry Participants were able respond to such matters in the manner they saw fit. Mr Guinane and PTSB were in a position to understand the basis on which the prescribed contravention is suspected and Mr Guinane's participation in its commission is alleged, by the requirement for the Inquiry to be preceded by the Investigation Report. The Investigation Report set out the basis upon which the Central Bank decided that an Inquiry should be conducted and it ensured that the Inquiry Participants had an understanding of the allegations to which they needed to respond and the basis for such allegations. All communication thereafter between an Inquiry Participant and the Inquiry Member was made available to all Inquiry Participants. I have concluded that the imposition of a burden of proof on any particular party would have been inconsistent with the core inquisitorial function of the Inquiry, and, furthermore, was not required in order to observe the rules of procedural fairness.

- 4.31 Counsel for Mr Guinane, in his closing submissions on 14 March 2024, stated that the Inquiry process was permitted to "*become accusatorial*".⁴⁷ This is a complaint concerning the questioning which occurred during the Inquiry Hearings. As outlined at paragraph 4.18 above, the Inquiry Hearing Protocol agreed with the Inquiry Participants set out *inter alia* the role each Inquiry Participant would have at the Inquiry Hearings. The Inquiry Member is satisfied that the roles played by the Inquiry Participants were appropriate and fair and that none of the agreed upon protocols were transgressed. It is unsurprising that some questions to witnesses from the Inquiry Participants or the LPT may have been perceived by the witnesses as accusatorial, given that the Inquiry was considering an alleged contravention of regulatory requirements. It was therefore appropriate that at times witnesses were asked about their involvement in, or knowledge of, such alleged contravention. Such questioning by counsel for Mr Guinane and Enforcement, by the LPT or by the Inquiry Member was necessary or permissible in order to assist the Inquiry in its fact-finding role and to permit Mr Guinane to challenge assertions or evidence with which he disagreed. The

⁴⁷ [Transcript of Inquiry Hearing, dated 14 March 2024, page 87, lines 17 and 18.](#)

introduction of a burden of proof on an Inquiry Participant or the LPT when acting on behalf of the Inquiry Member would not have reduced the prospect of such questioning occurring and was not required in order to ensure procedural fairness.

PRIVILEGE

- 4.32 In January 2009, a customer query in respect of SC706 prompted the individuals within PTSB who were dealing with the query to obtain legal advice. This legal advice was obtained in the first instance, in January 2009, from one of PTSB's in-house lawyers. Advice was also provided, in March 2010, by the head of PTSB's in-house legal team and also, in 2010 by senior counsel. That advice was, of course, subject to a claim of LLP. PTSB provided three documents to the Central Bank pursuant to a Privilege Limited Waiver Agreement (**PLWA**) entered into by PTSB and the Central Bank in December 2017, in the course of the Central Bank's investigation. As its name suggests, the PLWA recorded PTSB's limited waiver of LPP. The PLWA allowed the Central Bank to use the contents of the privileged documentation for the purpose of the investigation.
- 4.33 In order to protect PTSB's claim of LPP over certain documents at the Inquiry Hearings, the Inquiry Privilege Protocol was drawn up. This protocol, the final version of which was dated 23 May 2023, contained an appendix with 66 documents over which PTSB asserted LPP in respect of certain highlighted parts. Enforcement and PTSB agreed that PTSB's claim of LPP over this material and a further 25⁴⁸ documents that were subsequently identified should be protected at the Inquiry Hearings (the **protected material**).⁴⁹
- 4.34 The Inquiry Participants were provided with two sets of Core Books; one with the protected material redacted, for use during public elements of the Inquiry Hearings, and one with the protected material not redacted but with such material subject to highlighting to indicate that it was protected material,⁵⁰ for use during private elements of the Inquiry Hearings.

⁴⁸ The initial Appendix to the Inquiry Privilege Protocol dated 23 May 2023 contained 66 documents but this was updated on 12 February 2024 (in advance of the Substantive Inquiry hearing) as further documents containing protected material were identified. The final number of documents contained in the Appendix was 91.

⁴⁹ The agreement was subject to the reservations of Enforcement regarding the validity or otherwise of any assertions of privilege made by PTSB save in respect of the three documents that Enforcement had previously indicated to the Inquiry were subject to claims of privilege. These three documents are detailed in the Investigation Report.

⁵⁰ It should also be noted, in passing, that certain of the documentation available to the Inquiry had 'burnt in' redactions the purpose of which appeared designed to protect personal data. None of the parties raised objection with regard to any such 'burnt in' redactions.

- 4.35 As the Core Books were supplemented by additional documents during the course of the Inquiry, the same approach was adopted to new documents and material.
- 4.36 Section 33AZ(1) of the 1942 Act provides that the Inquiry shall, save as otherwise determined by the Inquiry Member, proceed in public. Section 33AZ(2)(a) of the 1942 Act provides that proceedings of the Inquiry may be heard in private if “*evidence may be given, or a matter may arise, during the inquiry that is of a confidential nature...*”.⁵¹
- 4.37 The Inquiry was managed so that before any advocate or witness referred to protected material in a document, the Inquiry moved from public to private session.
- 4.38 In the Inquiry and in these Written Findings, the Inquiry Member was and remains mindful of the requirement in law to respect PTSB’s claim to LPP over the protected material. The impact of the procedures set out in the Inquiry Privilege Protocol on the ability of the public to follow and understand the progress of the Inquiry was significant. The Inquiry is aware that the effect of these procedures was to make public understanding of the Inquiry more difficult and to restrict Mr Guinane’s ability to convey the full basis for his rebuttal of the allegation regarding his participation in the SPC in public. This is regrettable, but was necessary in order to protect PTSB’s rights to claim LPP over the protected material.

⁵¹ [Part IIIC, Central Bank Act 1942 \(as amended\) \(Core Book 5 Tab 1\).](#)

CHAPTER 5

DECISIONS ON PROCESS AND PRELIMINARY MATTERS

- 5.1 The Inquiry made a number of decisions on preliminary matters and process during the course of the Inquiry, in particular relating to the effect on fair procedures of the passage of time between the Relevant Period and the commencement of the Inquiry, and the disclosure of documents. These decisions are outlined below.

THE EFFECT OF THE PASSAGE OF TIME

- 5.2 In the IMMs and at the Legal Issues Hearing in October 2023, counsel for Mr Guinane submitted that the passage of time between the events giving rise to the SPC and the holding of the Inquiry rendered the Inquiry procedurally unfair and violated Mr Guinane's rights both under the Constitution and the European Convention on Human Rights (**ECHR**) to have the matter dealt with, with reasonable expedition.
- 5.3 Mr Guinane's submissions in this regard were, in essence, that the delay in holding the Inquiry was prejudicial to him, not least due to the inevitable failing of memories which happens over the passage of time.
- 5.4 Counsel for Mr Guinane referred the Inquiry to article 6.1 of the ECHR which gives explicit protection to the right to have civil proceedings determined within a reasonable time. The relevant part of article 6.1 provides as follows:

*"In the determination of his civil rights and obligations..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..."*⁵²

- 5.5 The ECHR was given effect for the purposes of Irish domestic law by the European Convention on Human Rights Act 2003 (**2003 Act**). Section 3(1) of the 2003 Act provides:

*"Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a matter compatible with the State's obligations under the convention provisions".*⁵³

⁵² [Submissions of the Person Concerned, dated 16 June 2023, paragraph 28 \(Core Book 7 Tab 3\).](#)

⁵³ [Submissions of the Person Concerned, dated 16 June 2023, paragraph 29 \(Core Book 7 Tab 3\).](#)

*“Organ of the State” is defined in section 1 of the 2003 Act as including “a tribunal or any other body ... which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised”.*⁵⁴

5.6 Counsel for Mr Guinane pointed to the fact that fourteen years had then passed since the events giving rise to this Inquiry. They submitted that this was a period which relevant case law indicated was too long to satisfy the principles of basic fairness and that the passage of time ultimately rendered the holding of the Inquiry procedurally unfair.

5.7 In recording the common ground that existed on issues of law between Mr Guinane and Enforcement, it was agreed that:

*“the passage of time between the issue of the Notice of Inquiry and the Inquiry hearing in Feb/March 2024 does not, in itself, give rise or contribute to procedural unfairness, other than to the extent it may affect witness evidence”.*⁵⁵

5.8 This reflects my view. The Inquiry therefore concludes that the submissions on behalf of Mr Guinane regarding the effect of the passing of time on the Inquiry’s ability to conduct itself fairly and in a manner that is not prejudicial to him are based on the passage of time between the occurrence of the events giving rise to the SPC in January 2009 and April 2010, and the issuing of the Notice of Inquiry on 9 November 2021 - a period of over twelve years.

5.9 In addition, I consider that I am obliged to assess whether witness evidence that is, or is likely to be, material to the outcome of the Inquiry, has not, due to the overall passage of time between the actions, events and communication that are the subject of such evidence and the date on which such evidence is given, ceased to be reliable or sufficient to form the basis for any findings that the Inquiry needs to reach.

5.10 I have considered the extensive submissions by Mr Guinane in relation to the impact of delay on the fairness of proceedings and the Inquiry’s ability to hold a fair hearing. I

⁵⁴ [Submissions of the Person Concerned, dated 16 June 2023, paragraph 30 \(Core Book 7 Tab 3\).](#)

⁵⁵ [Legal Issues - Areas of Consensus, dated 16 October 2023, paragraph 7 \(Core Book 6 Tab 13\).](#)

have also taken note of the response provided by Enforcement and submissions made at the Legal Issues Hearing.

5.11 I recognise the difficulty that arises in ensuring that a fair hearing is possible after the passing of over twelve years. I have had regard to the availability of contemporaneous documentary evidence relating to the conduct of PTSB and the conduct of Mr Guinane during the period from the beginning of 2009 to the first half of 2010. I note that there is a significant volume of contemporaneous documentation that provides information about the events, acts and communication within PTSB and the involvement, or lack of involvement, of Mr Guinane in matters that are relevant to the SPC. I concluded that it was necessary to hear witness evidence from certain of the individuals who worked within PTSB during the Relevant Period in order to see if a better understanding of the events, acts, communication or omissions that were relevant to the SPC could be obtained. Many of the witnesses who worked within PTSB had already given information to inquiries and audits held within PTSB and to the investigations held by Enforcement into the conduct of PTSB during the Relevant Period. The existence of transcripts of interviews from those inquiries, audits and investigations and records of correspondence from the Relevant Period that were created in the course of the audits and investigations has been useful in assisting witnesses appearing before the Inquiry. The continuing internal and regulatory scrutiny in relation to the conduct of PTSB during the Relevant Period has caused witnesses to focus on and recall events that occurred during that time over the intervening years. It is clear, however, that any reliance upon witness evidence relating to events that took place and correspondence that was produced over twelve years prior to the Notice of Inquiry and up to fifteen years prior to the Inquiry Hearings must be subject to scrutiny in the light of the possibility that memories have faded, that recollections may no longer be accurate and that the records produced at the time, or the transcripts of subsequent conversations and interviews, may serve to focus witness evidence on those records and documents, rather than relying on their own recollection of the time.

5.12 In order to ensure that the Inquiry was in a position to give proper consideration to matters that are relevant to the Inquiry, I sought legal submissions in relation to the effect of the passing of time on the fairness of proceedings. The Inquiry considered the issue on a preliminary basis and heard submissions from Mr Guinane and from Enforcement at the Legal Issues Hearing. The Inquiry concluded after the Legal Issues Hearing, at the sixth IMM on 13 October 2023, that it was not clear, at that time, that the Inquiry's ability to obtain and assess and hear evidence and submissions upon the

matters of fact that need to be determined in order for the Inquiry to reach a fair and just conclusion was so adversely affected by the passing of time as to give rise to significant prejudice to Mr Guinane. It was also not clear, at that time, that the risk that the Inquiry could not be conducted in a fair and just manner or reach an objective evidence-based conclusion due to the passing of time was so great as to prevent the Inquiry proceeding. In coming to this conclusion, the Inquiry had regard to the documentation that had been provided to it, the Investigation Report produced by Enforcement, the disclosure exercise conducted on behalf of Mr Guinane and the witness statements that had been obtained at that time, in advance of the Substantive Inquiry Hearing.

- 5.13 Counsel for Mr Guinane supported this conclusion and stated, toward the end of the Legal Issues Hearing on 12 October 2023:

*"It seems to me, sir, that obviously there are a number of issues that relate to the delay question. As I said, just before we broke, I don't think there is sufficient before you at this stage to justify a decision taken in the abstract that it would be unfair to proceed".*⁵⁶

And

*"So at this point in time, I think those issues are dependent upon the evidence that's going to be given at the hearing, and obviously it's at that point that we will be in a better position to make arguments about any prejudice that we say arises from the delay. We're also going to be able to ask, for example, the witnesses from the Central Bank to explain the lengthy time periods, as Ms. O'Neill has sought to do this morning, but that I think is something that you have to hear in the form of evidence also".*⁵⁷

- 5.14 I therefore concluded that it was fair and appropriate for the Substantive Inquiry Hearing of witness evidence to proceed. I indicated to the Inquiry Participants that I would reach a final conclusion in relation to whether the passing of time had a prejudicial effect on Mr Guinane, or on the ability of the Inquiry to reach a conclusion on the balance of probabilities based on objective analysis of the information provided by witnesses, after I had heard from witnesses and heard submissions from the Inquiry Participants. On this basis, the Inquiry proceeded to the Substantive Inquiry Hearing.

⁵⁶ [Transcript of Legal Issues Hearing, dated 12 October 2023, page 82, line 17 \(Core Book 9 Tab 9\).](#)

⁵⁷ [Transcript of Legal Issues Hearing, dated 12 October 2023, page 83, line 14 \(Core Book 9 Tab 9\).](#)

- 5.15 In considering the impact of the lapse of time between the Relevant Period and the issuing of the Notice of Inquiry, I have taken account of all of the submissions made on behalf of Mr Guinane on the issue, as well as those made by Enforcement.⁵⁸ I am aware of the need to consider the ability of the Inquiry to conduct its proceedings fairly and of the need to ensure that the evidence that the Inquiry requires in order to reach its findings is sufficient and remains available and reliable.
- 5.16 In his legal submissions dated 16 June 2023, Mr Guinane made three points. First, that as a matter of general principle, the delay of fourteen years in holding the Inquiry unfairly prejudiced him. In this regard, he referred to the “*inevitable fading of memories which happens over the passage of time*”.⁵⁹ Second, it was argued that that delay has also denied Mr Guinane his right to have the matter dealt with expeditiously pursuant to his constitutional right to fair procedures and natural justice. Third, the delay has further denied Mr Guinane his right to have the matter dealt within a “reasonable time” as guaranteed by article 6.1 of the ECHR.
- 5.17 I will consider first the constitutional and ECHR arguments made by Mr Guinane. I was referred to *Kelly: The Irish Constitution* (5th ed, 2018) where the authors note (at §6.5.250) that the right to fair procedures protected by Article 40.3 of the Constitution encompasses a general right to have civil litigation heard within a reasonable time. It was argued by Mr Guinane that the serious and unique nature of the Inquiry renders the need for expedition more pressing than it would be in other civil cases.
- 5.18 I was referred by Mr Guinane to the case of *DPP v Nash*.⁶⁰ The judgement of the Supreme Court in this case identified a right of a person facing court proceedings to have them determined in a timely fashion as well as having a right to a fair trial. Clarke J. (as he then was) stated:

“...persons who may be the subject of adverse findings as a result of a court process (criminal convictions or adverse orders in civil claims) have a general constitutional entitlement (similar to the rights established under the European Convention on Human Rights) to have those rights, obligations or liabilities

⁵⁸ [Submissions of the Person Concerned, dated 16 June 2023 \(Core Book 7 Tab 3\)](#), [Submissions of Enforcement, dated 31 July 2023 \(Core Book 7 Tab 4\)](#), [PM v DPP \[2006\] 3 IR 172 \(Core Book 7 Tab 21\)](#), [PH v DPP \[2007\] IESC 3 \(Core Book 7 Tab 23\)](#), [McFarlane v DPP \(No 1\) \[2007\] 1 IR 134 \(Core Book 7 Tab 24\)](#), [Kennedy v DPP \[2012\] IESC \(Core Book 7 Tab 31\)](#), [Lyden v IBRC \[2018\] IEHC 374 \(Core Book 7 Tab 45\)](#).

⁵⁹ [Submissions of the Person Concerned, dated 16 June 2023, paragraph 9 \(Core Book 7 Tab 3\)](#).

⁶⁰ [Submissions of the Person Concerned, dated 16 June 2023 \(Core Book 7 Tab 3\)](#).

*(including criminal liabilities) determined in a timely fashion (see further I.I. v. J.J. [2012] IEHC327). That is an entitlement which is, in my view, independent of the entitlement to a fair trial”.*⁶¹

- 5.19 Counsel for Mr Guinane argued that he was not required to establish blameworthiness or culpable delay. However, he maintained that blameworthiness was present here because the extent of the delay in holding the inquiry was inexcusable.
- 5.20 In respect of the submissions regarding article 6.1 ECHR (as set out above), Mr Guinane argued that what constitutes “within a reasonable time” for the purposes of article 6.1 of the ECHR is context-specific but that the delay in holding the Inquiry means that the “reasonable time” threshold has not been met in this case. The cases of *Pélissier and Sassi v France*⁶² and *Frydlander v France*⁶³ were relied upon in this regard.
- 5.21 The legal submissions of Enforcement laid emphasis on contextualising the passage of time between the acts alleged to have taken place and the Inquiry, and broke the period into distinct phases. It was argued that when the Central Bank formed a suspicion of a breach by PTSB of the 2006 Code, in relation to SC706, that allegation was put to PTSB without delay in 2018, and that when the Central Bank formed a suspicion that Mr Guinane participated in PTSB’s breach, those allegations were promptly put to him, also in 2018.
- 5.22 Enforcement relied *inter alia* on the judgment in *Fingleton v Central Bank of Ireland*. In that case a delay of up to eleven years had arisen between events that were the subject of an inquiry and the inquiry taking place (the events took place between 2004 and 2008 and the inquiry commenced in 2015). Noonan J quoted O’Donnell J (as he then was), in *Kennedy v DPP*⁶⁴, where he had stated;

“I think it is important to recall that the right to a speedy trial is a separate component of the overall right to a fair trial. The right to a speedy trial, ...is focused primarily on the period between charge and trial. While investigatory delay cannot be entirely divorced from the impact of post-charge delay, it is in

⁶¹ [Nash v DPP \[2015\] IESC32, paragraph 2.7 \(Core Book 7 Tab 37\).](#)

⁶² [Pélissier and Sassi v France \(1999-II\) ECHR, GC, No. 25444/94 \(Core Book 7 Tab 65\).](#)

⁶³ [Frydlander v France \(2000-VII\) 31 EHRR 1152 GC \(Core Book 7 Tab 66\).](#)

⁶⁴ [Kennedy v DPP \[2012\] IESC 34 \(Core Book 7 Tab 31\).](#)

my view important that it be recognised that there is no right to be speedily, or necessarily efficiently, investigated”.⁶⁵

5.23 Noonan J. then stated:

“In the present case, the applicant does not allege any specific prejudice arising from delay. He does not suggest that there is any missing evidence or that there are witnesses who are unavailable. On the contrary, it would appear that to a very significant extent, the inquiry will be concerned with evidence in documentary form which appears to be extremely comprehensive. Even if there had been any blameworthy delay in this case, it could only relate to the “pre-charge” investigation and would thus, as explained by O’Donnell J., have less significance, in any event, than “post-charge” delay”.⁶⁶

5.24 It is clear from all of the domestic and ECHR case law opened to me by Mr Guinane and Enforcement, that the courts, and by extension public bodies, who are considering civil or criminal liability must act expeditiously. In my view, all the relevant authorities in relation to the rights of parties in criminal and civil litigation to have legal proceedings dealt with within a reasonable period demand analysis of the circumstances in which the delay has arisen.

5.25 In this instance, the investigation into Mr Guinane’s potential participation in the SPC began on 28 December 2018, when he received a first investigation letter. This investigation was completed, and the Investigation Report was issued, by 27 May 2021. The Notice of Inquiry was issued to Mr Guinane on 9 November 2021. Prior to the investigation commencing into Mr Guinane’s potential participation in the SPC, the Central Bank had conducted an investigation into PTSB. This investigation ran from 2014 to 2019.

5.26 The 1942 Act requires that the Central Bank must come to a decision in relation to a SPC by a RFSP prior to coming to a decision in relation to the participation by any person concerned in the management of the RFSP in such SPC.

⁶⁵ [Fingleton v Central Bank of Ireland \[2016\] IEHC1, paragraph 132 \(Core Book 7 Tab 40\).](#)

⁶⁶ [Fingleton v Central Bank of Ireland \[2016\] IEHC1, paragraph 133 \(Core Book 7 Tab 40\).](#)

- 5.27 There is, therefore, a risk of significant delay in the commencement of any investigation into a person concerned in the management of a RFSP that arises as a direct consequence of the provisions of the 1942 Act.
- 5.28 In this instance, Mr Guinane has waited a long time since the period that is the subject of this Inquiry for the outcome of the investigations by Enforcement and for this Inquiry to reach its findings. Over five years have passed since the investigation into Mr Guinane began. However, it is not clear that this delay could have been avoided by more active or more diligent conduct from Enforcement or from this Inquiry. The Inquiry does not consider that the five year period from the start of the investigation into PTSB and the conclusion of a settlement with PTSB is, in itself, excessive.
- 5.29 Where the delay between the events that are the subject of the SPC and the commencement of the investigation into Mr Guinane is open to question, is in respect of the five-year gap between the events that are the subject of the SPC and the commencement of the initial investigation into PTSB.
- 5.30 Having heard submissions from Enforcement and Mr Guinane on this aspect of the delay, I do not consider that there was an exceptional failure by the Central Bank to act expeditiously or an unreasonable failure to investigate potential regulatory breaches within a reasonable time of having concluded that such an investigation was necessary. Enforcement explained that it initially sought to ensure that PTSB remedied customers for the harm that had arisen from its failure to meet regulatory requirements and this took precedence over an investigation into PTSB.⁶⁷ Once the investigation into PTSB's conduct began it appears to have been complex and extensive. In that regard, the settlement agreement, referred to in Chapter 3, paragraph 3.7 of these Written Findings, which resolved the Central Bank's investigation into PTSB, sets out 42 separate contraventions that are covered by the settlement agreement. This Inquiry into the conduct of PTSB and Mr Guinane relates to only one of those contraventions. Furthermore, the decision in *Fingleton* is particularly influential on my reasoning, in light of the fact it concerned an inquiry pursuant to Part IIIC of the 1942 Act, and a broadly similar passage of time between the acts giving rise to the inquiry and the holding of the inquiry itself. In line with *Fingleton*, any delay associated with the "pre-charge" investigation has less significance, in any event, than "post-charge" delay.

⁶⁷ [Transcript of Inquiry Hearing, dated 4 March 2024, page 125, lines 10 to 29.](#)

- 5.31 I am aware that Mr Guinane has experienced detriment by reason of the passage of time, insofar as his good name and reputation in the industry in which he has made a living have been under a cloud since December 2018. However, the possibility of such reputational harm is a risk that arises in choosing to pursue a career in a regulated sector, where action against individuals for breach of their regulatory duties may arise. I do not consider that any detriment that has arisen from the time taken since December 2018 in carrying out the investigation into Mr Guinane's conduct and holding this Inquiry is sufficient, in these circumstances, to impose an obligation on this Inquiry to cease its proceedings or to modify them.
- 5.32 In all of the circumstances of this case, and having had regard to the submissions on behalf of Mr Guinane and taking account of the position under the Constitution and ECHR, I conclude that the overall passage of time involved here has not arisen as a result of failures or avoidable delays by the Central Bank that are so excessive as to amount to a failure to have Mr Guinane's rights, obligations or liabilities determined in a timely fashion.
- 5.33 My concern, therefore, in relation to the long period of time that has elapsed between the Relevant Period and the hearings in this Inquiry relates primarily to whether a fair process could be pursued. In this regard, I also wish to consider the arguments made by Mr Guinane regarding alleged prejudice arising from the effect of the passage of time on the available evidence.
- 5.34 The Inquiry has been able to obtain a great deal of relevant and reliable information from the documentation that exists from the Relevant Period. The documentary records of PTSB appear to be well preserved as a result of the internal inquiries and audits that took place within PTSB, the investigation into PTSB that began in 2014 by Enforcement and by the investigation that preceded this Inquiry. Many of the witnesses who appeared at the Substantive Inquiry Hearing had been interviewed and been given access to documents from the Relevant Period during the course of the investigation into PTSB and were, therefore, familiar with the issues that are relevant to this Inquiry. I was struck by the extent to which a number of the witnesses within PTSB were able, during the course of their evidence, to distinguish between the answers that they were giving based upon documents they had seen and the recollection that these documents had triggered or clarified, and the answers they were giving based on what they recalled from their own memory of their activities during the Relevant Period. It was clear that a number of the witnesses were confident in responding to questions

about the manner in which they carried out their work, how the function within which they worked operated and the manner in which PTSB operated or made decisions during the Relevant Period, even if they had limited recollection of individual emails or meetings at that time. Some of the witnesses were able to explain from their own recollection how systems and processes within PTSB would have operated and how responsibility was allocated between functions. This facility to offer informed answers about how things normally operated within PTSB, or particular functions within PTSB, also enabled witnesses to respond, where they felt comfortable, to questions asking them to explain or clarify the contents of some documents. There are clearly limits to the weight that can be placed upon witness evidence where there is an element of supposition or generalisation. In determining the weight to be attached to the responses from the witnesses and exercising a judgement upon it, it was helpful to understand whether the witness was speaking from their own recollection, or from a perspective based on the documentary evidence provided to them over the period since the Central Bank began its investigation into PTSB. I find, on balance, that the examination and cross-examination of witnesses took place in a manner that enabled the Inquiry to make a judgement on the accuracy and reliability of the witness evidence being given and the weight to be attached to the witness evidence.

- 5.35 I have considered whether Mr Guinane is prejudiced by his inability, or that of others, to recall matters that may have strengthened his ability to deny or challenge the allegation that he participated in the SPC due to the passing of time. The details of the alleged contravention were first made known to Mr Guinane in 2018 and were refined in 2020 in the manner set out in paragraph 5.21 above.⁶⁸ He had little reason to focus his thoughts on the specific events that are relevant to the SPC prior to that. I have approached these findings on the basis that no adverse inference should be drawn from the inability of Mr Guinane to recall the details of his role in relation to PTSB's approach to implementing SC706 during the Relevant Period. Any fact that is required to establish Mr Guinane's participation in the SPC must be established on the balance of probabilities based on available documentary evidence or reliable witness evidence.

⁶⁸ The Central Bank commenced an investigation against Mr Guinane by way of investigation letter dated 28 December 2018 (First Investigation Letter). A Second Investigation Letter issued to Mr Guinane on 20 August 2020 (Second Investigation Letter). That letter provided that the investigation concerned an allegation that Mr Guinane participated in PTSB's alleged breach of Chapter 1, General Principle 1 of the 2006 Code by making a decision to only offer the more favourable tracker interest rate to those customers with SC706 in their mortgage loan agreements who specifically requested the lower interest rate, or queried or complained.

5.36 For all of the reasons set out above and having considered the submissions of Mr Guinane and Enforcement, I conclude that the passing of time has not had a prejudicial effect on the ability of the Inquiry to reach a conclusion on the balance of probabilities based on an objective evaluation of the information provided by witnesses and available from documentary records. The Inquiry is able to satisfy the obligation on it to operate a fair process, notwithstanding the considerable passage of time since the events that form the basis for the SPC.

DISCLOSURE

5.37 In June 2021, as part of the referral of the case to Inquiry, RDU was provided with various categories of documents that were relied upon by Enforcement in preparing the Investigation Report, totalling 168 documents (**Relied Upon Documents**).

5.38 In response to an invitation from the Inquiry, in March 2022, Mr Guinane requested that the Inquiry require the production of a number of additional categories of documents from Enforcement and PTSB.

5.39 The Inquiry requested clarification of the request by reference to the schedule of categories of materials and information gathered by Enforcement during the investigation (**Schedule of Gathered Documents**) and requested that Mr Guinane outline why the disclosure for each category of documents requested was:

- (a) Relevant to the subject matter of the Inquiry;
- (b) Necessary in the interests of fairness; and
- (c) Necessary to assist Mr Guinane.

5.40 In advance of an IMM held on 3 May 2022, Mr Guinane provided a *“Reasoned and Revised Disclosure Request”*⁶⁹ for the Inquiry’s consideration.

5.41 There was an exchange of correspondence between Enforcement and Mr Guinane throughout May and June 2022 to agree the categories of disclosure. The areas that had not been agreed notwithstanding this exchange were discussed at an IMM on 8

⁶⁹ [Reasoned and Revised Disclosure Request on behalf of Mr Guinane, dated 29 April 2022.](#)

July 2022. The Inquiry gave directions on 28 July 2022 outlining the agreed categories of disclosure and the timeframe within which Enforcement was to comply with the disclosure request. The categories of disclosure are set out in full at [Appendix 3](#) of these Written Findings.

- 5.42 The disclosure documents were provided by Enforcement to Mr Guinane between 29 July 2022 and 27 October 2022, and totalled approximately 1,747 documents.
- 5.43 As part of the directions given by the Inquiry on 28 July 2022, the Inquiry gave directions setting out the timeline in which Mr Guinane should complete his review and notify the Inquiry of any documents within the additional disclosure which he deemed relevant to the Inquiry.
- 5.44 On 29 November 2022, Mr Guinane identified 66 documents which he considered were relevant to the Inquiry. Following a review of the documents and consideration of legal advice from the LPT dated 18 January 2023,⁷⁰ the Inquiry decided, on 27 January 2023, that all 66 documents would be admitted to the Inquiry in accordance with section II(D) of the Evidence Protocol.
- 5.45 Following a change of legal representation by Mr Guinane due to circumstances beyond his control at the end of May 2023, I allowed Mr Guinane's new firm of solicitors (Messrs Seán Costello solicitors) a period of time to take possession of the files from Mr Guinane's previous solicitor (which were then being held by the Law Society). In the interests of fair procedures, I allowed time for the new solicitors to review the disclosure documents and thereafter provide a list of any additional documents which they considered relevant to the Inquiry no later than eight weeks after the receipt of the files (i.e. by no later than 8 November 2023). On 22 November 2023, Mr Guinane confirmed that there were no further documents that he considered relevant to the Inquiry which had not already been identified.
- 5.46 The 66 documents admitted by the Inquiry in January 2023, in addition to the Relied Upon Documents, were contained in a Core Book for the purposes of the Substantive Inquiry Hearing.

⁷⁰ [LPT Legal Opinion regarding queries on certain issues arising with the disclosure documents, dated 18 January 2023 \(Core Book 8 Tab 8\)](#).

5.47 Additionally, I requested the provision by Enforcement of five interview transcripts referenced in the Investigation Report but not furnished to the Inquiry as part of the Relied Upon Documents.

5.48 I also requested a number of documents from Mr Andrew Walsh, current group general counsel for PTSB, which he provided to the Inquiry by way of witness statement dated 7 July 2023.⁷¹ These were:

- (a) An organisational structure chart (or charts) showing the IL&P Group structure in the period between 2008 to 2010, the regulated legal entities operating in Ireland during this period and the management structure for all operations and functions having some responsibility for the management, control or supervision of PTSB.
- (b) A graph setting out:
 - (i) the official ECB interest rate to which PTSB tracker mortgages were linked;
 - (ii) Euribor;
 - (iii) the variable mortgage rate offered by PTSB;
 - (iv) the tracker mortgage rates offered by PTSB; and
 - (v) the margins applied by PTSB to such tracker mortgage rates during the Relevant Period.⁷²
- (c) A copy of the Memorandum and Articles of Association of any company operating the PTSB business in Ireland during the Relevant Period.

⁷¹ [Witness Statement of Andrew Walsh, dated 7 July 2023 \(Core Book 2 Tab 171\).](#)

⁷² See Paragraph 7.6

MATTERS RELEVANT TO THE INVESTIGATION

5.49 Counsel for Mr Guinane submitted in his closing remarks⁷³ that the evidence of Ms Louise Gallagher, the Joint Head of the Enforcement Investigations Division of the Central Bank, revealed that the decision to commence the present Inquiry was based on misapprehensions and pre-judgement of the outcome of the investigation. Ms Gallagher denied this in her oral evidence to the Inquiry on 4 March 2024.⁷⁴ Counsel for Mr Guinane also stated that Ms Gallagher's refusal to answer questions designed to elicit whether any other individual who worked for a bank which had tracker mortgage issues has been subjected to similar treatment (in the form of an investigation or inquiry) to that which Mr Guinane has been subjected, meant that I did not have access to evidence potentially favourable to Mr Guinane's position. I have taken account of the substance of counsel's submission and Ms Gallagher's evidence, including her failure or inability for legal reasons to answer certain questions. This Inquiry has considered the allegation and assertions set out in the Notice of Inquiry and the Investigation Report afresh. The Inquiry has taken the Investigation Report into account in coming to its findings, but has heard extensive evidence and submissions and sought disclosure of documents in order to come to its own conclusion on the matters that are relevant to the Notice of Inquiry and the Outline of the SPC. Mr Guinane, Enforcement and PTSB have all been permitted the opportunity to provide evidence, call witnesses and make submissions on relevant matters, including any aspect of the Investigation Report that they believe to be inaccurate or incomplete and any inference they wish me to draw from the failure or inability of witnesses to answer questions. I am satisfied that any misapprehensions or alleged pre-judgement of the outcome of the investigation prior to the Inquiry has not affected the ability of the Inquiry to come to a fresh conclusion on all matters that are relevant to the Notice of Inquiry and the Outline of the SPC.

⁷³ [Outline Closing Submissions on behalf of the Person Concerned, dated 14 March 2024.](#)

⁷⁴ [Transcript of Inquiry Hearing, dated 4 March 2024, page 111.](#)

CHAPTER 6

ISSUES OF LAW

COMMON GROUND ON ISSUES OF LAW

- 6.1 The Inquiry Member invited written and oral submissions on certain issues of law from Enforcement and Mr Guinane. Certain issues of law were identified that appeared to be important in deciding the outcome of the Inquiry and, consistent with the statutory objectives at section 33AY of the 1942 Act, appeared capable of being decided prior to the hearing of witness evidence and submissions in relation to the documentary evidence.
- 6.2 As touched on in Chapter 4, the Legal Issues Hearing took place on 11 and 12 October 2023 to hear submissions on issues of law.
- 6.3 Following the receipt of written and oral submissions from Enforcement and Mr Guinane, and the sharing of advice provided by the LPT during the course of the Inquiry, certain areas of consensus on issues of law were agreed between Enforcement and Mr Guinane and accepted by the Inquiry. These issues are:

“1. The Person Concerned was at the Relevant Time “a person concerned in the management of” the regulated financial services provider – namely permanent tsb plc, formerly Irish Life & Permanent plc.

2. The Inquiry Member does not have jurisdiction to determine the constitutionality of the establishment of the Inquiry by reference to Articles 34 and 37 of the Constitution.

3. The Inquiry Member does not have jurisdiction to determine the question of whether the Consumer Protection Code 2006 and/or its implementation by the Central Bank of Ireland offends Article 15.2.1° of the Constitution.

4. If the alleged prescribed contravention occurred, it occurred “within the context of [PTSB’s] authorisation”, for the purposes of the Consumer Protection Code 2006.

5. *A consideration of the Unfair Terms in Consumer Contracts Regulations 1995 is unnecessary for the purposes of the Inquiry.*

6. *Noting that the proper interpretation of General Principle 1 of the Consumer Protection Code 2006 is a matter for the Inquiry, and noting the Person Concerned's legal submissions in respect of the interpretation thereof, a breach of the Code is in principle, capable of constituting a prescribed contravention for the purposes of Part IIIC of the Central Bank Act 1942.*

7. *The passage of time between the issue of the Notice of Inquiry and the Inquiry hearing in Feb/March 2024 does not, in itself, give rise or contribute to procedural unfairness, other than to the extent it may affect witness evidence.*⁷⁵

CONTENTIOUS MATTERS OF LAW

6.4 It was apparent from the submissions received from Mr Guinane and from Enforcement and from the legal advice received from the LPT, that there was continuing disagreement on certain of the issues of law on which the Inquiry had sought submissions. Following the Legal Issues Hearing, the Inquiry was of the view that a number of these issues would be best resolved in the light of its findings in relation to the facts that are relevant to the Inquiry and having regard to the witness evidence and submissions in relation to the documentary evidence. The Inquiry deals with these issues of law in the following chapters. However, there are four particular issues of law or construction that are relevant to the Inquiry and on which it has heard submissions, in respect of which I consider it is necessary or helpful to set out its conclusions in principle at this stage. These four issues are addressed below.

1. ***The proper construction of General Principle 1 of the 2006 Code***

6.5 The first issue concerns the proper construction of General Principle 1 of the 2006 Code. This was the subject of extensive submissions from Mr Guinane and from Enforcement.⁷⁶ General Principle 1 reads as follows:

⁷⁵ [Legal Issues – Areas of Consensus, dated 16 October 2023 \(Core Book 6 Tab 13\).](#)

⁷⁶ [Submissions from Enforcement, dated 28 April 2023 \(Core Book 7 Tab 1\), Submissions from the Person Concerned, dated 31 July 2023 \(Core Book 7 Tab 5\), Submissions from Enforcement, dated 5 October 2023 \(Core Book 7 Tab 6\), Closing Submissions from the Person Concerned, dated 14 March 2024, Closing Submissions from Enforcement, dated 12 March 2024.](#)

“CHAPTER 1

GENERAL PRINCIPLES

*A regulated entity must ensure that in all its dealings with **customers** and within the context of its authorisation it:*

*1 acts honestly, fairly and professionally in the best interests of its **customers** and the integrity of the market”.⁷⁷*

6.6 The term “customer” is defined within the 2006 Code as being:

“any person to whom a regulated entity provides or offers to provide a service the subject of this Code, and any person who requests such a service”.⁷⁸

In this definition “any person” means “a natural person or a legal person”.⁷⁹

6.7 In the common ground that was reached by Enforcement and Mr Guinane with regard to certain issues of law, it was agreed that if the SPC described in Annex A of the Notice of Inquiry occurred, it occurred within the context of PTSB’s authorisation for the purpose of the 2006 Code. I confirm my conclusion that PTSB’s dealings with residential mortgage borrowers in relation to mortgage loan agreements containing SC706 amounted to dealings with customers within the context of its authorisation.

6.8 The phrase “acts honestly, fairly and professionally in the best interests of its customers and the integrity of the market”⁸⁰ was the subject of helpful submissions from the representatives of Mr Guinane and Enforcement. Each proposed different approaches to the proper construction of the phrase. Counsel for Mr Guinane submitted that the phrase should be construed on a cumulative basis so that a contravention only occurs if a RFSP fails to act (1) in the best interest of its customers and (2) in the best interests of the integrity of the market. I find that that this construction does not arise naturally from the drafting of General Principle 1.

6.9 I conclude that the requirement imposed by General Principle 1, that a RFSP must ensure that in all its dealings with customers it acts honestly, fairly and professionally

⁷⁷ [Consumer Protection Code 2006, Chapter 1 \(Core Book 5 Tab 4\).](#)

⁷⁸ [Consumer Protection Code 2006 \(Core Book 5 Tab 4\).](#)

⁷⁹ [Consumer Protection Code 2006 \(Core Book 5 Tab 4\).](#)

⁸⁰ [Consumer Protection Code 2006, Chapter 1 \(Core Book 5 Tab 4\).](#)

in the best interests of its customers and the integrity of the market, creates a number of separable obligations. A failure to ensure that a RFSP acts in any one of the three manners required - honestly, fairly or professionally - may give rise to a contravention if any one of these three standards is not met. I also conclude that the requirement to act as required "*in the best interests of its customers and the integrity of the market*"⁸¹ is to be construed on the basis that it requires two distinct obligations to be met – it is not to be construed on a cumulative basis. The first is to act as required in the best interests of its customers and the second is to act in the same way in relation to the integrity of the market. A failure to meet either of these obligations can give rise to a contravention. Therefore, a breach of the requirement arises, in principle, in the event that a RFSP fails to meet any of the individual standards that can be discerned in the requirement, specifically:

- (a) Failing to act honestly in the best interests of its customers;
- (b) Failing to act fairly in the best interests of its customers;
- (c) Failing to act professionally in the best interests of its customers;
- (d) Failing to act honestly in the best interests of the integrity of the market;
- (e) Failing to act fairly in the best interests of the integrity of the market; and
- (f) Failing to act professionally in the best interests of the integrity of the market.

In many instances these individual requirements may well overlap. It is very difficult to envisage circumstances where acting dishonestly, would not also involve acting unfairly and unprofessionally. In most cases, it is to be hoped that the best interests of customers and the integrity of the financial markets align. However, it is possible to identify occasions when these may diverge, for example when deciding what steps to take to avoid a run on a deposit-taker or the creation of a disorderly market in stocks or instruments held by customers.

6.10 I conclude that interpreting General Principle 1 as giving rise to severable obligations on PTSB to act as required in the best interests of its customers and to act in the same

⁸¹ [Consumer Protection Code 2006, Chapter 1 \(Core Book 5 Tab 4\).](#)

way in relation to the integrity of the market is the proper construction of General Principle 1. To conclude otherwise, raises the prospect of regulated entities being permitted by the 2006 Code to act unfairly and contrary to the best interest of their customers as long as this does not affect the integrity of the market. Construing General Principle 1 in this way is inconsistent with the overall purpose of the 2006 Code, which is to offer some protection to individual customers in their dealings with regulated entities.

- 6.11 Counsel for Mr Guinane pointed to a lack of clarity in the phrasing of General Principle 1 when referring to “*the integrity of the market*” and to the absence of any clear precedent or guidance as to the correct meaning of the reference to the undefined terms, “*integrity of the market*” or “*the best interests of the integrity of the market*”.⁸² The broad concept of market integrity in financial services can be understood from the ordinary and natural meaning of that phrase and, by way of example only, the term is used in EU financial services regulation that post-dates the 2006 Code.⁸³ In light of my conclusion on the construction of General Principle 1, I find that, it is only necessary to attempt to reach a decision in relation to the proper construction of the obligation in respect of the integrity of the market, or the best interests of the integrity of the market, placed on PTSB by General Principle 1, if the SPC alleges a breach of that obligation. The Inquiry Participants have not sought to argue that any act or omission that is relevant to determining whether the SPC took place affected the integrity of the market. The evidence in the Inquiry and the findings of fact in Chapter 7 do not lead me to conclude that the impact of PTSB’s acts or omissions on the integrity of the market, or the best interests of the integrity of the market, is a necessary or relevant factor in considering whether the SPC occurred. On this basis and in light of my conclusion in paragraph 6.10, I have not found it necessary to come to a conclusion on the precise meaning of the reference to the, “*integrity of the market*” or “*the best interests of the integrity of the market*” in General Principle 1.

2. Does the prescribed contravention require any particular intention, state of mind or knowledge?

- 6.12 The second issue of law on which I considered it would be helpful to come to a conclusion in principle, is in relation to the state of mind, *mens rea* or state of

⁸² [Consumer Protection Code 2006, Chapter 1 \(Core Book 5 Tab 4\).](#)

⁸³ [Regulation \(EU\) No 596/2014 of the European Parliament and of the Council.](#)

knowledge that may be required in order to establish that a breach of General Principle 1 of the 2006 Code has been committed by a RFSP or participated in by an individual who is a person concerned in the management of the RFSP. Mr Guinane referred to this issue in the *“Initial Discrete Observations”* submitted by him at the outset of the Inquiry and suggested that Enforcement would need to clarify its position on:

*“the mens rea or mental element (if any) of each and all aspects of the (i) the alleged participation and (ii) the alleged prescribed contravention”*⁸⁴

6.13 I invited Enforcement and Mr Guinane to make submissions on this issue. Having considered these submissions,⁸⁵ and the position in law, I conclude that there is no requirement to prove that the leadership or controlling mind of PTSB had any particular state of knowledge, state of mind or intention in order to establish that its dealings with customers were in breach of General Principle 1 of the 2006 Code. PTSB was, during the Relevant Period, a RFSP that operated through hierarchical management structures and dealt with customers through its use of information systems, or responses or information derived from information systems. It was, therefore, as a matter of fact inherently capable of acting unfairly and against the best interests of its customers without any individual or group of individuals within PTSB having deliberately intended this to happen. In such circumstances, it seems unnecessary and inappropriate to require that any particular intention, state of mind, state of knowledge or other mental state should be required of PTSB and/or those controlling it, in determining whether it has failed to meet the obligations imposed by General Principle 1 of the 2006 Code.

6.14 The position of the individual who is a person concerned in the management of the RFSP and who is alleged to have participated in a breach of General Principle 1 is potentially different. The Inquiry was conducted on the basis that the state of knowledge, state of mind or intention of a person concerned in the management of a RFSP may be relevant in assessing whether they have participated in any act or breach that gave rise to the SPC. I therefore sought and heard evidence and submissions on Mr Guinane’s knowledge, state of mind and intention at the times that are relevant to the SPC. It is not necessary or appropriate for this Inquiry to come to a

⁸⁴ [Initial Discrete Observations on behalf of David Guinane upon the Investigation Report, dated 10 January 2022 \(Core Book 6 Tab 6\).](#)

⁸⁵ [Submissions of the LPT, dated 28 April 2023 \(Core Book 7 Tab 2\), Submissions of Enforcement, dated 5 October 2023 \(Core Book 7 Tab 6\), Transcript of Legal Issues Hearing, dated 11 October 2023 \(Core Book 9 Tab 7\), Transcript of Inquiry Hearing, dated 14 March 2024.](#)

general conclusion about the specific *mens rea* or state of mind that may be required for a person concerned in the management of a RFSP to have participated in a failure or contravention by that RFSP. This Inquiry needs only to consider if the facts and circumstances as a whole, including Mr Guinane's intention, state of knowledge and/or state of mind, establish that Mr Guinane was, in the Relevant Period, a person concerned in the management of PTSB and participated, in the ordinary and natural sense of that word, in a failure or contravention by PTSB. It was helpful to the Inquiry to understand the respective approaches proposed by Mr Guinane and Enforcement on the criteria and legal principles that are relevant to a decision on whether a person concerned in the management of a RFSP participated in a failure or contravention by a RFSP, including what level of knowledge, intention or awareness may be relevant. I have come to a conclusion in relation to the alleged participation by Mr Guinane having considered all the evidence, facts and circumstances and the submissions of the Inquiry Participants in relation to the particular circumstances of this Inquiry, including those relating to Mr Guinane's intention, state of mind and state of knowledge. The approach adopted to deciding if Mr Guinane participated in the SPC and my conclusion on Mr Guinane's intention, state of mind and state of knowledge and my reasons for reaching that conclusion in the particular circumstances of this Inquiry are set out in the following chapters of these Written Findings.

3. SC706

- 6.15 The third issue on which the Inquiry considers it appropriate to come to a conclusion in principle, relates to the proper construction of SC706.

[REDACTED]

[REDACTED]

The redacted content in paragraph 6.15 contains reference to legal advice that was available to PTSB and about which Mr Guinane received reports prior to 19 January 2009.

[REDACTED]

[REDACTED]

6.16

[REDACTED]

The redacted content in paragraph 6.16 contains reference to legal advice that was available to PTSB and about which Mr Guinane received reports prior to 19 January 2009.

[REDACTED]

6.17 Given the significance of the terms of SC706 and the need to construe it in the context in which it was used, I sought submissions from Enforcement and Mr Guinane and advice from the LPT on whether SC706 was, on its proper construction, ambiguous.

6.18 Counsel for Mr Guinane described the ambiguity in SC706 as follows:

⁸⁶ [Email from Ailbhe O'Doherty to Niall O'Grady with subject line 'FW: Draft text for Letter for Broker – SENT ON BEHALF OF KEVIN O' CONNOR' forwarding a draft legal opinion extract from Kevin O'Connor in respect of the tracker condition query, dated 15 January 2009, page 1 of 2 \(Doc ID: 0.7.296.5248, Core Book 1 Tab 22\).](#)

⁸⁷ [Transcript of Inquiry Hearing, dated 26 February 2024, page 22.](#)

*“The wording raises two possibilities: (1) whether customers were entitled to the tracker rate on which their loan originally commenced on and which was specified in their loan documents or (2) whether they were entitled to an unspecified tracker rate. In other words, did the words “a tracker mortgage rate as described above” refer back to a rate specified “above” in the loan documents, or did it refer to a more general concept of a tracker rate which was also referred to in the loan documents”.*⁸⁸

In questioning Mr O’Grady, counsel for Mr Guinane asked Mr O’Grady to consider that SC706 is not ambiguous, as follows:

*“You are au fait with what the problem is, you have been given legal advice on the matter, and you are telling Mr Guinane that there is an ambiguity, which I have to suggest to you simply wasn’t there in the conditions because they were clear, “as described above”, refer to the conditions, and you say so yourself in the e-mail, you say: “The conditions above this condition on the Letter of Approval refer to the price promise.”*⁸⁹

- 6.19 It was submitted on behalf of Mr Guinane that, in any event, it was inappropriate to seek to transform an interpretative tool like the *contra proferentem* rule of construction into a regulatory obligation.⁹⁰ The LPT submitted that the effect of the rule is that an ambiguous term should be construed in the manner less favourable to the party who drafted it, which in a retail banking context will invariably be the bank.⁹¹ Enforcement submitted⁹² that the *contra proferentem* principle of interpretation applies to any term that is found to be ambiguous in mortgage loan agreements, which included SC706. Enforcement further submitted that the characterisation of the rule by Mr Guinane as being one of “last resort” had been extracted from the dissenting judgment of O’Donnell J in *ICDL GCC Foundation FZ-LLC and Others v European Computer Driving Licence Foundation Ltd*, whereas the correct approach would be to consider whether the words can be interpreted in accordance with their natural and ordinary meaning and in the event of ambiguity, the *contra proferentem* rule then applies. In this instance SC706 was drafted by PTSB and [REDACTED]

⁸⁸ [Submissions of the Person Concerned on issues Raised by the Inquiry Member, dated 31 July 2023, paragraph 108 \(Core Book 7 Tab 5\).](#)

⁸⁹ [Transcript of Inquiry Hearing, dated 22 February 2024, page 145.](#)

⁹⁰ [Submissions of the Person Concerned in issues raised by the Inquiry Member, dated 31 July 2023, paragraph 18 \(Core Book 7 Tab 5\).](#)

⁹¹ [Submissions of the Legal Practitioner Team, dated 28 April 2023 \(Core Book 7 Tab 2\).](#)

⁹² [Submissions on behalf of Enforcement, dated 5 October 2023 \(Core Book 7 Tab 6\).](#)

[REDACTED]

6.20 By 8 December 2009, Mr O'Connor [REDACTED]

[REDACTED] He stated in his email to Ms Ailbhe O'Doherty of that date :

[REDACTED]

6.21

[REDACTED]

[REDACTED]

[REDACTED]

6.22 SC706 needs to be construed in context. It is common ground that SC706 was contained in the mortgage loan agreement of some PTSB customers who had started on a tracker interest rate. The evidence and submissions relating to the means by which SC706 formed a part of a mortgage loan agreement with customers establishes that the condition was included in the offer letter issued by PTSB to prospective borrowers. SC706 cross-refers to matters addressed elsewhere in the contractual conditions included in the offer letter, such as the phrases "*the rate on this loan*" and "*a tracker mortgage loan as described above*". In any individual customer's mortgage loan agreement it would be necessary to consider these and other phrases in context.

⁹³ [Email from Kevin O'Connor to Ailbhe O'Doherty dated 8 December 2009 re Tracker Condition Query 706 – Sent on behalf of Kevin O'Connor, page 3 of 3 \(Doc ID: 0.7.296.26106, Core Book 4 Tab 51\).](#)

⁹⁴ [Email from Kevin O'Connor to Cathal MacCarthy, dated 8 January 2010, page 1 of 4 \(Doc ID: 0.7.296.26028, Core Book 4 Tab 55\).](#)

⁹⁵ [Email from Kevin O'Connor to Joe Fleming \(copying Cathal MacCarthy\) re 706 – sent on behalf of Kevin O'Connor, dated 1 April 2010, page 1 of 2 \(Doc ID: 0.7.296.26047, Core Book 4 Tab 12\).](#)

6.23 I have seen a document entitled “*Letter of Approval – Particulars of Mortgage Loan*” dated 4 January 2006⁹⁶ (the **Letter of Approval**), which I understand from the evidence is typical of the letters issued to customers who were being offered a mortgage loan with a tracker rate. Page 1 of the Letter of Approval identifies the loan as “*Loan Type: Tracker Mortgage (ECB + max 1.10%) – Home Loan.*” Special Condition D in the Letter of Approval allows PTSB to vary the interest rate provided that it does not exceed 1.10% over “*THE EUROPEAN CENTRAL BANK REFINANCING RATE (THE ‘ECB RATE’)*”. Special Condition H in the Letter of Approval sets out the text of SC706. I would construe the phrase “*a tracker mortgage loan as described above*” in the text of SC706 to be referring to the loan product in question i.e. “*Loan Type: Tracker Mortgage (ECB plus max 1.10%) – Home Loan.*” This description of the tracker mortgage loan includes the basis on which the interest rate is to be calculated i.e. the then current ECB refinancing rate plus a maximum of 1.1%. In the absence of any different description of the tracker mortgage loan to which SC706 could be referring, I conclude that it refers to the tracker mortgage rate of the ECB refinancing rate + whatever maximum interest rate, e.g. max 1.10%, that is set out in the letter from PTSB that enclosed the terms and condition of the mortgage loan agreement including SC706. In the circumstances, it is not clear that any ambiguity arises when SC706 is interpreted in the context of the Letter of Approval in which it is first offered to a customer for their acceptance.

4. *Whether EU law is engaged in this Inquiry and whether General Principle 1 breaches EU law’s general principle of legal certainty*

6.24 The fourth issue on which the Inquiry considers it appropriate to come to a conclusion in principle is the issue of whether EU law is engaged in this Inquiry and whether General Principle 1 breaches EU law’s general principle of legal certainty.

6.25 In legal submissions dated 31 July 2023,⁹⁷ Mr Guinane argued (in section G) that:

- (a) EU law is engaged in this Inquiry; and

⁹⁶ [Letter of approval from the Bank to \[redacted\] in respect of a tracker mortgage, dated 4 January 2006 \(Doc ID: 0.7.2366.136090, Core Book 1 Tab 3\).](#)

⁹⁷ [Submissions of the Person Concerned on issues raised by the Inquiry Member dated 31 July 2023, section G \(Core Book 7 Tab 5\).](#)

- (b) General Principle 1 breaches EU law's general principle of legal certainty, and the *Marleasing*⁹⁸ principle requires the Inquiry Member to disapply General Principle 1, as it constitutes national law which conflicts with EU law.

6.26 Counsel for Mr Guinane relied on the decision of Hedigan J in *Purcell v Central Bank of Ireland* [2016] IEHC 514 (***Purcell***)⁹⁹ in respect of the submission that the Inquiry is operating within the scope of EU law, such as to engage his fundamental rights under the Charter of Fundamental Rights (by virtue of article 51 thereof) and under the general principles of EU law.

6.27 In *Purcell*, it was noted by Hedigan J., at paragraph 6.25(xi), that the Central Bank had made the following argument:

“(xi) While EU law does not mandate that the particular prescribed contraventions in the present case be addressed by way of the ASP, it does require, in respect of some of them, that there be penalties other than criminal sanctions. EU law requires that many important obligations imposed on financial service providers are addressed by way of an administrative sanctions procedure which procedure is specifically distinguished from civil and criminal proceedings.” [Emphasis added]

6.28 At paragraph 8.7(v) of *Purcell*, Hedigan J. held:

“The regulation of the financial sector is a relatively modern phenomenon. It is established by statute and at EU level. As the evidence of both of the above experts demonstrated, it is a highly complex and sophisticated series of interlocking statutes and regulations. It is clear, following recent economic difficulties, that the public interest in the effective regulation of the financial sector is an overwhelming one. It is something that requires different levels and depths of supervision and effective forms of regulation and enforcement. The EU presence in the regulatory framework reflects not only the complexity of cross-border regulation but the necessity for it to operate in a co-ordinated way. The Oireachtas has provided that those functions should be carried out by the Central Bank of Ireland and have established complex and sophisticated administrative machinery for doing so.” [Emphasis added]

⁹⁸ Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA*.

⁹⁹ [Purcell v Central Bank of Ireland \[2016\] IEHC 514 \(Core Book 7 Tab 41\)](#).

6.29 It has not been disputed by Enforcement that the Inquiry is operating within the scope of EU law, and were such a position advanced, it might well be inconsistent with the Central Bank's position in *Purcell*. For the purposes of this decision, I am satisfied to hold that EU law is engaged.

6.30 As regards the second submission, that General Principle 1 breaches EU law's general principle of legal certainty, I am content to agree with counsel for Mr Guinane's contention that there is:

"no issue but that legal certainty is a general principle of EU law and, in effect, a fundamental right"

6.31 I have considered if a general principle of legal certainty in EU law impacts the Inquiry or the findings that I must reach. I have set out at 6.10 above my conclusion with regard to the proper interpretation of General Principle 1 of the 2006 Code. I do not find that there is a lack of certainty in relation to the requirement to act fairly in the best interests of a bank's customers. The concepts of fairness and unfairness are well-established in EU consumer legislation. By way of example, the term is used in Directive 2005/29/EC ('Unfair Commercial Practices Directive') and Directive 93/13/EEC – (Unfair Terms in Consumer Contracts).¹⁰⁰ There is extensive jurisprudence in relation to the application of the terms "fair" and "unfair" in relation to businesses dealing with consumers. Acting in the best interest of customers is a requirement that is readily understandable and familiar in Irish law and EU law and I see no lack of certainty in this concept. Mr Guinane has felt able to offer his view on whether particular actions were "fair" or not. For example, in the Substantive Inquiry Hearing Mr Guinane responded to questions from the LPT about fairness as follows:

"I take it, Mr Guinane, you would agree that charging the customer an interest rate which isn't in compliance with their contractual entitlements, is unfair?"

A. Absolutely.

Q. And is not in their best interests?

A. Absolutely."

¹⁰⁰ [Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market](#), [Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts](#).

Q. And there is nothing vague about what “unfair” means in this context; it means charging the customer more than they’re obliged to pay?

A. I think it’s called overcharging.”¹⁰¹

In Mr Guinane’s interview with Enforcement on 22 May 2019, he was asked by Enforcement whether certain actions were “fair” to customers and he is able to respond immediately and without seeking clarification of the term.

- 6.32 The concern that Mr Guinane expressed over the terms “*in the context of its authorisation*” and “*integrity of the market*” are not a source of uncertainty in this Inquiry. Counsel for Mr Guinane stated at an earlier stage that they “admit of no clear definition, notwithstanding their apparent centrality to General Principle 1”.¹⁰² However, common ground was subsequently reached on how “*in the context of its authorisation*” should be applied in relation to the SPC by PTSB. The requirement in General Principle 1 in respect of “*the best interests of integrity of the market*” could create some uncertainty, but the interpretation that I have placed on General Principle 1 means that this is irrelevant to the findings of the Inquiry.

¹⁰¹ [Transcript of Inquiry Hearing, dated 6 March 2024, pg.122.](#)

¹⁰² [Submissions of the Person Concerned on issues raised by the Inquiry Member dated 31 July 2023, page 99 \(Core Book 7 Tab 5\).](#)

CHAPTER 7

FINDINGS OF FACT

COMMON GROUND

- 7.1 Mr Guinane and Enforcement were invited to consider if there were matters of fact that were relevant to the Inquiry that could be agreed between them. I am grateful to them for their co-operation in considering and responding to this request. Common ground was found on many relevant matters of fact, which I found to be supported by the evidence. These agreed facts are set out below.¹⁰³

“A. Background and Structure of Permanent TSB plc

a) Irish Permanent plc was authorised by the Central Bank on 21 September 1994 as a credit institution and a regulated financial services provider (RFSP). In April 1999, Irish Permanent plc merged with Irish Life plc resulting in a combined banking and life assurance company named Irish Life & Permanent Group Holdings plc (IL&P Group). IL&P acquired the Trustee Savings Bank (TSB) in 2001.

b) In 2002, IL&P Group’s re-branded retail banking operation known as PTSB was launched following the integration of Irish Permanent and TSB bank operations. PTSB was the trading name of IL&P Group for banking purposes from 19 January 2009 to April 2010 (the Relevant Period), but the banking licence was held by IL&P Group, which was at all material times the RFSP. In the overall IL&P Group structure, during the Relevant Period, there were two divisions: PTSB (the retail banking division) and Irish Life (the life assurance division).

c) PTSB was not a separate company with its own board of directors nor did it have a separate authorisation from the Central Bank. IL&P Group, also simply known as “Group” oversaw both subsidiaries. During the Relevant Period, IL&P Group had a CEO and Board of Directors. During the Relevant Period, PTSB had its own separate CEO, but it did not have a Board of Directors. During the Relevant Period, IL&P Group had a Senior Management Team referred to as the “Strategy Group” or “Top Team”.

¹⁰³ [Narrative of Agreed Facts, dated 31 March 2023 \(Core Book 6 Tab 10\).](#)

d) *The Strategy Group consisted of inter alia the Group CEO, the Group Finance Director, the CEO of PTSB, the CEO of Irish Life, the Group Legal Officer, the Group Risk Officer, Group HR Director and Irish Life Investment Managers.*

e) *In 2012, the Irish Life business division was sold to the Irish State for €1.3bn. On 30 May 2012 IL&P changed its name and became permanent tsb Group Holdings plc.*

B. Roles held by the Person Concerned

a) *The Person Concerned holds a banking degree from the Institute of Bankers, which was obtained in the early 1980's. The Person Concerned joined Irish Permanent Building Society (as it then was) in 1985.*

b) *From 1985 to 1989 the Person Concerned held the role of Branch Manager. He held the role of Financial Services Manager from 1989 to 1992. His title was Marketing Manager from 1992 to 1994. The Person Concerned held the role of General Manager, Bancassurance, from 1994 to 1996. He was Managing Director of Capital Home Loans from 1996 to 2001.*

c) *From 2001 to 2005, the Person Concerned held the role of General Manager, Intermediaries, PTSB. From 2005 to 2007, he held the role of General Manager, Retail, PTSB. From 2007 to 2012, and therefore throughout the Relevant Period, the Person Concerned held the role of Chief Executive Officer, PTSB. The Person Concerned has not occupied a role in any RFSP since 2012.*

d) *An executive team ("ExCo") consisting of some nine general managers in the areas of Retail, Intermediaries, Finance, IT, Operations, HR, Marketing, Credit, Intermediaries and Branch Banking reported to the Person Concerned throughout the Relevant Period in his role as CEO of PTSB.*

e) *The Person Concerned, in his role as CEO of PTSB, chaired ExCo meetings throughout the Relevant Period.*

f) *The Person Concerned reported to the IL&P Group CEO throughout the Relevant Period. At no time was the Person Concerned a Board member of IL&P Group, but he did, on occasion, attend Board meetings. The Person Concerned was a member of the Strategy Group during the Relevant Period. The Person Concerned was also a member of the IL&P Group Assets and Liabilities Committee (ALCO) during the Relevant Period.*

C. Tracker Mortgages and SC706

a. *PTSB introduced its first tracker mortgages in January 2004. The development and implementation of Special Condition 706 ("SC706") commenced in 2003. SC706 was drafted by Mr Kevin O'Connor in the legal department of PTSB.*

b. *SC706 provided as follows:*

"Please note that where the applicant switches the rate on this loan to a rate which is fixed for a certain period, the applicant must inform permanent tsb, on expiry of the fixed rate period, whether the rate on the loan is to switch into a further fixed rate (if available) or whether the loan is to revert to a tracker mortgage loan as described above. In the absence of instructions from the applicant at the expiry of the fixed rate period, the interest rate will switch to the then current variable interest rate and as may be varied from time to time thereafter."

c. *SC706 was contained in the loan documents of some PTSB customers whose mortgages had started on a tracker interest rate. SC706 required customers to advise PTSB at the end of a fixed rate period whether they wanted to move to a variable rate or revert to a tracker. In the absence of an instruction from the customer, PTSB would move the customer to a variable rate.*

d. *SC706 was drafted to address a specific aspect of the PTSB system at the time whereby if a customer with a tracker interest rate switched to a fixed interest rate, the system could not be set up to default the customer back to a tracker interest rate at the end of that fixed interest rate period as it could only default the customer to a standard variable rate.*

e. In 2004, PTSB offered two tracker interest rates. The first was a tracker rate not exceeding ECB +1.4% where a loan amount was equal to or exceeding €150,000 but was less than €250,000, and the second was a tracker rate not exceeding ECB +1.1% where a loan amount was equal to or more than €250,000. Further tracker products were subsequently developed.

f. PTSB stopped offering tracker rates to new customers from 14 July 2008.

D. Customer Queries regarding SC706

The Person Concerned was present at a PTSB ExCo meeting on 13 January 2009. The issue of customer complaints concerning SC706 was raised by Mr Niall O'Grady at this meeting.

On 16 January 2009, Mr O'Grady sent the Person Concerned the following email:

"Dave

As mentioned this summarises the issue we discussed re tracker customer.

Overall

The issue refers to approx. 10,000 mortgage contracts for customers who started on price promise tracker. These customers have the options to take a fixed rate (to date only about 400 have taken a fixed and this will fall further as all fixed rates are higher than tracker rates).

At the end of the fixed rate period, they will default to a variable rate.

Once they have defaulted to the variable rate there is no option for them to request to go back to any tracker.

Specific issue to decide on

Customers who started on this price promise tracker and go to a fixed rate have the option of reverting, in the words of the loan condition, "to a tracker mortgage loan as described above" if they contact us on expiry of the fixed rate period. The conditions above this condition on the Letter of Approval refer to the price promise.

Which tracker they have the option of reverting to appears ambiguous (the original or today's?) so we have the option of making whichever we chose available to them.

I propose we allow the customers who actually contact (1 so far) to revert to their original tracker.

Niall

The redacted content in paragraph 7.1D contains reference to legal advice that was available to PTSB and about which Mr Guinane received reports prior to 19 January 2009.

On 19 January 2009, Mr O'Grady sent the Person Concerned a follow-up email, referring to the proposal contained in the email of 16 January, asking if "you are OK with this".

On 19 January 2009, the Person Concerned responded by email to Mr O'Grady's emails of 16 and 19 January 2009, stating "OK with that".

E. Events after 19 January 2009

As CEO, the Person Concerned was responsible for signing off on the monthly compliance reports for the PTSB division.

The PTSB February 2009 Compliance Report contained the following statement concerning the decision taken in relation to SC706:

"It has been agreed that if a customer misunderstands the condition and entered into their fixed rate on the understanding that they would return to the original tracker margin, that we will honour the original margin. If a customer takes our intended meaning of the condition they will be entered in to 'a tracker' which will be the tracker rate appropriate to the loan at that time.

Compliance has recommended that a robust system is put in place in Marketing in to (sic) ensure that these cases can be identified and to ensure that all customers are treated fairly as outlined above."

As CEO, the Person Concerned reviewed and signed off the PTSB February 2009 Compliance Report, and the subsequent report of March 2009 which addressed SC706 in similar terms.

F. PTSB Strategy and Remediation

PTSB continued to receive complaints and queries regarding SC706 throughout 2009.

These complaints were dealt with broadly in line with the decision made on 19 January 2009 as reflected in the February 2009 Compliance Report.

From approximately March or April 2010, customers who rolled off a fixed rate no longer had to specifically request a return to their original tracker rate as opposed to the then current tracker rate.

PTSB remediated all impacted customers in late 2010. In 2011, KPMG prepared a report at the request of PTSB. KPMG concluded that there was nothing to suggest that the remediation calculations of PTSB were not materially accurate.”

- 7.2 During Mr Guinane’s evidence to the Inquiry on 6 March 2024, he sought to clarify his position on one issue which had been agreed in the Narrative of Agreed Facts i.e. that he was responsible for signing off on compliance reports. Mr Guinane stated that he was copied on a compliance report at the same time as everyone else who was to receive it and so never signed off on any of the compliance reports.¹⁰⁴

FINDINGS OF FACT ON THE EVIDENCE AND SUBMISSIONS

Background and structure of IL&P Group and PTSB

- 7.3 It follows from the agreed facts set out above that during the Relevant Period, Mr Guinane was the CEO of PTSB, the retail banking division of IL&P Group. It is clear from the evidence¹⁰⁵ that the legal and compliance functions that operated in the IL&P Group had responsibilities to both the management of the IL&P Group and the management of PTSB. The legal function operated within the IL&P Group and provided a service to the management of PTSB. A compliance function operated within PTSB and reported to both the senior management of PTSB and to the group compliance function within IL&P Group. I also heard evidence¹⁰⁶, which were unchallenged, that the treasury function of the banking operations of the IL&P Group were not managed

¹⁰⁴ [Transcript of Inquiry Hearing, dated 6 March 2024, page 51, line 24.](#)

¹⁰⁵ [Witness Statement of Joseph Fleming, dated 20 December 2022 \(Core Book 2 Tab 4\), Witness Statement of William Hannan, dated 6 December 2022 \(Core Book 2 Tab 51\), Witness Statement of Frank Wynn, dated 21 December 2022 \(Core Book 2 Tab 135\).](#)

¹⁰⁶ [Transcript of Inquiry Hearing dated 5 March 2024, page 25, Transcript of Inquiry Hearing, dated 6 March 2024, page 23.](#)

within PTSB. These were managed within the central IL&P Group. This structure indicates that the CEO of PTSB did not have full responsibility and control over all aspects of the banking business of IL&P Group. It also indicates that the regulatory responsibility for the IL&P Group was held by the board of the IL&P Group, which had its own chief executive and senior managers. I have concluded from the evidence on the structure of the IL&P Group that the divisional management of PTSB had responsibility for the customer facing aspects of the banking operations of IL&P Group. This leads me to conclude that Mr Guinane and the senior management of PTSB did not have sole, or even prime, responsibility for PTSB's compliance with its legal and regulatory obligations. However, I also conclude that they should have had a particular awareness of the regulatory requirements that arose in dealing with customers in the course of the banking business.

SC706 and PTSB's mortgage loan agreements

- 7.4 I heard evidence from Mr O'Grady¹⁰⁷ and Mr Guinane and reviewed documentation, including the Investigation Report¹⁰⁸ and remediation report from KPMG,¹⁰⁹ which indicated that SC706 had been included by PTSB in between 10,000 and 12,800 loan agreements prior to PTSB ending its offer of tracker mortgages. I find that PTSB believed in early 2009 that around 10,000 customers had mortgage loan agreements containing SC706 and that subsequent audits indicated that there were around 12,800 customers in this position. I regard the initial estimate as adequate and the difference between this and the number revealed in the audit is of no significance to my findings.
- 7.5 Mr Kevin O'Connor, in-house solicitor for PTSB, was responsible for drafting the terms of SC706. He gave evidence to the Inquiry that he had been constrained in drafting the provision by PTSB's IT system, which had a limit on the number of characters that could be used for a clause.¹¹⁰ As set out in para 7.1(C)(d) above, the special condition was itself required in order to address a specific aspect of PTSB's IT system at the time (which could not be set up to default a customer back to a tracker interest rate at the end of a fixed interest rate period). As a result, a customer seeking to revert back to a tracker rate at the end of a fixed rate period was required, under SC706, to contact PTSB in order to request that. I accept this as a matter of fact.

¹⁰⁷ Mr O'Grady was the general manager of marketing in PTSB.

¹⁰⁸ [Investigation Report, dated 26 May 2021, page 37 \(Core Book 6 Tab 2\)](#). Also see paragraph 7.151 below.

¹⁰⁹ [Letter from KPMG to David Guinane on the 'Agreed Upon Procedures' completed in respect of the Permanent TSB 706 condition customer mortgage account remediation project, dated 18 January 2011 \(Doc ID: 0.7.2366.72414, Core Book 1 Tab 83\)](#).

¹¹⁰ [Transcript of Inquiry Hearing, dated 26 February 2024 \(page 18\)](#).

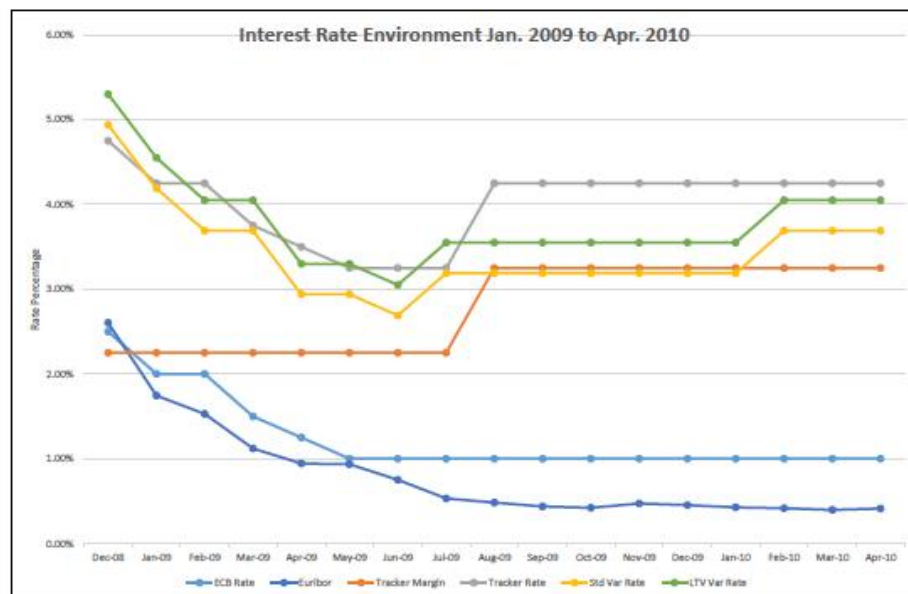
Interest rates

- 7.6 The economic and banking environment in 2008 and during the Relevant Period gave rise to extraordinary difficulties for many banks in Ireland and elsewhere. The background to the economic and banking crises during this period are common knowledge and I do not propose to summarise them in these Written Findings. However, the movement of particular euro interest rates are relevant to the Inquiry in so far as they affected the position of PTSB and its customers and may have affected the judgement or actions of the management of IL&P Group and PTSB. I have set out below a chart showing interest rates during the period from January 2009 to April 2010, together with notes and context. The chart and the notes and context were provided to the Inquiry by Mr Andrew Walsh, solicitor, group legal counsel of PTSB,¹¹¹ and was unchallenged. A similar chart was referred to in the Investigation Report.¹¹² I was informed,¹¹³ and I accept, that all lenders in the Irish mortgage market, including PTSB, stopped offering tracker interest rates to new customers during 2008. The risk to banks lending in euros at that time and offering tracker rates, was that the tracker interest rate, including the margin that they might have expected to earn over and above the relevant euro interest rate, may have been insufficient to cover their borrowing costs. Enforcement, in the Investigation Report, placed reliance on this interest rate environment being a motivating factor for the PTSB management in considering how to apply SC706.

¹¹¹ [Exhibit to Witness Statement of Andrew Walsh, dated 7 July 2023 \(Core Book 2 Tab 181\)](#). In his witness statement Mr Walsh, who was not employed by PTSB at the Relevant Period, made it clear that all of the information provided was based on input from relevant sources within PTSB. Accordingly, he had no direct knowledge of matters occurring or relating to the Relevant Period. In the end, as none of the Inquiry Participants indicated they would seek to cross-examine Mr Walsh, he was not examined in chief by the LPT and his Witness Statement was taken as read.

¹¹² [Investigation Report, dated 27 May 2021, page 40, Chart 3 \(Core Book 6 Tab 2\)](#).

¹¹³ [Investigation Report, dated 27 May 2021, page 20 \(Core Book 6 Tab 2\)](#).



Notes and Context

1. ECB rate is included at month end to make chart easier to read, rather than date of change
2. Euribor rate is 30 day Euribor, at month end
3. Tracker Margin is the margin available to customers through out the period
- 3a. Tracker Margin is for customers maturing from a fixed rate and was not available to new customers
4. Tracker Rate is the tracker rate available to customers through out the period
- 4a. Tracker Rate is for customers maturing from a fixed rate and was not available to new customers
- 4b. Tracker Rate is ECB rate (1) plus Tracker Margin (3)
5. Standard Variable Rate is the Bank's back book variable rate product in the period
6. LTV Variable rate is the <80% LTV Variable product available on maturity of a fixed rate

Customer queries in relation to SC706

- 7.7 On 12 January 2009, Ms Ailbhe O'Doherty, a mortgage product development manager within the marketing division of PTSB, arranged a meeting with two representatives of the compliance function of PTSB including Mr Joe Fleming, the head of compliance in PTSB, Mr O'Connor and members of the marketing and mortgage operations teams. The meeting invitation stated:

"Hi all

We have had some queries in relation the interpretation of an old mortgage condition appearing on loan offers from approx 2005.

Can we meet to discuss legal/compliance views briefly as we need to respond to 2 customer queries.

*Thanks”*¹¹⁴

- 7.8 Ms O’Doherty sent an email to Mr Niall O’Grady, the general manager of marketing in PTSB, on 12 January 2009 at the end of that working day which stated the following:

“Subject: Mortgage Loan Condition Query.....Please find below a brief summary of the mortgage condition query discussed earlier.

The condition that appeared in tracker loan offers from 2004 reads as follows:

Please note that where the applicant switches the rate on this loan to a rate which is fixed for a certain period, the applicant must inform permanent tsb, on expiry of the fixed rate period, whether the rate on the loan is to switch into a further fixed rate (if available) or whether the loan is to revert to a tracker mortgage loan as described above. In the absence of instructions from the applicant at the expiry of the fixed rate period, the interest rate will switch to the then current variable interest rate as may be varied from time to time thereafter.

We have now received a query from a broker whose client is on a fixed rate until July 09 looking for confirmation that she will revert to the original tracker rate of ECB+0.9% on expiry of the fixed rate as the condition above is in her original loan offer.

It is understood that this condition was drafted due to the fact that the system at the time could not mature loans to a tracker automatically and therefore the onus had to be on the customer to request a tracker. The default was SVR. It was never intended to give the customer confirmation of what the tracker rate would be just confirmation that a tracker type mortgage could be requested. However, as the condition refers to “the tracker mortgage loan as described above” it is ambiguous and therefore the customer could assume that they could go back to the tracker rate quoted on the original loan offer.

¹¹⁴ [Appointment invitation from Ailbhe O’Doherty to Daragh Larkin, Ruth Brophy, Joe Fleming, Ann Furlong, Kevin O’Connor and Ruta Walsh with subject line ‘Tracker Condition Query’ seeking a meeting to discuss the legal interpretation of a mortgage condition on loan offers from ~2005 \(Doc ID: 0.7.2366.63510, Core Book 1 Tab 17\).](#)

The broker states that his client took the loan with permanent tsb on the understanding that she could revert back to this tracker rate at various stages after a fixed period.

As the condition is ambiguous we plan to send a letter to this customer highlighting that her interpretation of the condition is incorrect however we will make an exception and give her the tracker rate offered on the loan offer in this case.

Any other cases that arise where this condition is specifically queried would be dealt with in the same way, i.e. give the tracker rate as per condition. However, unless the customer contacts us requesting the old tracker rate they will continue to be offered and default to the current rates available today.

We are working on a draft response with Kevin and I will send you on a copy of this tomorrow for sign off.

Can you please advise if you agree with this approach”¹¹⁵

- 7.9 This email was copied to Mr O'Connor. I note that the email refers to a discussion about the issue asserted to have taken place “earlier” between Mr O'Grady and Ms O'Doherty.
- 7.10 The Inquiry heard from Ms O'Doherty. She had little direct recollection of events in 2009. However, she was able to give evidence as to her actions at the relevant time based upon her access to emails and other documents from that time. She was in the marketing department and was experienced in relation to mortgages. Her immediate manager was the head of mortgages, who was on maternity leave at that time. Ms O'Doherty was, around this time or shortly thereafter, in line to take up a role in relation to the bank's online activities. She indicated that she was unfamiliar with this particular mortgage condition and the query from the broker that was passed to her. The query in relation to the application of the SC706 condition was passed to marketing rather than being dealt with in a branch or in customer services, as it was received from a broker.¹¹⁶

¹¹⁵ [Internal email chain between Joe Fleming, Niall O'Grady and Ailbhe O'Doherty regarding mortgage loan condition queries, dated 13 January 2009, page 1 of 2 \(Doc ID: 0.7.2366.51647, Core Book 1 Tab 18\).](#)

¹¹⁶ [Transcript of Inquiry Hearing, dated 23 February 2024, page 84.](#)

- 7.11 The witness evidence as to the discussions that may have taken place at the meeting organised on 12 January 2009 with members of the legal, compliance, marketing and operations teams was based upon the documents that have survived from that time.¹¹⁷ None of the witnesses that the Inquiry heard from recollected the particular discussion or decisions reached at the meeting and Mr O'Connor and Mr Fleming were not certain that they attended the meeting. On the balance of probabilities it seems likely from Ms O'Doherty's subsequent correspondence with Mr O'Grady, Mr O'Connor and the compliance team, that Mr O'Connor and representatives of compliance participated in the discussions on 12 January 2009. (See paragraph 7.27 below). These discussions resulted in the email dated 12 January 2009 being sent by Ms O'Doherty to Mr O'Grady and copied to Mr O'Connor in the terms set out above at paragraph 7.8.
- 7.12 This query from a broker was deemed sufficiently important for a group to be put together immediately to work out PTSB's response to it, for the general manager of marketing to be involved and for Mr O'Grady to take this issue to the ExCo of PTSB at the first opportunity. It is clear from the evidence of the witnesses and from the relevant documents that this query raised a point of interpretation with regard to SC706 that had not arisen before. It does not appear that PTSB had previously considered the issue of how to apply SC706 when its current tracker rate was different to the initial tracker rate offered to a customer in their tracker mortgage offer letter. There may be good reasons why this is the case. The movement of interest rates set out in the chart at paragraph 7.6 above would have given rise to variations in tracker rates offered by PTSB during the course of 2008. New tracker rate mortgages had been withdrawn from the customer market. SC706 was only relevant to customers who had started with a tracker rate and had then chosen a fixed interest rate and the term of that fixed interest rate was expiring. By early 2009 there were customers in this position. I am content to conclude that the issue that arose in January 2009 was new and that the course of actions that followed reflected a desire within the bank to come to a swift conclusion on an untested aspect of certain of their mortgage loan agreements that related to tracker rate mortgages. PTSB was wary of its commitments to tracker rate mortgages and was seeking to avoid a position where these commitments gave rise to tracker rates on mortgages that were below the level at which PTSB could obtain funding at that time. The response of PTSB (set out above at paragraph 7.8) to a single

¹¹⁷ [Transcript of Inquiry Hearing, dated 22 February 2024, page 116](#), [Transcript of Inquiry Hearing, dated 23 February 2024, page 16](#), [Transcript of Inquiry Hearing, dated 27 February 2024, page 23](#).

query from a broker, indicates that it regarded it as raising an issue that was urgent and important for PTSB.

- 7.13 Mr O'Grady was asked by the LPT why he took this issue to the ExCo at the earliest opportunity. He explained that he was looking for guidance on an unfamiliar matter and, ideally, for someone else to take ownership of this issue. Mr O'Grady stated:

*"Well, the way it happened was I had received the e-mail from Ailbhe the previous evening, and as per normal on a Tuesday morning, we had ExCo, and under "Any other business" I raised this because, I suppose, I was looking for guidance or input to it and maybe ownership, because I didn't necessarily see it as under the natural terms of reference of a Marketing Department, and -- but raised it. I can't remember, I know there were questions that came from the ExCo, I don't remember the exact meeting, but I didn't necessarily get much guidance or anyone to own it, and I certainly would have asked was anyone else aware of this across the business. And that's really as far as it went"*¹¹⁸

- 7.14 Mr O'Grady went on to say that at the time of the ExCo meeting PTSB was fighting for its survival. He stated:

"I know at the time there were lots of, I think I mentioned it previously, there was lots of fires that were burning in the business at the time and you can, even when I look at the minutes now, you can tell that -- I mentioned previously the deposit gathering project in the UK at the time was seen as potentially a solution to the deposit issue. That had been rejected. Liquidity was a problem. House prices were coming down. So, they were all a series of unusual issues that were happening in the business and the business probably felt -- sorry, I think did at this stage feel that it was under pressure for its very survival."

- 7.15 However, he reiterated that he had brought the issue to the ExCo meeting which dealt with a range of grave and routine matters, because;

*"I certainly just felt that I needed a bit of help, if you like, on this, and guidance, and to question whether or not anybody else was aware of it and if it sat somewhere other than marketing"*¹¹⁹

¹¹⁸ [Transcript of Inquiry Hearing, dated 22 February 2024, pages 31 and 32.](#)

¹¹⁹ [Transcript of Inquiry Hearing, dated 22 February 2024, page 33.](#)

- 7.16 Mr O Grady said that his main focus at the time in marketing was on raising deposits in PTSB.¹²⁰

Meeting of the PTSB executive team on 13 January 2009

- 7.17 The ExCo of PTSB met on 13 January 2009. The Inquiry heard that this was a weekly meeting held by the CEO of PTSB, with all his direct reports (i.e. the general managers of the various functions in PTSB) invited and normally attending to discuss issues relevant to the overall management of PTSB.¹²¹ The meeting was held at the start of the business day on the Tuesday of each week. The meetings would deal with a wide range of matters including those affecting strategy and fundamental aspects of business, as well as operational matters. The ExCo meetings had a formal structure with papers presented and circulated in advance whenever possible and decisions reached and minuted at the end of each meeting. The ExCo meetings also provided for new matters of concern or interest to be raised by the general managers during the course of the meeting and these were minuted under any other business. The minutes of the ExCo meeting of 13 January 2009¹²² show that Mr Guinane, Mr O’Grady and seven others were present on that day. The meeting minuted the matters discussed under various headings including: matters arising; meeting structure discussion; risk appetite; financial plan; overrides and systems access; and any other business. Actions were allocated to individuals opposite the various bullet points under each of these headings, where appropriate. The minutes record, as an item under the ‘Any Other Business’ section, the following entry:

“- NO’G reviewing situation of customers who exited a tracker to go fixed and now fixed period is ending.”

- 7.18 The Inquiry heard evidence from three individuals who attended this meeting; Mr Guinane, Mr O’Grady, and Mr Gerry Martin, the general manager of retail (and who was a witness called by Mr Guinane). None of these attendees had any recollection of the particular events or discussions at the meeting. Mr O’Grady was able to confirm that the reference in the ‘Any Other Business’ section of the minutes, set out above,

¹²⁰ [Transcript of Inquiry Hearing, dated 22 February 2024, page 16.](#)

¹²¹ [Transcript of Inquiry Hearing, dated 22 February 2024, page 19, line 19.](#) [Transcript of Inquiry Hearing, dated 6 March 2024, page 28, line 17.](#)

¹²² [Minutes of Permanent tsb Executive Team Meeting, dated 13 January 2009 \(Doc ID: 0.7.945.2581871.1, Core Book 1 Tab 19\).](#)

related to the query that had been received regarding SC706.¹²³ Each of the attendees felt able to offer views and analysis based upon the documentation that existed in relation to the meeting and to give evidence as to the manner in which such meetings took place in early 2009.

- 7.19 Mr Guinane was asked by his counsel about his recollection of the ExCo meeting on 13 January 2009 and the issues that were discussed there, as follows:

"Q.the first thing I want to ask you, Mr. Guinane, is, do you have any recollection of attending this meeting?"

A. No, no.

Q. Do you have any recollection of the agenda items that were discussed at the meeting?"

*A. No."*¹²⁴

Mr Guinane was asked about Mr O'Grady's evidence about what happened at this particular ExCo meeting and replied as follows:

Q. Mr. O'Grady's evidence was that questions were raised. I think his evidence was that he brought it up under "Any Other Business", hoping that the other members of ExCo would give guidance or take ownership of the issue. Did you hear that evidence?"

A. I heard that in evidence. That was the first time I'd heard that, obviously.

Q. And I think his evidence was that nobody was interested in either giving guidance or taking ownership, but, notwithstanding that, some questions were asked in relation to the issue, and it was Mr. O'Grady's evidence that he believes that you may be asked those questions. Do you have any recollection of asking any questions in relation to the issue?"

*A. Well, I mean, as I say, I have no recollection of the meeting, of the items, etc. I heard Mr. O'Grady, or perhaps that was in his written evidence. If Mr. O'Grady is saying that he thinks I asked the questions, I don't think that's unreasonable; I mean, I was the CEO, so I was known to ask questions, but I have absolutely no memory of doing so."*¹²⁵

¹²³ [Transcript of Inquiry Hearing, dated 22 February 2024, page 31, line 19, Transcript of Inquiry Hearing, dated 5 March 2024, pages 46 and 47, Transcript of Inquiry Hearing, dated 6 March 2024, page 30.](#)

¹²⁴ [Transcript of Inquiry Hearing, dated 6 March 2024, pages 29 and 30.](#)

¹²⁵ [Transcript of Inquiry Hearing, dated 6 March 2024, page 31.](#)

7.20 Immediately after the ExCo meeting finished, at 12:10 on 13 January 2009, Mr O'Grady sent an email to Ms O'Doherty and copied this to Mr O'Connor. Mr O'Grady wrote as follows:

"Discussed this at exec this Morning and no decision but two points raised to be addressed

*- how big an exposure is this (how much potential volume approx)
- if we allow customers to get back into their original tracker a) do they have to notify us before the expiration of the fixed rate and b) are we obliged to allow other tracker customers who have defaulted from the fixed to the SVR from requesting access to the price promise tracker?"*¹²⁶

7.21 The above referenced witnesses who attended the ExCo meetings expressed a view that questions of this nature were likely to have been raised by, or agreed to by, Mr Guinane. Mr Guinane chaired the ExCo meetings¹²⁷ and, as he pointed out, it was his responsibility to question matters that arose at the meeting and to address issues raised by the general managers.¹²⁸ It was also his responsibility to summarise the views of the meeting when these required further action or information. I find, as a matter of fact, that the two points that Mr O'Grady felt needed to be addressed following the ExCo meeting would have been known to Mr Guinane. I do not need to form a view as to whether he was the originator of these questions, it is enough that he would have had knowledge of these issues and that these questions were the outcome of discussions at the ExCo meeting.

7.22 In his evidence to the Inquiry on 6 March 2024 Mr Guinane explained his recollection of how the ExCo operated:

"So I think the distinction that we had executive authority to make decisions for the bank, is not correct. That had to be approved, and any decisions like that, major decisions, would have to be approved by the Irish Life & Permanent Board. But I would take that proposal to the Irish Life & Permanent Board and

¹²⁶ [Internal email chain between Niall O'Grady and Ailbhe O'Doherty, copied to Kevin O'Connor, regarding mortgage loan condition queries, dated 13 January 2009, page 1 of 2 \(Doc ID: 0.7.2366.63245, Core Book 1 Tab 16\).](#)

¹²⁷ [Transcript of Inquiry Hearing, dated 6 March 2024, page 79.](#)

¹²⁸ [Transcript of Inquiry Hearing, dated 6 March 2024, page 80.](#)

*put it forward based on the agreement we had reached at the Executive Committee*¹²⁹

In response to a question on what was raised by managers under “*any other business*”, Mr Guinane responded as follows:

“Yeah, and again, I am struggling to remember, but in general terms, as we described earlier, the main items for the weekly meeting were in the agenda, and that sort of makes sense - I mean, they were the things that were on people's minds, they were the items that people wanted discussed, they were the items, as I said earlier, people would have had supporting papers. “Any other business” was -- and I think I described it in an interview I gave to the Regulator - was described as -- I'd describe it as an informal sort of catch-up, whereby people would really say things that were just on their mind.”

.....

*““any other business” could include, as it says, anything, but, in reality, my memory would be they would be items that were perhaps considered less important than something that had been on the main agenda.”*¹³⁰

In response to whether Mr Guinane chaired the ExCo meeting of 13 January 2009 he stated:

“I would have, that would be the norm if I was in the room, yes, I would be the Chairperson for the meeting.”

.....

Q. And, as Chairperson, you would have to devote all or – virtually all of your attention to all of the items on the agenda, would you agree with that?

A. Yes, I mean, as I explained to the Chair, I think, earlier, the agenda would be circulated in advance of the meeting and I'd be well aware of what was -- you know, what was coming up. I would also be aware of any papers that were accompanying the agenda.”

.....

¹²⁹ [Transcript of Inquiry Hearing, dated 6 March 2024, page 23.](#)

¹³⁰ [Transcript of Inquiry Hearing, dated 6 March 2024, pages 28 and 29.](#)

*".....was I more vocal than others at the meeting and was I more inclined to ask questions than others at the meeting? I would have thought yes, as the CEO, about all issues, I would have thought."*¹³¹

"Q. Would you agree that, looking at the minutes of the meeting, bearing in mind that they don't specifically table the issue for a future meeting, unlike some of the items you discussed earlier, it's reasonable to infer that Mr. O'Grady was not being told to take it back to the Executive Committee at a future date?"

*A. I don't need to see -- I mean, I know the minute of the meeting. From looking at it with Mr. Hogan this morning, I would have thought that Niall wasn't raising the issue and forgetting about it, so I would think inherent in the comment in the minute was that Mr. O'Grady was going to continue to work through the issue, that would be my understanding."*¹³²

The Inquiry Member questioned Mr Guinane on whether other people around the table at the ExCo would have been aware of the large body of customers with a price promise tracker or a price promise mortgage; Mr Guinane responded that he didn't know *"what other people thought. I wouldn't have thought it was a secret."*¹³³

- 7.23 I conclude from the evidence that at the ExCo on 13 January 2009 PTSB's senior management were considering how to respond to a query about the implementation of SC706. The subsequent actions of a number of the witnesses, including Ms O'Doherty, Mr Guinane, Mr O'Grady and Mr O'Connor show that PTSB then moved swiftly to address and resolve this issue. I see nothing untoward or sinister in the executive committee of a bank, when faced with queries about the application of terms in a customer loan, focussing in the first place on the potential financial exposure that this issue may have for the bank. The questions that were raised are consistent with PTSB, at the executive committee level, being concerned about a contractual obligation existing that might result in "an exposure" for PTSB and looking at the extent of the obligation. It is relevant to note that the possible operation of SC706 was regarded as the cause of a potential exposure. This is consistent with other evidence provided to the Inquiry about the concern within PTSB at that time that the interest rate charged to customers with tracker rate mortgage loans might have been below the cost that the bank incurred in borrowing or obtaining the funds required to maintain these mortgage

¹³¹ [Transcript of Inquiry Hearing, dated 6 March 2024, pages 79 and 80.](#)

¹³² [Transcript of Inquiry Hearing, dated 6 March 2024, page 91.](#)

¹³³ [Transcript of Inquiry Hearing, dated 6 March 2024, page 140.](#)

loans.¹³⁴ Establishing the risk or cost to PTSB was a prudent first step in coming to a decision on how to respond to the customer query. However, it should not have been the only factor considered when reviewing this issue in a customer agreement.

7.24 The email response of Mr O'Grady to Ms O'Doherty following the ExCo meeting appears to confirm that the issue raised by a single query regarding the tracker rate that a customer was entitled to receive was regarded as giving rise to a serious issue within PTSB. The email is marked "*Importance – high*".¹³⁵

7.25 I have no direct evidence as to any other discussion that took place in or around the ExCo meeting in relation to SC706 or the approach that the bank might adopt to customers who may have had a right to obtain a tracker mortgage at rates that were unattractive to the bank. I therefore reach no conclusion as to whether any such discussions took place or what, if anything, was discussed at that time. In response to questions from his counsel, Mr Guinane said that he had no recollection of other discussions about this issue after the ExCo meeting on 13 January 2009:

"QDid you, following the meeting of ExCo on 13th January, did you have any further discussion with Mr. O'Grady in relation to the issue that he had raised?"

A. No, not to my recollection, no.

Q. Excluding the e-mail from Mr. O'Grady to you on 16th January, were you party to any other communications with anyone else who was considering the matter - Ms. O'Doherty, Mr. O'Connor or Mr. Fleming or anyone else, Ms. Furlong, or any of the other individuals who the Inquiry has heard were considering the issue?"

*A. No."*¹³⁶

7.26 At 14:25 on 13 January 2009, Ms O'Doherty wrote to Mr Fleming at PTSB copying Ms Ruth Brophy (one of the other members of the compliance team) and forwarding the email set out above at paragraph 7.20 from Mr O'Grady sent at 12:10 on that day. The email read as follows:

¹³⁴ See Paragraph 7.6 above.

¹³⁵ [Internal email chain between Niall O'Grady and Ailbhe O'Doherty, copied to Kevin O'Connor, regarding mortgage loan condition queries, dated 13 January 2009, page 1 of 2 \(Doc ID: 0.7.2366.63245, Core Book 1 Tab 16\).](#)

¹³⁶ [Transcript of Inquiry Hearing, dated 6 March 2024, pages 37 and 38.](#)

"Hi Please see query below from Exec in relation to a condition appearing on loans offers in 2004. Would you be free to discuss this with Kevin tomorrow morning at 9.30? Ruth is familiar with the issue.

*Thanks..."*¹³⁷

Mr Fleming responded ten minutes later by saying that he was "...OK until 10"¹³⁸

7.27 I find on the basis of these emails that it is more likely than not that Ms Brophy of the Compliance function attended the meeting organised by Ms O'Doherty on 12 January 2009 to discuss how to respond to the query from the broker in relation to the tracker rates applying to customers who were reaching the end of a fixed rate and whose mortgage loan agreement contained SC706. In her email, Ms O'Doherty explained to Mr Fleming that the queries raised at the ExCo meeting related to a condition appearing on loan offers in 2004. While she confirmed that Ms Brophy was "*familiar with the issue*", she wished to involve Mr Fleming as well. It is clear that Mr O'Connor is to be present at the meeting and it also appears that those involved at that stage regard this as a significant matter i.e. the email from Ms O'Doherty, like the email from Mr O'Grady that was sent to her following the ExCo meeting, is marked "*Importance – high*". It is also clear that the meeting to discuss the approach to be adopted to the condition is to take place as soon as possible i.e., first thing the next day. These emails once again point to the urgency and importance attached to the question from a broker. The marketing, legal and compliance functions are to get together on an urgent basis to answer the questions from the ExCo about the exposure that the bank has as a result of a particular condition in a customer mortgage loan agreement.

7.28 The role of the marketing department was broad and it included the creation of customer facing products including savings as well as lending products.¹³⁹ The Inquiry heard that it also acted as a central resource for addressing queries raised by the retail operations, brokers and other distribution functions.¹⁴⁰ The involvement of the legal and compliance functions in addressing the size of an exposure is unsurprising. Ms

¹³⁷ [Email chain between Joe Fleming, Ailbhe O'Doherty and Niall O'Grady with subject line 'Mortgage Loan Condition Query' arranging a meeting to discuss the legal implications and exposure risk of a mortgage loan condition from 2004, dated 13 January 2009, page 1 of 2 \(Doc ID:0.7.2366.51647, Core Book 1 Tab 18\).](#)

¹³⁸ [Email chain between Joe Fleming, Ailbhe O'Doherty and Niall O'Grady with subject line 'Mortgage Loan Condition Query' arranging a meeting to discuss the legal implications and exposure risk of a mortgage loan condition from 2004, dated 13 January 2009, page 1 of 2 \(Doc ID:0.7.2366.51647, Core Book 1 Tab 18\).](#)

¹³⁹ [Witness Statement of Niall O'Grady, dated 14 December 2022 \(Core Book 2 Tab 120\).](#)

¹⁴⁰ [Transcript of Inquiry Hearing, dated 22 February 2024, page 18.](#)

O'Doherty and Mr O'Connor both gave evidence indicating that a matter arising out of the interpretation of a condition of a loan agreement was something that marketing and legal should discuss.¹⁴¹ This makes sense and I accept that this was the case. The involvement of the compliance function would also appear to be a sensible and, indeed, a desirable outcome when deciding how to interpret or apply a condition in a customer product where there may be some uncertainty or novelty. I understood from the documentary evidence and from the witness evidence¹⁴² of Mr O'Grady and Ms O'Doherty that it was also likely to be the responsibility of marketing to assess how many agreements that contained a particular condition were in place with customers. Marketing would have access to or control over the records of the bank in relation to which products were held by which customers. Marketing also had responsibility for recording the decisions in relation to the design and structure of savings and lending products. It also kept a record of all changes to such products.

7.29 I conclude that marketing had the knowledge and responsibility to address the questions in relation to the exposure that the bank might have as a consequence of SC706. Marketing would then have consulted with legal and compliance to see how the condition in the loan agreement should be interpreted or applied. This conclusion is consistent with the overall evidence of Mr O'Connor and Ms O' Doherty as to their respective roles.

7.30 I note that Ms O Doherty, who had prime responsibility for putting together a response on the issues arising from the customer query in relation to SC706, was acting in a temporary role and without an immediate manager and that the manager to whom she brought this issue, Mr O Grady, was also looking for guidance on the approach that PTSB should take, or for someone within PTSB with more familiarity with the subject matter to take ownership of the issue.

Email correspondence on 15 January 2009

7.31 There is no contemporary evidence as to what was discussed or agreed at the above referenced meeting on 14 January 2009 between the legal, compliance and marketing functions other than the correspondence that arises on 15 January 2009. In their evidence to the Inquiry, Mr O'Connor, Mr Fleming and Ms O'Doherty did not have any

¹⁴¹ [Transcript of Inquiry Hearing, dated 23 February 2024, pages 32 and 100, Transcript of Inquiry Hearing, dated 26 February 2024, page 85.](#)

¹⁴² [Transcript of Inquiry Hearing, dated 22 February 2024, page 60, Transcript of Inquiry Hearing, dated 23 February 2024, page 89.](#)

recollection of the discussions that took place on 14 January 2009. None of them had any reason to doubt that this meeting or these discussions took place. Correspondence that issued on 15 January 2009 suggests that they, at that time, were looking to move forward on the basis that there had been a discussion or a meeting on the preceding day – i.e. 14 January, 2009.

- 7.32 At 08:53 on 15 January 2009 Mr O’Grady wrote to Mr O’Connor and Ms O’Doherty. He stated:

“Is this accurate summary”¹⁴³

and then he set out in draft form a proposed email clearly intended to be sent to Mr Guinane. The draft email stated as follows:

“Dave

As mentioned this summarises the issue we discussed.

Overall

This issue refers to approx 10,000 mortgage contracts for customers who started on price promise tracker. These customers have the option to take a fixed rate (to date these numbers are insignificant. They are unlikely to increase as all fixed rates are higher than trackers and likely to stay that way). At the end of the fixed rate period, they will default to a SVR. Once they have defaulted to the SVR there is no option for them to request to go back to any tracker

Specific issue to decide on:

Customers who started on this price promise tracker and go into a fixed rate have the option of opting back into “a tracker” if they contact us before the end of the fixed rate period.

Which tracker they have the option of reverting to is ambiguous (the original or today’s?) so we have the option of making whichever we chose available to them.

¹⁴³ [Email chain between Niall O’Grady, Kevin O’Connor and Ailbhe O’Doherty attaching “Tracker Condition Query \[redacted\].doc” summarising the entitlements of customers on fixed rate loans defaulting to a ‘tracker’ rate, dated 15 January 2009, page 1 of 1 \(Doc ID: BSI039907, Core Book 1 Tab 21\).](#)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *I propose we allow the customer to revert to their original tracker.*"¹⁴⁴

7.33 I note that this email was sent by Mr O'Grady first thing, at 8:53 on 15 January 2009. This reinforces the impression of urgency around this issue. There is no suggestion that Mr O'Grady took part in the discussion on the previous day involving the compliance and legal functions and Ms O'Doherty. I therefore conclude that it is most likely that Mr O'Grady had been briefed on the previous day as to the outcome of the discussion that had taken place between marketing, compliance and legal. I note that Mr O'Grady chose to write to Mr O'Connor and Ms O'Doherty. He did not address or copy that email to Mr Fleming or other members of the compliance function.

7.34 Ms O'Doherty responded by email to Mr O'Grady and Mr O'Connor later that day. The time shown on the email is stated as 9:12:19. It is possible that this was sent at 9:12 in which case it was a mere 20 minutes after receipt of the note from Mr O'Grady. It is also possible that it was sent at 12:19 on that day. In any event the matter was thought significant enough to merit a swift response. The email from Ms O'Doherty to Mr O'Grady and Mr O'Connor stated as follows:

"Tracker Condition Query –[redacted].doc

...

Attached is a more detailed document that I have drafted that we can keep on file. I have sent this to Kevin for his input. In relation to the summary below for Dave:

Yes fixed are very low at approx 400.

At the end of the fixed rate these loans currently default to 2.25% Tracker. They also get the option of LTV variable rate. This may change after we implement product parameterisation in March when we will have the option to default them to LTV variable rate.

¹⁴⁴ [Email chain between Niall O'Grady, Kevin O'Connor and Ailbhe O'Doherty attaching "Tracker Condition Query – \[redacted\].doc" summarising the entitlements of customers on fixed rate loans defaulting to a 'tracker' rate, dated 15 January 2009, page 1 of 1 \(Doc ID: BSI039907, Core Book 1 Tab 21\).](#)

Any that have defaulted to SVR in the past are not entitled to a tracker as they did not request it before their fixed rate expired. However, if they were to opt for a fixed rate in the future then the option to request a tracker would be open to them again.”¹⁴⁵

- 7.35 A more detailed document which Ms O’Doherty stated she had drafted so it could be kept on file, was attached to the email. This document stated the following:

“Tracker Condition Query

Background

The following condition appears on approximately 10,000 tracker loans issued from 2004 when tracker mortgages were first introduced, up until April 2007.

"Please note that where the applicant switches the rate on this loan to a rate which is fixed for a certain period, the applicant must inform permanent tsb, on expiry of the fixed rate period, whether the rate on the loan is to switch into a further fixed rate (if available) or whether the loan is to revert to a tracker mortgage loan as described above. In the absence of instructions from the applicant at the expiry of the fixed rate period, the interest rate will switch to the then current variable interest rate and as may be varied from time to time thereafter".

This condition was included because at the time of introducing trackers, the system could not automatically switch maturing fixed rate customers back into a tracker rate. The default was the then current variable rate (SVR at that time).

The purpose of the condition was to highlight to tracker customers that if they were to switch to a fixed rate they would need to contact us prior to its expiry and specifically request a tracker product.

Issue

We have now received a query from a broker whose client is on a fixed rate until July 09.

¹⁴⁵ [Email chain between Niall O’Grady, Kevin O’Connor and Ailbhe O’Doherty attaching “Tracker Condition Query .doc”, dated 15 January 2009, page 1 of 1 \(Doc ID: BSI039907, Core Book 2 Tab 89\).](#)

His interpretation is that as per this loan condition his client is entitled to revert to the original tracker rate of ECB + 0.9%.

*The broker states that his client took the loan with **permanent tsb** on the understanding that she could revert back to this tracker rate at various stages after a fixed period*



Proposed Approach

Letter attached will be sent to broker explaining that his interpretation of the legal condition is incorrect however as he states that the decision to take the loan was based on his client having the option of returning to the original tracker rate we will make an exception in this case.

Any future queries would be dealt with in a similar manner. Unless the customer contacts us prior to the expiry of their fixed rate and requests the original tracker rate as per loan offer we will continue to default them to the current rates (tracker or LTV variable).¹⁴⁶

- 7.36 This document clearly set out a proposal that the “*original tracker rate as per loan offer*” will only be offered to customers who requested it. All other customers who contacted PTSB prior to the expiry of their fixed rate and sought a tracker rate on their mortgage would be offered the currently available tracker rate. The document stated that PTSB “*will continue to default them to the current rates*”. This clearly suggests that this was the established position in dealing with customers seeking a tracker rate after the expiry of a fixed rate at that time. The document makes it clear that the approach to be adopted to the customer whose broker had brought the issue of SC706 to PTSB’s

¹⁴⁶ [Document entitled ‘Tracker Condition Query’ outlining a query received from a broker regarding the relevant tracker condition, a redacted legal opinion and the proposed approach by the Bank to resolve the query, page 2 of 2 \(Doc ID: BSI039907-0001, Core Book 2 Tab 89\).](#)

attention was an exception to the general approach of the bank when offering its current tracker or variable rates.

7.37 This document was sent to Mr O' Grady and Mr O'Connor. The issue was thought to be urgent and important. The document was produced after a meeting with Mr Fleming to discuss the issue. As stated above, Ms O'Doherty lacked relevant experience to determine how PTSB should respond to a query about SC706 and she was acting in an interim role and without a direct manager. I conclude that this would have been known to the more senior managers with whom she was meeting and corresponding on this issue.

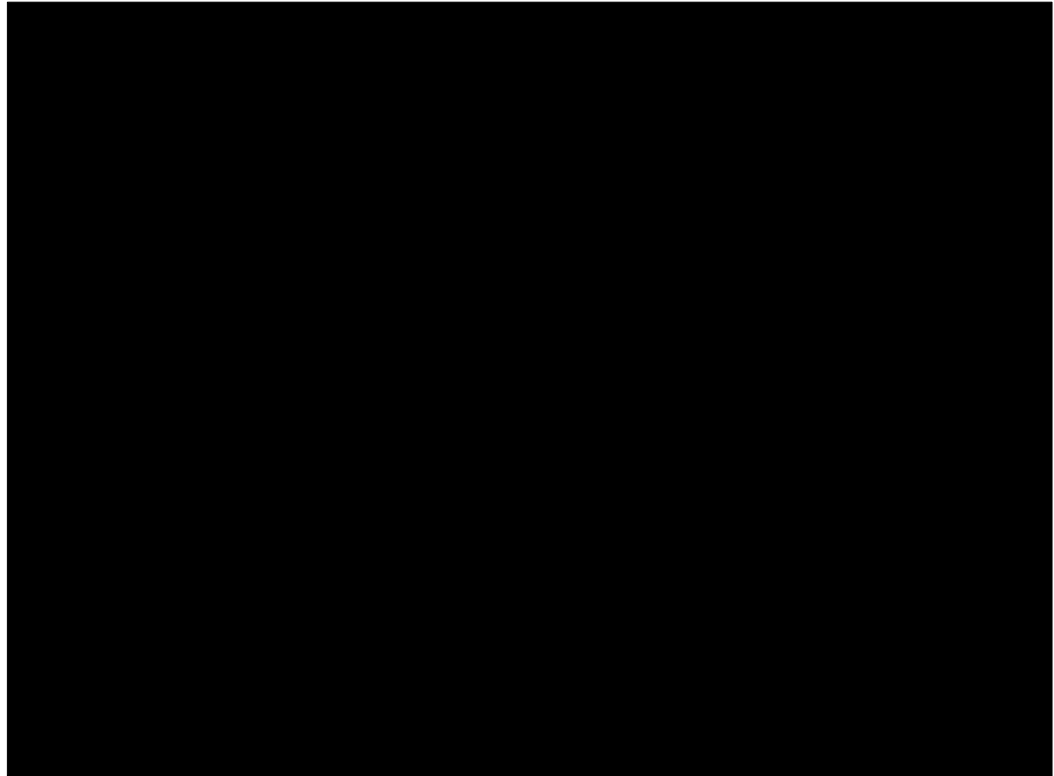
7.38 Mr O'Grady's initial draft of the proposed email to Mr Guinane, which is set out at paragraph 7.32 above, was circulated before he received the more detailed document prepared by Ms O'Doherty for the file. Mr O'Grady had already formed the view that PTSB had a "*very low exposure*" when he circulated the draft email first thing on 15 January 2009. It is reasonable to conclude that he relied on a briefing from Ms O'Doherty in coming to this conclusion. The initial draft email was not explicit about the different treatment of customers depending on whether they request the original tracker rate or not. Ms O'Doherty's detailed document prepared for the file is absolutely clear on this point. Ms O'Doherty's email attaching that document is also clear that "*At the end of the fixed rate these loans currently default to 2.25% Tracker*" and Mr O'Grady would have been aware that PTSB's margin over the relevant ECB interest rate on the customer's original tracker would have been lower than that. As Mr O'Grady prepared his draft email after discussion with Ms O'Doherty it is more likely than not that he understood that he was proposing to depart from PTSB's standard practice and treat the customer who was the subject of the broker's query differently from others in the same position.

7.39 At 16:16 on 15 January 2009 Ms O'Doherty sent an email to Mr O'Grady stating as follows:

"See legal opinion below from Kevin in relation to tracker condition query".¹⁴⁷

¹⁴⁷ [Email from Ailbhe O'Doherty to Niall O'Grady with subject line "FW: Draft text for Letter for Broker – SENT ON BEHALF OF KEVIN O'CONNOR" forwarding a draft legal opinion extract from Kevin O'Connor in respect of the tracker condition query, dated 15 January 2009, page 1 of 2 \(Doc ID: 0.7.296.5248, Core Book 1 Tab 22\).](#)

- 7.40 The email to Mr O’Grady forwarded an email timed 16:11 from Mr O’Connor’s personal assistant, Donal Regan, to Ms O’Doherty. That email was stated to be from Mr O’Connor and it related to SC706. It was headed “*Draft text for Letter for Broker*”. The text of the email read as follows:



Regards..¹⁴⁸

- 7.41 It is unlikely that this draft was intended for a reply to the broker who had raised the query on behalf of a customer. It is likely that this draft text was intended either for the note to be sent to Mr Guinane or the file note recording the reasons for the approach set out in that note.

[REDACTED]

[REDACTED] This email was forwarded to Mr O’Grady before he finalised the text of his email to Mr Guinane.

The redacted content in paragraph 7.41 contains reference to legal advice that was available to PTSB and about which Mr Guinane received reports prior to 19 January 2009.

- 7.42 Mr O’Connor gave evidence to the Inquiry and submitted a witness statement. He had earlier been interviewed by Enforcement and copies of these interviews were made

¹⁴⁸ [Email from Ailbhe O’Doherty to Niall O’Grady with subject line “FW: Draft text for Letter for Broker – SENT ON BEHALF OF KEVIN O’CONNOR” forwarding a draft legal opinion extract from Kevin O’Connor in respect of the tracker condition query, dated 15 January 2009, page 1 of 2 \(Doc ID: 0.7.296.5248, Core Book 1 Tab 22\).](#)

available to the Inquiry.¹⁴⁹ I conclude from Mr O'Connor's evidence that he has no recollection of his role in any discussion in early 2009 relating to the implementation of SC706, other than that which he has gained from reviewing the emails and other documents from that time. I also conclude that Mr O'Connor was content that the emails and other documents shown to him set out the advice that he gave and the actions that were discussed with him at that time and that he accepted that these set out the extent of his involvement during this period.

Correspondence with Mr Guinane from 16 to 19 January 2009

- 7.43 On 16 January 2009, Mr O'Grady sent Mr Guinane an email in the form set out as an agreed fact at paragraph 7.1(D) above.

The email sent to Mr Guinane on 16 January 2009 included a number of refinements and changes to the draft email circulated by Mr O'Grady on 15 January 2009 to Mr O'Connor and Ms O'Doherty. That draft email was amended at a number of points. The references to "SVR" were changed to "*variable rate*". It included more detail in relation to the phrasing of the loan condition. It clarified the number of customers who had taken a fixed rate. It stated that notice from the customer must be given on the expiry of the fixed rate period rather than before the end of the fixed rate period. It included greater clarity in relation to the choice that the customer has to make. It made it clear that: "*The conditions above this condition on the Letter of Approval refer to the price promise*". Most significantly, in the final sentence of the email Mr O'Grady, instead of saying: "*I propose we allow the customer to revert to their original tracker*" (as included in his initial draft of the email),¹⁵⁰ chose to amend it to say: "*I propose we allow the customers who actually contact (1 so far) to revert to their original tracker*"¹⁵¹ [Emphasis added].

- 7.44 I find that these amendments were made by Mr O'Grady of his own volition in order to clarify the response that he proposed to submit to Mr Guinane and that they were made in the knowledge of the responses received from Ms O'Doherty and Mr O'Connor, which were circulated on 15 January 2009. One important effect of these amendments

¹⁴⁹ [Transcript of Inquiry Hearing, dated 26 February 2024, Witness Statement of Kevin O'Connor, dated 15 December 2022 \(Core Book 2 Tab 82\), Transcript of Interview with Kevin O'Connor, dated 7 March 2019 \(PTSB_COM_000367, Core Book 2 Tab 94\).](#)

¹⁵⁰ [Email chain between Niall O'Grady, Kevin O'Connor and Ailbhe O'Doherty attaching "Tracker Condition Query \[REDACTED\].doc" dated 15 January 2009, page 1 of 1 \(Doc ID: BSI039907, Core Book 1 Tab 21\).](#)

¹⁵¹ [Internal email chain between Kevin O'Connor, Niall O'Grady and David Guinane with subject line "FW: Tracker" dated 16 January 2009, page 2 of 2 \(Doc ID: BSI040147, Core Book 1 Tab 23\).](#)

was to turn the email into a statement of the position for all customers who meet the criteria set out in the email rather than a response to one customer.

- 7.45 The intention of those involved in preparing and sending the email to Mr Guinane on this point was the subject of examination and cross-examination during the Substantive Inquiry Hearing. The intention of Ms O'Doherty and Mr O'Connor is clear. In the email of 12 January 2009 from Ms O'Doherty to Mr O'Grady¹⁵² and the detailed document prepared and sent on 15 January 2009 by Ms O'Doherty to Mr O'Grady, it is expressly stated that PTSB will continue to offer the current rates available at the time the customer's fixed rate expires unless the customer contacts PTSB to request the original tracker rate. The email states:

"As the condition is ambiguous we plan to send a letter to this customer highlighting that her interpretation of the condition is incorrect however we will make an exception and give her the tracker rate offered on the loan offer in this case.

Any other cases that arise where this condition is specifically queried would be dealt with in the same way i.e. give the tracker rate as per condition. However unless the customer contacts us requesting the old tracker rate they will continue to be offered and default to the current rates available today.

We are working on a draft response with Kevin and I will send you on a copy of this tomorrow for sign off."

- 7.46 There is no record of Mr Fleming's intention, but he had taken part in the discussion that had resulted in the briefing to Mr O'Grady and the document prepared for the file by Ms O'Doherty and I conclude from these facts and his subsequent conduct that he did not disagree with the approach being pursued. His evidence to the Inquiry was that he regarded it as a matter for the legal function to decide as it related to contract interpretation.¹⁵³

- 7.47 As the extract from the email of 12 January 2009 set out above shows, when Mr O'Grady was first introduced to the question of how to implement SC706 on 12 January

¹⁵² [Internal email chain between Niall O'Grady and Ailbhe O'Doherty dated 12 January 2009, page 2 of 2 \(Doc ID: 0.7.2366.51647, Core Book 1 Tab 18\).](#)

¹⁵³ [Transcript of Inquiry Hearing, dated 27 February 2024, page 33.](#)

2009, it was on the basis that a customer must specifically ask for the original tracker rate if they were to receive it.

- 7.48 Mr O'Grady was asked during the Substantive Inquiry Hearing by the LPT and counsel for Mr Guinane to clarify precisely what he was asking Mr Guinane in his email of 16 January 2009. Mr O'Grady found it difficult to provide this clarification. He explained his understanding in response to a question from counsel for Mr Guinane in the following terms:

"Because, first of all, the customer had to contact, under the terms and conditions of 706 the customer had to contact the bank, and once the customer had contacted the bank, then the bank's default option was to go into the current tracker. [REDACTED]

*and, as a result, the decision was made for that particular first customer to offer the original tracker."*¹⁵⁴

- 7.49 Later on in response to further questions from counsel for Mr Guinane in relation to the email of 16 January 2009, Mr O'Grady appeared to give a different response as follows:

"Q. You don't suggest that you only allow the customers who query what their entitlements are. Anyone who contacts the bank before their fixed expires gets the price promise, according to that proposal, I have to suggest to you. Would you agree with that?

A. Yeah, I'd agree.

Q. Would you also agree that at no time, either up to this, or certainly, obviously, in the proposal that you are putting to Mr. Guinane, did you suggest to him that customers who specifically request the original lower interest rate or query or complain, that they will get the price promise but everyone else who doesn't complain or query but says they want to go back on a tracker, that they'll be treated differently?

*A. It doesn't say that there, no."*¹⁵⁵

¹⁵⁴ [Transcript of Inquiry Hearing, dated 22 February 2024, page 148.](#)

¹⁵⁵ [Transcript of Inquiry Hearing, dated 22 February 2024, page 153.](#)

7.50 After answering questions from both the LPT and counsel for Mr Guinane, Mr O'Grady asked to be given the chance to clarify his position:

"INQUIRY MEMBER: So what was the clarification you wanted to make?

A. I just wanted to make sure that we are clear that that was what was decided based on the agreement. The approval.

Q. MR. HOGAN: The proposal that you made to Mr. Guinane, that he signed off on, was to give customers who contact the bank the price promise tracker.

A. Correct, yeah.

Q. And that e-mail confirms that sign-off, that we should allow the customers who actually contact to revert to their original tracker?

A. Yeah.

Q. But ultimately that didn't happen?

A. That didn't happen.

Q. Isn't that correct?

A. That's consistent with what was signed off.

Q. With what was signed off. But it didn't happen, the bank didn't actually implement the proposal that was signed off on, it implemented a different system?

A. I might just -- sorry, my memory in view of it all seems to have changed, but based on that insight. So I have to probably agree with you on that, yeah.

Q. Thank you very much, Mr. O'Grady.

INQUIRY MEMBER: So you are saying this was done but this is not all that was done?

A. No, I'm just saying that that -- I wasn't sure what question I was asked on it. But I wanted to clarify that that is consistent with the approval that Dave Guinane gave."¹⁵⁶

7.51 I understood Mr O'Grady's position, after close questioning in which he gave answers openly and thoughtfully but with some contradiction and after seeking the chance to clarify his view, was that he believed that the actions taken by his department and by PTSB after Mr Guinane's sign off of the Proposal was consistent with that sign off, but he was prepared to accept now that this was not the case.

¹⁵⁶ [Transcript of Inquiry Hearing, dated 22 February 2024, pages 162 and 163.](#)

7.52 The original draft of the email of 16 January 2009 to Mr Guinane was prepared by Mr O'Grady after being briefed on the issue after the meeting between Ms O'Doherty, Mr Fleming and Mr O'Connor. The draft was refined by Mr O'Grady, who had been briefed on the meeting and the proposed resolution by Ms O'Doherty. Both Ms O'Doherty and Mr O'Grady felt inexperienced on the relevant issue. Mr O'Grady made a number of refinements to the draft text of the email that he had prepared and inserted the phrase "one so far" in order to clarify that other customers who "actually contact" PTSB could be in the same position as the customer who had been the subject of the query referred to the ExCo on 13 January 2009. I conclude from the evidence that Mr O'Grady's email of 16 January 2009 was intended to ask Mr Guinane to agree that a customer who contacted PTSB prior to the expiry of their fixed rate and sought the original tracker rate as per the loan offer would receive that rate, but other customers would continue to default to the current tracker or SVR rate at that time. I will consider separately whether this intention would have been clear to Mr Guinane.

7.53 Paragraph 7.1(D) above sets out Mr O'Grady's follow up to Mr Guinane on 19 January 2009 seeking a response to his email of 16 January 2009 and Mr Guinane's reply to Mr O'Grady on 19 January 2009.

7.54 In the course of his evidence, Mr Guinane was asked about receiving the email of 16 January 2009 and about his current understanding of its contents. He stated:

"Q. Reading the e-mail now -- I suppose, firstly, I should ask you, Mr. Guinane, do you have any recollection of receiving that e-mail?"

A. No.

Q. Looking at it now and reading what you were being requested to confirm you were OK with, what do you understand it, what do you understand the proposal to be?"

*A. I understand the proposal to be that people who ring us looking for a tracker rate, as they are obliged to do, will be given their original tracker rate. That's what it says, and that is the recommendation that's being made."*¹⁵⁷

7.55 When asked by Enforcement in 2019, during the course of its investigation, about this email and the decision that he was being asked to make, Mr Guinane was uncertain as to what he had approved. The interview by Enforcement took place on 22 May 2019, many years after the events that he was being asked about, so such uncertainty is

¹⁵⁷ [Transcript of Inquiry Hearing, dated 6 March 2024, page 43.](#)

understandable. Mr Guinane did not show any sign of the issue, or the approval that he gave, becoming more familiar to him as the interviewer took him through the emails and the customer correspondence. However, as he was led through the documents by a representative of Enforcement (Mr Regan), he was diligent and open in trying to recall the position that he had been asked to approve and PTSB had adopted. Mr Guinane offered the following summary after being guided by Enforcement:

"Mr. Guinane: Rightly or wrongly, and let's not get into the debate about it now, okay, we thought we were doing the right thing.

Mr Regan: okay, I don't want to get into a debate about it.

Mr Guinane: Or the interpretation.

Mr Regan: we will just get your side of the story.

Mr Guinane: Yeah, but, sorry, that's important to this premise

[REDACTED] If we are wrong, and I think one has to accept in light of events from, you know, ten years on we were wrong.

Mr Regan: Okay.

Mr Guinane: But that was our understanding.

Mr Regan: Okay.

Mr Guinane:

Mr Regan: Okay.

Mr Guinane: There was an issue that had come up, I am not sure if there was many other issues had come vis-a-vis complaints. This issue had come up.

Mr Regan: Okay.

Mr Guinane: I am just -- if you don't accept what I am saying, you know --

MR Regan: No --

MR Guinane: if you want to clarify that.

MR Regan: No.

Mr Guinane: That's what it would seem to have suggested, this.

Mr Regan: Yeah.

Mr Guinane: However, we did have a duty to the customer obviously and if they were, had misinterpreted what we intended, which is where the ambiguity point is, we would go along and give them what they -- because otherwise it could

The redacted content in paragraph 7.55 contains reference to legal advice that was available to PTSB and about which Mr Guinane received reports prior to 19 January 2009.

be said that they had been, you know, in some ways not clear about what they were actually signing up to."¹⁵⁸

7.56 Mr Guinane's position or understanding of what he was asked to sign off has changed over time, but I am aware that a consistent feature of Mr Guinane's dealings with Enforcement and the Inquiry is that he has been seeking to rebuild his understanding from the documentary records and has little direct recollection of the approval he gave on 19 January 2009.

7.57 During the Substantive Inquiry Hearing, Mr O'Grady was asked about the exchange of emails with Mr Guinane by the LPT, as follows:

"Q. So going back to your e-mail to Mr. Guinane sent on Friday, 16th January 2009 at 11:15 in the morning. Then you follow up with an e-mail on the 19th January 2009, which is a Monday, which we can see at 14:16 hours, and you say:

*"Dave, can I take it you are okay with this?
Niall."*

Can I ask you question, and I think the answer is yes or no, had you discussed this issue with Mr. Guinane over the weekend?

A. No.

Q. So you send -- would you agree that you are sending, effectively sending a chaser on Monday to get a response?

A. Yes.

Q. And then on Monday, 19th January, 2009, 14:19 hours, Mr. Guinane responds saying:

"Niall, OK with that. Regards Dave."

So that e-mail comes three minutes after your chaser?

A. Yeah.

Q. And then, also on Monday, at 2:23 p.m. you send that e-mail exchange to Mr. O'Connor for the record?

¹⁵⁸ [Transcript of an interview with David Guinane held at the Central Bank of Ireland's offices, dated 22 May 2019, pages 140 to 173. \(Core Book 1 Tab 136\).](#)

A. Yeah.

Q. You have explained earlier that, from your perspective, you felt under time pressure, if I can put it that way, to respond because this was a question that came in from the broker, or from a broker, is that a fair summary of what you were saying earlier?

A. I think we'd always give priority to broker queries, yeah. I mean as a bank, we'd always." ¹⁵⁹

7.58 I conclude that Mr Guinane gave his approval to the Proposal without seeking any additional information.

Events after the sign off by Mr Guinane

7.59 At 16:23 on 19 January 2009, Ms O'Doherty sent an email to Mr O'Connor, Mr Fleming and Ms Brophy and copied in others in marketing and operations. The email read as follows:

"Hi All, Please find attached draft letter to be sent to [redacted,] in relation to the tracker loan condition query received via her broker.

*Niall has received sign off from Dave Guinane that [redacted]
[redacted] we should allow the customers who actually contact to revert to their original tracker.*

Ann I have spoken with Susan [a member of the operations team] on this and once the final letter is sent out mortgage services can scan this letter via workflow so that it will generate a reminder in July or if the customer contacts us then the letter will saved on file.

*Can you please revert ASAP with a sign off on the attached as I need to post the letter and also email the broker a copy? Many thanks"*¹⁶⁰

7.60 Attached to this email was a draft letter to the customer which stated the following:

"Thank you for your recent queries regarding the above numbered account.

The redacted content in paragraph 7.59 contains reference to legal advice that was available to PTSB and about which Mr Guinane received reports prior to 19 January 2009.

¹⁵⁹ [Transcript of Inquiry Hearing, dated 22 February 2024, pages 76 and 77.](#)

¹⁶⁰ [Email from Ailbhe O'Doherty to Kevin O'Connor, Ann Furlong, Joe Fleming, Ruth Brophy, Susan O'Riordan and Jaime King with subject line \[Redacted\] – Letter.doc dated 19 January 2009, pages 147 and 148 \(Doc ID: 0.7.2366.216649, Core Book 1 Tab 15\).](#)

I understand that you are querying the option of your mortgage account reverting to a tracker rate as detailed in your original loan offer dated 11th November 2005.

The purpose of the condition K was to inform the customer that the Bank would not automatically put the customer back onto a tracker type Loan which tracked the European Central Bank Refinancing Rate as described in the earlier conditions unless the customer expressly informed the Bank that the customer wished to retain that type of Loan and, if the customer did not so inform the Bank, the customer's rate would be current variable rate.

The reference in the condition to "as described above" was a reference to a type of tracker loan, that is, one based on the European Central Bank Refinancing Rate as opposed to any other type of tracker loan. The condition did not refer to the same tracker loan at the same rate of interest as existed prior to the fixed rate period. Nevertheless we note the customer incorrectly interpreted the condition as having the latter effect and this was central to the customer's decision to take out a tracker loan with the Bank. Accordingly the Bank is prepared to put you back onto the ECB +0.9% margin provided the customer so informs the Bank on expiry of the fixed rate period in accordance with the condition.

We would not wish to take your instruction at this stage as there is at least 6 months to run on the fixed term and you may wish to retain all your rate options but if you inform the Bank on expiry of the fixed rate period that you still wish to revert to the ECB Tracker loan and at the rate of ECB +0.9%, then your instruction will be carried out".¹⁶¹

- 7.61 At 09:01 on 20 January 2009, Mr Fleming responded to the above email by emailing Ms O'Doherty, without copying anyone else, stating that "Ruth is dealing with this for Compliance" and he went on to say:

¹⁶¹ [Attachment to email from Ailbhe O'Doherty to Kevin O'Connor, Ann Furlong, Joe Fleming, Ruth Brophy, Susan O'Riordan and Jaime King with subject line \[Redacted\] – Letter.doc dated 19 January 2009, pages 148 and 149 \(Doc ID: 0.7.2366.216649, Core Book 1 Tab 15\).](#)

"I gather that a more personalised version of the letter is to be circulated today. I assume that we will address the person as "Dear [redacted]".¹⁶²

7.62 I understand from this response that members of the compliance department were aware of and were in a position to evaluate the approach that PTSB proposed to adopt in deciding which interest rate would be offered to customers whose mortgage loan agreement contained SC706 and who were reverting to a tracker rate mortgage, before PTSB responded to the original query on how SC706 should be applied.

7.63 On 20 January 2009 at 15:28 Mr O'Connor replied to Ms O'Doherty's email attaching the draft letter to the customer set out above, without copying anyone else. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

7.64 I understand from this response that Mr O'Connor was aware of, and was in a position to evaluate, the approach that PTSB proposed to adopt in deciding which interest rate would be offered to customers whose loan agreement contained SC706 and who were reverting to a tracker rate mortgage, before PTSB responded to the original query on how SC706 should be applied. [REDACTED]

[REDACTED]

¹⁶² [Email from Joe Fleming to Ailbhe O'Doherty with subject line 'RE: \[Redacted\]', dated 20 January 2009, page 150 \(Doc ID: 0.7.2366.216649, Core Book 1 Tab 15\).](#)

¹⁶³ [Email from chain dated 19 January 2009 to 20 January 2009 with redacted subject line between Ailbhe O'Doherty, Kevin O'Connor, Ann Furlong, Joe Fleming and Ruth Brophy, page 1 of 2 \(Doc ID: 0.7.296.5078, Core Book 10 Tab 2\).](#)

[REDACTED]

[REDACTED] Ms O'Doherty was able to see this from the email.

7.65 Later that day, 20 January 2009,¹⁶⁴ Ms O'Doherty sent a further email to compliance, a manager in operations, Mr O'Connor and others in the operations department, in which she stated she was attaching the final version of the letter sent to the customer for their records. [REDACTED]

[REDACTED] She asked the operations team to arrange for the letter to be scanned through the workflow system and asked another individual to send a copy of the correspondence to the broker, who had brought the original query.

7.66 On the following day, 21 January 2009, at 12:05, an email was sent from Ms Jaime King, a member of the marketing team, to Mr O'Connor copied to Ms O'Doherty regarding another customer who had SC706 included as condition H in their mortgage loan agreement. The email said that the customer:

*"has already defaulted from her fixed rate and had the same condition (H in this instance) on her loan offer..."*¹⁶⁵

as the individual who had been written to on the previous day. An amended version of the agreed letter which had issued to the other customer the previous day was attached. The letter had been changed to remove the last paragraph which *"referenced the customer reverting to us in 6 months when they are due to come off their fixed rate..."*¹⁶⁶ as this customer had already reverted to PTSB. Mr O'Connor was asked to review and respond with comments if appropriate.

7.67 On 22 January 2009 at 13:10 Mr O'Connor responded to this email and attachment in the following terms:

[REDACTED]

¹⁶⁴ [Email from Ailbhe O'Doherty to Ruth Brophy, Ann Furlong, Kevin O'Connor and Susan O' Riordan, dated 20 January 2009, page 153 \(Doc ID: 0.7.2366.216649, Core Book 1 Tab 15\).](#)

¹⁶⁵ [Email from Jaime King to Kevin O'Connor, dated 21 January 2009, page 156 \(Core Book 1 Tab 15\).](#)

¹⁶⁶ [Email chain, dated 21 January 2009 to 22 January 2009, with redacted subject line between Kevin O'Connor and Jaime King, page 154 \(Doc ID: 0.7.2366.216649, Core Book 1 Tab 15\).](#)

[REDACTED]

[REDACTED]

[REDACTED]¹⁶⁷

- 7.68 Jaime King responded to the email from Mr O'Connor and confirmed that the customer had referred to her original loan offer and quoted condition H (SC706) as the reason why she had accepted the loan. Mr O'Connor responded by stating that:

*"That's ok. Each case has to be looked at individually."*¹⁶⁸

It was agreed by the end of 22 January 2009 that the letter would be sent in the form agreed between operations and Mr O'Connor.

- 7.69 On 30 January 2009 Mr O'Connor emailed Ms O'Doherty [REDACTED]

[REDACTED]

[REDACTED]. Ms O'Doherty forwarded this to colleagues and said that she was working on a response.¹⁷⁰ Ms O'Doherty copied the email from Mr O'Connor and her response to Mr O'Grady. Ms O'Doherty sent the draft letter to the customer to Mr O'Connor for comment.

- 7.70 On 5 February 2009, Ms O'Doherty sent an email to Mr O'Grady in which she confirmed that the three cases in which the tracker condition query had resulted in

¹⁶⁷ [Email chain, dated 21 January 2009 to 22 January 2009, with redacted subject line between Kevin O'Connor and Jaime King, page 1 of 1 \(Doc ID: 0.7.296.5200, Core Book 10 Tab 3\).](#)

¹⁶⁸ [Email chain, dated 21 January 2009 to 22 January 2009, with subject 'RE: \[redacted\]' between Jaime King and Kevin O'Connor, page 1 of 2 \(Doc ID: 0.7.296.5039, Core Book 10 Tab 4\).](#)

¹⁶⁹ [Email, dated 30 January 2009, with subject redacted from Kevin O'Connor to Ailbhe O'Doherty, page 1 of 1 \(Doc ID: 0.7.296.5104, Core Book 10 Tab 5\).](#)

¹⁷⁰ [Email from Ailbhe O'Doherty to Rosemary Bailey, dated 2 February 2009, page 1 of 1 \(Core Book 10 Tab 9\).](#)

them being given their original tracker rate would not give rise to loss and would not be included in the monthly loss report.¹⁷¹

7.71 I conclude that had Mr O'Grady intended to ask Mr Guinane to sign off on a proposal to give all customers who reverted to a tracker rate at the end of a fixed rate the original tracker rate that was the subject of a "price promise", he would by 30 January 2009 or 5 February 2009 have realised that this was not the approach being adopted by PTSB. This further supports my conclusion that the email sent by Mr O'Grady on 16 January 2009 to Mr Guinane was prepared on the basis that it was asking Mr Guinane to approve a position whereby the customer had to contact PTSB and complain about the tracker rate being offered, or request the original tracker rate, before the original rate would be made available to the customer. That email was poorly drafted and lacked adequate clarity on this point and was open to misunderstanding, but the intention of those involved in drafting and sending the email is apparent from events and correspondence before and after it was sent.

7.72 The evidence shows that the issue around which tracker rate PTSB's customers should revert to after the end of a period of fixed rates, continued to arise in customer correspondence in February and March 2009. From early February 2009 the individuals and functions working on this issue sought to standardise the approach that PTSB was adopting to these cases.

7.73 On 5 February 2009 Ms Brophy emailed Ms O'Doherty stating the following:

"I have gone through this condition with Joe [Fleming] and we agree that customers should default to a variable rate (as opposed to a tracker) as this is in line with their terms and conditions.

We have all agreed that if a customer misunderstands the condition and entered into their fixed rate on the understanding that they would return to the original tracker margin, that we will honour the original margin. If a customer takes our intended meaning of the condition they will be entered into 'a tracker' which will be the tracker rate appropriate to the loan at that time.

Customers who entered into a fixed rate on the basis of this condition will be

¹⁷¹ [Email from Ailbhe O'Doherty to Niall O'Grady, dated 5 February 2009, page 176 \(Doc ID: 0.7.2366.216649, Core Book 1 Tab 15\).](#)

aware of the condition and will contact us before expiry. The condition does not specify who the customer should contact and it is therefore necessary that anyone who is contacted will provide customers with the same outcome regardless of whether they contact a branch or HO. In order for this process to operate effectively all staff members will need to be able to identify the 10,000 cases and understand the implications of the condition. We believe that the only way to achieve this is through flagging the accounts affected on the system with explanatory text. A lot of these accounts will be on our books for the next 20-30 years and we need to ensure that there is a robust system in place to manage this condition.

Can you please advise us of possible solutions for this issue.”¹⁷²

7.74 This email dealt with two different aspects of SC706. The email was headed “*Condition 706*”. In the first paragraph it considered the default to a variable rate in the event that a customer with a fixed rate did not contact PTSB before the end of their fixed rate period. The second paragraph appears to be dealing with the question of which rate the customer should receive if they do revert to a tracker rate. The third paragraph was clearly intended to ensure that customers with SC706 in their mortgage loan agreements could be identified by staff within PTSB and a consistent approach put in place. This email also stated that the issue of which tracker interest rate a customer whose mortgage loan agreement contained SC706 should be offered had been discussed with the head of the PTSB compliance department and that he was content to apply different approaches to customers depending upon whether or not the customer makes it known that they understood they could return to their original tracker rate when they entered into a fixed rate of interest on their mortgage loan agreement.

7.75 Ms O’Doherty forwarded this email to Ann Furlong, a member of the operations team, who responded a few days later by email stating:

“Where do we go from here on this?”¹⁷³

¹⁷² [Internal email from Ann Furlong to Ailbhe O’Doherty with subject line ‘RE: Condition 706’, dated 9 February 2009, page 1 of 2 \(Doc ID: 0.7.2366.63227, Core Book 1 Tab 27\).](#)

¹⁷³ [Internal email from Ann Furlong to Ailbhe O’Doherty with subject line ‘RE: Condition 706’, dated 9 February 2009, page 1 of 2 \(Doc ID: 0.7.2366.63227, Core Book 1 Tab 27\).](#)

7.76 The compliance function was diligent in its reporting of the issue around the implementation of SC706. By way of example, a member of the compliance team wrote to Mr Fleming on 3 March 2009 setting out:

*“details of the tracker issue discussed earlier for inclusion in the monthly report. If you need me to clarify anything please let me know”.*¹⁷⁴

This is a reference to the compliance report prepared by the compliance function for circulation within PTSB and to the IL&P Group compliance function. I will return to this below.

7.77 I find that the evidence, including that set out above, establishes that the approach that PTSB was to adopt in respect of customers seeking to return to a tracker rate after a period with a fixed rate was developed by the marketing, compliance, operations and legal functions within PTSB. The intention to distinguish between customers who asked for their original tracker rate and those who did not, was openly expressed and clear to all involved. The general manager marketing, Mr O’Grady, the head of compliance, Mr Fleming, and the in-house solicitor, Mr O’Connor, were all aware of the position that PTSB intended to adopt and of the legal analysis of that position.

7.78 The issue of how to standardise the approach being adopted to customers who had a tracker rate and who raised the question of what rates they were entitled to at the end of a fixed rate period was resolved by the creation of a *“project registry document”*.¹⁷⁵ The Inquiry heard evidence from members of the marketing and compliance departments about the role of these project registry documents and the processes that accompany them. PTSB created this document, known as a PRD, in order to record any change required to the bank’s systems and processes. This would include systems and processes required to implement new loan or saving products and to support most standardised forms of communication with customers.¹⁷⁶ In March 2009 the marketing and operations functions produced the first version of a PRD the purpose of which was to *“identify customers with condition 706 and flag them on Hogan”*.¹⁷⁷ Hogan was the name of the IT system in use in PTSB at that time.

¹⁷⁴ [Internal email from Ruth Brophy to Joe Fleming with subject line ‘Tracker Condition Issue- monthly report item’ attaching ‘Tracker Condition Issue-.doc’, dated 3 March 2009, page 1 of 1 \(Doc ID: 0.7.2366.5667, Core Book 1 Tab 37\).](#)

¹⁷⁵ [Project registry document outlining project to ‘identify customers with condition 706 and flag them on Hogan’, dated 4 March 2009 \(Doc ID: 0.7.2366.19571, Core Book 1 Tab 38\).](#)

¹⁷⁶ [Transcript of Inquiry Hearing, dated 22 February 2024, page 83, Transcript of Inquiry Hearing, dated 23 February 2024, page 52, Transcript of Inquiry Hearing, dated 26 February 2024, page 84.](#)

¹⁷⁷ [Project registry document outlining project to ‘identify customers with condition 706 and flag them on Hogan’, dated 4 March 2009 \(Doc ID: 0.7.2366.19571, Core Book 1 Tab 38\).](#)

7.79 The 'executive sponsor' of this PRD was Mr O'Grady. In this context, the 'executive sponsor' was the PTSB employee with management responsibility for proposing the PRD and ensuring it was implemented. The first draft of this PRD appears on the face of the draft to have been raised on 4 March 2009. It stated that its "Problem/purpose" was:

"10,000 fixed rate customers contain a condition stating the following:

"Please note that where the applicant switches the rate on this loan to a rate which is fixed for a certain period, the applicant must inform permanent tsb, on expiry of the fixed rate period, whether the rate on the loan is to switch into a further fixed rate (if available) or whether the loan is to revert to a Tracker Mortgage loan as described above. In the absence of instructions from the applicant at the expiry of the fixed rate period, the interest rate will switch to the then current variable interest rate and as may be varied from time to time thereafter."

Customer's may interpret this condition as referring to the Tracker rate mentioned earlier in their loan offer rather than the appropriate Tracker rate currently on offer.

*The purpose of the condition was to inform the customer that the Bank would not automatically put the customer back onto a tracker type Loan as described in the earlier condition unless the customer expressly informed the Bank that the customer wished to retain that type of Loan and, if the customer did not so inform the Bank, the customer's rate would be the current variable rate."*¹⁷⁸

7.80 The objective of the PRD was stated to be:

*"Create a flag on Hogan to identify these loans using condition 706 as a means of identifying the customers. Once they are identified it can be procedurally noted that if these customers contact ptsb as described above they can be transferred via mortgage services to the original Tracker product."*¹⁷⁹

¹⁷⁸ [Project registry document outlining project to 'identify customers with condition 706 and flag them on Hogan', dated 4 March 2009 \(Doc ID: 0.7.2366.19571, Core Book 1 Tab 38\).](#)

¹⁷⁹ [Project registry document outlining project to 'identify customers with condition 706 and flag them on Hogan', dated 4 March 2009 \(Doc ID: 0.7.2366.19571, Core Book 1 Tab 38\).](#)

7.81 The draft PRD set out the benefits that would be achieved from the creation of the PRD. In this instance the “*benefit type*” was said to be “*compliance*”. The benefit was described in the following terms:

“Dealing with these cases procedurally runs the risk that some customers may not be identified when they contact Open 24, MPC or retail channel. Staff may not be aware that customers can revert to their original Tracker product. Compliance have identified CPC requirements that states that we have adequate systems and controls in place to ensure compliance with this Code. In order that we treat all these customers fairly as agreed we need to have appropriate systems in place.”¹⁸⁰

7.82 I understand the reference in this document to “CPC” and to the “Code” are references to the Consumer Protection Code 2006.

7.83 The PRD was then agreed and put in place within PTSB. From that point forward I find that the evidence points to PTSB having systematically achieved its objective of ensuring that;

- (a) Customers with SC706 in their mortgage loan agreement were identified to those in PTSB who might deal with them;
- (b) Customers who asked in good time to revert from a fixed interest rate to a tracker interest rate would be identified and permitted to do so;
- (c) Those customers with SC706 in their mortgage loan agreement who failed to contact the bank at the end of their fixed rate period, would revert to a standard variable interest rate on their mortgage;
- (d) Those customers who contacted the bank prior to the expiry of their fixed rate period would, unless they asked for the original tracker rate to apply to their mortgage, receive the tracker rate that PTSB was applying at that time to other existing mortgages; and

¹⁸⁰ [Project registry document outlining project to 'identify customers with condition 706 and flag them on Hogan', dated 4 March 2009 \(Doc ID: 0.7.2366.19571, Core Book 1 Tab 38\).](#)

- (e) Those customers who asked in good time to receive their original tracker rate would revert to that original tracker rate at the end of their fixed rate period.

7.84 This objective and the system that was required to ensure that it was achieved was put into place with the active involvement of the marketing, legal, compliance and operations functions within PTSB, including the heads of the compliance and marketing functions.

Compliance Reports

7.85 During March 2009 the compliance team led by Mr Fleming prepared a monthly compliance report and a quarterly compliance report. The Inquiry heard evidence¹⁸¹ from the PTSB head of compliance, Mr Fleming, the deputy group head of compliance in IL&P Group, Mr Frank Wynn, who during the Relevant Period became the general manager - group compliance and operational risk and Mr William Hannan, the group head of compliance in IL&P Group, who became the group head of risk and compliance in IL&P Group during the Relevant Period. These individuals gave evidence as to the process by which PTSB and IL&P Group prepared monthly compliance reports for each division of IL&P Group and quarterly reports for such divisions. These reports were then consolidated into a quarterly compliance report for IL&P Group and an annual compliance report for the regulated group. The purpose of the reports was addressed by witnesses. The Inquiry heard that these reports had more than one benefit and purpose to the group and the divisions. However, it was clear to those producing and reviewing the reports that they would form the basis for reporting by IL&P Group to the then Financial Regulator.¹⁸²

7.86 On 13 March 2009, Mr Fleming circulated the compliance monthly report for February 2009. This document went to approximately 43 recipients. The recipients included the CEO and general managers of PTSB as well as the group head of compliance and the deputy group head of compliance of IL&P Group. On page 10 of the monthly

¹⁸¹ [Transcript of Inquiry Hearing, dated 27 February 2024, pages 17 to 19.](#) [Transcript of Inquiry Hearing, dated 29 February 2024, page 63.](#) [Transcript of Inquiry Hearing, dated 4 March 2024, pages 40 and 43.](#) [Witness Statement of Mr Fleming, dated 20 December 2022 \(Core Book 2 Tab 4\).](#) [Witness Statement of Mr Hannan, dated 6 December 2022 \(Core Book 2 Tab 51\).](#) [Witness Statement of Mr Wynn, dated 21 December 2022 \(Core Book 2 Tab 135\).](#)

¹⁸² The Irish Financial Services Regulatory Authority was the regulator of all the financial institutions in Ireland from May 2003 to October 2010. With effect from 1 October 2010, pursuant to the Central Bank Reform Act 2010, the regulator became part of a single unitary organisation – the Central Bank of Ireland. The term Financial Regulator is used throughout the Written Findings to refer to the pre October 2010 iteration of the regulator

compliance report for February 2009¹⁸³ the issue that had arisen in relation to SC706 was described. This section is set out below in full:

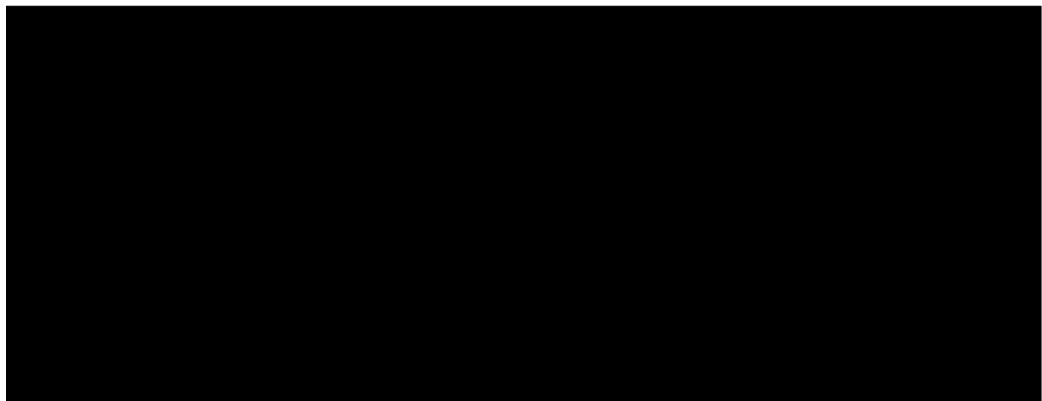
“Tracker Condition

The following Tracker condition appears on approximately 10,000 tracker loans issued from 2004 when tracker mortgages were first introduced, up until April 2007.

“Please note that where the applicant switches the rate on this loan to a rate which is fixed for a certain period, the applicant must inform permanent tsb, on expiry of the fixed rate period, whether the rate on the loan is to switch into a further fixed rate (if available) or whether the loan is to revert to a tracker mortgage loan as described above. In the absence of instructions from the applicant at the expiry of the fixed rate period, the interest rate will switch to the then current variable interest rate and as may be varied from time to time thereafter.”

When tracker mortgages were first introduced all products were set up to default to the Standard Variable Rate at the end of a fixed term. The purpose of this condition was to highlight to Tracker customers who fix their mortgage to contact permanent tsb on expiry of the fixed rate advising us that they wish to revert to a tracker product.

Marketing have recently received a number of requests from customers wishing to revert to the original tracker margin as stated in their letter of offer. The customers in these cases have advised us that they chose to fix their mortgage on the understanding that they could revert to their original margin.



¹⁸³ [Monthly Compliance Report, issued by Joe Fleming, head of compliance, dated February 2009 \(Doc ID: BSI035592-0001, Core Book 1 Tab 25\).](#)

It has been agreed that if a customer misunderstands the condition and entered into their fixed rate on the understanding that they would return to the original tracker margin, that we will honour the original margin. If a customer takes our intended meaning of the condition they will be entered into 'a tracker' which will be the tracker rate appropriate to the loan at that time.

Compliance has recommended that a robust system is put in place in Marketing in to ensure that these cases can be identified and to ensure that all customers are treated fairly as outlined above."

- 7.87 The compliance report is a long document at 13 pages. It covered a number of areas including: emerging issues/regulatory developments; current issues (of which 22 are noted in the report including the reference to the tracker rate issue); and significant communication with external parties who are relevant to compliance. The circulation list for the monthly compliance report was stated to be the CEO of PTSB, the PTSB general managers, the group head of risk and compliance, the deputy group head of compliance and the group head of internal audit of IL&P. In fact, as mentioned above, it was circulated to a much wider group of managers.
- 7.88 There is clearly a common position being set out in the PRD and in the monthly compliance report. Both documents described the issue and the rationale for the approach that PTSB is to adopt in similar terms. The approach, as recorded in the compliance report, was based on the notion that customers can misinterpret an ambiguous term by adopting one of the two possible interpretations. This makes little sense as a matter of law or logic; if there are two possible interpretations of an ambiguous term, adopting one of them cannot be considered a "misinterpretation." This logical flaw should have been apparent to the non-lawyers in PTSB who wrote or read this section of the report with care. The report stated that PTSB intended to rely on its "*intended*" meaning of an ambiguous term. This is also a stance that should have raised doubts or concerns amongst staff who were aware of its legal or regulatory responsibilities to customers.
- 7.89 The report provided a clear conclusion that the compliance function believed that the approach that was described and the system that was to be put in place would ensure that customers were treated fairly. Any reader of the compliance report, outside of the compliance or legal functions, was entitled to place some reliance on the judgement of the compliance function.

7.90 The approach that PTSB adopted at this time had been prepared with the involvement of the legal and the compliance functions. When the summary of the approach being adopted was summarised in the February 2009 monthly compliance report, there was no evidence of any concern or questions from those within the compliance function in PTSB or the IL&P Group. The evidence from Mr Fleming was that, at that time, he was aware that the issue had been discussed with the legal department. The interpretation of the terms and conditions of mortgage loan agreements was primarily a matter for the legal department and the compliance function did not see the need, nor was it their role, to second guess the legal function.¹⁸⁴ Within the IL&P group compliance department, Mr Wynn, the deputy group head of compliance, stated that at this time the group compliance function was coping with serious compliance issues and failures within the IL&P group. Mr Hannan, the group head of compliance, made the same point. I will return to this later.

7.91 The PTSB quarterly compliance report for March 2009¹⁸⁵ was circulated to the same executives in PTSB and IL&P Group as the monthly compliance report and contained the same text as in the February monthly compliance report in relation to PTSB's position on the implementation of SC706. Elsewhere in the quarterly report the compliance function reported on PTSB's compliance with its obligations under the 2006 Code.

7.92 During his evidence to the Inquiry, Mr Guinane was asked by his counsel about any meetings that he had to review or discuss these compliance reports. He responded:

*".....I don't actually remember. I do remember having Compliance meetings; as to what time and years they are, I can't be sure, obviously. But I do think a lot of meetings, perhaps, did get cancelled due to logistical reasons, people not being in the building, people not being in the country, you know, people dealing with different things. So I can't remember ever, I have to say, meeting Mr. Hannan in 2009, and if he believes we didn't, I'd have to take him as his word."*¹⁸⁶

¹⁸⁴ [Transcript of Inquiry Hearing, dated 27 February 2024, page 33.](#)

¹⁸⁵ [Compliance Report for the quarter ended 31 March 2009 issued by Joe Fleming, head of compliance \(Doc ID: 0.7.2366.115415, Core Book 1 Tab 46\).](#)

¹⁸⁶ [Transcript of Inquiry Hearing, dated 6 March 2024, page 58, line 6.](#)

- 7.93 It is not clear from the evidence of witnesses or the documentation provided to the Inquiry that any of the executives to whom the February monthly compliance report or the quarterly compliance report for the first quarter of 2009 were addressed, actually read the report. It is not clear that the regular meetings between the compliance function and the CEO or general managers that should have taken place did, in fact, take place at this time. I will return to this issue later in these findings.

The actions of PTSB in developing and implementing a position on SC706

- 7.94 I find that the central functions of PTSB and the group functions of IL&P Group approached the issue of how to respond to the customers with SC706 in their mortgage loan agreement and who were approaching the end of a fixed rate period, in a diligent and considered way. The speed with which the bank responded to the initial query from a broker and resolved the issue and then made the system and process changes required to establish a system whereby customers were treated in a way that PTSB regarded as consistent, is notable. The evidence establishes that the issue of how to implement SC706 was regarded as urgent and important. Senior managers in compliance, legal, operations and marketing were all involved and were kept informed of developments on the issue. It was deemed so important that a single customer query was referred to the ExCo and the response to the customer query had to be agreed with the CEO. The approach that was to be taken appears from the written evidence to have been prepared after consultation with appropriate functions and individuals within the bank.
- 7.95 I find that all of the information that was required for PTSB to be aware that the position it was adopting in implementing SC706 did not take account of the best interests of customers was known to the responsible managers in PTSB when the position was adopted and subsequently implemented. It would have been evident to all those involved in making the decision on how to implement SC706 that customers who did not expressly request the original tracker rate or who did not complain about being offered a higher tracker rate, would pay more for their mortgage loan.
- 7.96 Despite this knowledge, there is little evidence in documentation produced at the time of disquiet or concern over the position that PTSB was adopting by any of the senior or middle managers involved from a variety of departments until the Financial Regulator intervened in December 2009. Prior to that, [REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]. The compliance department expressly took account of the 2006 Code in deciding that the position that PTSB adopted should be standardised so that customers were treated consistently, even though the approach that was being adopted was to treat customers with the same contractual right inconsistently. There was an understanding that customers should be treated fairly and knowledge that PTSB would not draw a customer's attention to their right to revert to a lower rate of interest than the bank intends to offer. Other managers were unquestioning in approaching the issue, despite being aware that the position being adopted may not be defensible if it was referred to the (then) Financial Services and Pensions Ombudsman (the **Ombudsman**).

- 7.97 I find no evidence that Mr Guinane had any involvement in the implementation of the approach to customers with SC706 after 19 January 2009 when he approved the Proposal put to him by Mr O'Grady. There is also no evidence that he actively applied his mind to the precise implementation of the approach that he had authorised by, for example, asking colleagues about this. Furthermore, there is no evidence of him reading the PTSB compliance reports in this period.¹⁸⁷

Reaction from the PTSB branch network

- 7.98 On 18 March 2009, Jaime King a member of the marketing team wrote to Mr O'Connor in the following terms:

"Hi Kevin,

We have received another case where a customer was going through the AMR. Business Retention told the customer that they had loan condition H and requested the customer contact their branch to see what rate they would receive.

¹⁸⁷ [Transcript of Inquiry Hearing, dated 6 March 2024, page 57](#). Mr Guinane was on the circulation list for the PTSB monthly compliance reports. In his oral evidence to the Inquiry on 6 March 2024, Mr Guinane agrees that there was a chance that he did not read the Compliance report (pg 57). He later goes on to say that "...I didn't sign off the Compliance report. I think Mr. Hogan clarified that earlier this morning. I know that was said, but I think the evidence subsequently, particularly the evidence given in this Inquiry where Mr. Fleming said he issued the report all the time, so I didn't actually sign off or have to sign off a report, the Compliance report. I had memory, and I have many memories of having meetings with Compliance, but I have no particular memory of having a meeting in, I think it would have been March 2009, and I have no memory of discussing this issue at any time later".

They have not stated they want the ECB+1.10, simply they are requesting a Tracker. However, the branch feel that if they are to offer the ECB+2.25 and the customer checks their loan offer and sees ECB+1.10%, they will look like they were trying to dupe the customer.

Niall has agreed to offer the 1.10% rate, but I have had to amend the letter as attached.

I have taken out the sentence "Nevertheless we note you interpreted the condition as having the latter effect and that this was the main reason for taking out the loan with the Bank".

*Can you please review and revert if you have any changes."*¹⁸⁸

7.99 On 23 March 2009 Mr O'Connor responded and [REDACTED]
[REDACTED]¹⁸⁹ This highlighting of the adverse impact on customers by the branch had no impact on the central functions who had set the policy on this matter.

7.100 It is striking that whilst none of the central functions appeared, on the face of the documents and from the evidence that I heard or have seen, to have identified a problem in terms of the fairness of the approach that PTSB had adopted to implementing SC706, someone in a branch of PTSB who had to deal with a customer early on in this process could see the problem immediately. They understood straight away that the approach that PTSB was pursuing was not in the best interests of the branch customer and was misleading and unfair to them. It speaks well of the culture within PTSB that an individual in one of the branches had the confidence and judgement and felt they had the platform to criticise the approach being taken by the bank and to do so in strong terms. The individual referred to PTSB trying to "*dupe the customer*". I do not wish to place too great an emphasis on one item of correspondence, concerning one customer, who may have had particular circumstances of which I am unaware. Nevertheless, this forthright response from the

¹⁸⁸ [Email chain dated 18 March 2009 to 23 March 2009 with redacted subject line between Kevin O'Connor and Jaime King, page 1 of 1 \(Doc ID: 0.7.296.5110, Core Book 10 Tab 10\).](#)

¹⁸⁹ [Email chain dated 18 March 2009 to 23 March 2009 with redacted subject line between Kevin O'Connor and Jaime King, page 1 of 1 \(Doc ID: 0.7.296.5110, Core Book 10 Tab 10\).](#)

branch, bolsters my view that the problem with the approach being taken to SC706 and its fairness to customers should have been apparent at that time to individuals in PTSB who applied their minds to the issue. Had they done so, it would have been apparent that the best interests of customers were not being served by the approach that PTSB was systematically applying and that the effect was to treat some customers unfairly.

- 7.101 The response of the central functions of PTSB did not change as a result of this response from a branch. No concerns with PTSB's implementation of SC706 were identified until the intervention of the Financial Regulator in December 2009.

Options letters August 2009

- 7.102 The evidence that was heard by the Inquiry indicated that in August 2009 PTSB took the decision to withdraw all references to the availability of tracker rates in the letters sent to customers whose period of paying a fixed rate of interest on their mortgage loan agreement was expiring. This decision, which was the subject of witness evidence,¹⁹⁰ is not in itself relevant to the SPC that is the subject of this Inquiry. I understand that it is probable that the change was made inadvertently as part of changes to PTSB's systems and/or without any motive to disadvantage customers. Nevertheless, I note that this decision would have made the position of customers who had an entitlement to revert to a tracker rate, or a particular tracker rate, more difficult. I understand that PTSB implemented this change as part of a routine PRD.

- 7.103 The initial decision as to how to respond to the broker's query regarding the implementation of SC706 found its way promptly to Mr O'Grady and from him to the ExCo of PTSB and thereafter it was thought necessary to be the subject of a decision by the CEO. By contrast, the introduction of the PRD to effect the change to the letter sent to those customers whose fixed term at a fixed interest rate was expiring appears, from limited evidence, to have been undertaken as a routine matter without reference to the senior management of the bank.

Query from the Financial Regulator in December 2009

¹⁹⁰ [Transcript of Inquiry Hearing, dated 22 February 2024, page 92 to 100.](#) [Transcript of Inquiry Hearing, dated 23 February 2024, pages 53, 54, 65 to 70, 79 and 106.](#)

7.104 On 16 December 2009, Mr Fleming issued an email headed “Query from Financial Regulator”¹⁹¹ to Mr O’Grady, Ms O’Doherty and members of the compliance and operations teams. The email was also copied to Mr Wynn, the deputy group head of compliance of IL&P Group. It read as follows:

“Folks

*At yesterday’s meeting with the Consumer Director of the Financial Regulator at which we discussed the Endowment/Interest Only Project, the Financial Regulator queried whether the item below from **Askaboutmoney.com** was related to the Endowment/interest Only issue. From discussions with Ailbhe and Ruta it is clear that this is not the case. It seems to be a reference to the Condition 706 type of mortgage agreements. I may get a follow-on question from the Financial Regulator when I revert to them to answer their specific question and therefore we should discuss this at the meeting which Ronan has arranged for Thursday morning”*

The email then included the following post from the askaboutmoney.com consumer forum:

“I just received my options letter from permanent TSB and they’re offering me a variable of 3.65 and 4 different fixed rate options (very high ones I must add). The one thing they are not offering is my original tracker ECB+1.1 as detailed in my special conditions in my loan agreement (which say that I can revert to same on expiry of my fixed rate upon informing them thereof).

I’ve also clarified this with them in writing in February of this year and they confirmed that indeed the tracker would be available on expiry of my fixed rate. So I am puzzled now, that the option is not given in my “options letter”. I’ve drafted a letter informing them of my loan conditions, attaching the confirmation received in February and informing them of my choice to revert to the tracker rate.

Are they just trying to see if people have forgotten about their special agreements, trying to lure them into expensive variable rates? Or should I assume that this was a genuine mistake?”

¹⁹¹ [Email from Joe Fleming to Niall O’Grady, Ronan O’Rourke, Ailbhe O’Doherty and Ruta Walsh with subject line ‘Query from Financial Regulator’, dated 16 December 2009, page 1 of 2 \(Doc ID: 0.7.2366.161411, Core Book 1 Tab 68\).](#)

7.105 I note from this email that Mr Fleming assumed that the email recipients were familiar with SC706, even though it was many months since PTSB had established a uniform process for dealing with customers whose mortgage loan agreements contained this condition. I also note that he thought the issue that arose as a result of the query from the Financial Regulator on this point was sufficiently important to copy in Mr O'Grady and Mr Wynn. The matter was to be discussed promptly. Mr Fleming was asked in the course of giving his evidence about who he was directing the information in his email to? He responded that:

*"...marketing were the product owners for mortgages and had also owned the remediation exercises that were in progress. So, they were the ones who we thought first and foremost, we'd raise this with."*¹⁹²

7.106 Mr Fleming further clarified that he wished to understand what exactly was going on so that he would be able to deal effectively with an update to the Financial Regulator or any follow-on questions.

7.107 Prior to Mr Fleming sending his email on 16 December 2009, following the meeting with the Financial Regulator, it was clear that the issue of SC706 was still considered to be a live issue within the marketing function. The evidence provided to the Inquiry included a meeting request from Ms O'Doherty to Mr O'Grady on 11 November 2009¹⁹³ requesting a meeting to discuss the "*top 5 mortgage project priorities*". Item five on the list was the following:

"Review Hogan Letters – incl new compliance warnings, re platforming etc Condition 706"

When giving evidence to the Inquiry, Ms O'Doherty stated that she could not recall if this meeting went ahead.¹⁹⁴

¹⁹² [Transcript of Inquiry Hearing, dated 27 February 2024, page 47.](#)

¹⁹³ [Meeting request from Ailbhe O'Doherty to Niall O'Grady, dated 11 November 2009 \(Doc ID: BSI49516, Core Book 2 Tab 113\).](#)

¹⁹⁴ [Transcript of Inquiry Hearing, dated 23 February 2024, page 53, line 7.](#)

7.108 The documents made available to the Inquiry included an email from Mr O'Connor to Ms O'Doherty sent on 8 December 2009 headed "*Tracker Condition Query 706*".¹⁹⁵ The email read as follows:

"Ailbhe,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁹⁵ [Email from Kevin O'Connor to Ailbhe O'Doherty dated 8 December 2009 re Tracker Condition Query 706 – Sent on behalf of Kevin O'Connor, page 3 of 3 \(Doc ID: 0.7.296.26106, Core Book 4 Tab 51\).](#)



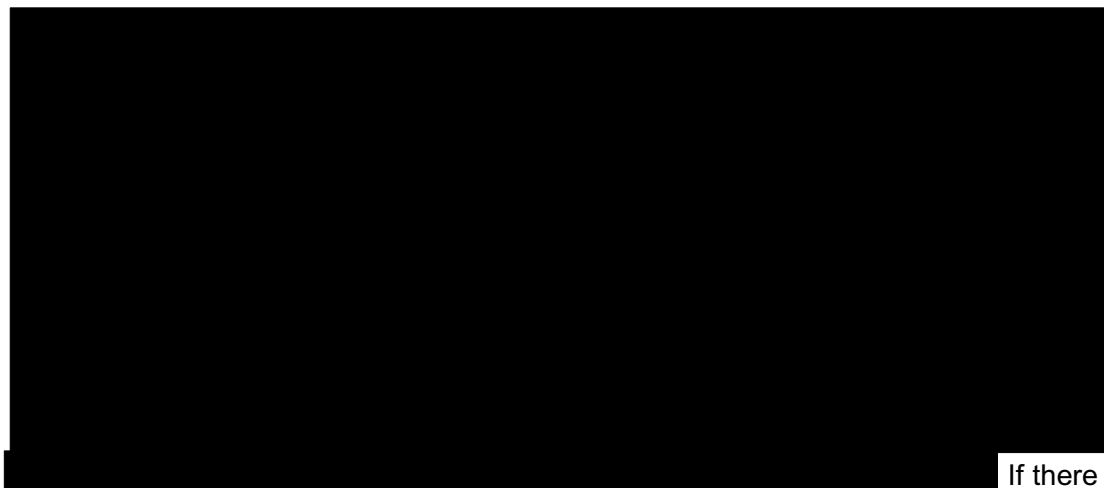
Regards,

Kevin O'Connor"

7.109 The context for this email about tracker condition SC706 is not clear and neither Mr O'Connor nor Ms O'Doherty was able to offer any additional information about why this issue had arisen on 8 December 2009.

7.110 I conclude that the issue of the proper implementation of SC706 was a live issue in the central functions of PTSB in November and early December 2009.

7.111



If there was any doubt before about the correct interpretation of SC706 on this point, it was now clear and the marketing function was now aware of the position.

7.112 It was not clear from the evidence provided during the Substantive Inquiry Hearing or in the documents available to the Inquiry that this advice was acted upon until it was forwarded to Mr Fleming by email dated 5 January 2010 from the personal assistant of Mr O'Connor, stating:

"Joe I think this is what you were looking for".¹⁹⁶

¹⁹⁶ [Email from Donal Regan to Joe Fleming dated 5 January 2010 re Tracker Condition Query 706 – Sent on behalf of Kevin O'Connor, page 1 of 3 \(Doc ID: 0.7.296.26106, Core Book 4 Tab 51\).](#)

7.113 This email indicates that Mr Fleming had requested the document and knew that it existed. Mr Fleming responded on 5 January 2010, stating:

*"it is indeed".*¹⁹⁷

7.114 I conclude, on the balance of probabilities, that this email of 8 December 2009 from Mr O'Connor to Ms O'Doherty was referred to by marketing in their dealings with compliance as part of a dialogue that was taking place in response to Mr Fleming's email of 16 December 2009.

7.115 It is not clear from the evidence what actions, if any, were taken in response to Mr Fleming's email of 16 December 2009 prior to the 6 January 2010 email referred to below. Mr Fleming's evidence was that he believed that he was absent from the office during the first part of this period.¹⁹⁸

7.116 On 6 January 2010 Ms O'Doherty wrote to Mr Fleming, Mr O'Grady, Mr O'Connor and managers within the operations function of PTSB. The heading of the email was "Cond 706" and the email stated:

*"Please find attached a draft of the proposal we discussed yesterday in relation to treatment of loans with condition 706. Can you please review and revert with any amendments. I have requested an up to date extract from IT but cannot confirm when this will be available just yet."*¹⁹⁹

7.117 Attached to this email was a long note explaining the background, the issues arising and a proposal for resolving them. I have set this out in full below.

"Tracker Condition Query 706

Background

The following condition (Cond. 706) appears on approximately 10,000 tracker loans issued from 2004 when tracker mortgages were first introduced, up until April 2007.

(approx 400 on fixed rates figures based on extract from Jan 09).

¹⁹⁷ [Email from Donal Regan to Joe Fleming dated 5 January 2010 re Tracker Condition Query 706 – Sent on behalf of Kevin O'Connor, page 1 of 3 \(Doc ID: 0.7.296.26106, Core Book 4 Tab 51\).](#)

¹⁹⁸ [Transcript of Inquiry Hearing, dated 27 February 2024, page 61, line 28.](#)

¹⁹⁹ [Email from Ailbhe O'Doherty to Joseph Fleming & Ors, dated 6 January 2010, page 1 of 3 \(Doc ID: BSI048822, Core Book 2 Tab 115\).](#)

Please note that where the applicant switches the rate on this loan to a rate which is fixed for a certain period, the applicant must inform permanent tsb, on expiry of the fixed rate period, whether the rate on the loan is to switch into a further fixed rate (if available) or whether the loan is to revert to a tracker mortgage loan as described above. In the absence of instructions from the applicant at the expiry of the fixed rate period, the interest rate will switch to the then current variable interest rate and as may be varied from time to time thereafter.

This condition was included because at the time of introducing trackers the system could not automatically switch maturing fixed rate customers back into a tracker rate. The default was the then current variable rate (SVR at that time). The intention of this condition was not clear from the PRD. The purpose of the condition may not have been to guarantee entitlement to the tracker rate that the customer left when going into the fixed rate but to a tracker type product once requested by the applicant. However it is clear that the intention was to advise the customer they would need to contact us prior to its expiry and specifically request a tracker product.

Current Process

Where the customer contacts Open 24/Mortgage Dept. and requests a tracker rate they are offered the current tracker option (currently ECB + 3.25%).

However if the customer has specifically interpreted the condition as an entitlement to revert to their original tracker rate, as the condition wording is quite ambiguous we have given them the original rate. To avail of either option the customer must contact us on expiry of their fixed rate, otherwise we will continue to default them to the current rates (LTV variable).

There have been approx. 15 of these cases escalated where the original tracker rate has been reinstated.

Issue

Since August 09 a tracker rate option is no longer included on the automated options letters for a customer unless their T&C's specifically state that they will revert to a tracker rate. The tracker option therefore has also been removed from loans with Cond. 706. The current wording of the automated options letter may confuse these customers as it does not highlight that if they have cond. 706 in their loan offer they are entitled to request a tracker mortgage product.

Proposal

Since 27th November any mortgage that has condition 706 attached is flagged on 2 screens in Hogan. This will enable easier identification of these loans.

The current appropriate tracker rate option will be reinstated on the automated options letter for these customers. If a customer is dissatisfied with the offer of the current tracker rate the case should be escalated to the mortgage mailbox 'mtg query'

We will continue to review these on a case by case basis and reinstate the original tracker if necessary.

This process will be communicated to Retail, Open 24 and Mortgage Dept.

Next Steps

An extract has been requested from IT to identify any of these cases that are due to mature from their fixed rate over the next 6 months.

Their options letter can be manually updated in the short term to offer the current tracker rate. PRD submitted to automate the offering of then current tracker rate on any cond 706 accounts going forward.”²⁰⁰

7.118 Ms O’Doherty explained in her witness statement that:

“In January 2010, I prepared a memo for the Executive (although it appears that this was incorrectly dated “2009”) The issue at that stage was that since August 2009 the Option Letters going out to customers at the end of their fixed rate period did not include a tracker rate option. The proposal was that the Options letter would be updated to include an option to revert to the current appropriate tracker rate but if a query was raised in relation to SC 706 then these could be dealt with on a case-by-case basis and the customer offered to original tracker in the same approach adopted in January 2009. A PRD was raised by my team to initiate these changes on the system.”²⁰¹

7.119 It is not clear what stage this draft proposal had got to when it was attached to Ms O’Doherty’s email of 6 January 2010. The Inquiry did not receive evidence that established who had drafted this proposal, who had commented at that time or who had still to comment. However, it is clear from the draft proposal that there was an

²⁰⁰ [Email from Ailbhe O’Doherty to Joseph Fleming & Ors, dated 6 January 2010, page 2 of 3 \(Doc ID: BSI048822_0001, Core Book 2 Tab 115\).](#)

²⁰¹ [Witness Statement of Ailbhe O’Doherty, dated 13 December 2022 \(Core Book 2 Tab 99\).](#)

awareness on 6 January 2010 of the change made in August 2009 to the letter sent to customers at the end of a period at a fixed interest rate, which no longer referred to tracker rates. A system change had been implemented on 27 November 2009. The draft proposal was to address the change made in August 2009 and offer customers a tracker rate option at the end of a period at a fixed interest rate. At this stage, the proposal was to continue with the approach that was already in place when deciding which tracker interest rate a customer would be offered. The draft proposal was that customers would receive the current tracker rate of ECB+3.25%, unless they were dissatisfied with this, in which case they would receive the original tracker rate “*if necessary*”. As the draft proposal was circulated after a meeting held the previous day and Ms O’Doherty was aware of [REDACTED]

[REDACTED], this draft proposal is concerning. [REDACTED] had also been sent to Mr Fleming at his request the previous day.

7.120 Ms O’Doherty’s email of 6 January 2010 was reviewed by Mr Fleming, who responded with his thoughts and amendments on the draft proposal.²⁰²

7.121 Mr Fleming wrote to Mr Wynn on 8 January 2010. He included a draft email to the Financial Regulator which stated that the Financial Regulator had brought Mr Fleming’s attention to the post on the askaboutmoney.com website, that this had been investigated, insofar as that was possible without details of the customer being available, and PTSB was satisfied that it had no connection with the matter discussed at their meeting of 15 December 2009. Mr Fleming also informed Mr Wynn that:

“Pending a discussion with Dave Guinane next week, I propose to send this to [the relevant individual in the Financial Regulator] by way of update given that I have not responded on this since the meeting of 15th Dec. More details of this issue are in the attached e-mail.”

7.122 The draft email to the Financial Regulator went on to say that:

“the item indicates suggests a problem with the options letter which is issued at the end of a fixed-rate period and we are currently working to ascertain

²⁰² [Email from Joe Fleming to Ailbhe O’Doherty & Ors, dated 6 January 2010, page 4 of 4 \(Doc ID: 0.7.296.26028, Core Book 4 Tab 55\).](#)

whether this has happened in certain instances and the number of customers who may have been impacted by the problem.”

Mr Fleming concluded the draft email by saying that PTSB expected to update the Financial Regulator the following week.²⁰³

7.123 Mr Fleming was asked about this email during the Substantive Inquiry Hearing and he stated that he was not sure whether he was writing to Mr Wynn in order to escalate the matter or because at that time his family had suffered a bereavement and he may have been asking Mr Wynn to look after things whilst he was off.²⁰⁴

7.124 On 8 January 2010, Mr O'Connor wrote to Mr Cathal MacCarthy, group chief legal officer in IL&P Group, [REDACTED]. He enclosed a copy of Ms O'Doherty's draft proposal to the executive on this issue with Mr Fleming's comments marked on it. Mr O'Connor sent a copy of the email he had sent to Mr MacCarthy to Ms O'Doherty and summarised the response he had received from Mr MacCarthy in the following terms:

“Ailbhe,

[REDACTED]

[REDACTED]
Regards,

Kevin

.....

Cathal,

[REDACTED]

²⁰³ [Email from Joe Fleming to Frank Wynn, re regulator update, dated 8 January 2010, page 1 of 1 \(Doc ID: 0.7.2366.161419, Core Book 2 Tab 154\).](#)

²⁰⁴ [Transcript of Inquiry Hearing, dated 27 February 2024, page 62, line 9.](#)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Thanks ,

*Kevin*²⁰⁵

7.125 During the course of giving his evidence to the Inquiry, Mr O'Connor indicated that, from the documentation furnished to him, he believed that Mr Fleming had come to him because of the post on the askaboutmoney website. This would have been around 8 January 2010. This was the first occasion that he could recall on which he was asked to give a second look [REDACTED]²⁰⁶ Mr O'Connor consistently stated that he had no recollection of events at this time, other than [REDACTED]

[REDACTED]

7.126 Mr Fleming, whilst giving evidence to the Inquiry, stated that the response to the Financial Regulator which he had prepared and sent on 15 January 2010 was:

²⁰⁵ [Email from Kevin O'Connor to Cathal MacCarthy, dated 8 January 2010, pages 1, 2 and 3 of 4 \(Doc ID: 0.7.296.26028, Core Book 4 Tab 55\).](#)

²⁰⁶ [Transcript of Inquiry Hearing, dated 26 February 2024, page 95, line 8.](#)

“Well, it was in the first instance to indicate what the issue was, that we had this problem with 706 and 737.

So it was to get back to the Central Bank as quickly as possible, to inform them well, look, we are looking at this, there are issues with these conditions.”²⁰⁷

7.127 Mr O’Grady provided evidence in his witness statement²⁰⁸ in relation to Mr Guinane’s subsequent involvement with the position being followed by PTSB in relation to tracker mortgages. Mr O’Grady had been asked:

“ On 16 December 2009 you received an email from Joseph Fleming about his meeting with the Financial Regulator on the preceding day, which forwarded a post by someone with a username of [REDACTED] made on the website Askaboutmoney.com”What action did you take in response to it and with whom did you discuss it?”

7.128 In response, Mr O’Grady said in his witness statement:

“The email refers to a planned meeting with Ronan O’Rourke. I discussed it with Joe Fleming, and as far as I recall we brought it for approval and resolution to David Guinane.

The specific request to Marketing is that we have an online site scanning plan in place.

David Guinane approved the project to start reinstating trackers for customers with SC706 in their terms and conditions.

Customers were allowed to obtain the then available tracker – but they could also have the original tracker if they contacted the mortgage department as set by compliance.”

7.129 In his witness statement to the Inquiry, Mr Fleming referred to a discussion with Mr Guinane being scheduled at this time but he could not recall if it took place.²⁰⁹ PTSB did decide at this time to reinstate the option for customers to select a tracker rate mortgage, where they had the right to do so, in the options letter they were sent when

²⁰⁷ [Transcript of Inquiry Hearing, dated 27 February 2024, page 58, line 17.](#)

²⁰⁸ [Witness Statement of Niall O’Grady, dated 14 December 2022 \(Core Book 2 Tab 120\).](#)

²⁰⁹ [Witness Statement of Joe Fleming, dated 20 December 2022, page 6 \(Core Book 2 Tab 4\).](#)

leaving a fixed interest rate loan. In his evidence to the Inquiry, Mr Fleming stated that PTSB did not change its position on offering the original tracker rate to every customer with SC706 in their mortgage loan agreement at this time because he was awaiting [REDACTED].²¹⁰ Mr Fleming's evidence suggests that it was thought appropriate to consult Mr Guinane before reinstating the offer of a tracker rate in the options letter sent to customers who were at the end of a period of a fixed interest rate. The tracker rate would be offered at the then available rate and the customer's original tracker rate would only be made available if they contacted the mortgage department to request it.

7.130 Mr Guinane had no recollection of a meeting to discuss tracker mortgages at this time.²¹¹

7.131 I conclude from this that [REDACTED]
[REDACTED]
[REDACTED] and Mr Fleming was aware of this. [REDACTED]
[REDACTED]
[REDACTED]. Neither Mr O'Connor nor Mr MacCarthy had any recollection of what was said between them at that time, other than by reference to the documentary records. [REDACTED]
[REDACTED]
[REDACTED].

7.132 It is clear from the documentary evidence that the issues around SC706 were being discussed within PTSB in the period from early January to early March 2010 and the compliance department was reminding people of the need to explain the bank's position to the Financial Regulator.

7.133 Mr O'Grady stated during the Substantive Inquiry Hearing that around this time and when PTSB was considering how to respond to the askaboutmoney.com post, he and Mr Fleming had discussed the question of how to respond to customers who were not being told that they could revert to a tracker rate with Mr Guinane. He said:

²¹⁰ [Transcript of Inquiry Hearing, dated 27 February 2024, page 87.](#)

²¹¹ [Transcript of Inquiry Hearing, dated 6 March 2024, page 117, line 21.](#)

*"there was a meeting – Joe had referred to a meeting that was to take place with Ronan O'Rourke and I was referred to and Kevin O'Connor and Ailbhe O'Doherty, and maybe some others, which we saw two minutes ago, and at that meeting it was clearly discussed would we consider going -- reinstating the current tracker to those 706 customers, and one of the actions that came from that was, the first action was for Joe Fleming and myself to speak to David Guinane to see was that the appropriate course of action. And it was subsequently decided yes, it was."*²¹²

7.134 On 5 March 2010, Mr Fleming wrote to Mr MacCarthy and Mr O'Connor as follows:

"Re: Condition 706

I have today provided a requested update to the Financial Regulator on our remediation project for mortgage issues including Condition 706. I have indicated that "we are writing to the affected customers to inform them of the error and to give them a corrected range of options including a tracker. In cases where a customer decides to opt for the tracker, we will calculate whether the customer has paid additional interest as a result of our error and will compensate them accordingly." [REDACTED]

[REDACTED] *We will need to have this in order to revert to the Regulator next week and also for the business to deal with customer correspondences on this matter.*

*Regards"*²¹³

I understand that the error referred to in this email was that of omitting all references to a tracker rate option in letters being sent to customers upon the expiry of a fixed rate following the system change in August 2009.

7.135 On 4 March 2010 Mr Fleming sent an email to Mr Wynn [REDACTED]
[REDACTED] set out at para 7.108 above and;

*"a paper on the issue for the Exec (attached) and a copy of the offending condition in the context of a loan approval letter"*²¹⁴

²¹² [Transcript of Inquiry Hearing, dated 22 February 2024, page 100, line 14.](#)

²¹³ [Email from Joe Fleming to Cathal MacCarthy and Kevin O'Connor, dated 5 March 2010, page 1 of 5 \(Doc ID: 0.7.296.26015, Core Book 4 Tab 30\).](#)

²¹⁴ [Email from Joe Fleming to Frank Wynn dated 5 January 2010, re Tracker Condition Query 706 - sent on behalf of Kevin O'Connor, page 1 of 4 \(Doc ID: 0.7.296.26100, Core Book 2 Tab 155\).](#)

On 5 March 2010 Mr Wynn responded to Mr Fleming with a question. The email read:

“How much detail and content is included about trackers in the T&Cs before you come to 796? Term 706 says “a tracker mortgage loan as described above”. I’m just wondering what the “described above” looks like. Does it definitively commit us for all time in the future to a fixed margin over ECB, or does it leave any scope for a view that the margin over ECB is currently X, but may not always be X? You might send me a sample T&C with 706 included”.

7.136 At this point, Mr Wynn was considering the matter that was now of interest to the Financial Regulator and had identified the key issue on the construction of SC706 straight away. He appears to be doing so for the first time. When questioned about this²¹⁵ Mr Wynn could remember very little about this and was unsure whether he had seen the term before or whether he was just asking for it in order to have all the documents in one place. He is not aware of how the dialogue with Mr Fleming proceeded, but thought he may have just agreed with [REDACTED] and had nothing to add. (Para. 7.141 refers to Mr Wynn being copied on subsequent correspondence.)

7.137 By 5 March 2010, Mr O’Connor was planning to write to Mr MacCarthy again on the SC706 matter. He circulated a draft memo to Mr Fleming for comment:

“Cathal,

[REDACTED]

²¹⁵ [Transcript of Inquiry Hearing, dated 29 February 2024, page 50.](#)



Regards,

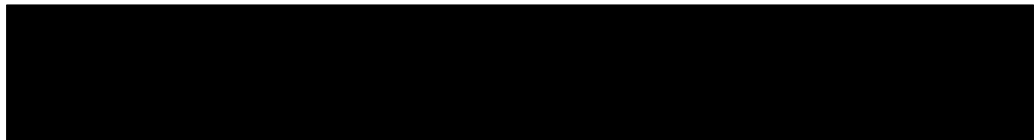
Kevin O'Connor

Encl. 1. Copy e-mail of 8th January 2010 with background note from Joe Fleming

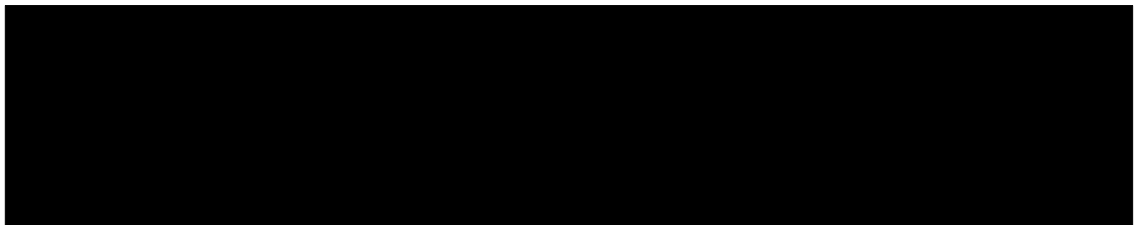
2. Copy e-mail from Joe Fleming to Terry Murphy of Regulator's office

3. Samples of Letters of Approval - condition H being condition 706.²¹⁶

7.138 Mr Fleming responded on 8 March 2010 to the above draft memo to Mr MacCarthy that Mr O'Connor had prepared and stated:

 ²¹⁷

7.139



²¹⁶ [Email from Donal Regan \(on behalf of Kevin O'Connor\) to Joe Fleming, dated 5 March 2010, re Condition 706, pages 1 and 2 of 2 \(Doc ID: BSI046063, Core Book 1 Tab 76\).](#)

²¹⁷ [Email from Joe Fleming to Kevin O'Connor, re: Condition 706, dated 8 March 2010, page 1 of 2 \(Doc ID: BSI046063, Core Book 1 Tab 76\).](#)

7.140 Mr Fleming took the step of writing directly to Mr MacCarthy on 11 March 2010, copying Mr O'Connor and some individuals in the operations department and blind copying Mr Wynn. [REDACTED]

Mr Fleming stated:

"Cathal,

[REDACTED]

[REDACTED]

*Regards Joe".*²¹⁹

7.141 The email included an extract from a speech by the new head of the Financial Regulator in which he talked about being keen to see firms move more quickly to clear backlogs in handling overcharging cases. This extract had been sent to Mr Fleming by Mr Wynn, who was blind copied on Mr Fleming's email to Mr MacCarthy.

²¹⁸ [Memo from Kevin O'Connor to Cathal MacCarthy, dated 8 March 2010 \(Doc ID: 0.7.296.5037, Core Book 1 Tab 88\).](#)

²¹⁹ [Email from Joe Fleming to Cathal MacCarthy, re new head of Financial regulator – first major public speech, dated 11 March 2010, page 1 of 1 \(Doc ID: 0.7.296.5192, Core Book 10 Tab 18\).](#)

7.142 Mr MacCarthy responded to the memo sent by Mr O'Connor on 8 March 2010 by way of a handwritten note on the memo.²²⁰ This handwritten note was undated and neither Mr O'Connor nor Mr MacCarthy recalled when the handwritten note was sent. It read as follows:

[REDACTED]

7.143 Mr MacCarthy gave evidence to the Inquiry on 28 February 2024. He stated prior to and at the Substantive Inquiry Hearing that he had little, if any, recollection of the issues surrounding SC706 or his involvement in 2009 or 2010 in this matter. He stated the following:

"I have no recollection of the issue at that time. The situation is that from the beginning of February I was totally absorbed because the Anglo transactions involving the bank were about to break and that chewed up the next four or five months, so I spent most of my time in Abbey Street rather than up in the bank"

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7.144 He clarified that 'Abbey Street' was the group headquarters and that the problems that had arisen in relation to the IL&P Group's dealings with Anglo Irish Bank were of sufficient gravity and seriousness to take up most of his time for a period from February 2009 for around four to five months.

7.145 Mr MacCarthy had no recollection of his correspondence or discussion with Mr O'Connor on 8 January 2010 or in March 2010 other than what he had derived from reviewing the correspondence that he had seen from the time. He was aware that [REDACTED]

[REDACTED]

7.146 On 25 March 2010, Mr Fleming wrote to Mr MacCarthy and Mr O'Connor with a clear statement of his view that [REDACTED]

[REDACTED]

[REDACTED]. It is likely that Mr Fleming sent this because Mr MacCarthy had not responded to Mr O'Connor's email of 8 March. It

²²⁰ [Memo from Kevin O'Connor to Cathal MacCarthy dated 8 March 2010, page 2 of 10 \(with handwritten notes\) \(Doc ID: 0.7.296.5037, Core Book 1 Tab 88\).](#)

²²¹ [Transcript of Inquiry Hearing, dated 28 February 2024, page 15.](#)

provides a clear example of how PTSB should have approached its regulatory responsibilities in the first quarter of 2009. The email stated:

"Cathal

Although the legal interpretation of Condition 706 is that [REDACTED]

[REDACTED]
[REDACTED] The principles are:

A regulated entity must ensure that in all its dealings with customers and within the context of its authorisation it:

1 Acts honestly, fairly and professionally in the best interests of its customers and the integrity of the market.

2 Acts with due skill, care and diligence in the best interests of its customers.

It is our understanding that, based on these principles, the FR will extend the requirement for a written statement of suitability provided to consumers to the exercise of options under a mortgage contract. In my view, the consumer is protected by the legal/broker advice when taking out a mortgage but is not obliged to seek legal advice when exercising options and therefore would be seen as more vulnerable by the Regulator (and therefore has an information need which would be satisfied by the options letter).

Regards

Joe

Joe Fleming

*Head of Compliance*²²²

7.147 The external legal advice that the PTSB legal department [REDACTED] in Mr O'Connor sending an email on 1 April 2010 to Mr Fleming in relation to SC706 copying Mr MacCarthy. The email [REDACTED] as follows:

²²² [Email from Joe Fleming to Cathal MacCarthy re Condition 706 – Consumer Protection Code requirements re Options Letter, dated 25 March 2010, page 1 of 2 \(Doc ID: 0.7.296.26040, Core Book 4 Tab 13\).](#)



7.148 From this point forward, PTSB moved swiftly and diligently to change its position in relation to making customers aware that they could select a tracker at the end of a period of fixed interest rate and that they were entitled, where their mortgage loan agreement contained SC706, to revert to the original tracker rate that was promised in the offer of a mortgage loan agreement made by PTSB. Most of the individuals within PTSB who developed and undertook the system and procedural changes required to implement this new approach were the same people who had implemented the approach to SC706 that was adopted in early 2009.

7.149 PTSB subsequently went on to offer remediation to customers who had suffered a loss as a result of not being offered the original tracker rate to which they were entitled after the expiry of a period at a fixed rate.

Remediation

7.150 In the description of the SPC set out at Annex A to the Notice of Inquiry, it is stated that the Central Bank suspected that *“PTSB was advised that this issue could affect up to 10,000 customers, but was immediately applicable to 400 such customers who were at that time on a fixed rate and had SC706 in their mortgage contracts”*. It further stated that the Central Bank suspected that Mr Guinane made the decision on 19 January 2009 to sign off on the Proposal made to him *“at a time when he was fully aware”* of the same facts.²²⁴

²²³ [Email from Kevin O'Connor to Joe Fleming \(copying Cathal MacCarthy\) re 706 – sent on behalf of Kevin O'Connor, dated 1 April 2010, pages 1 and 2 of 2 \(Doc ID: 0.7.296.26047, Core Book 4 Tab 12\).](#)

²²⁴ See [Appendix 1](#).

7.151 The remediation work that PTSB undertook in 2010 and 2011 with banking customers whose mortgage loan agreements contained SC706 and who were entitled to revert to the tracker rate loan from PTSB at the rate that was originally offered, was the subject of a report by KPMG dated 18 January 2011. The report by KPMG was titled *“Report on the Agreed Upon Procedures completed in respect of the Permanent TSB 706 Condition customer mortgage account remediation project”*. The report from KPMG stated, amongst other things:

“PTSB determined that, of the 12,800 tracker mortgage loan products issued since 2004, 551 loan accounts may require some form of refund or restitution (the “Impacted Accounts”), as a fixed rate period had been selected by the customer at some point after the origination of the mortgage, indicating that an original tracker- related rate should also have been subsequently offered to those customers. Of these Impacted Accounts, 279 were found to require a refund while the remaining 272 accounts were not due a refund for reasons including:

- The customer being on a more advantageous product than the original tracker interest rate of their mortgage; and*
- Other conditions being applicable, e.g. a renegotiation of the account during the fixed rate term.”*²²⁵

7.152 In 2020 the head of product assurance at PTSB provided additional information to Enforcement in relation to the final figures regarding the remediation that was offered to customers with mortgage loan agreements containing SC706. PTSB indicated that a figure of €1,311,352 had been provided by PTSB to the Central Bank in 2010, as the total amount of remediation offered to customers in respect of the bank’s failure to offer customers the tracker rate to which they were entitled. PTSB provided a breakdown of this figure which indicated that 234 customers had received remediation amounts totalling €1,198,517 in respect of the bank’s failings in respect of SC706 and a further 45 customers had received a total of €112,835 as a result of being impacted by operational issues.²²⁶ These operational issues are thought to be a reference to the failure by PTSB to notify customers that a tracker rate was still available to them as a result of the system changes made in August 2009. I understand that the above figures

²²⁵ [Letter from KPMG to David Guinane, Chief Executive of the Bank reporting on the ‘Agreed Upon Procedures’ completed in respect of the Permanent TSB 706 Condition customer mortgage account remediation project, dated 18 January 2011 \(Doc ID: 0.7.2366.72414, Core Book 1 Tab 83\).](#)

²²⁶ [Email from Ronan O’Rourke to Caroline Delaney, re Tracker Mortgage Examination – Remediation figures, dated 19 November 2020, page 1 of 4 \(Doc ID: PTSB EML 014579, Core Book 1 Tab 158\).](#)

are not in dispute between the Inquiry Participants and, on the balance of probabilities, I accept that they offer an indication of the number of customer affected and the scope of the impact of the SPC on customers.

COMPLIANCE AND LEGAL FUNCTIONS

7.153 It is a feature of the actions that were taken by PTSB during the Relevant Period that the compliance functions within PTSB and within IL&P Group were involved in, or aware of, the position being taken by the banking business in relation to SC706 throughout the Relevant Period. It was therefore relevant for the Inquiry to understand the role and responsibilities of the compliance functions within the group and to assess whether the actual knowledge of the functions should have prompted any re-consideration of PTSB's conduct.

7.154 The Inquiry heard from three witnesses from the compliance function: Mr Fleming, head of compliance during the Relevant Period; Mr Wynn, deputy group head of compliance in IL&P Group; and Mr Hannan, group head of compliance in IL&P Group. During the Relevant Period the functions and titles within the group compliance function changed. Mr Wynn became the general manager - group compliance and operational risk from December 2009 and Mr Hannan changed from being the group head of compliance and group head of risk policy to become the group head of risk and compliance in November 2009.²²⁷

7.155 Mr Fleming, in his witness statement, stated that the compliance team in PTSB included a deputy and a small team of three to four staff during the Relevant Period. Mr Fleming said that his title was somewhat misleading:

"My role was, in fact, relatively junior in rank. I reported to the General Manager – Finance, who had primary responsibility for the Finance function in PTSB and who was a member of the PTSB management team".²²⁸

²²⁷ [Transcript of Inquiry Hearing, dated 27 February 2024](#), [Transcript of Inquiry Hearing, dated 29 February 2024](#), [Transcript of Inquiry Hearing, dated 4 March 2024](#), [Witness Statement of Joseph Fleming, dated 20 December 2022 \(Core Book 2 Tab 4\)](#), [Witness Statement of William Hannan, dated 6 December 2022 \(Core Book 2 Tab 51\)](#), [Witness Statement of Frank Wynn, dated 21 December 2022 \(Core Book 2 Tab 135\)](#).

²²⁸ [Witness Statement of Joseph Fleming, dated 22 December 2022, page 1 \(Core Book 2 Tab 4\)](#).

7.156 He also stated that he had an indirect reporting line to Mr Wynn, *“who was responsible for compliance in group companies including PTSB and Irish Life. My role was to support him. Frank Wynn reported in turn to Bill Hannon”*.²²⁹

7.157 The Inquiry heard evidence²³⁰ about the structure and reporting lines within the PTSB and IL&P Group management structure and I accept that Mr Fleming’s role in the IL&P Group was as set out above during the Relevant Period.

7.158 In his witness statement, Mr Fleming stated that the compliance function had supported the work undertaken by PTSB to implement the 2006 Code. This work required system changes and a multidisciplinary team under a project manager was established to manage this. The compliance function provided guidance to that team. The guidance was based, in part, on the participation by the PTSB compliance function in working groups of the Irish Banking Federation and on its attendance at implementation meetings with the Financial Regulator. He stated that within the PTSB compliance team:

“...arrangements were put in place for monitoring compliance with the new advertising requirements and preparations for monitoring staff compliance with the suitability and complaint requirements [of the code]”.²³¹

7.159 Mr Fleming accepted that the monthly compliance report that he was responsible for producing had stated the following in both the February and March 2009 monthly reports:

*“Ensuring compliance with conduct of business rules and, in particular, with the Consumer Protection Code, Minimum Competency Requirements and other relevant Codes is the primary focus of the Bank’s Compliance function. We have integrated testing of the requirements into our ongoing programme of monitoring including branch audits, mortgage file monitoring and business unit monitoring programmes. In our opinion, based on the results of our compliance monitoring work, the bank is in material compliance with the requirements of the Consumer Protection Code for the quarter ended 31 March 2009”*²³²

²²⁹ [Witness Statement of Joseph Fleming, dated 22 December 2022, page 1 \(Core Book 2 Tab 4\).](#)

²³⁰ [Transcript of Inquiry Hearing, dated 27 February 2024, page 13.](#)

²³¹ [Witness Statement of Joseph Fleming, dated 22 December 2022, page 2 \(Core Book 2 Tab 4\).](#)

²³² [Witness Statement of Joseph Fleming, dated 22 December 2022, page 3 \(Core Book 2 Tab 4\).](#)

7.160 The compliance function in PTSB drew up an annual plan and then produced monthly and quarterly compliance reports for circulation within the IL&P Group.

7.161 Mr Fleming was invited to comment in his witness statement on the extract set out at paragraph 7.1(E) above from the monthly compliance report for February 2009 (at page 10) and which was repeated in the March 2009 quarterly report. This extract specifically addressed the position being adopted in relation to SC706. Mr Fleming stated:

*“...the first paragraph of the above cited text from the monthly report is simply reflecting the position as established by the CEO, Mr Guinane, [REDACTED] [REDACTED] email from Ailbhe O’Doherty dated 19 January 2009. The compliance function had no role in advising on, or commenting on, this matter. As I clearly had no role in this specific matter, I did not seek to review the legal advice provided to the CEO or the position adopted by the CEO”.*²³³

7.162 Each of the three individuals from the compliance function who gave evidence to the Inquiry made it clear that they had no direct recollection of the events relating to SC706 that took place during the Relevant Period. However, each of them had been asked to attend interviews and give responses to questions from Enforcement in 2019 and, as a result, they had the opportunity to familiarise themselves with the correspondence and documentation from the Relevant Period. All relevant documents were provided to them again in the course of the Inquiry and prior to their providing witness evidence. The three individuals gave careful and considered responses in their witness statements and in their oral evidence when responding to my questions and those from the LPT. Mr Fleming and Mr Wynn were questioned by counsel for Mr Guinane. In the course of giving evidence, I formed the view that each of them was able to distinguish between their recollection of matters as they existed or occurred during the Relevant Period from their own memory and their recollection or deductions regarding such matters based upon their review of the documents that they had seen and which had been produced at the time. Each was able to offer considered views on the systems and procedures in place in IL&P Group during the Relevant Period and their understanding of the approach that would have been adopted when considering any issue or dealing with other functions within PTSB.

²³³ [Witness Statement of Joseph Fleming, dated 22 December 2022, page 5 \(Core Book 2 Tab 4\).](#)

- 7.163 I have been careful to consider the capability and competence that would have been required of a compliance function in 2009 and 2010. I have sought to avoid any application of current standards and practices in considering how IL&P Group structured and resourced its compliance activities and how responsibilities were exercised or allocated around the management of PTSB and the wider IL&P Group.
- 7.164 Each of Mr Fleming, Mr Wynn and Mr Hannan should, in the ordinary course of events, have had meetings with Mr Guinane in order to discuss the monthly or quarterly compliance reports that were produced by the head of compliance. The quarterly compliance report would, in part, be incorporated into the IL&P Group's quarterly and annual compliance reports. None of the individuals recalled the details of any meeting with Mr Guinane at this time. Mr Wynn and Mr Hannan were uncertain whether the regular meetings had continued during this time due to other work pressures.²³⁴ Mr Guinane did not recall any meetings to discuss a Compliance Report during the Relevant Period.²³⁵
- 7.165 Mr Fleming gave evidence that, in his view the role of compliance was to ensure that adequate systems were put in place to properly support the decisions being taken by the bank such that they were consistent with the requirements of the 2006 Code and were consistently applied. However, he felt strongly that the compliance function was not in a position to, nor should it have been responsible for, second guessing or reviewing legal advice provided by the legal department.²³⁶ The PTSB compliance function was active in approving any marketing materials issued by PTSB during the Relevant Period. It was also involved, as the facts set out above demonstrate, in reviewing system changes and process changes within PTSB.
- 7.166 Mr Fleming indicated that the Relevant Period was an exceptionally busy period for the compliance function and PTSB. When preparing the monthly compliance report for PTSB, he asked members of his team to prepare a synopsis of the work that was being undertaken. The quarterly report showed "*the sheer volume of activities going on in the business*". By way of example, he stated that during this period there was a number of authorisations required for retail credit firms within the IL&P Group and that there had been a number of themed inspections and issues relating to complaints and

²³⁴ [Transcript of Inquiry Hearing, dated 4 March 2024, page 39](#), [Transcript of Inquiry Hearing, dated 29 February 2024, page 74](#).

²³⁵ [Transcript of Inquiry Hearing, dated 6 March 2024, page 117](#).

²³⁶ [Transcript of Inquiry Hearing, dated 27 February 2024, page 26, pages 26, 71 and 76](#).

complaint management. He stated that he would compile the quarterly compliance reports after normal office hours when it was quieter.²³⁷

7.167 In his evidence to the Inquiry,²³⁸ Mr Wynn stated that the PTSB compliance function had a secondary “dotted reporting line”²³⁹ into his position in the IL&P Group compliance department. During the Relevant Period the IL&P Group compliance function had two members only and throughout most of the period the group head of compliance was concerned with one particular and significant matter and was therefore not involved in routine matters. He pointed out that following the introduction of the Government Guarantee Scheme (the **Scheme**) for credit institutions, which had, by then, already been established in order to enable banks and lenders to survive the credit crunch arising from the global financial crisis at the time, the responsibilities of the department had changed. A very detailed compliance report had to be prepared pursuant to the Scheme and the CEO and chairman had to certify to the Financial Regulator and the Department of Finance that the terms of the Scheme had been met. In early 2009 the Financial Regulator decided all future reports pursuant to the Scheme had to be compiled by the compliance function and not by the internal audit function. This responsibility fell on Mr Wynn. He stated that, in any event, about 80% of his time in late 2008 and into 2009 was spent on risk management matters, including prudential matters. This, in itself reduced resourcing of the IL&P Group compliance function to about 1.2 full time equivalent staff members. In his evidence to the Inquiry, Mr Hannan stated that the new role for the compliance function in relation to the Scheme:

“...was a big change. It involved a significant amount of prudential compliance work. Previously the Compliance function had been dealing with conduct of business pretty much totally and now had a very large prudential compliance role. Mr Wynn largely took on that role during 2009 and I think he did all the work very well but he was under pressure in 2009, and so was I, because the annual transactions [transcript error – Mr Hannan referred to “the Anglo transaction”] became public in February of 2009 and I was assigned to work on the resulting review of corporate governance with the firm Oliver Wyman who

²³⁷ [Transcript of Inquiry Hearing, dated 27 February 2024, page 34.](#)

²³⁸ [Transcript of Inquiry Hearing, dated 27 February 2024, pages 12 and 13.](#)

²³⁹ [Witness Statement of William Hannan, paragraph 4 \(Core Book 2 Tab 51\)](#) “a “solid reporting line” is a person’s principal reporting line, while a “dotted reporting line” is a secondary reporting line over which a “solid reporting line” takes precedence. The “dotted reporting line” was the mechanism through which Group Compliance coordinated the compliance functions across the Irish Life & Permanent Group and through which it received Business Division compliance plans and reports”.

*were hired by the board to help carry out this work. So, both he and I came under a lot of extra work pressure in 2009.”*²⁴⁰

7.168 Mr Wynn was referred to the PTSB monthly compliance report that was sent to him and which provided details of the position PTSB was adopting in relation to SC706 in the form set out at paragraph 7.86 above. He stated that he had no recollection of the issue although he accepted that he had included the issue in the quarterly compliance report produced by IL&P Group compliance for the first quarter of 2009. Mr Hannan also indicated that he had no recollection of the SC706 issue and said that he did not believe he was aware of the issue until it was the subject of the Central Bank investigation.²⁴¹

7.169 Each of Mr Fleming, Mr Wynn and Mr Hannan asserted that the responsibility for compliance with regulatory obligations lay firstly with the operational management of the relevant division and referred to the same model whereby the compliance function provided a second line of support and took responsibility in relation to regulatory compliance and then the internal audit function provided a third line of defence. This model, which I accept is a standard approach adopted by groups with a compliance function, was the subject of some questioning. Reliance on the operational management in the divisions within the IL&P Group to discharge their responsibility to comply with regulatory obligations required such operational managers being sufficiently aware of and briefed on those regulatory responsibilities so that they were in a position to discharge them. The managers of the compliance function accepted that it was part of the role of the compliance function to arrange for such training or awareness raising to take place and to review the systems that were in place to ensure that this happened.

7.170 It is clear from the evidence of these and other witnesses that PTSB did take steps in good faith to embed systems for complying with the 2006 Code. However, the adequacy of the training provided to operational managers was unclear. Mr Wynn, Mr Hannan and Mr Fleming confirmed that some training was provided, but none of them could remember the details of any training programme. Mr Guinane did not recall any training on the 2006 Code.

²⁴⁰ [Transcript of Inquiry Hearing, dated 4 March 2024, page 16.](#)

²⁴¹ [Transcript of Inquiry Hearing, dated 29 February 2024, page 36.](#)

- 7.171 The limited communication between the divisional compliance function and the IL&P Group compliance function during the Relevant Period is noteworthy. Mr Wynn indicated that he did not really have time to review the substance of the compliance reports provided by the divisional compliance heads. His role was to compile a report and in the course of doing so he would exercise sufficient judgement to work out which were important matters and which were not. The important matters would be included in the overall group report. However, he was clear that it was not his role to second guess Mr Fleming or exercise any independent judgement in relation to the information provided through the reporting procedure from the divisions.²⁴² It was unclear whether he had maintained the quarterly meetings with the CEO of PTSB during the Relevant Period. I accept as a matter of fact that the resources of the compliance functions in IL&P Group during the Relevant Period were stretched. The group had very significant issues to address as a result of compliance failures and these were the subject of regulatory and public attention. In addition, the credit crunch arising from the global financial crisis at the time and the Scheme and the regulatory analysis of the problematic transactions with Anglo Irish Bank were also extraordinary matters that required an extraordinary response from the financial regulators and the relevant banks. This created a considerable burden for the compliance function in IL&P Group.
- 7.172 I asked each of Mr Fleming, Mr Wynn and Mr Hannan if the way in which the compliance function operated in IL&P Group and/or PTSB created a single point of failure, in that Mr Fleming was solely responsible for identifying compliance issues within the relevant division and if he did not identify an issue, the group compliance function did not believe they had the responsibility or means to identify a compliance failing independently.²⁴³ In addition, the compliance function within PTSB relied upon the operational management to provide the first line of protection against compliance failures, but the responsibility for monitoring or assessing whether adequate training on regulatory responsibilities had been made available to the operational management of the division and, if not, ensuring such training was provided, lay with the compliance function in PTSB. The PTSB compliance function then had responsibility for identifying compliance failures where these had not been picked up by the senior management of a division. The three individuals acknowledged that this system was in operation, but did not acknowledge the inherent risk it created. If the divisional head of compliance did not identify a concern over any compliance issue, whether arising from existing

²⁴² [Transcript of Inquiry Hearing, dated 29 February 2024, page 63.](#)

²⁴³ [Transcript of Inquiry Hearing, dated 29 February 2024, page 84, Transcript of Inquiry Hearing, dated 27 February 2024, page 35, Transcript of Inquiry Hearing, dated 4 March 2024, pages 62 and 64.](#)

operations, or whether potentially arising due to regulatory changes, it is unclear how anyone else in IL&P Group would identify the concern and consider whether senior management training was required, or whether operational processes or customer communication were adequate to ensure compliance.

7.173 This system was unlikely to be adequate in ensuring compliance with changing regulatory obligations. If Mr Fleming did not identify a need for training or raising awareness amongst management in PTSB about any particular compliance issue, then no one else would. If the failure to identify such a need was due to the head of compliance's own lack of awareness, then both the first and second line of the defence,²⁴⁴ on which the IL&P Group compliance system relied, would not operate effectively and the group compliance function would remain unaware.

7.174 In addition, the difficult economic and operations environment and changing regulatory position immediately prior to and during the Relevant Period left the IL&P Group and divisional compliance functions with a significant amount of ground to cover if they were to attempt to monitor compliance in the division.

7.175 I find that the overall group compliance function was inadequately resourced and inefficiently deployed within the IL&P Group during the Relevant Period.

7.176 The evidence suggests that in considering the approach to adopt in respect of customers who had SC706 in their mortgage loan agreements, PTSB was aware of the need to comply with its obligations under the 2006 Code throughout the Relevant Period. As early as 5 February 2009²⁴⁵ the compliance department, when considering how PTSB should act in relation to SC706, was concerned that all customers should receive the same outcome. The compliance function expressly sought to take the initiative to make sure that customers were treated consistently when it was considering how to apply the decision that had been made in relation to SC706. The need to "*treat all these customers fairly as agreed*" was expressly stated as one of the compliance benefits of the PRD that implemented the agreed approach to SC706. I

²⁴⁴ [Witness Statement of Frank Wynn, dated 21 December 2022, paragraph 11 \(Core Book 2 Tab 135\)](#), "The local business unit compliance teams, including PTSB compliance, operated as a second-line function under a three lines of defence model – the first line with primary responsibility being business management. The second line (local Compliance teams) provided ongoing advice, support, training, and guidance on the 2006 Code, and updated business management on the Financial Regulator's ongoing updates, pronouncement or clarification on the 2006 Code. The local compliance teams also carried out a monitoring programme on a cyclical basis of management's first line compliance responsibilities (The third line providing oversight was Internal Audit)".

²⁴⁵ [Email from Ruth Brophy to Ailbhe O'Doherty, re Condition 706, dated 5 February 2009, page 1 of 1 \(Doc ID: 0.7.2366.51473, Core Book 4 Tab 64\)](#).

also note that, the issue of consistent treatment was in the minds of the compliance function following the questions from the Financial Regulator in December 2009. It is therefore hard to understand why the function did not identify and raise a concern over the decision to treat individual customers differently when considering how SC706 should be applied to customers reaching the end of a period of fixed interest rates. Having considered all of the evidence, I conclude that this failure within compliance arose from carelessness and poor judgement, rather than a reluctance to object to a strategy approved by PTSB's senior management. The compliance function does not appear to have applied adequate thought to the issues raised by the initial customer query on SC706 and [REDACTED]

[REDACTED] When subsequent correspondence or information should have caused them to consider whether the approach being adopted by PTSB to implementing SC706 was fair and in the best interests of all customers, the compliance function failed to act on it until the Financial Regulator raised a concern.

7.177 The extent and tone of the involvement of the compliance functions after the meeting with the Financial Regulator on 15 December 2009 was markedly different from that adopted earlier in 2009. The emails in January and March 2010, referred to above, display an active, questioning and assertive function. It is clear from the facts set out above that the Financial Regulator's questions that set off this issue were not specifically about SC706 and the way it was being applied, and that the Financial Regulator was not aware of the position PTSB had adopted in relation to the tracker rate being offered to customers following the expiry of a period of fixed interest rate. It was the compliance function that made the connection with SC706, with which I conclude it remained very familiar. This familiarity is surprising given the view that was evident earlier in 2009, that there was nothing of concern in relation to the approach being adopted to SC706.

7.178 On 8 January 2010, Mr Fleming wrote to Mr Wynn with a draft email he proposed to send to the Financial Regulator and stated that he would send this "*pending a discussion with Dave Guinane next week*".²⁴⁶ This indicates that the head of compliance was expecting to raise a compliance concern with the CEO of PTSB at that time in a way that did not happen in early 2009.

²⁴⁶ [Email from Joe Fleming to Frank Wynn, re Regulator update, dated 8 January 2010, page 1 of 1 \(Doc ID: 0.7.2366.161419, Core Book 2 Tab 154\).](#)

7.179 Mr Wynn responded to Mr Fleming on 5 March 2010,²⁴⁷ after receiving the copy of [REDACTED] with a number of comments about the application of SC706. In this email, he asked about the detail and content regarding tracker rates that were included in the loan terms and conditions. He identified that the reference in SC706 to “a tracker mortgage loan as described above” meant that the tracker rate described above was the important issue and he asked to see a copy of the terms and conditions including SC706. It is clear that at this time Mr Wynn felt comfortable in considering operational matters within PTSB and was ready and able to pursue operational matters with the divisional compliance team when he felt the circumstances demanded this. This contradicts the assertion that the IL&P Group compliance function relied upon divisional compliance functions and did not seek to intervene or second guess them. In this case it is the intervention of the Financial Regulator that appeared to cause the compliance department to focus its mind on the issues around implementing SC706.

7.180 The email of 8 March 2010 referred to at paragraph 7.138 above provides evidence of a very clear intervention from Mr Fleming on a matter of contract interpretation. He stated to Mr O'Connor that compliance:

[REDACTED]

[REDACTED]²⁴⁸

7.181 The email of 11 March 2010 from Mr Fleming to Mr MacCarthy set out at paragraph 7.140 above, was equally direct in [REDACTED]

7.182 In these emails Mr Fleming was clearly stating a view in relation to the way in which SC706 should have been interpreted and applied by the bank. [REDACTED]
[REDACTED]. It is clear that Mr Fleming was prepared at this stage to act in a manner that he stated in his evidence he regarded as outside of his responsibility or capability, when the issue of how to interpret and apply contract conditions such as SC706 arose in early 2009. He repeatedly stated that

²⁴⁷ [Email from Frank Wynn to Joe Fleming, dated 5 March 2010 \(Doc ID: 0.7.296.26100, Core Book 2 Tab 28\).](#)

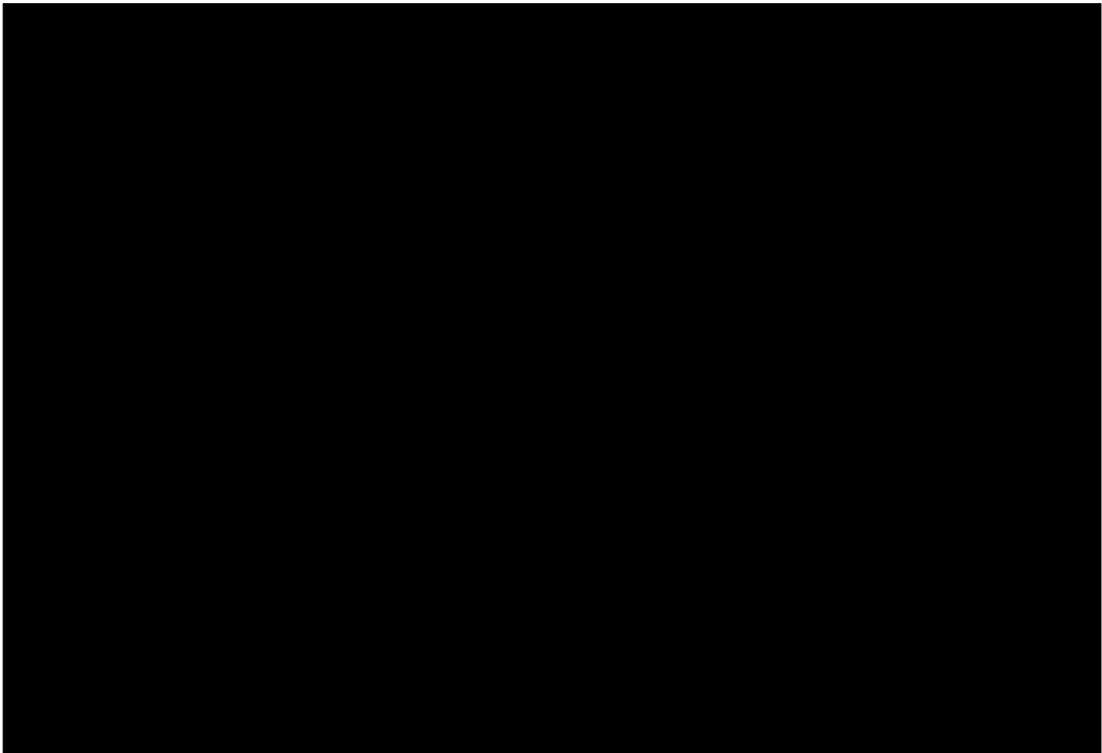
²⁴⁸ [Email from Joe Fleming to Donal Regan re Condition 706 – Sent on behalf of Kevin O'Connor, dated 8 March 2010, page 1 of 3 \(Doc ID: 0.7.296.26075, Core Book 4 Tab 14\).](#)

contract terms and conditions were a matter for the legal department and not compliance.

- 7.183 I find clear inconsistencies between the views of the compliance function with regard to the limited role and responsibilities it took in developing the position applied by PTSB in 2009 in relation to SC706 and the assertive and questioning role that it adopted when the issue resurfaced as a result of the questions of the Financial Regulator at the end of 2009 and in early 2010.

Legal Function

7.184



CHAPTER 8

CONCLUSIONS AND FINDINGS WITH REGARD TO PTSB AND THE SPC

8.1 My findings with regard to the SPC alleged against PTSB are as follows.

- (a) By January 2009 PTSB had entered into a significant number of mortgage loan agreements with customers that contained SC706. This condition provided customers with an enduring right to a tracker rate, subject to meeting certain requirements set out in that clause. In particular, customers were expected to notify PTSB that they wished to revert to a tracker rate prior to the expiry of any period in which they had opted for a fixed rate of interest on their mortgage.
- (b) PTSB was aware during the Relevant Period that SC706 would be relevant to the position of around 10,000 customers. I note that the conclusion of PTSB and KPMG, after KPMG's review of PTSB's conduct in relation to customers whose mortgages contained SC706, was that the true number was around 12,800 customers.²⁴⁹
- (c) PTSB was aware that the issue of how to treat customers with SC706 in their mortgage loan agreement, who were able to revert to a tracker rate after a period in which they had had a fixed interest rate on their mortgage, was thought to be relevant to around 400 such customers when the bank considered its position in January 2009. The remediation exercise carried out by PTSB after the Relevant Period, as referred to at paragraph 7.151 above, indicates that the number of customers with SC706 in their mortgage loan agreement who were not offered an opportunity to revert to the original tracker rate after a period in which they had a fixed interest rate on their mortgage was 279.
- (d) During the Relevant Period, PTSB decided to apply and/or decided to continue to apply a tracker rate that was less favourable to those customers whose contracts contained SC706 and who did not raise specific queries about the rate to which they were entitled. PTSB decided to charge a higher tracker

²⁴⁹ [Letter from KPMG to David Guinane, Chief Executive of the Bank reporting on the 'Agreed Upon Procedures' completed in respect of the permanent TSB 706 Condition customer mortgage account remediation project \(Doc ID: 0.7.2366.72414, Core Book 1 Tab 83\).](#)

mortgage interest rate to such customers than they were contractually obliged to pay when reverting to a tracker mortgage. If any such customer raised the question of their entitlement to the original tracker rate that was offered to them at the outset of their mortgage loan agreement, they would be offered that original rate. This was understood and intended within PTSB and a number of employees of PTSB were actively and openly involved in implementing this approach during the Relevant Period.

- (e) The agreed facts reached by Enforcement and Mr Guinane, which are set out at paragraph 7.1 above, include a reference to the PTSB February 2009 compliance report, which confirmed that:

“it has been agreed that if a customer misunderstands the condition and entered into their fixed rate on the understanding that they would return to the original tracker margin, that we will honour the original margin. If a customer takes our intended meaning of the condition they will be entered into “a tracker” which will be the tracker rate appropriate to the loan at that time.”²⁵⁰

I take this to be additional confirmation that PTSB was operating a policy of offering the interest rate to which the customer was entitled only if they asked for it or complained about not being offered it, whilst those who did not make any such request or complaint paid an interest rate that PTSB expected would be higher.

- (f) The issue of how to implement SC706 was regarded as urgent and important in early 2009. It was referred to the ExCo and the CEO with great speed. The implication in terms of identifying or selecting which interest rate would be paid by customers was understood immediately. The evidence indicates that the central functions within PTSB remained interested in and familiar with the issue throughout 2009 and regarded it as important. Senior staff in PTSB and central functions were involved in decisions about how PTSB should deal with customers whose mortgage loan agreements contained SC706. For example, Mr Fleming and Mr O’Grady concluded that their first action when deciding how to respond to the Financial Regulator’s question in December 2009, that they

²⁵⁰ [Monthly Compliance Report issued by Joe Fleming, head of compliance, dated February 2009 \(Doc ID: BSI035592-0001, Core Book 1 Tab 25\).](#)

realised was about SC706, was to speak to Mr Guinane to see what the appropriate course of action would be. The central functions had all of the information that was required in order to understand that they were treating customers who did not ask for the original tracker rate, or who did not complain about the tracker rate that they were offered, unfairly and contrary to their best interests. Despite this, PTSB persisted with the approach agreed in January 2009 for over a year.

- (g) A single enquiry from the Financial Regulator in late 2009, which did not identify SC706, was sufficient to cause a complete re-think of PTSB's policy in relation to implementing SC706 by those managers who had devised, implemented or been consulted on the original approach. No new information was required for PTSB to change its position. By the end of the Relevant Period, PTSB recognised that it had a duty to comply with General Principle 1 of the 2006 Code when it was applying SC706 and that SC706 gave customers a right to receive the original tracker rate identified in their letter of offer when they were reverting to a tracker rate.
- (h) I conclude that PTSB acted as it did with a clear understanding of the consequences for customers and for PTSB and pursued a course of action that caused a group of customers to pay an interest rate on their mortgage loan agreement that was higher than they were contractually obliged to pay.

8.2 Under section 33AO(2) of the 1942 Act (in the form in which it existed at the time of the issue of the Notice of Inquiry) this Inquiry has to determine whether or not PTSB has committed a prescribed contravention. The SPC was set out in [Annex A of the Notice of Inquiry](#), as follows:

*"Following an investigation, the Central Bank suspects on reasonable grounds that from January 2009, PTSB understood that Special Condition 706 (a special condition in PTSB's tracker mortgage contracts relating to certain customers' enduring right to a tracker rate, (**SC706**)) was ambiguous. It is also suspected that PTSB was advised that this issue could affect up to 10,000 customers, but was immediately applicable to 400 such customers who were at that time on a fixed rate and had SC706 in their mortgage contracts. From 19 January 2009 to April 2010 (the **Relevant Period**), it is suspected that PTSB decided to apply and/or decided to continue to apply a rate that was less*

favourable to customers, save in circumstances where individual customers raised specific queries in relation to that rate.

*The Central Bank suspects on reasonable grounds that PTSB treated those customers who did not complain about the tracker rate that was applied after a fixed rate period, unfairly and contrary to their best interests compared to those that did i.e. by only giving those who complained or queried a more favourable tracker rate. It is suspected that this approach was in breach of the principle contained in Chapter 1, General Principle 1 of the Consumer Protection Code 2006 (the **2006 Code**) which required PTSB to “ensure that in all its dealings with customers and within the context of its authorisation it acts honestly, fairly and professionally in the best interests of its customers and the integrity of the market.”*

8.3 In the light of my conclusions in relation to the matters of fact and the issues of law set out in Chapters 6 and 7 of these Written Findings, I now set out below my findings in respect of PTSB on the essential elements of the SPC.

- (a) It was agreed between Enforcement and Mr Guinane, and I find it to be true, that in entering into and operating the mortgage loan agreements containing SC706 with customers, PTSB was acting within the context of its authorisation.
- (b) In January 2009 PTSB understood that SC706 was ambiguous. PTSB also understood, at this time, [REDACTED]
[REDACTED]
- (c) PTSB was aware that this issue could affect up to 10,000 customers, but was immediately applicable to 400 such customers who were at that time on a fixed interest rate and had SC706 in their mortgage loan agreements. The outline of the SPC refers to PTSB being advised of certain issues, including the likely number of customers whose mortgage loan agreements contained SC706. In reality, the only source of advice to PTSB was from employees of PTSB. I do not think that the distinction between decision makers being advised by members of PTSB's own staff, as opposed to external advisors, is material to the substance of the SPC.

- (d) During the Relevant Period, PTSB decided to apply and/or decided to continue to apply a rate that was less favourable to customers, save in circumstances where individual customers raised specific queries in relation to that rate. I find that PTSB's treatment of those customers who did not complain about the tracker rate that was applied after a fixed rate period, or who did not demand or seek the original tracker rate they had been offered, was unfair and contrary to the best interests of its customers. I reach this conclusion for the following reasons:
- (i) PTSB was aware of the position that applied to customers who had a tracker rate mortgage loan agreement containing SC706 and who were approaching the expiry of their period of fixed interest rate. PTSB and its staff were expert and knowledgeable in relation to mortgage loan agreements generally and the particular terms on which they provided them to customers. They would have been aware that most customers were not so expert and knowledgeable. PTSB and its staff would also have been aware that many customers have a limited aptitude, interest or time to engage in detailed analysis of the mortgage loan agreements that they have been offered, or have agreed to, with a major lender such as PTSB.
- (ii) In considering whether PTSB dealt with customers fairly in deciding how to treat customers whose mortgage loan agreements contained SC706, I have considered the collective knowledge within PTSB during the Relevant Period. At the outset of the Relevant Period PTSB believed that the provisions of SC706 were ambiguous and understood that, [REDACTED]
- [REDACTED]
- [REDACTED] In practice this meant that customers would pay the original tracker interest rate offered at the time they entered into the mortgage loan agreement, if the current tracker rate offered by PTSB had a higher interest rate overall.
- (iii) PTSB sought to take advantage of their superior understanding of the mortgage loan agreements in order to charge the relevant customers a higher rate of interest than they were legally obliged to pay.

- (iv) PTSB chose not to inform customers of their contractual right to revert to the original tracker rate they had been offered and which was referred to within PTSB in the Relevant Period as being the subject of a *“price promise”*. In its correspondence and dealings with customers, PTSB did nothing to assist its customers in understanding that they had such a right and, at times, sought to reduce the chance of the customer gaining such an understanding.
- (v) By knowingly taking the actions set out in iii) and iv) in the hope of profiting from the customer’s lack of awareness of their contractual rights, PTSB acted in bad faith in its dealings with those customers who PTSB caused to pay a higher rate of interest than they were obliged to when reverting to a tracker loan rate.
- (e) These actions and omissions by PTSB were unfair on any ordinary and natural meaning of that phrase, and were clearly contrary to the best interests of customers.
- (f) PTSB staff were motivated by a desire to protect the interest of PTSB and to reduce its exposure to tracker rate mortgage loan agreements during a period of extraordinary interest rate movements.
- (g) The treatment of customers who were entitled under SC706 to pay a lower tracker rate than that offered to them by PTSB, was in breach of the principle contained in Chapter 1, General Principle 1 of the 2006 Code which required PTSB to *“ensure that in all its dealings with customers and within the context of its authorisation it acts honestly, fairly and professionally in the best interests of its customers and the integrity of the market”*.
- (h) I find that on the proper construction of SC706, PTSB did not have the right to impose its then current tracker rate on customers whose mortgage loan agreement contained SC706 and who wished to revert to a tracker rate. PTSB understood that it was not entitled to impose this rate because it was ambiguous [REDACTED]
[REDACTED]

- (i) PTSB's awareness that SC706 was not ambiguous, but took effect so as to commit it to provide the original tracker rate set out in the letter of offer at the commencement of a mortgage, grew during the Relevant Period. In January 2009 [REDACTED]
[REDACTED]
[REDACTED] By 8 December 2009, [REDACTED]
[REDACTED]
[REDACTED] In December 2009 and January 2010, the Compliance function began to consider whether PTSB's position in respect of SC706 complied with the 2006 Code and recognised the need to construe the condition in light of the offer letter issued with it. By 1 April 2010 PTSB had [REDACTED]
[REDACTED]. PTSB's failure to understand that SC706 was not ambiguous is not an element of the SPC set out in the Notice of Inquiry. I have taken account of this change in understanding, in so far as it is relevant, when considering if PTSB was capable of ensuring that it acted fairly in the best interests of customers and was aware of, and seeking to satisfy, that obligation, as required by General Principle 1 of the 2006 Code.

8.4 I conclude that the prescribed contravention described in Annex A to the Notice of Inquiry that was suspected by the Central Bank in respect of PTSB, did occur and that PTSB committed the SPC as so described.

CHAPTER 9

CONCLUSIONS AND FINDINGS WITH REGARD TO MR GUINANE AND THE SPC

- 9.1 The Notice of Inquiry (as set out in [Appendix 1](#)) outlined the allegation that Mr Guinane had participated in the SPC by PTSB in the following terms:

“Mr Guinane participated in PTSB’s contravention of Chapter 1, General Principle 1 of the 2006 Code (a prescribed contravention) by signing off on the proposal made to him on 19 January 2009 i.e. the strategy to only give the more favourable rate back to those customers who specifically requested their original and lower interest rate, or queried or complained. At that time Mr Guinane was CEO of PTSB and a member of PTSB’s Group Senior Management Team which reported directly to Irish Life & Permanent plc’s CEO. The Central Bank thus suspects on reasonable grounds that David Guinane was, during the Relevant Period, a person concerned in the management of PTSB.

The Central Bank suspects on reasonable grounds that Mr Guinane made the decision on 19 January 2009 at a time when he was fully aware of the factual position i.e. that 400 customers would be immediately impacted, and that

[REDACTED]

The redacted content in paragraph 9.1 contains reference to legal advice that was available to PTSB and about which Mr Guinane received reports prior to 19 January 2009.

- 9.2 It was agreed between Enforcement and Mr Guinane, and I find from the evidence provided to the Inquiry, that Mr Guinane was, during the Relevant Period, a person concerned in the management of IL&P Group, which was a RFSP at that time. I reach this conclusion because of Mr Guinane’s position as CEO of PTSB, the banking division of IL&P Group. I do not conclude that Mr Guinane had the ultimate authority to control or direct the actions of PTSB. I am also clear, that the responsibility in regulatory or legal terms for the conduct of PTSB falls primarily on the board of directors of IL&P Group as the RFSP. Under section 33AO(2) of the 1942 Act at the relevant time the Central Bank is permitted to hold an inquiry to determine whether or

not a person participated in a contravention by a RFSP if that person was concerned in the management of that RFSP.

9.3 On the basis of the findings of fact in Chapter 7 and the findings set out in Chapter 8 with regard to PTSB, I have reached the following findings in respect of Mr Guinane:

- (a) On 19 January 2009, Mr Guinane signed off on the proposal made to him in an email dated 16 January 2009 from Mr O'Grady to Mr Guinane with subject line "*Tracker*" (**Proposal Email or Proposal**). This proposal set out the position that PTSB would adopt in dealing with customers whose mortgage loan agreements contained SC706 and who wished to revert to a tracker rate.
- (b) Mr Guinane was informed at the time that the issue addressed in the Proposal was relevant to approximately 10,000 mortgage loan agreements with customers who started on a "price promise" tracker loan and that only about 400 of these had taken a fixed rate and might, seek to revert to a tracker rate. He was also told that this number would fall further. Mr Guinane was therefore aware that 400 customers would be immediately impacted by the decision he was initially asked to make on 16 January 2009.
- (c) Mr Guinane was informed at the time that he signed off on the Proposal on 19 January 2009 that [REDACTED]
[REDACTED]
[REDACTED]. Mr Guinane signed off on the proposal that if such a customer actually contacted PTSB, PTSB would offer the customer the original tracker rate under their mortgage loan agreement. It was assumed that in these circumstances the original tracker rate was more favourable to the customer.
- (d) Mr Guinane was present at the PTSB ExCo meeting on 13 January 2009 (see paragraph 7.1(D) above) at which the issue of a query from a broker concerning the operation of SC706 was raised by Mr O'Grady. The minutes of the ExCo meeting of 13 January 2009 state under item 6;

*“any other business”, “NO’G reviewing situation of customers who exited a tracker to go fixed and now fixed period is ending.”*²⁵¹

- (e) This minute is a reference to the position of customers who had condition SC706 in their mortgage loan agreements and who had the right to revert to a tracker rate at the expiry of any period with a fixed interest rate.

9.4 In the light of my conclusion with regard to Mr Guinane’s role in the ExCo meeting (at 7.21 above) and Mr O’Grady’s summary of the issues that needed to be addressed after this ExCo meeting²⁵² which stated the following:

“Discussed this at exec this Morning and no decision but two points raised to be addressed:

- a. How big an exposure is this (how much potential volume approx)*
- b. If we allow customers to get back into their original tracker (a) do they have to notify us before the expiration of the fixed rate and (b) are we obliged to allow other tracker customers who have defaulted from the fixed to the SVR from requesting access to the price promise tracker?”*

I find that on 13 January 2009 Mr Guinane was aware that:

- (a) The issue in relation to customers who had exited a tracker rate in order to go onto a fixed rate mortgage loan agreement and whose period of fixed interest rate was now ending, had the potential to create an “exposure” for PTSB.
- (b) Such “exposure” arose because customers might pay a lower rate of interest than PTSB desired or needed.
- (c) There was a question over whether PTSB should *“allow customers to get back into their original tracker”* rate.
- (d) There was a question over when such customers would have to notify PTSB if they wished to revert to the original tracker rate.

²⁵¹ [Minutes of Bank’s Executive Team Meeting, dated 13 January 2009, page 2 of 3 \(Doc ID: 0.7.945.2581871.1, Core Book 1 Tab 19\).](#)

²⁵² [Email from Niall O’Grady to Ailbhe O’Doherty re Mortgage Loan Condition Query, dated 13 January 2009, page 1 of 2 \(Doc ID: 0.7.2366.51647, Core Book 1 Tab 18\).](#)

- (e) There was a question over whether other customers with tracker loans who had already moved from a fixed interest rate to PTSB's standard variable rate, because they had not contacted PTSB, could have access to a "price promise" tracker; and
- (f) PTSB had issued "*the price promise tracker*" which "*allows customers to get back into their original tracker*".²⁵³

9.5 On the basis of the evidence set out previously in relation to the contravention by PTSB and, in particular, from the correspondence that took place between Mr O'Grady and Ms O'Doherty at paragraph 7.8 above (which was copied to Mr O'Connor) immediately prior to the Proposal being sent to Mr Guinane, I find that the intention of Mr O'Grady in sending his email of 16 January 2009 to Mr Guinane was to obtain the approval of Mr Guinane to the approach of only offering the original tracker rate to a customer approaching the end of a period of paying a fixed interest rate, if that customer had asked for the original tracker rate or queried or complained about the tracker rate that they had been offered. The email was therefore intended to seek approval for a strategy to only give the original and, in most cases, more favourable tracker rate back to those customers who specifically requested their original and lower interest rate, or who queried or complained about the rate they were offered.

9.6 Mr O'Grady's email of 16 January 2009²⁵⁴ to Mr Guinane is poorly expressed. If construed in isolation, it lacks clarity on whether all customers who revert to a tracker rate are to revert to their original tracker rate, or only those customers who specifically requested their original and lower interest rate or who queried or complained about the rate they were offered. In reality, the email was not read in isolation. Mr Guinane had extensive background knowledge of all aspects of PTSB's mortgage loan business and of customer behaviour and communication. He also had a specific understanding of some of the issues that were the subject of the Proposal. By way of example; Mr Guinane was asked the following question by his counsel about his familiarity with "price promise" trackers:

"Qwere you familiar with price promise trackers and what was involved with price promise trackers?"

²⁵³ [Transcript of Inquiry Hearing, dated 6 March 2024, page 34.](#)

²⁵⁴ [Email from Niall O'Grady to David Guinane, dated 16 January 2009 re Tracker \(Doc ID: BSI040147, Core Book 1 Tab 23\).](#)

A. Yes. I mean, the term was a much used term and I think "price promise" was -- my memory of it, I think, would be that it was the promise -- it was the promise to have a rate above what was the -- effectively the, at the time, and still is of course, the ECB rate, so it was a margin. Price promise, I think, equated to whatever margin we were looking for over ECB. That would be my memory.

Q. The Inquiry has already seen samples of the loan offer, but effectively, the price promise was that the margin over ECB would never exceed a maximum amount of percentage margin?

*A. Again, from memory, from looking at documents for the last number of years, that's correct."*²⁵⁵

- 9.7 He had already been introduced to the particular issue covered in the email through a discussion at the ExCo meeting on 13 January 2009. Mr Guinane was asked by his counsel;

"Q. And could you just confirm, before we look at what's contained in the e-mail, that the sum of your knowledge in relation to Special Condition 706 was confined to what had been discussed at the ExCo meeting on 13th January?

*A. Yes."*²⁵⁶

- 9.8 At the start of the Proposal email Mr O'Grady responded to the questions raised at the ExCo meeting, which he had set out in his email of 13 January 2009 referred to above at paragraph 9.4. He clarified that approximately 10,000 mortgage loan agreements for customers were affected by the issue. He referred to these customers as having "*started on price promise tracker*". This supports the conclusion that both Mr O'Grady and Mr Guinane were familiar with the concept of a tracker mortgage where a "*price*", (that is an interest rate or the basis for calculating an interest rate), had been promised by PTSB to its customers. Mr O'Grady confirmed that of these 10,000 customers only about 400 had taken a fixed rate. He stated that this number was unlikely to increase. These responses address the point raised at the ExCo meeting in relation to the "exposure" of PTSB to customers with the right to revert to a tracker rate. Mr O'Grady clarified that other customers who had tracker rates and then chose a fixed rate could not revert to a "price promise" tracker after they had defaulted to a variable interest rate. This addresses the second point in Mr O'Grady's email of 13 January 2009 summarising the questions from the ExCo.

²⁵⁵ [Transcript of Inquiry Hearing, dated 6 March 2024, page 36.](#)

²⁵⁶ [Transcript of Inquiry Hearing, dated 6 March 2024, page 39.](#)

9.9 In the Proposal email, Mr O’Grady then set out the “*specific issue to decide on*” as follows:

“Customers who started on this price promise tracker and go to a fixed rate have the option of reverting, in the words of the loan condition, “to a tracker mortgage loan as described above” if they contact us on expiry of the fixed rate period. The conditions above this condition on the Letter of Approval refer to the price promise.

Which tracker they have the option of reverting to appears ambiguous (the original or today’s?) so we have the option of making whichever ever we chose available to them.

[REDACTED]

[REDACTED]

[REDACTED]

*I propose we allow the customers who actually contact (1 so far) to revert to their original tracker.*²⁵⁷

The redacted content in paragraph 9.9 contains reference to legal advice that was available to PTSB and about which Mr Guinane received reports prior to 19 January 2009.

9.10 Upon reading this email, I find that Mr Guinane must have been aware that he was now being asked to make a decision that would affect a group of PTSB’s customers and that he would be deciding what interest rate certain established customers would pay for their existing mortgage loan agreements. Mr Guinane must also have been aware of the following when considering the specific issue he was asked to decide on in the emails of 16 and 19 January 2009:

- (a) He would have had a recollection of the discussion at the ExCo meeting on 13 January 2009 and the understanding and knowledge set out at paragraph 9.4 above. The Proposal email starts “*As mentioned this summarises the issue we discussed re tracker customer*”, which refers to the discussion at the ExCo meeting.
- (b) He would have understood that he was being given information relevant to the “exposure” of PTSB to customers who could have a right to a tracker rate at an interest rate that could be below the interest rate at which PTSB could borrow funds at this time and that this would create the “exposure” for PTSB.

²⁵⁷ [Email from Niall O’Grady to David Guinane, dated 16 January 2009 re Tracker \(Doc ID: BSI040147, Core Book 1 Tab 23\).](#)

- (c) This “exposure” was very low.
- (d) The question of the correct tracker rate that applied to a residential mortgage borrower was a significant one for each individual customer.
- (e) That interest rates had changed significantly in the period prior to this issue coming to him for decision and that customers leaving a period at a fixed interest rate were likely to be facing a significant increase in their borrowing costs.²⁵⁸
- (f) The margin over the ECB rate in a tracker rate that was then in operation within PTSB was higher than that which would have applied at the time that most of the customers received a letter of approval at the outset of their mortgage loan agreement containing SC706.²⁵⁹
- (g) Given these facts and Mr Guinane’s knowledge of interest rates in the customer sector, he would have been aware that it would be in the best interests of some, or all, customers to receive the original tracker rate, which was the subject of a “price promise” and not the tracker rate that was then in operation within PTSB.
- (h) PTSB had a choice over whether to offer customers their original tracker rate or the tracker rate then applying.
- (i) 

9.11 As stated in Chapter 7, the Narrative of Agreed Facts set out that:

“On 19 January 2009, Mr O’Grady sent the Person Concerned a follow-up email, referring to the proposal contained in the email of 16 January, asking if “you are OK with this”.

*On 19 January 2009, the Person Concerned responded by email to Mr O’Grady’s emails of 16 and 19 January 2009, stating “OK with that”.*²⁶⁰

²⁵⁸ [Transcript of Inquiry Hearing, dated 6 March 2024, page 78.](#)

²⁵⁹ [Transcript of Inquiry Hearing, dated 6 March 2024, page 78.](#)

²⁶⁰ [Narrative of Agreed Facts, dated 31 March 2023 \(Core Book 6 Tab 10\).](#)

9.12 I find that after 19 January 2009, Mr Guinane could have checked or revisited the position that PTSB had adopted in relation to tracker mortgages or the application of SC706. I conclude from Mr Guinane's evidence to the Inquiry that he did not do so. Mr Guinane received the monthly and quarterly compliance reports for February and March 2009 that set out in some detail the actions that PTSB was taking at that time with regard to implementing SC706. Had he read them carefully, or discussed them with others in PTSB, he would have been aware that PTSB was not offering customers with SC706 in their mortgage loan agreements, their original tracker rate when they reverted to a tracker rate, unless they requested this or objected to paying the then current tracker rate. He could have read these reports or other compliance reports issued during the Relevant Period and checked if the approval that he had given on 19 January 2009 was being implemented as he expected. Mr Guinane stated in his evidence to the Inquiry that there is a chance that he didn't even read the Monthly Compliance report of February 2009.²⁶¹ There is no evidence from anyone in the compliance function to suggest that Mr Guinane did read these reports or that he discussed them at a meeting with compliance managers.

9.13 I now need to consider, in the light of these findings, if Mr Guinane's actions in signing off on the Proposal made to him on 16 and 19 January 2009, in the context of his overall conduct during the Relevant Period, means that he "*participated in*" the prescribed contravention by PTSB. In so doing I also wish to consider whether Mr Guinane signed off on a strategy to only give the more favourable tracker rate to those customers who specifically requested their original and lower interest rate, or queried or complained about the rate they were offered.

PARTICIPATION

9.14 Section 33AQ(8) of the 1942 Act²⁶² provides as follows:

"(8) At the conclusion of an inquiry relating to the conduct of a person concerned in the management of a regulated financial service provider, the Bank shall notify the person of its decision. The decision must set out—

²⁶¹ [Transcript of Inquiry Hearing, dated 6 March 2024, page 57.](#)

²⁶² [Part IIIC, Central Bank Act 1942 \(as amended\) \(Core Book 5 Tab 1\).](#)

- (a) *its finding as to whether or not the person is participating or has participated in the commission of the prescribed contravention to which the inquiry relates, and*
- (b) *the grounds on which the finding is based, and*
- (c) *if the Bank finds that the person is participating or has participated in the contravention, the sanctions (if any) imposed under this section in respect of the participation.”*

9.15 Section 33A0(2) of the 1942 Act²⁶³ provided at the relevant time as follows;

“Whenever the Bank suspects on reasonable grounds that a person concerned in the management of a regulated financial service provider is participating or has participated in the commission of a prescribed contravention by the financial service provider, it may hold an inquiry to determine whether or not the person is participating or has participated in the contravention.”

9.16 A finding as to whether or not Mr Guinane has participated in the commission of the prescribed contravention by PTSB to which this Inquiry relates is primarily a matter of fact. However, I invited submissions from Mr Guinane and Enforcement on the question of:

*“what legal principles or criteria apply in determining if an individual who is a person concerned in the management of a RFSP “has participated in” an act or omission that gives rise to a prescribed contravention by a RFSP for the purposes of section 33AO of the 1942 Act”.*²⁶⁴

I received helpful written submissions from the representatives of Mr Guinane and Enforcement.²⁶⁵ I also received advice from the LPT on the question of whether any judicial clarification has been provided in relation to the phrase, or concept, of “*participation*” in the commission of a prescribed contravention.²⁶⁶ These were received

²⁶³ [Part IIIC, Central Bank Act 1942 \(as amended\) \(Core Book 5 Tab 1\).](#)

²⁶⁴ [Issues of Law list, dated 24 March 2023.](#)

²⁶⁵ [Submissions by the Person Concerned on issues raised by the Inquiry Member, dated 31 July 2023 \(Core Book 7 Tab 5\), Submissions on behalf of Enforcement, dated 5 October 2023 \(Core Book 7 Tab 6\).](#)

²⁶⁶ [LPT Legal Opinion, dated 12 December 2021 \(Core Book 8 Tab 3\).](#)

prior to the Legal Issues Hearing, where the issue was discussed. I have taken these submissions and advice into account in reaching my findings.

9.17 The submissions of the Person Concerned and Enforcement and the advice of the LPT agreed to a significant extent in concluding there is no definition of “participating” or “participated” in the 1942 Act and no specific guidance is to be found in statute or case law with regard to the use of these terms in sections 33AO and 33AQ of the 1942 Act, other than in the decision of Noonan J. in *Fingleton v Central Bank of Ireland*,²⁶⁷ to which I refer below. I was referred to the decisions in *Horgan v Ireland*²⁶⁸ and *Dubsky v Ireland*²⁶⁹ and certain English decisions in which judicial consideration was given to the term “*participate*” and “*participation*”.²⁷⁰ I note, and take into account, the decisions of the courts in these cases, which I will not summarise here, and the submissions that I have received regarding these decisions. However, the factual context in all of these cases is very different to that which is being considered by this Inquiry. A number of cases are concerned with an individual’s concern over their participation, or the participation of the State in an act to which they object as a matter of conscience or belief. Nevertheless, I take particular note that the judgement in *Horgan v Ireland* referred to a decision on participation being a matter of “*substance and degree*”.

9.18 I have been referred to the decision in *Fingleton v Central Bank of Ireland* in which, in considering subsection 33AO(2) of the 1942 Act, Noonan J. stated:

*“It seems to me therefore that it is clear that the misconduct that may be inquired into under the subsection is participation in a prescribed contravention by a person concerned in management on the presumed basis that such managerial status renders the conduct potentially blameworthy. The subsection is self evidently concerned with participation in the wrongdoing of a RFSP by persons who, by virtue of their status, are in a position to influence the actions of the RFSP when it commits the wrong. This is what renders the conduct improper.”*²⁷¹

9.19 I have taken account of the judgement of Noonan J. in this case. The case is primarily considering the term “*person concerned in the management*”, which it was decided is

²⁶⁷ [Fingleton v Central Bank of Ireland \[2016\] IEHC 1 \(Core Book 7 Tab 40\).](#)

²⁶⁸ [Horgan v Ireland \[2003\] 2 IR 468 \(Core Book 7 Tab 18\).](#)

²⁶⁹ [Dubsky v Ireland \[2007\] IESC 3 \(Core Book 7 Tab 22\).](#)

²⁷⁰ [R v Salford Health Authority Ex p Janaway \[1989\] AC 537 \(Core Book 7 Tab 62\), Doogan and another v Greater Glasgow and Clyde Health Board \(Royal College of Midwives and another intervening\) \[2015\] AC 640 \(Core Book 7 Tab 70\).](#)

²⁷¹ [Fingleton v Central Bank of Ireland \[2016\] IEHC 1, paragraph 76 \(Core Book 7 Tab 40\).](#)

a neutral term and referred to the persons engaged in the management of the RFSP at the time of the commission of the prescribed contraventions. I note that Noonan J's remarks indicate that the status, which I understand to include seniority, of the person concerned and their ability to influence the conduct of the regulated entity, is relevant in assessing whether their conduct amounts to "*participation*". I also note that Noonan J. suggests that the conduct of the person concerned should be "*potentially blameworthy*" and "*improper*".

- 9.20 I find that in the absence of a clear definition of the terms "participating" or "participated" in the 1942 Act or case law, they must be given their ordinary and natural meanings. I also find that the proper application of the terms will depend on the particular facts and circumstances in which they are being applied and is likely to require an overall judgement on the substance and degree of the involvement of a person concerned in the management of a RFSP in a prescribed contravention.
- 9.21 In the circumstances of the Inquiry, I accept the submissions of Mr Guinane and Enforcement that the conclusion in relation to whether Mr Guinane participated in the prescribed contravention is separate from the finding in relation to whether he was a person concerned in the management of PTSB at the time of the contravention.²⁷² Being the CEO of PTSB and a senior manager in IL&P Group, the RFSP, at the time of a contravention is not, in itself, a sufficient basis for concluding that he had participated in the contravention by the RFSP.
- 9.22 The submissions of the Person Concerned and Enforcement both acknowledged the need for participation to have an active element in relation to commission of the prescribed contravention. Counsel for Mr Guinane referred to an "*active and 'moving' role*".²⁷³ Counsel for Enforcement referred to Mr Guinane playing a role in the commission of the contravention. In the circumstances of this Inquiry and having taken account of the terms of the Notice of Inquiry, I am content to adopt this approach and to consider if Mr Guinane took an active role in the prescribed contravention by PTSB.

²⁷² [Submissions of the Enforcement Division of the Central Bank of Ireland, dated 28 April 2023 \(Core Book 7 Tab 1\)](#), [Submissions of the Person Concerned on issues raised by the Inquiry Member, dated 31 July 2023 \(Core Book 7 Tab 5\)](#).

²⁷³ [Submissions of the Person Concerned on issues Raised by the Inquiry Member, dated 31 July 2023, page 8 \(Core Book 7 Tab 5\)](#).

- 9.23 Counsel for Mr Guinane submitted that the Inquiry should give the narrowest possible interpretation of the term, “*participation*”²⁷⁴ given that the Inquiry is considering its application in connection with a finding that can have serious implications for Mr Guinane and may result in penal sanction. They stated that the participation must carry some “*moral culpability*”.²⁷⁵
- 9.24 Counsel for Enforcement submitted that the Inquiry should “*focus on the acts and omissions of such a person, bearing in mind their awareness and knowledge, respective to their role*”.²⁷⁶
- 9.25 I accept the submissions of Mr Guinane’s counsel and agree that in this Inquiry “*participation*” is not to be decided on the basis of strict liability.
- 9.26 I sought submissions on the question of what mental element is applicable in determining whether a person concerned in the management of a RFSP has participated in a breach of General Principle 1 of the 2006 Code. Counsel for Mr Guinane argued strongly that the participation must have some mental element or mens rea in order to avoid creating a regime of strict liability and that a mental element was required to establish a contravention of the regulatory requirement.²⁷⁷ In the “Initial Discrete Observations on behalf of David Guinane upon the Investigation Report”,²⁷⁸ it was stated:

“21. If necessary, DG will rely upon the definition of “contravene” in section 33AN of the Central Bank Act, 1942 (as amended) (‘the Act’) which contains terms which all appear to have a mental element-e.g. “attempting”, “aiding, abetting [etc.]”, “inducing”, “knowingly concerned in” and “conspiring”.

22. At the initial stages arising, it is important that the CBI clarify what it considers to be the mens rea or mental element (if any) of each and all aspects of the (i) the alleged participation and (ii) the alleged prescribed contravention.

²⁷⁴ [Submissions of the Person Concerned on issues Raised by the Inquiry Member, dated 31 July 2023, page 40 \(Core Book 7 Tab 5\).](#)

²⁷⁵ [Submissions of the Person Concerned on issues Raised by the Inquiry Member, dated 31 July 2023, page 40 \(Core Book 7 Tab 5\).](#)

²⁷⁶ [Submissions of the Enforcement Division of the Central Bank of Ireland, dated 28 April 2023, page 25 \(Core Book 7 Tab 1\).](#)

²⁷⁷ [Submissions of the Person Concerned, dated 31 July 2023 \(Core Book 7 Tab 5\).](#)

²⁷⁸ [Initial Discrete Observations on behalf of David Guinane upon the Investigation Report, dated 10 January 2022 \(Core Book 6 Tab 6\).](#)

Accordingly, DG respectfully considers that the Inquiry Member should, as one of the initial steps arising, direct in due course clarification by the CBI in this regard also.”²⁷⁹

- 9.27 Enforcement did not directly address this issue, other than to suggest that a person concerned’s awareness and knowledge at the time “*and in some cases what that person ought to have been aware of*”²⁸⁰ were relevant factors. The advice from the LPT²⁸¹ briefly considered some analogous criminal concepts such as “*abetting*”, but concluded that participation remains a matter of fact and degree. At the Legal Issues Hearing, counsel for Enforcement when asked about this issue stated:

“But the second issue you are asking me is more an issue of principle, which is: is it a necessary mental element for this SPC to show some subjective knowledge? Is that what you are asking me?

INQUIRY MEMBER: What’s the Central Bank’s position on that, yes.

MS. O’NEILL: I don’t think it is. I think, as I outlined yesterday, there may be inquiries in which something less than that is sufficient to ground participation. But in this particular inquiry, as it happens, the facts as alleged demonstrate subjective knowledge. But as I explained to you yesterday, because of the wide-ranging circumstances in which inquiries could arise, I wouldn’t be correct to say that subjective knowledge is always required. There could be cases involving constructive knowledge, commission by omission....”²⁸²

Counsel for Mr Guinane stated at the Legal Issues Hearing that:

“And ultimately we do accept that it comes down to a question of degree. It is a fact specific issue at the end of the day, I accept that, but it does require, we say, some element of knowledge of the fact of the commission, or doing something wrong, that’s what we say it comes down to. And we say that’s mitigated or-- mitigated is the wrong word, we say that is answered by the fact

²⁷⁹ [Initial Discrete Observations on behalf of David Guinane upon the Investigation Report, pages 4 and 5 of 13 \(Core Book 6 Tab 6\).](#)

²⁸⁰ [Submissions on behalf of the Enforcement Division of the Central Bank of Ireland, dated 5 October 2023 \(Core Book 7 Tab 6\).](#)

²⁸¹ [LPT Legal Opinion, dated 12 December 2021 \(Core Book 8 Tab 3\).](#)

²⁸² [Transcript of Legal Issues Hearing \(Public Session\) dated 12 October 2023, pages 76 and 77 \(Core Book 9 Tab 9\).](#)

*that in this particular case there couldn't have been any mental element or active element where advice was taken at the time from others".*²⁸³

9.28 I have taken all of these submissions into account in considering whether Mr Guinane participated in the prescribed contravention by PTSB. I have considered the evidence and submissions²⁸⁴ regarding Mr Guinane's state of knowledge and state of mind with regard to the acts and omissions that gave rise to the contravention during the Relevant Period in order to assess their relevance in determining whether he participated in the prescribed contravention.

9.29 In reaching a conclusion on whether the findings of fact set out in Chapters 7, 8 and in this Chapter establish that Mr Guinane participated, as the term is used in section 33AO and 33AQ of the 1942 Act, in the prescribed contravention by PTSB I consider it fair and appropriate to take account of the following factors:

- (a) Whether as a matter of fact and on the ordinary and natural meaning of the word, Mr Guinane, participated in the acts and/or omissions that constituted the prescribed contravention by PTSB.
- (b) If he did, whether Mr Guinane took an active role in the prescribed contravention by PTSB.
- (c) Mr Guinane's subjective knowledge when signing off the Proposal.
- (d) Mr Guinane's intention or state of mind when signing off the Proposal.
- (e) Mr Guinane's culpability or blameworthiness for the prescribed contravention by PTSB.

I will then come to a conclusion on whether in all of the circumstances, Mr Guinane's acts or omissions justify a conclusion that he has participated, in the commission of the prescribed contravention by PTSB to which the Inquiry relates. In adopting this approach I believe that I am adopting a relatively narrow interpretation of "participating" and "participated" as these terms are used in section 33AO and 33AQ of the 1942 Act. I consider this approach is appropriate and fair in the particular circumstances of this

²⁸³ [Transcript of Legal Issues Hearing \(Public Session\) dated 11 October 2023, page 88 \(Core Book 9 Tab 7\).](#)

²⁸⁴ [Submissions of the Person Concerned, dated 31 July \(Core Book 7 Tab 5\), Transcript of Inquiry Hearing, dated 21 February 2024, Transcript of Inquiry Hearing, dated 14 March 2024, Transcript of Legal Issues Hearing, dated 11 October 2024 \(Core Book 9 Tab 7\), Person Concerned's Initial Discrete Observations on Investigation Report, dated 10 January 2022 \(Core Book 6 Tab 6\).](#)

Inquiry. It is not necessary for me to draw any conclusions of broader application about the proper interpretation of these terms in order to reach my findings in this Inquiry and I have not sought to do so.

(a) *Whether as a matter of fact and on the ordinary and natural meaning of the word, Mr Guinane, ‘participated’ in the acts and/or omissions that constituted the prescribed contravention by PTSB.*

9.30 I have set out in Chapters 7 and 8 and paragraphs 9.2 to 9.11 above, the role that Mr Guinane took in January 2009 in considering how PTSB should respond to customers seeking to revert to a tracker rate under loan agreements that contained SC706. He briefly considered the issue at the ExCo meeting and then approved the Proposal that was subsequently put to him.

9.31 I have found that upon reading the Proposal from Mr O’Grady of 16 January 2009,²⁸⁵ Mr Guinane must have been aware that he was being asked to make a decision on the interest rate to be paid by some customers under existing mortgage loan agreements.

9.32 In responding to the Proposal in the email of 16 January 2009, it is obvious that Mr Guinane is making a decision on behalf of PTSB. He is deciding what PTSB should do in dealing with customers who have a mortgage loan agreement with PTSB containing SC706 and who wish to revert to a tracker rate. By reason of my findings as to Mr Guinane’s state of knowledge as set out in paragraphs 9.3, 9.4, 9.6, 9.7, 9.8 and 9.10 above, Mr Guinane was aware that his decision will affect customers and from the contents of the email from Mr O’Grady he is aware that others in PTSB would act on his decision.

9.33 Mr Guinane’s approval of the Proposal was instrumental in causing PTSB to take the approach that it did to customers whose mortgage loan agreements contained SC706. It was therefore instrumental in the prescribed contravention. If Mr Guinane had declined to approve the Proposal, then the contravention would not have occurred. The evidence indicates that, had Mr Guinane not answered the email at all, the contravention would not have occurred. This is not just because of Mr Guinane’s seniority as CEO of the banking division, but because those in the marketing,

²⁸⁵ [Internal email chain between Kevin O’ Connor, Niall, O’Grady and David Guinane with the subject line “FW: Tracker” confirming approval of tracker query summary of Niall O’Grady \(Doc ID: BSI040147, Core Book 1 Tab 23\).](#)

compliance, legal and operations function of PTSB, who were responsible for deciding on how to respond to customers who had SC706 in their mortgage loan agreements and wished to revert to a tracker rate, were awaiting a decision from Mr Guinane. If Mr Guinane had responded to the Proposal by stating that he was “OK” with all customers who contacted PTSB to revert to a tracker rate being offered the tracker rate that they paid at the outset of their mortgage loan, then it is unlikely that the prescribed contravention would have occurred. If Mr Guinane had sought clarification of the effect of the Proposal on customers, it is likely that no action would have been taken by PTSB in respect of customers whose loan agreements contained SC706, until that clarification had been provided and a decision made. Mr Guinane chose to respond to the Proposal without seeking clarification and with a simple unqualified approval.

9.34 I conclude that Mr Guinane’s approval of the Proposal was a necessary part of the actions by PTSB that gave rise to the contravention by PTSB. It is difficult to justify a conclusion that Mr Guinane had not participated, under the ordinary and natural meaning of that word, in the commission of an action that he had considered and authorised on behalf of PTSB.

9.35 These conclusions are enough in themselves to conclude that Mr Guinane took part in the prescribed contravention by PTSB. This is, of course, a long way from concluding that Mr Guinane was fully aware of, or intended, the consequences of his actions. It is quite possible to be an unwilling or unknowing participant in an act or event. Such a notion does not stretch the ordinary and natural meaning of “participation” in normal usage.

9.36 I conclude that as a matter of fact and on the ordinary and natural meaning of the word, Mr Guinane, participated in the acts and/or omissions that constituted the prescribed contravention by PTSB. However, as I have indicated this conclusion is merely a step toward deciding if Mr Guinane participated in the prescribed contravention as the term is used in section 33AO and 33AQ of the 1942 Act.

(b) *Whether he took an active role in the prescribed contravention.*

9.37 The prescribed contravention by PTSB that is the subject of this Inquiry is a breach of the principle contained in Chapter 1, General Principle 1 of the 2006 Code which required PTSB to:

*“ensure that in all its dealings with customers and within the context of its authorisation it acts honestly, fairly and professionally in the best interests of its customers and the integrity of the market”.*²⁸⁶

- 9.38 The regulatory obligation on PTSB is to **ensure** that the required standards are met in its dealings with customers. It is an obligation that requires positive or active steps to be taken by the RFSP. A person concerned in the management of a RFSP could, in principle, participate in such a failure by PTSB by failing to take a positive or active step to ensure that the regulatory requirement is met. In the circumstances of this Inquiry and given the apparent brevity of Mr Guinane’s involvement, I have considered if Mr Guinane’s involvement in the SPC amounted to an active participation in the prescribed contravention.
- 9.39 Mr Guinane signed off the Proposal in the knowledge that others would act upon the authorisation that he was giving. It is clear from the contents of the email from Mr O’Grady that Mr O’Grady and others in PTSB will act on his decision. Authorising others to take an action or a course of action is an active step. I have concluded for the reasons set out at paragraph 9.33 above, that Mr Guinane’s approval of the Proposal was a necessary part of the actions within PTSB that gave rise to the contravention by PTSB. Mr Guinane’s state of knowledge as set out in paragraphs 9.3, 9.4, 9.6, 9.7, 9.8 and 9.10 above means that Mr Guinane was aware that his decision would be followed by PTSB staff and that it would affect PTSB’s customers. I conclude from this that he took an active role in the prescribed contravention.
- 9.40 I find no evidence that Mr Guinane took the opportunity to consider what had happened to customers with a “price promise” tracker rate after January 2009 until he was approached in January 2010 about the need to reinstate a reference to tracker rates in the “options” letter sent to customers approaching the expiry of a fixed rate period. It may be understandable, from a business perspective that Mr Guinane chose to prioritise other matters during this period, given the extraordinary circumstances in which PTSB and other banks were operating at the time. He may have focused on matters that appeared at the time to be the most important to PTSB, its owners and staff and perhaps even the interest of the Irish State under the Government Guarantee Scheme. However, the regulatory regime that applied to banks during the Relevant Period, including compliance with the 2006 Code, imposed obligations in respect of

²⁸⁶ [Consumer Protection Code 2006 \(Core Book 5 Tab 4\).](#)

customers that could not be subordinated. This failure to follow up on the implementation of the Proposal he had signed off occurs after he has taken an active role in the prescribed contravention and is not relevant to the conclusion that I have come to on this particular issue.

(c) Mr Guinane's subjective knowledge when signing off the Proposal.

9.41 I have set out the minimum level of subjective knowledge that I attribute to Mr Guinane at the time that he signed off the Proposal at paragraphs 9.3, 9.4, 9.6, 9.7, 9.8 and 9.10 above.

9.42 Mr Guinane has been consistent in stating that he does not recall the discussion about SC706 at the ExCo meeting on 13 January 2009, receiving the Proposal or the decision that he made in response to it. He has stated this in interviews prior to and as part of the investigation and during the course of the Inquiry. I accept this. By way of example, Mr Guinane was asked by his counsel about the notes of the ExCo meeting of 13 January as follows:

"Seeing that note of what was discussed, does it jog your memory in any way, Mr. Guinane --

A. Absolutely not, no.

Q. -- as to the issues that were identified by Mr. O'Grady?

A. No, I mean, it's over 15 years ago, I have absolutely no memory of that.....

*A. Well, I mean, as I say, I have no recollection of the meeting, of the items, etc."*²⁸⁷

9.43 Mr Guinane has, during the course of the Inquiry, offered his thoughts on what he might have understood from the email containing the Proposal and what the basis for his response to it may have been. I am aware of the difficulty of expecting any senior manager to recall some years after the event, one of many decisions that they made quickly in the course of their working day at the time. Mr Guinane was asked in the Substantive Inquiry Hearing by his counsel, about his workload at the time in the context of the compliance reports. He replied as follows:

²⁸⁷ [Transcript of Inquiry Hearing, dated 6 March 2024, pages 30 and 31.](#)

“Could I ask just a general question? In terms of the level of information that you were having to deal with on a day-to-day basis, could you give the Inquiry some indication of what you would be, in terms of receiving reports, having to consider reports and so forth?”

A. Yes. And particularly at that time, if that's the question, around '09, so there was a lot of reports. I mean, if you are CEO of a bank, even in, you know, good times, you are getting a lot of reports. The reports I would have been getting around that time would have been very much on the whole mortgage arrears situation and how they were, you know, how they were developing. Now, they had began to turn negative for us from, as I said earlier, from '08, and in '09, and it continued in '10, '11, so that would have been very much a priority, to be watching that. And on the other side then, if you like, of the equation, would have been our funding efforts. As I earlier explained, we had actually lost access to wholesale funding. I believe in '09 we were in emergency ECB funding at the time, we couldn't actually access anything from the markets, so, as a result of that, we were looking to develop our deposit base, and we were doing that twofold, from memory: one was, we were trying to gather as much retail deposits within Ireland as we could. And, look, again, my memory is jarred by looking at the earlier Executive meeting. We were also looking to develop a deposit business in the UK, and I remember, actually, I was the direct contact at that stage with the FSA in the UK and I was travelling to and forth to try and get them to agree to a licence. So that -- deposit reporting and the arrears, as I call it, and the ticking up on that, they would have been, I suppose, the priorities, you know, all -- different priorities can change depending on circumstance. But certainly they would be coming in on a daily, weekly, monthly basis, reports around those particular areas, as well as all the normal business as usual, of which the Compliance report would have been one.”²⁸⁸

9.44 In the Substantive Inquiry Hearing, Mr Guinane, in response to questions from his counsel about the Proposal, gave the following responses:

Q. Reading the e-mail now -- I suppose, firstly, I should ask you, Mr. Guinane, do you have any recollection of receiving that e-mail?

A. No.

²⁸⁸ [Transcript of Inquiry Hearing, dated 6 March 2024, pages 52, 53 and 53.](#)

Q. Looking at it now and reading what you were being requested to confirm you were OK with, what do you understand it, what do you understand the proposal to be?

*A. I understand the proposal to be that people who ring us looking for a tracker rate, as they are obliged to do, will be given their original tracker rate. That's what it says, and that is the recommendation that's being made."*²⁸⁹

9.45 Mr Guinane was asked by the LPT and, at more length, by counsel for Enforcement, why he had never expressed this view before. Mr Guinane was referred to his statements in interview to Enforcement in 2017 and 2019.

9.46 In response to the following question from the LPT at the Substantive Inquiry Hearing, Mr Guinane explained an answer he gave in the 2017 interview:

"Q. So, my point is this, Mr. Guinane, and it's a simple question looking for an explanation: you are saying today that the proper interpretation of Mr. O'Grady's e-mail to you of 16th January is in terms of a proposal that all of the customers coming off a fixed rate who were on a tracker previously should be given their original rate, that's --

A. If they look for a tracker.

Q. If they look for a tracker?

A. Yes.

Q. You didn't say that at the 2017 interview. Why is that?

*A. Well, I would think there is a myriad of reasons, Mr. Breslin. Firstly, in 2017, I wasn't under investigation, so I wasn't taking, let's say, due care and attention. A lot of those answers of "yeah", or whatever, I was trying to be helpful. I don't know when I received the documents that were being referred to."*²⁹⁰

9.47 Counsel for Enforcement asked a number of questions about why Mr Guinane had not offered the explanation about his response to the email of 16 January 2009 that he advanced at the Substantive Inquiry Hearing i.e. that he had thought he was agreeing that all of the customers coming to the end of a fixed interest rate who were on a tracker rate previously and wished to revert to a tracker rate should be given their original tracker rate. Mr Guinane and his counsel, pointed to Mr Guinane lacking access to

²⁸⁹ [Transcript of Inquiry Hearing, dated 6 March 2024, page 43.](#)

²⁹⁰ [Transcript of Inquiry Hearing, dated 6 March 2024, page 106.](#)

relevant documentation and not having an explanation in 2017 of the allegation as it is now being made by Enforcement.

- 9.48 In his 2019 interview, Mr Guinane was still lacking the full range of documents relating to his decision on 19 January 2009. In this interview Enforcement asked at length about Mr Guinane's understanding of the decision that he and PTSB had made regarding SC706. Mr Guinane engaged with the questions from Enforcement in an open and constructive manner. He was asked about which rate customers were entitled to receive when reverting to a tracker rate and provided the responses set out at paragraph 7.55 in Chapter 7 above. In the 2019 interview the following exchange between Mr Regan of Enforcement and Mr Guinane took place as part of a longer analysis of what SC706 was understood to mean:

"Mr. Regan: Yes, and from reading that now or from reading it previously, what is your understanding of what tracker rate a customer is entitled to at the end of fixed-rate period?"

Mr. Guinane: The rate, the one — if you are asking me what I felt at the time is that that was -- and what 706, we believed 706 and was written [REDACTED]

Mr. Regan: Yeah.

Mr. Guinane: [REDACTED]

" 291

- 9.49 At the Substantive Inquiry Hearing, Enforcement placed weight on Mr Guinane's statement in this interview that he did not think that the treatment of the customers who paid the prevailing rate was "fair". Mr Guinane pointed to his clear statements [REDACTED]

- 9.50 However, it is clear in the interview that Mr Guinane was answering questions based on the documents that he had been shown and was seeking to rebuild his knowledge and understanding from these. At one point when asked to clarify his position about the sign off of the Proposal, he stated:

"MR. GUINANE: I have no memory of this. This is ten years ago.

²⁹¹ [Transcript of interview with David Guinane on Wednesday, 22 May 2019 held at the Central Bank of Ireland's offices, page 100 \(Doc ID: PTSB_COM_000410, Core Book 1 Tab 136\).](#)

MR. Regan: Sure, okay.

MR. GUINANE: *I only can judge it from what I am reading and what I see is what I signed off for in a Compliance Report. But I have actually no memory of this meeting or, as I said, to you earlier of this, the actual event that precipitated the meeting*²⁹²

9.51 In coming to a view on what Mr Guinane understood when he read the Proposal, I note the inconsistencies between Mr Guinane's comments in these interviews and his evidence in the Substantive Inquiry Hearing. However, I do not conclude from this that Mr Guinane was telling the truth in the interviews but had changed his story by the time of the Substantive Inquiry Hearing. I conclude that, as Mr Guinane has consistently said, he has no memory of the decision he was asked to make in January 2009 and was seeking to explain what he did by reference to the documents he was seeing from that time and from the evidence of others in PTSB.

9.52 Mr Guinane was asked about his response in the *"Initial Discrete Observations on behalf of David Guinane upon the Investigation Report"* that was prepared by Mr Guinane with his legal advisers on 10 January 2022.²⁹³ This document contained the following observations:

"45. Although the email and associated matters will be a matter for evidence in due course, certain issues arise at this juncture of relevance to the case being advanced by the CBI against DG.

46. The CBI has not explained how DG, so as not to participate in a prescribed contravention to act fairly in the best interests of customers and the integrity of the market, should have acted in response to this proposal.

47. For example, it is unclear whether it is being suggested that, to avoid an Inquiry, DG ought to have formulated his own counter-proposal, whereby all customers would get the original tracker rate.

48. If that is being suggested, it is unclear how DG could have done so in circumstances where it is not suggested by the CBI that this email was accompanied by the wording of Condition 706."

²⁹² [Transcript of interview with David Guinane on Wednesday, 22 May 2019 held at the Central Bank of Ireland's offices, page 167 \(Doc ID: PTSB COM 000410, Core Book 1 Tab 136\).](#)

²⁹³ [Initial Discrete Observations on behalf of David Guinane upon the Investigation Report, dated 10 January 2022, page 9 of 13 \(Core Book 6 Tab 6\).](#)

9.53 Counsel for Enforcement asked the following question of Mr Guinane and received the following response about this observation:

Q. "Because it's inconsistent, because what it suggests is that the proposal was not in fact one that all the customers would get all the original tracker rate, isn't that right? Because otherwise why would you have to come up with a counterproposal?"

A. Yeah, I don't... I mean I have seen this -- this is the first time I have seen this, I have to say, or again if I saw it back in '2022, and I don't understand whether they are talking about customers prior to 2005 or, you know, from there onwards. But I would repeat that in answer to the question as to when I was, you know, or what I was aware of as regards what I'm saying in my evidence, that clarity came when I received all the documents that were relevant and what's now become, and as you would have heard yesterday was my evidence.²⁹⁴

9.54 The above response provided in the *"Initial Discrete Observations on behalf of David Guinane upon the Investigation Report"* was given at a time when Mr Guinane had seen the Investigation Report and the Notice of Inquiry and the details of the SPC and was familiar with the contravention that was alleged. It indicates that he did not at that time believe that he had thought he was agreeing that all of the customers coming off a fixed rate who were on a tracker previously and wished to revert to a tracker rate should be given their original tracker rate. He believed that it would have required a counter-proposal from him to achieve that.

9.55 At the Substantive Inquiry Hearing I understood Mr Guinane to be stating that, now that he had seen all relevant documents, he could have understood, or would have understood, from the Proposal that all customers who sought a tracker rate after a period of fixed interest rates in a mortgage loan agreement containing SC706 would be given the original tracker rate once they had contacted PTSB to request a tracker rate. He was not stating that he remembered having that understanding at the time.

9.56 In the closing remarks, counsel for Mr Guinane stated his objection to any attempt to impute knowledge to Mr Guinane, as follows:

²⁹⁴ [Transcript of Inquiry Hearing, dated 7 March 2024, page 58.](#)

“...this is an attempt by Enforcement, a last ditch attempt by Enforcement to try and broaden the scope of the Inquiry to suggest that Mr. Guinane, not only did he know but he ought to have known what the proposal was that was intended to implement. And again we say that that is an impermissible broadening of the scope of the allegation because of course the allegation is very specific. It says not that he ought to have been fully aware of the factual position, which is now enforcement's position that he ought to have been fully aware of the factual position and [REDACTED] because the allegation is that he was fully aware of those matters. And suggesting now that he should have constructive knowledge of information that was in the possession of other individuals, or, as we'll see in the submissions, that he should have made reasonable inquiries and asked questions and [REDACTED] and reviewed the matter, it's all with a view to saying that had he done those things, then he would have been fully aware of the essential matters constituting the contravention and that he should be deemed to be constructively -- or to have constructive knowledge of those matters. And again we say that that is entirely impermissible and doesn't form part of this inquiry.”²⁹⁵

9.57 I have set out at paragraphs 9.3, 9.4, 9.6, 9.7, 9.8 and 9.10 above the minimum level of subjective knowledge that Mr Guinane had when signing off the Proposal. Mr Guinane was in a position to understand the issue that he was being asked to consider and to decide and to assess the implications of the decision for PTSB and the relevant customers. However, the Proposal lacked clarity on what it was asking Mr Guinane to approve. This lack of clarity was evident from the text of the Proposal. As noted at paragraph 5.35 above, I have approached these findings on the basis that no adverse inference should be drawn from the inability of Mr Guinane after many years to recall the details of his role in deciding PTSB's approach to implementing SC706 during the Relevant Period. On that basis, I have based my findings on Mr Guinane possessing the subjective knowledge referred to in this Chapter.

²⁹⁵ [Transcript of Inquiry Hearing, dated 15 March 2024, pages 30 and 31.](#)

(d) ***Mr Guinane's intention or state of mind when signing off the Proposal***

Intention

9.58 Overall, I have not been referred to, nor have I found, sufficient evidence that supports a view that Mr Guinane intended to cause PTSB to offer the original tracker rate to all customers who contacted PTSB in order to revert to a tracker rate after the expiry of a period at a fixed rate of interest. The evidence relied upon by counsel for Mr Guinane in support of such a conclusion was the phrasing of the final request in the email of 16 January 2009 and his likely understanding of it and response to it. Mr Guinane's evidence with regard to his understanding and intention has been consistent throughout the investigation that preceded the Investigation Report and throughout the Inquiry; he does not remember approving the email or what was in his mind at the time. However, his evidence to the Inquiry was that, now that he had seen all relevant documents, he could have understood, or would have understood, from the Proposal email that all customers who sought a tracker rate after a period of fixed interest rates in a mortgage loan agreement containing SC706 would be given the original tracker rate once they had contacted PTSB to request a tracker rate. The submissions on behalf of Mr Guinane ask me to accept that he was the only person in the central functions of PTSB who was dealing with this issue who did not understand the intention behind the Proposal. He subsequently failed to identify the problem that had arisen in relation to the treatment of customers with SC706 and, in particular, he did not read the compliance reports that had been prepared for him by the compliance function within PTSB, which would have identified the problem and the contravention. He did not ask any questions about the implementation of the Proposal. It is clear from the evidence²⁹⁶ that the issue is regarded as important throughout the Relevant Period by PTSB's senior managers. These senior managers, including some of Mr Guinane's direct reports, remained very familiar with the issue throughout the period and they all shared an understanding of the approach that PTSB was adopting. When he was consulted about the need for tracker rates to be reintroduced to "option" letters for customers leaving a fixed rate, there is no evidence that he was surprised or that he recalled the position adopted on SC706. There is no contemporaneous evidence that supports Mr Guinane's current view that when he signed off on the Proposal he intended that all consumers who sought a tracker rate after a period of fixed interest

²⁹⁶ [Transcript of Inquiry Hearing, dated 22 February 2024, page 106](#), [Transcript of Inquiry Hearing, dated 27 February 2024, page 59](#), [Transcript of Inquiry Hearing, dated 29 February 2024, page 54](#).

rates in a mortgage loan agreement containing SC706 would be given the original tracker rate once they had contacted PTSB to request a tracker rate.

9.59 It may be worth stating at this point that, of course, there is no onus on Mr Guinane to disprove the allegation made by Enforcement in the Investigation Report and none should be implied from this analysis of the evidence.

9.60 I am also aware that there is a lack of clear evidence that points to Mr Guinane having formed an intention to cause the bank to put customers in a position whereby they would not receive the tracker interest rate to which they were legally entitled. Such an approach was within the contemplation of PTSB. Mr O'Grady's Proposal to Mr Guinane expressly referred to this possibility and suggested that the bank had the option of taking this step. Mr Guinane has consistently rejected the suggestion that he had any such intention during the course of the investigation and during the Inquiry. The evidence relied upon in the Investigation Report in support of such a conclusion is Mr Guinane's action in approving the Proposal at a time when PTSB was financially exposed due to the rapid change in interest rates. No stronger evidence in support of such a conclusion arose in the course of the Inquiry. I do not find this to be a sufficient basis for concluding that Mr Guinane intended to put customers in a position whereby they would not receive the tracker interest rate to which they were legally entitled.

9.61 Mr Guinane was asked in the course of giving his evidence whether the response he gave to Mr O'Grady's Proposal was made just three minutes after receiving the follow up email from Mr O'Grady on 19 January 2009. Mr Guinane stated that he had no recollection of receiving the email of 16 January 2009 or the follow up email on 19 January 2009. He was asked if he would have responded to the email after looking at it on 16 January or was it only considered when he was asked again on 19 January. Mr Guinane, who had already explained his working practice of responding to emails as quickly as possible, replied as follows:

"Well, I have, obviously no memory of it. I did, when I received the email a number of years ago check that 16th January was, in fact, a Friday and the 19th was a Monday. So I suspect, because, looking at that, I suspect I didn't see it, for whatever reason. I have no access to my diary or anything else that was going on at that time, so I can't speculate as to what I may have been doing at the time, but it looks -- the first time I saw it was when I opened it at -- you can see the time there -- twenty past two, or just before that, sixteen

minutes past two on the Monday, and I would have responded. So I would – again, I can’t be sure but, you know, my best judgement would be that that was the first time I looked at it.”²⁹⁷

- 9.62 The question was then put to Mr Guinane as to whether the proposal to allow customers who “*actually contact*” to revert to their original tracker rate [REDACTED] [REDACTED] were matters that would have influenced his decision to sign-off on the Proposal in this email? Mr Guinane responded:

The redacted content in paragraph 9.62 contains reference to legal advice that was available to PTSB and about which Mr Guinane received reports prior to 19 January 2009.

“I mean, I can’t – I can’t be sure. I think if there was I mean, looking at that email – and as you’ll appreciate, I have looked at it many times – I mean, there is nothing in that, to me, is a red flag, if I can say that, there is nothing that seems untoward about that. It’s coming from somebody who was a close colleague, someone I trusted.” [REDACTED]

[REDACTED] But, I mean, I would have just concentrated, I think, and if I got it today, would be concentrating on the proposal and looking at, you know, things like, allegedly, I already asked, which was the ... you know, what is the exposure and what happens when they, you know, go on to a default option, if they were the questions that I either or somebody else asked, and that looked perfectly reasonable to me, I have to say, that he was recommending a course of action that seemed reasonable, as I was, you know, three minutes later, happy to say “OK with that”.”²⁹⁸

- 9.63 PTSB was, in January 2009, a bank facing extraordinary pressures. Mr Guinane as CEO was extremely busy and facing a range of issues. The agenda of the ExCo on 13 January 2009 showed that the senior management of PTSB were dealing with a range of business, including normal operational issues and some fundamental problems including funding, which was described as a key issue for the bank at that time. The approach that Mr Guinane describes above of assessing an email quickly and forming a judgment in very broad terms based on who it was from and whether it “*seemed*” reasonable is both plausible and consistent with Mr Guinane’s other evidence in the Inquiry and his responses to questions during the investigation.

²⁹⁷ [Transcript of Inquiry Hearing, dated 6 March 2024, pages 43 and 44.](#)

²⁹⁸ [Transcript of Inquiry Hearing, dated 6 March 2024, pages 44 and 45.](#)

9.64 I have therefore also considered the extent to which the Inquiry should focus on seeking to discern Mr Guinane's intentions when he responded to Mr O'Grady on 19 January 2009. If Mr Guinane gave his approval to the Proposal without paying sufficient attention to the contents of the poorly worded request for authorisation from a trusted colleague,²⁹⁹ and without a full or considered understanding of its practical implications for customers, then the difficulty in determining Mr Guinane's intention may reflect the fact that he did not form any clear intention with regard to the treatment of customers at the time.

9.65 I consider that whilst Mr Guinane's inability to remember precisely on what basis he signed off on the Proposal from Mr O'Grady and may have been affected by the passing of time, the evidence³⁰⁰ suggests that it is more likely that, as a busy CEO dealing with extensive correspondence at a time of great tension and difficulty for PTSB, he did not recall the basis for his decision because he gave very little consideration to the decision at the time he was asked to make it. This would also help to explain why he did not review the consequences of that decision or reconsider it after it was made.

Understanding of Proposal

9.66 Counsel for Mr Guinane stated during the course of the Substantive Inquiry Hearing that the Inquiry should consider what Mr Guinane actually agreed to when approving the Proposal put to him by Mr O'Grady when considering if he participated in the SPC. In his closing remarks, counsel for Mr Guinane stated:

"...there is no evidence that Mr. Guinane signed off on any decision or strategy other than that the customers who contacted the Bank would obtain the original tracker or price promise.

The lack of any such evidence does not appear to be in dispute. Enforcement's closing submissions don't point to any evidence".

"The lack of any such evidence means that the prescribed contravention must be dismissed, because even if PTSB acted unfairly or breached General Principle 1 of the CPC, which we dispute, again for the reasons that we have set out in our July 2023 submissions, and also because in fact there is

²⁹⁹ [Transcript of Inquiry Hearing, dated 6 March 2024, page 113, line 6.](#)

³⁰⁰ [Transcript of Inquiry Hearing, dated 6 March 2024, pages 17, 18 and 113.](#)

absolutely no evidence that any customer was treated unfairly and not given the price promise tracker between January 2009 and March 2010, but there is no evidence that Mr. Guinane participated in the conduct actually alleged to give rise to the contravention”.

Counsel for Mr Guinane went on to summarise the position that had been set out in the course of the Inquiry Hearings in the following terms:

“....

On no or no reasonable assessment of the evidence can it be suggested that Mr. Guinane was fully aware of the factual position [REDACTED] when he signed off on the proposal contained in the email such that he knew that he was signing off on something different.

.....

“However, we say it’s apparent that, the alleged ‘participation’ by Mr. Guinane consists and only consists of by signing off on the 19 January 2009 email. That, we say, is the “particular allegation” in your words, sir, which this Inquiry is concerned³⁰¹.

9.67 The Investigation Report³⁰² prepared by Enforcement concluded that the Proposal email set out a proposal to allow only those customers who contacted PTSB to complain about or query the tracker rate that they had been offered, being allowed to revert to the original tracker rate that they had been offered at the start of their mortgage loan.

9.68 The email of 16 January 2009³⁰³ is set out at paragraph 7.1 D above.

9.69 The email uses the word “*contact*” twice. The first time to refer to the customer’s option of reverting, if they started on a “price promise” tracker, “*to a tracker mortgage loan as described above*” if they “*contact*” PTSB on expiry of the fixed rate period. The second time to allowing customers who “*actually contact*” PTSB to revert to their original tracker rate. As stated above, although I am reluctant to extrapolate detailed conclusions based on forensic examination of an email issued in the course of a busy working day between colleagues, some careful analysis of how the email was

³⁰¹ [Outline Closing Submissions on behalf of the Person Concerned, dated 14 March 2024, page 3.](#)

³⁰² [Investigation Report, dated 27 May 2021 \(Core Book 6 Tab 2\).](#)

³⁰³ [Internal email chain between Kevin O’ Connor, Niall, O’Grady and David Guinane with the subject line “FW: Tracker” confirming approval of tracker query summary of Niall O’Grady \(Doc ID: BSI040147, Core Book 1 Tab 23\).](#)

understood, or how it might reasonably have been understood is appropriate. In this instance, the different interpretations of the email put forward on behalf of Mr Guinane and Enforcement depend upon whether the second reference to “*actually contact*” is referring to the “*contact*” prior to the expiry of the fixed rate period that is required in order to revert to a tracker mortgage, or whether it refers to a more specific or additional contact in which a customer “*specifically requested their original and lower interest rate, or queried or complained*” in order to be offered the original tracker rate set out in their mortgage loan offer.

9.70 The Proposal email is relatively clear on the questions relating to the “exposure” of PTSB that arose at the ExCo meeting and addressed one of the concerns raised (whether by Mr Guinane or others) at the ExCo meeting. [REDACTED]

[REDACTED] and the approach to be adopted to customers. Mr Guinane was aware that the issue of which tracker rate a customer would receive is important to the affected customers and he would be aware from the Proposal email that he was being asked to make a decision on this. He was told that customers can revert to a tracker mortgage rate on the expiry of the fixed rate period, if they contact PTSB. He was also told that the reference in the letter of approval to a “price promise” is relevant. He was told that PTSB has a choice over which tracker rate it makes available to the customer as it was ambiguous as to whether the customer could revert to the original or today’s tracker rate. [REDACTED]

The redacted content in paragraph 9.70 contains reference to legal advice that was available to PTSB and about which Mr Guinane received reports prior to 19 January 2009.

[REDACTED] On even a quick read a few concerns should have arisen, as follows:

- (a) Did PTSB really have the option of making which ever tracker rate it chooses available to customers?
- (b) Was it being suggested that PTSB had a choice over which rate to offer [REDACTED]
[REDACTED]
- (c) How does the customer make contact at the expiry of the fixed rate period but before the loan defaults to a variable rate?
- (d) The timing of any contact was clearly important, but what was being proposed?
- (e) What was meant by “*actually contact*” as opposed to “*contact*”, if anything?

- (f) Which customers with “price promise” trackers were covered by the decision that was requested?

[REDACTED]

[REDACTED] and on the expertise of his compliance department, but he should be open to seeking clarification or confirmation [REDACTED] as the report of it is in the email.

- 9.71 It was then proposed that PTSB allows customers who actually contact them, of which the one mentioned at the ExCo meeting is the only one, to revert to their original tracker rate. This was said to be [REDACTED]

- 9.72 I found as matter of fact that the Proposal sent by Mr O’Grady was prepared on the basis that it was asking Mr Guinane to approve a position whereby the customer had to contact PTSB and complain about the tracker rate being offered, or request the original tracker rate, before the original rate would be made available to the customer. The email was poorly drafted and lacked adequate clarity on this point and was open to misunderstanding. The email did not expressly seek approval for a strategy to only give the more favourable rate back to those customers who specifically requested their original and lower interest rate, or queried or complained. If the Proposal email had proposed that all customers who had a “price promise” would receive the “price promise” tracker rate if they contacted PTSB before the fixed rate expired and the interest rate defaulted to a variable rate, then the decision to be made was relatively straight forward. Effectively, this would be a proposal that the bank should honour the “price promise” and do what the bank is contractually obliged to do. It is easy to see that if this had been the intention of the sender, the email would have been drafted in much simpler and clearer terms. The statement that PTSB had the option of making which ever tracker rate it chooses available to customers make little sense if the proposal was simply to comply with the “price promise”. For the reasons set out above, I find that this was not the intention of the sender or those drafting the email.

- 9.73 I have therefore considered if an initial read of the email should have been sufficient to alert Mr Guinane when dealing with a busy inbox and serious problems in PTSB to the potential implications of the Proposal. I find that it would have been. The email was unclear and that the text of the email when viewed in isolation was ambiguous. It could have been understood to be seeking approval to charge the original tracker rate of

The redacted content in paragraph 9.71 contains reference to legal advice that was available to PTSB and about which Mr Guinane received reports prior to 19 January 2009.

interest to all customers who contacted PTSB to request a tracker rate, or it could have been understood to be seeking approval to charge the original tracker rate of interest to those customers, of which there had been one so far, who actually contacted PTSB to request the original tracker rate. However, as stated in paragraph 9.6 above Mr Guinane did not read the email in isolation. The email referred to his discussions at the ExCo meeting just a few days earlier, which were likely to have clarified his understanding of the issue, and his general knowledge of PTSB's business would have given him a clear perspective on the issues involved. For example, he was familiar with the "price promise" and he is likely to have known if the "*one so far*" was the only one requesting the "price promise" tracker rate or the only one requesting to revert to a tracker rate. However, it would have been apparent that the email needed to be read with some care by Mr Guinane to understand the precise implications for customers.

9.74 I find, on the balance of probabilities, that Mr Guinane made his decision to sign off on the Proposal within three minutes. The email gave him the answer to the questions that were raised at the ExCo meeting. The only concern recorded at that meeting was about the "exposure" of PTSB that may arise from giving effect to SC706. Upon receipt of the Proposal email, Mr Guinane could readily understand that the "exposure" of PTSB was low (on the limited logic behind the email³⁰⁴) as it should not rise beyond 400 customers in the short term. Mr Guinane's evidence suggested that this may have been enough for him to agree to the Proposal and to do so within three minutes of being reminded of the email. In essence, the issues that had concerned the ExCo and that concerned him when he read the Proposal had been addressed satisfactorily and he relied on the judgement of his colleagues as to the rest of the email.

9.75 On balance, I find that it is most likely that Mr Guinane approved the Proposal on the basis of a brief review of its contents, its source (Mr O'Grady [REDACTED]), and its conclusions on the extent of PTSB's "exposure" and without considering the implications for customers.³⁰⁵ Such a conclusion is more consistent with Mr Guinane's evidence at 9.61 and 9.62 above and the overall evidence in the Inquiry, than concluding either that Mr Guinane had understood the Proposal to be to give customers what they were contractually entitled to, or that he intended to charge customers more interest than they were obliged to pay.

The redacted content in paragraph 9.75 contains reference to legal advice that was available to PTSB and about which Mr Guinane received reports prior to 19 January 2009.

³⁰⁴ See footnote 303

³⁰⁵ This Inquiry is focused on the position of customers, but the email also appears to overlook the issue of the future "exposure" of PTSB if it were to return to offering tracker rates in future interest rate cycles.

9.76 I conclude that he did not give the email sufficient care and attention. He did not consider the implication of the Proposal for customers and did not take any steps to ensure that PTSB was acting fairly in the best interests of its customers.

9.77 As soon as Mr O'Grady received Mr Guinane's approval and the various central functions involved in this issue were notified, they proceeded straight away to implement the process of only offering the original tracker rate, to which customers were entitled, if the customer requested this rate or complained or questioned the higher rate that they would be offered in the first place by PTSB. The understanding that those notified of Mr Guinane's acceptance of the Proposal have, of the course of action that has been approved, is apparent from the evidence, as set out in paragraphs 7.59 to 7.84 above.

State of Mind

9.78 I have concluded that Mr Guinane's authorisation of the Proposal lead to the actions that gave rise to the contravention. I find that Mr Guinane's lack of care and attention makes it unclear whether he intended these actions to follow from his sign off. However, Mr Guinane's awareness and knowledge of the Proposal and the circumstances in which it had arisen was such that these actions were a foreseeable consequence of approving the Proposal, which expressly stated that PTSB had the option of making which ever rate it chose available to customers.

9.79 It is clear from the evidence that matters proceeded swiftly in January 2009 from the first receipt of a query from a broker regarding the proper application of SC706 to approval being sought and then obtained from Mr Guinane. The contravention arose because various managers within PTSB either lacked experience to decide, or did not apply their minds to, the issue of how to implement SC706 when they first had to do so. There was a collective failure to ensure that PTSB was acting fairly and considering the best interests of customers when recommendations or decisions were being made about how to give effect to SC706. Many of those involved in making these decisions and implementing them had the knowledge and experience required to understand PTSB's regulatory responsibilities. The relevant managers did not reconsider or exercise any new judgement on the course of conduct they had engaged in until the intervention of the Financial Regulator in late 2009 caused some of them to review the approach that PTSB was pursuing. A number of the senior managers within PTSB and within the IL&P Group who ought to have been exercising some judgement on the

bank's compliance with the 2006 Code were either distracted by the extraordinary events affecting PTSB or the IL&P Group at that time³⁰⁶ or did not look beyond the interests of PTSB.

I consider it more likely than not that Mr Guinane's conduct and approach in January 2009 may also reflect a failure to apply his mind to the consequences of the Proposal for customers at a time when he was distracted by extraordinary events affecting PTSB or was focused on protecting the interests of PTSB.

- 9.80 The obligation in General Principle 1 of the 2006 Code that PTSB contravened is to "*ensure that in all its dealings with customers*" PTSB acts fairly and professionally in the best interests of its customers. Mr Guinane must have been aware that he was being asked to decide unilaterally on behalf of PTSB what interest rate a group of customers should be charged under existing mortgage loan agreements whose terms regarding the interest rate to be charged to customers were ambiguous or uncertain. This must have been an unusual request to receive in a well-run bank in 2009 and should, in itself, have given him pause for thought. The unusual nature of this request might be expected to have triggered some recollection of regulatory duties to customers from an experienced and senior retail banker like Mr Guinane.
- 9.81 Mr Guinane did not seek clarification of what he was approving and did not offer any confirmation of what he believed he was approving. I have concluded that Mr Guinane was aware of the importance for customers of the decision that he was being asked to make. He should have been aware of the need to ensure that in its dealings with the 400 customers who he was told were then in the position set out in the Proposal email, PTSB was acting fairly and in their best interests. Even if he could not recall the obligations imposed on PTSB by the 2006 Code, Mr Guinane should have been aware that PTSB should not take advantage of its customers when applying an uncertain or ambiguous loan term. I find that Mr Guinane's awareness and knowledge of the circumstances of customers who would be affected by his decision was such that he would have understood that he was choosing what interest rate they would be asked to pay if he had read the Proposal with any care. He would also have been aware of the risk that customers may suffer material detriment from a wrong decision by PTSB

³⁰⁶ [Transcript of Inquiry Hearing, dated 22 February 2024, page 32](#), [Witness Statement of Frank Wynn, dated 21 December 2022 \(Core Book 2 Tab 135\)](#), [Transcript of Inquiry Hearing, dated 4 March 2024, pages 16 and 17](#), [Transcript of Inquiry Hearing, dated 28 February 2024, page 15](#), [Transcript of Inquiry Hearing, dated 6 March 2024, page 53](#).

on the interest rate payable on their mortgage loan agreement at this time. He nevertheless chose to sign off the confusingly presented Proposal within three minutes of receiving a follow up email from Mr O'Grady.

9.82 Mr Guinane's action in signing off the Proposal when he had a good understanding of the risks to customers and without adequate scrutiny or understanding is, on the face of it, reckless. He foresaw the risk at the ExCo meeting that PTSB might have an "exposure" as the "price promise" tracker rate they could charge was too low to cover PTSB's funding costs, which had increased significantly. He must therefore have seen the risk that were the "price promise" tracker rate not to be offered to customers, a customer would pay a significantly higher interest rate. He was told that 400 customers at that time were in a position where the interest rate they should pay was ambiguous, but that if they disputed the tracker rate they were offered, they would receive the "price promise" tracker rate. Nevertheless, Mr O'Grady expressly stated that PTSB had the option of making which ever rate it chooses available to the customers. The possibility of overcharging customers was therefore envisaged in the Proposal. Mr Guinane signed off the Proposal on the understanding that PTSB had a very low "exposure" without clarifying what this meant for customers. He agreed to the Proposal that PTSB allowed the customers who actually contacted it, of whom there had been one so far, to revert to their original tracker. He did not seek any clarification of what this meant for the remaining 399 customers and did not offer any clarification of what he was approving. Had he asked any question of Mr O'Grady he would have understood that the Proposal involved charging customers with the same contractual rights at different rates and that Mr O Grady was not comfortable with his role in relation to this issue³⁰⁷ and that he was relying on a member of staff who was also acting in an unfamiliar role. Had Mr Guinane clarified his reply in order to address the confusion in the Proposal and said what he was "OK with", he would have discovered that this was not the intention behind the Proposal. (It would have been a simple, quick and sensible step for a busy CEO to respond by adding a few words to his reply to say for example that he was "OK with all customers getting the price promise" given the lack of clarity in the Proposal email). He did neither. The risk that customers would be overcharged was apparent to, and not addressed by, Mr Guinane when responding to the Proposal.

9.83 The conclusions above regarding Mr Guinane's lack of care and apparent recklessness raise the question of whether a reckless or careless act can form the

³⁰⁷ [Transcript of Inquiry Hearing, dated 22 February 2024, page 120.](#)

basis for concluding that a person concerned in the management of a RFSP has participated in a prescribed contravention contrary to section 33AQ(2) of the 1942 Act. It is helpful and appropriate to address this issue prior to considering the question of Mr Guinane's culpability or blameworthiness for the prescribed contravention by PTSB.

- 9.84 Counsel for Mr Guinane addressed the question of carelessness in his closing remarks. He regarded the Notice of Inquiry and the outline of the SPC as setting out a specific allegation that he signed off the Proposal whilst understanding its effect, as follows:

"Obviously it's not the case here, or it's not suggested that Mr. Guinane took a cavalier approach -- well, it may in fact be suggested, and I'll return to that in relation to the submissions that have been made by Enforcement, but certainly it's not part of, or it's not my understanding that it's part of the allegation against Mr. Guinane that he acted in a cavalier fashion and took a decision without informing himself fully of the factual position [REDACTED]. The contrary allegation is made that he was fully informed of both the factual position [REDACTED] and he went ahead and signed off on it irrespective of that, knowing what he knew and having been advised, as he was advised, he signed off on it. And it is that signing off, having that knowledge, that's my understanding of his participation in the contravention.

.....

And obviously we make the point in our submission that he had to be fully aware of the factual position, he had to be fully aware [REDACTED] He also had to be fully aware that -- and of course understood how it was proposed to implement the strategy, and that by implementing the strategy, the effect of that would be to favour some customers over others and treat them unfairly. He had to be aware of those matters in order to have participated in the contravention.³⁰⁸

.....

"Now, of course if the circumstances were different, and if a Person Concerned in management had made a decision in a cavalier fashion and had closed their eyes to the factual position [REDACTED] that was put before them and

³⁰⁸ [Transcript of Inquiry Hearing, dated 14 March 2024, page 99.](#)

made a decision that ultimately resulted in a contravention by treating customers less favourably and perhaps unfairly, that of course would be an entirely different case, in my respectful submission. It's not a case that we're here or have to meet, but it could, by necessity, be a different kind of case, but it's not the case here. The allegation is very clear; it's that he signed off on this strategy and he did so in the full knowledge of the factual position

" 309

9.85 I do not accept this characterisation of the SPC. The Outline of the SPC states:

"...Mr Guinane participated in PTSB's contravention of Chapter 1, General Principle 1 of the 2006 Code (a prescribed contravention) by signing off on the proposal made to him on 19 January 2009 i.e. the strategy to only give the more favourable rate back to those customers who specifically requested their original and lower interest rate, or queried or complained"[Emphasis added]

The SPC alleges that Mr Guinane signed off the Proposal and it sets out the "strategy" behind the Proposal and which was pursued following the signing off of the Proposal. It does not state that Mr Guinane was fully aware of the strategy. It states that he signed off on the Proposal that would implement this strategy. The significance of his understanding lies in whether, if he did not know what the Proposal would entail, he can be said to have participated in any prescribed contravention that it gave rise to, and in addition, whether he can be culpable or blameworthy if he was unaware of the consequences or that those consequences could lead to a prescribed contravention.

9.86 Mr Guinane and Enforcement had ample opportunity to make submissions in relation to the interpretation to be given to "participation" under Part IIIC of the 1942 Act and the Inquiry received advice from the LPT and extensive submissions from the Mr Guinane and Enforcement on this issue during, and prior to, the Legal Issues Hearing and the Substantive Inquiry Hearing.³¹⁰ However, following the end of the Substantive

³⁰⁹ [Transcript of Inquiry Hearing, dated 14 March 2024, page 101.](#)

³¹⁰ The Inquiry Member requested submissions: [letter from RDU to the Person Concerned, dated 24 March 2023, enclosure Issues of Law List, to letter from RDU to the Person Concerned, dated 24 March 2023, Transcript of Inquiry Management Meeting, dated 26 June 2023 \(Core Book 9 Tab 5\)](#), together with [letter from RDU to the Person Concerned, dated 28 June 2023](#), and the [letter from RDU to the Person Concerned, dated 7 September 2023](#). The submissions received from Person Concerned: [Outline Legal Submissions on behalf of the Person Concerned on issues raised by the Inquiry Member dated 31 July 2023 \(Core Book 7 Tab 5\)](#), [Initial Discrete Observations on behalf of David Guinane upon the Investigation Report \(Core Book 6 Tab 6\)](#), [Oral submissions at the Legal Issues Hearing, dated 11 October 2023 \(Core Book 9 Tab 7\)](#), [Outline Closing Submissions on behalf of the Person Concerned, dated 14 March 2024](#), [Oral Closing Submissions, dated 14 March 2024](#) and [Oral Closing Submissions, dated 15 March 2024](#).

Inquiry Hearing, it became clear that the advice and extensive submissions on how “participation” should be interpreted in the context of the 1942 Act had made only limited reference to the question of whether participation could arise from a lack of care. Mr Guinane and Enforcement had focused on other aspects of this issue. I therefore sought specific advice from the LPT³¹¹ and thereafter invited submissions from Mr Guinane and Enforcement on the question of whether a person concerned in the management of a RFSP who recklessly or negligently (or carelessly) takes an active part in an act of a series of acts by that RFSP that gives rise to a prescribed contravention by the RFSP of a regulatory requirement imposed under the 1942 Act can be found to have participated in that prescribed contravention. I also requested advice and submissions on the meaning of “recklessness” in both a civil and criminal law context, and any guidance on the extent to which it is to be assessed on the basis of a subjective or an objective test.

9.87 The advice of the LPT reviewed the law in relation to recklessness and the relevant case law in both civil and criminal law in relation to recklessness and how this might inform the interpretation of “participation” for the purposes of this Inquiry. The LPT concluded that bearing in mind their previous advice on “participation”, and the fact there are no decisions of the Courts on this specific issue, their advice was as follows:

- (a) In the absence of any statutory definition, the words “participating” and “participated” should be given their ordinary meaning. Other case law on participation in different contexts may illustrate that “participation” is a question of fact and degree. In any event, the inclusion of a requirement that a person concerned in the management of a RFSP is participating or has participated in the commission of a prescribed contravention by the financial services provider requires an analysis of the role played by each relevant person concerned in the alleged acts or omissions. That is the approach suggested by Noonan J. in *Fingleton v Central Bank of Ireland*.³¹² The 1942 Act does not create a criminal offence, therefore, the case law in relation to criminal law presumptions in relation to mens rea and Article 38.1 of the Constitution are not applicable.
- (b) The meaning to be attributed to section 33AO(2) of the 1942 Act is determined by reference to the ordinary principles of statutory interpretation as set out in

³¹¹ [LPT Opinion, dated 17 July 2024.](#)

³¹² [Fingleton v Central Bank of Ireland \[2016\] IEHC 1 section 33AO\(2\) \(Core Book 7 Tab 40\).](#)

Heather Hill.³¹³ The provision does not contain words that suggest the Oireachtas intended a specific mental element as a precondition to a finding that a person concerned in the management of a RFSP had participated in a contravention by the RFSP.

- (c) Had the Oireachtas intended that a particular mental element should be prescribed, it could easily have done so, as with other provisions of 1942 Act and other Central Bank Acts.

9.88 The LPT advised that elsewhere in the 1942 Act, a requirement for particular knowledge or intention is set out in provisions that create offences e.g. Section 5C(6)(b) creates the offence of *intentionally* preventing or obstructing an investigation by the Central Bank. Section 134(6) of the Central Bank Act 1989 creates the offence of “*knowingly or recklessly*” giving misleading information to the Minister for Finance or the Central Bank to enable a person to obtain an exemption from a business restriction order. Section 271 of the Central Bank Act 1997 creates the offence of providing false or misleading information in a supervisory return or document to the Central Bank where the person “*knows or ought reasonably to know*” that the information is false or misleading.

9.89 Enforcement did not make any new submissions on these issues.

9.90 Counsel for Mr Guinane responded by stating that Mr Guinane maintained the written and oral submissions which he had previously made in this Inquiry in relation to “participation” as the term is used in the 1942 Act. Mr Guinane’s objections to my decision to seek advice and submissions at this stage of the Inquiry were also set out. The submissions went on to explain that a mental element must be proved on the part of the Person Concerned in order for it to be possible to find lawfully that he had participated in the commission of any prescribed contravention which PTSB might be found to have committed. The submission stated that this flows from a proper interpretation of the statutory provisions, interpreted as they must be in light of the requirements of the Constitution and of other fundamental rights. It was submitted that the required mental element is one of intent/knowledge. Without prejudice to all of that, it was also submitted that the evidence in the Inquiry had not disclosed any mental

³¹³ [Heather Hill Management Co & Anor v An Board Pleanala & Anor \[2022\] IESC 43 \(Core Book 7 Tab 57\).](#)

element – neither knowledge/intent, recklessness nor negligence – on the part of the Person Concerned.

- 9.91 The submissions on behalf of Mr Guinane took issue with the LPT’s assertion that civil and regulatory failings may not require a mens rea or other mental element. Strong objections were made on the basis of case law and general principles to the idea that strict liability may arise under the 1942 Act. The submissions referred to the definition of “*contravene*” in the 1942 Act, which it said is, in turn, relevant to, the meaning of “*contravention*” and what is required to “*participate*” in a contravention:

“Section 33AN provides:-

““contravene” includes fail to comply, and also includes—

(a) attempting to contravene, and

(b) aiding, abetting, counselling or procuring a person to commit a contravention, and

(c) inducing, or attempting to induce, a person (whether by threats or promises or otherwise) to commit a contravention, and

(d) being (directly or indirectly) knowingly concerned in, or a party to, a contravention, and

(e) conspiring with others to commit a contravention;”

Therefore, the Oireachtas has specifically legislated (in subparagraph (d)) to refer to a situation where someone is “knowingly concerned in, or a party to, a contravention”. It is impossible to see why the Oireachtas would have done so if the relevant matters entailed absolute liability, requiring no mental element at all. If that were so, subparagraph (d) would be surplus and redundant. To the contrary, this wording supports the view that there is a required mental element, and that mental element is knowledge.”³¹⁴

- 9.92 The submissions stated if recklessness was in issue, it would need to be considered on the basis of Mr Guinane’s subjective knowledge. However, Mr Guinane repeated the earlier submission that Enforcement had already taken upon itself to assert a

³¹⁴ [Outline Submissions on behalf of the Person Concerned on the LPT’s opinion dated 17 July 2024, dated 20 September 2024, pages 11 & 12.](#)

mental element – that of full awareness or knowledge – on Mr Guinane’s part. In addition the Notice of Inquiry asserted “*full awareness*” on the part of the Person Concerned.³¹⁵ It was further submitted that knowledge is required as a corollary of the serious nature of the Administrative Sanctions Procedure, and the potential penalties and opprobrium to which that procedure exposes a person. Support for this was said to emerge from *CW v Ireland*³¹⁶ where O’Donnell C.J. and O’Malley J. stated at §189:

“Silence in that matter will be interpreted to mean that mens rea is required, rather than excluded (which would still leave the difficult question as to what exactly was required by mens rea and whether intention, recklessness, or in some cases, carelessness, will suffice).”

Counsel for Mr Guinane concluded that the words “*in some cases*” reveal that a mental state as low as mere carelessness is very much the exception. Paragraph 46 of the submission provided:

*“Here, what is alleged is that Mr. Guinane participated in PTSB acting “unfairly” contrary to General Principle 1 of the Consumer Protection Code 2006. Such an allegation against Mr. Guinane does not make any sense, absent proof that he actually averted his mind to the unfairness in question. It has not been proven on the evidence that he did.”*³¹⁷

9.93 I have concluded that Mr Guinane had sufficient knowledge to understand that his decision in response to the Proposal would have a material financial impact on a group of customers. The difference in the tracker interest rates that might apply to the customers’ mortgage loan agreements was significant. Mr Guinane would also have been aware of the level of concern and anxiety that customers can feel if the affordability of a mortgage loan is in doubt. The potential for the decision on the Proposal to harm customers was foreseeable. The facts that I have found do not support a conclusion that Mr Guinane formed an intention to treat customers unfairly and contrary to their best interests. This is not because he lacked subjective knowledge about the circumstances giving rise to the decision, the facts on which the decision was to be made or the potential consequences of the decision. I have concluded that he did not intend to treat customers unfairly and contrary to their best interests because he made his decision solely on the basis of considering the consequences for PTSB

³¹⁵ [Outline Submissions on behalf of the Person Concerned on the LPT’s opinion dated 17 July 2024, dated 20 September 2024, page 17.](#)

³¹⁶ [CW v Ireland \[2023\] IESC 22.](#)

³¹⁷ [Outline Submissions on behalf of the Person Concerned on the LPT’s opinion dated 17 July 2024, dated 20 September 2024, page 13.](#)

and he did not apply his mind to the consequences of his decision for customers. He made his decision without adequate care and attention. Failing to exercise due care caused him to take an active part in the SPC. Failing to take care when a risk of harm to customers is apparent is a more serious failing and appears reckless.

9.94 I conclude that in the particular circumstance of this Inquiry participation under section 33AO(2) and section 33 AQ(8) of the 1942 Act in a breach of the 2006 Code can arise from conduct that was carried out recklessly or negligently rather than intentionally.

9.95 I conclude on the balance of probabilities that when Mr Guinane reviewed and responded to the Proposal he considered the “exposure” of PTSB before responding, but he did not consider the consequences for customers. Mr Guinane did not form a specific intention with regard to the treatment of customers who would be affected by the Proposal. He approved the Proposal without taking any care of, or paying any attention to, the consequences for customers despite being in a position to understand the significance of the proposal for them and the risk that customers could be overcharged.

(e) *Mr Guinane’s culpability or blameworthiness for the prescribed contravention by PTSB*

9.96 I find that Mr Guinane did not take adequate care when signing off the Proposal.

9.97 I find that the evidence points to Mr Guinane being in a position to understand on 19 January 2009 the potential implication for customers and for PTSB of the issue that he was asked to decide.

9.98 Counsel for Mr Guinane submitted that a blameworthy mental state is required for the purposes of the Administrative Sanctions Regime under Part IIIC of the 1942 Act, not least on account of the very serious potential consequences provided for under that regime. It was submitted that this is required as a matter of constitutional law. It was argued that the imposition of significant civil liability upon a blameless person (like the Person Concerned) under Part IIIC would also infringe article 40.3 of the Constitution.

The submissions contended that various cases demonstrated: “*general aversion on the part of Irish constitutional law to sanctions without blameworthiness*”.³¹⁸

9.99 Although acknowledging that Part IIIC is not a criminal regime, it was submitted that on the question of statutory interpretation, in light of constitutional norms, there are strong doubts as to whether the Oireachtas actually required, or could constitutionally have required, persons concerned in the management of RFSPs to be open to severe sanctions absent a blameworthy mental state on their part.

9.100 I consider that if a person concerned in the management of a RFSP participates in a prescribed contravention and took active steps with an intention to cause that prescribed contravention to take place, that intention would be highly relevant (and in many circumstances conclusive), in deciding that that persons participation was blameworthy. However, *intention* is only one of a number of factors to take into account in deciding upon someone’s culpability or blameworthiness for participating in a prescribed contravention. In other circumstances, it would be commonplace for a driver who causes a road accident by careless driving to be regarded as being culpable for their role in the accident despite a complete lack of intention to cause it. In contrast, it would be unusual for a shop worker who intends to sell food prepared by others for immediate consumption by customers to be regarded as blameworthy for any food poisoning resulting from the consumption of the food. In both cases, the culpability or blameworthiness of the individual is likely to be judged more on the basis of the care they took, the knowledge that they had, or could or should have had, and the active or passive nature of their involvement than on their intention.

9.101 I note Noonan J’s comments about a person’s seniority within a RFSP being relevant to their “*blameworthiness*”³¹⁹ in *Fingleton v Central Bank of Ireland*. In this case, I find that Mr Guinane’s seniority is relevant in considering what knowledge and understanding Mr Guinane had and what duty of care might reasonably be expected of him, but it adds little to an assessment of his blameworthiness.

9.102 The degree of blame that attaches to a lack of care needs to take account of other factors affecting a person concerned in the management of a RFSP. In this case these factors include the many demands on Mr Guinane’s time and attention and the unclear

³¹⁸ [Outline Submissions on behalf of the person concerned on the LPT’s opinion dated 17 July 2024, dated 20 September 2024, page 17.](#)

³¹⁹ [Fingleton v Central Bank of Ireland \[2016\] IEHC 1, paragraph 76 \(Core Book 7 Tab 40\).](#)

and ambiguous nature of the Proposal that he was considering. His participation was not enough on its own to cause the contravention and it arose in part because his colleagues and subordinates failed to exercise their own judgement properly. Mr Guinane was facing extraordinary demands on his time and energy during the Relevant Period. He was let down by the cumulative failures of other managers in PTSB and the IL&P Group, including those on whose particular expertise he was entitled to place some reliance. Mr Guinane is not responsible for system and compliance failures that contributed to the contravention by PTSB where these arose in functions and roles within the IL&P Group that did not report directly to him. Mr Guinane received inadequate support in his role as CEO of IL&P's banking division from the compliance and legal functions within the IL&P Group, who should have identified the regulatory responsibilities that needed to be considered when PTSB was deciding on how to implement SC706. However, I do not accept the contention of Mr Guinane's counsel (set out at paragraph 9.27 above) that in this case there could not have been any mental element or active element as advice was taken at the time from others. Mr Guinane did not seek advice, nor did he suggest that it be taken from the legal or compliance functions at the ExCo meeting on 13 January 2009 or before he responded to the Proposal. Instead he received a report of the advice given by the legal function that lacked clarity and consistency. His position was made more difficult by the failings of systems and other people in an over-stretched and under-skilled organisation for which the directors of the RFSP should bear ultimate responsibility. These are all matters of substance and degree that are relevant in determining the culpability and blameworthiness of Mr Guinane's participation in the prescribed contravention.

9.103 A CEO cannot cover all issues arising in a regulated business and must rely on delegation to trusted and competent members of staff. However, a CEO must be diligent in meeting legal and regulatory obligations. In this instance, Mr Guinane's conduct is blameworthy in making a decision that he understood involved deciding on the conflicting interests of PTSB and a group of 400 customers on a matter that was significant to the customers on the basis of the briefest of reviews of unclear information and without seeking any clarification at the time or clarifying his decision when he made it and without considering the impact on the customers.

9.104 I have concluded that Mr Guinane's sign off of the Proposal on 19 January 2009 was an active cause of the acts that gave rise to the contravention by PTSB. Mr Guinane was not an unthinking cog in a corporate wheel. He was in a position to understand

what he was deciding and what the consequences may be. He had the time and opportunity to consider his decision, but he made it quickly and may not have understood the effect of what he was deciding. He signed off the Proposal without taking any care of, or paying any attention to, the consequences for customers and despite being in a position to understand the risk that customers could be overcharged. Thereafter, he failed to take any steps to check that customers were being treated fairly and in their best interests. He was aware that his sign off would lead to the Proposal being implemented and he did not seek any further information about what would happen as a consequence of this sign off.

9.105 I find that Mr Guinane's participation in the prescribed contravention was blameworthy and culpable.

CONCLUSION

9.106 From advices provided by the LPT and the submissions of Mr Guinane and Enforcement, it is clear that "*participation*" is not defined for the purpose of the 1942 Act. The word must therefore be given its ordinary and natural meaning. The 1942 Act therefore set a comparatively low standard in providing that a person concerned in the management of a RFSP could be held responsible for the commission of a prescribed contravention by that RFSP if the person "*is participating or has participated in*"³²⁰ the prescribed contravention. The 1942 Act did not say that the person had to cause or be responsible for the contravention or that they had to intend for it to happen or be aware that it would arise.

9.107 I reviewed the submissions of Mr Guinane and Enforcement and the advice of the LPT on "*participation*" with care. I consider that the five point approach outlined at Paragraph 9.29 that I have adopted in deciding whether Mr Guinane participated in the prescribed contravention by PTSB is consistent with many of the positions advanced on Mr Guinane's behalf. I agree that the allegation against Mr Guinane in the Outline of the SPC is not to be decided on the basis of strict liability. A mental element is required. I agree that in the circumstances of this Inquiry, when considering if Mr Guinane was reckless, his subjective knowledge should be taken into account. I consider that when deciding if Mr Guinane took due care in his conduct and in meeting his regulatory obligations, I should consider all of the circumstances that were relevant to his conduct including the exceptional position of PTSB during the Relevant Period.

³²⁰ [Part IIIC, Central Bank Act 1942 \(as amended\), section 33AO\(2\) \(Core Book 5 Tab 1\).](#)

I also accept that some culpability or blameworthiness should be present before concluding that any careless, negligent or reckless act or omission by Mr Guinane constitutes participation in a SPC.

9.108 I do not agree that Enforcement and the Notice of Inquiry asserted full knowledge or awareness was required on the part of the Person Concerned. The Outline of the SPC sets out the facts of which it says Mr Guinane was “*fully aware*”. I have concluded that he was aware of these facts when he signed off on the Proposal.

9.109 In coming to a conclusion on whether the findings of fact set out in Chapters 7, 8 and in this Chapter establish that Mr Guinane participated, as the term is used in section 33AO and 33AQ of the 1942 Act, in the prescribed contravention by PTSB, I have decided that:

- (a) As a matter of fact and on the ordinary and natural meaning of the word, Mr Guinane, “participated” in the prescribed contravention by PTSB by signing off on the Proposal. He took take part in the prescribed contravention.
- (b) In so doing, Mr Guinane took an active role in the prescribed contravention by PTSB.
- (c) Mr Guinane had the knowledge set out at paragraphs 9.3, 9.4, 9.6, 9.7, 9.8 and 9.10 above when signing off the Proposal. He was in a position to understand the issue that he was being asked to consider and to decide and to assess the implications of the decision for PTSB and the relevant customers. However, the Proposal lacked clarity on what it was asking Mr Guinane to approve. This lack of clarity was evident from the text of the Proposal.
- (d) When Mr Guinane reviewed and responded to the Proposal he considered the “exposure” of PTSB before giving his approval, but he did not have any regard to the consequences for customers. This was despite him being in a position to understand the significance of the proposal for customers and the risk that customers could be charged a higher interest rate than they were contractually obliged to pay. Mr Guinane did not form a specific intention with regard to the treatment of customers who would be affected by the Proposal.
- (e) By signing off the Proposal without taking due care over, or paying any attention to, the consequences for customers, despite being in a position to understand the risk that customers could be overcharged, and thereafter failing to take any

steps to check that customers were being treated fairly and in their best interests. Mr Guinane's conduct was culpable and blameworthy.

9.110 I have concluded that, in the particular circumstance of this Inquiry, participation under section 33AO(2) and section 33 AQ(8) of the 1942 Act in a breach of the 2006 Code can arise from conduct that was carried out recklessly or negligently rather than intentionally. I am aware of the distinction between recklessness and negligence and the different manners in which these terms may be applied in civil, regulatory or criminal matters. I have received submissions from Mr Guinane and Enforcement and advice from the LPT on these issues. In these findings I have sought to describe the state of mind of Mr Guinane at particular times and in relation to particular actions or omissions. I have referred to Mr Guinane appearing to be reckless in signing off the Proposal without considering the position of customers despite being in a position to understand that the Proposal created a risk that customers could be overcharged. I have said that he needed to be diligent in meeting his legal and regulatory duties in respect of mortgage customers and he was not. I have also referred to his lack of care and/or attention at various times when describing his approach when he was considering and responding to the Proposal. In so doing, I have sought to reflect the evidence and submissions in relation to particular actions or omissions on his part. Mr Guinane's lack of care, attention or diligence is indicative of negligence. The evidence does not lead me to conclude that Mr Guinane was aware of the risk that PTSB could be in breach of its regulatory obligations to its customers if he signed off the Proposal. There was no input from other managers and professionals in PTSB that alerted him to this risk. He should have been aware of his regulatory obligations, but he was not. In this respect he was negligent.

9.111 I find that Mr Guinane participated in PTSB's failure to ensure that in its dealings during the Relevant Period it acted fairly and in the best interests of those customers whose mortgage loan agreements contained SC706. His participation arose as a result of a failure to consider the implications for customers of his sign off of the Proposal. My conclusion having taken account of all of the relevant circumstances, including his subjective knowledge at the relevant time is that this failure to consider the implications for customers arose from a serious lack of care and attention when considering and responding to the Proposal, rather than a reckless disregard for the consequences of the Proposal for customers.

9.112 Pursuant to section 33AQ(8)(a) of the 1942 Act I conclude, on the balance of probabilities, that Mr Guinane's sign off on 19 January 2009 of the Proposal is sufficient to establish that he has participated, while being a person concerned in the management of IL&P Group, in the prescribed contravention by PTSB.

9.113 It is, I hope, apparent from these findings that my current view is that there are mitigating factors to be taken into account in considering the seriousness of Mr Guinane's participation in PTSB's prescribed contravention. I will seek submissions with regard to sanction, which will permit submissions to be made on such mitigating factors.

The grounds on which the finding is based

9.114 The grounds on which this finding is based are set out in Chapters 7, 8 and 9 of these written findings.

COMMENT

9.115 Mr Guinane and his representatives expressed concern and anger during the course of the Inquiry at the position in which Mr Guinane finds himself. I understand that amongst other concerns; Mr Guinane feels strongly that he has been singled out as a scapegoat for what was a widespread 'scandal' in the banking sector. He is being held accountable for things that took place fifteen years ago. Over the years since he believes that an allegation of dishonesty has been hanging over him. Mr Guinane is of the view that all of this has arisen because he issued a three word approval to accept a recommendation put to him by others in an organisation for which he did not have the ultimate regulatory responsibility. I think it appropriate and just to clarify my position at this stage on some issues that are of understandable concern to Mr Guinane, even if they are not essential to my overall conclusion:

- (a) There is no finding of dishonesty against Mr Guinane and the Inquiry has never understood this to be a part of the SPC. At the start of the Substantive Inquiry Hearing the LPT when summarising the progress of the Inquiry up to that point clarified that "*It is not suspected or alleged that PTSB or Mr Guinane acted dishonestly*";³²¹

³²¹ [Transcript of Inquiry Hearing, dated 21 February 2024, page 29, line 1.](#)

- (b) Mr Guinane did not form an intention to harm or take advantage of customers;
- (c) Mr Guinane was entitled to receive better support from within the IL&P Group and his position was made more difficult by the failings of systems and people in an over-stretched and under-skilled organisation from which he was entitled to expect support and expertise; and
- (d) The ultimate responsibility for regulatory compliance in PTSB during the Relevant Period lay with the board of IL&P Group, of which Mr Guinane was not a member.

PART B

DECISION ON SANCTION

An Inquiry pursuant to Part IIIC of the Central Bank Act 1942 (as amended) concerning Mr David Guinane

Decision on Sanction

Mr Peter Hinchliffe

23 April 2025

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DECISION ON SANCTION

INTRODUCTION

1. As a consequence of the finding that Mr Guinane has participated in the contravention by PTSB of its duty under General Principle 1 of Chapter 1 of the Consumer Protection Code 2006 (**2006 Code**) to ensure that in all its dealings during the Relevant Period it acted fairly in the best interests of its customers, I am required under section 33AQ(5) of the Central Bank Act 1942 Act (as amended) (the **1942 Act**) to consider what sanctions (if any) are to be imposed on Mr Guinane. In accordance with section 8.1 of the Outline Procedure¹ for the Inquiry, I convened a sanctions hearing to hear submissions on whether any sanction should be imposed, and if so, what the nature of that sanction or sanctions should be.
2. The sanctions hearing took place on 29 January 2025 and was held in public. In advance of the hearing I invited written submissions on sanctions from Mr Guinane and Enforcement (and any other documentation they wished me to take into account when considering sanctions). I also identified additional information, as set out below that I considered might be relevant in making a decision on this issue. Furthermore, I invited Mr Guinane and Enforcement to make oral submissions at the sanctions hearing.

Possible sanctions

3. The sanctions that may be imposed at the conclusion of the Inquiry are provided for in sections 33AQ(5) and (6) of the 1942 Act, as they were in force during the Relevant Period, and include:
 - (a) caution or reprimand;
 - (b) a direction to pay to the Central Bank a monetary penalty not exceeding €500,000;

¹ Inquiry Outline Procedure, dated 2 April 2022 (Core Book 6 Tab 7).

- (c) a direction disqualifying the person from being concerned in the management of a regulated financial service provider (**RFSP**) for such period as is specified in the order; and/or
 - (d) a direction to pay to the Central Bank all or a specified part of the costs incurred by the Central Bank in holding the Inquiry and in investigating the matter to which the Inquiry relates.
4. The Central Bank has set out some of the factors to which an Inquiry Member may have regard when determining the appropriate sanction, if any, to impose in paragraphs 5.8 and 5.9 of “*Inquiry Guidelines prescribed pursuant to section 33BD of the Central Bank Act 1942*” (the **2014 Inquiry Guidelines**)² and section 6 of the Outline of the Administrative Sanctions Procedure 2018 (**Outline of the ASP 2018**),³ which is supplemented by Part II of the ASP Sanctions Guidance November 2019 (the **2019 Sanctions Guidance**).⁴ These factors are not exhaustive and an Inquiry Member may take other relevant factors into account, as appropriate.
5. Paragraph 5.9 of the 2014 Inquiry Guidelines states:

“All the circumstances of the case will be taken into account by the Inquiry Members in determining the appropriate sanction(s) and, in doing so, regard may be had to the following factors –

1. *The Nature, Seriousness and Impact of the Contravention*

- (a) whether the contravention was deliberate, dishonest or reckless;*
- (b) duration and frequency of the contravention;*
- (c) the amount of any benefit gained or loss avoided due to the contravention;*
- (d) whether the contravention reveals serious or systemic weaknesses of the management systems or internal controls relating to all or part of the business;*

² 2014 Inquiry Guidelines prescribed pursuant to section 33BD of the Central Bank Act 1942 (Core Book 5 Tab 2).

³ 2018 Outline of the Administrative Sanctions Procedure (Core Book 5 Tab 3).

⁴ ASP Sanctions Guidance November 2019.

- (e) *the extent to which the contravention departs from the required standard;*
- (f) *the impact or potential impact of the contravention on the orderliness of the financial markets, including whether public confidence in those markets has been damaged or put at risk;*
- (g) *the loss or detriment or the risk of loss or detriment caused to consumers or other market users;*
- (h) *the effect, if any, of the contravention on vulnerable consumers;*
- (i) *the nature and extent of any financial crime facilitated, occasioned or otherwise attributable to the contravention;*
- (j) *whether there are a number of smaller issues which individually may not justify administrative sanction, but which do so when taken collectively;*
- (k) *any potential or pending criminal proceedings in respect of the contravention which will be prejudiced or barred if a monetary penalty is imposed pursuant to the Administrative Sanctions Procedure.*

2. *The Conduct of the Regulated entity after the Contravention*

- (a) *how quickly, effectively and completely the regulated entity brought the contravention to the attention of the Central Bank or any other relevant regulatory authority;*
- (b) *the degree of co-operation with the Central Bank or other agency provided during the investigation of the contravention;*
- (c) *any remedial steps taken since the contravention was identified, including identifying whether consumers have suffered loss or detriment and compensating them, taking disciplinary action against staff involved (where appropriate), addressing any systemic failures, and taking action designed to ensure that similar problems do not arise in the future;*
- (d) *the likelihood that the same type of contravention will recur if no administrative sanction is imposed;*
- (e) *whether the contravention was admitted or denied.*

3. *The Previous Record of the Regulated entity*

- (a) whether the Central Bank has taken any previous enforcement action including instances resulting in a settlement or sanctions or whether there are relevant previous criminal convictions;*
- (b) whether the regulated entity has previously undertaken not to do a particular act or engage in particular behaviour;*
- (c) whether the regulated entity has previously been requested to take remedial action, and the extent to which such action has been taken.*

4. **Other General Considerations**

- (a) prevalence of the contravention;*
- (b) the appropriate deterrent impact of any sanction on the regulated entity and on other regulated entities;*
- (c) action taken by the Central Bank in previous similar cases;*
- (d) the level of turnover of the regulated entity in its last complete financial year prior to the commission of the contravention; and*
- (e) any other relevant consideration”.*

Invitation to make Written Submissions

6. Mr Guinane and Enforcement were invited to make any submissions that they thought relevant to the decision that I have to make on what sanction (if any) should be imposed and the factors that I should take into account in doing so. In order to assist Mr Guinane and Enforcement, I gave the following examples of issues which could be of assistance:

- (a) Whether one or more sanctions should be imposed.
- (b) If a sanction is to be imposed, the nature of such sanction.
- (c) The matters to which I should have regard when deciding on any appropriate sanction, including the relevant sanctioning factors within paragraphs 5.8 and 5.9 of the 2014 Inquiry Guidelines, section 6 of the Outline of the ASP 2018 and Part II of the 2019 Sanctions Guidance.

- (d) Any other information relevant to sanctioning factors to which I should have regard when deciding on any appropriate sanction.

Ultimately, however, I explained, in correspondence, that it was, of course, for Enforcement and Mr Guinane themselves to consider the focus and content of their respective submissions.

7. I informed Enforcement that if its submissions suggested that sanctions should include a direction in relation to costs, then I would require further information in that regard. I also informed Mr Guinane that it was likely that I would request relevant information from him about his current financial position, the remuneration he received from PTSB during, or in respect of, the Relevant Period and any current or proposed employment that may be affected by any sanction on him. I confirmed that Enforcement and Mr Guinane may wish to provide the relevant information in their written submissions and that precise requests for the provision of additional information prior to the sanctions hearings would, if required, be made after sight of these submissions.
8. Mr Guinane did not provide any such relevant information with his written submissions. I therefore issued directions on 17 December 2024 requiring any submissions that Mr Guinane might wish to make in relation to his financial position to be provided prior to the sanctions hearing. I directed that the following information be provided to the Inquiry:
 - (a) Any information regarding Mr Guinane's current financial position that Mr Guinane wished the Inquiry Member to take into account should the Inquiry Member consider imposing a monetary penalty or a direction to pay costs.
 - (b) Full details of all and any remuneration that Mr Guinane received from PTSB during, or in respect of, the Relevant Period including all salary, benefits or bonus received during the Relevant Period and any bonus or other remuneration or benefit received after the Relevant Period that related to, or arose as a consequence of, Mr Guinane's employment with PTSB during the Relevant Period.
 - (c) Details of any current or proposed employment that might be affected by any sanction.

(d) Any health issues that might be adversely affected by the imposition of any sanction.

9. On 23 January 2025, Mr Guinane provided information about the remuneration that he received from PTSB during, or in respect of, the Relevant Period and about his current net income. He did not make any submissions that indicated that he may suffer hardship or bankruptcy as a result of the imposition of a monetary penalty or a direction to pay costs and he did not provide information on his net worth or capital assets. I also asked PTSB to confirm the remuneration Mr Guinane received from PTSB during, or in respect of, the Relevant Period. PTSB responded and stated the gross and net remuneration that Mr Guinane received from PTSB during, or in respect of, the Relevant Period.

Guidance from the Legal Practitioner Team (LPT)

10. Given the lack of previous decisions on sanctions in other inquiries held under Part IIIC of the 1942 Act, I asked the LPT to provide guidance that may assist the Inquiry on the following matters:
- (a) The approach of other comparable Irish regulators to the decision on choice of sanctions in cases of regulatory breach.
- (b) Any decisions of the High Court which provide guidance as to regulatory decisions on choice of sanctions in cases of regulatory breach.
- (c) Any other relevant guidance under Irish law.
11. The guidance from the LPT was provided to me and shared with Enforcement, Mr Guinane and PTSB (the **Inquiry Participants**) prior to the sanctions hearing. It provided a helpful review of the matters referred to in paragraph 10 and provided some guidance for the Inquiry Participants and I to consider on the issues that might be relevant when deciding on sanctions at the conclusion of this inquiry. The LPT's conclusion stated:

“Although different regulatory regimes that provide for the imposition of a sanction involve their own specific statutory schemes, some concepts seem to be of general application. Most determinations of sanction involve a consideration of the proportionality of the sanction by reference to the particular conduct and the gravity of the breach in question. The purpose of the system of sanctions for the regulatory breach is also generally regarded as a relevant matter. Policies of deterrence and protection of the public have also been taken into consideration. Regard has also been had to case-specific factors that may impact the severity of any sanction, such as any aggravating or mitigating circumstances that are present.”⁵

WRITTEN SUBMISSIONS

12. Enforcement made extensive written submissions⁶ on sanction. Enforcement confirmed that there is no precedent for the imposition of sanctions by the Central Bank at the conclusion of an inquiry conducted under Part IIIC of the 1942 Act. Enforcement’s submissions stated:

“54. As the Central Bank has to date not imposed sanctions at the conclusion of an inquiry conducted under Part IIIC of the [1942] Act, there is no available Central Bank Inquiry precedent.

55. While the Central Bank has concluded enforcement actions under Part IIIC of the Act, Enforcement submits these are not “previous similar cases” to assist the Inquiry in the determination of sanction. The Central Bank’s previous Enforcement outcomes, concluded under section 33AR and 33AV of the Act (as they applied during the Relevant Period), are not analogous to the present Inquiry, as they were resolved on terms agreed between the parties, including agreement to the imposition of a sanction.”

13. I do not propose to summarise the written submissions of Enforcement in full here. I have taken full account of them. In summary, Enforcement argued that I should take account of the following factors in reaching a decision on sanction:

⁵ LPT Guidance, dated 13 December 2024.

⁶ Submissions on behalf of the Enforcement Directorate (“Enforcement”) regarding Sanctions, received on 29 November 2024.

- (a) The material role played by Mr Guinane in the commission by PTSB of the contravention.
- (b) Mr Guinane's failure to have regard to and/or pay due care and attention to the serious consequences of his actions for customers (who were mortgage holders).
- (c) The detriment or risk of detriment caused to consumers by the contravention.
- (d) The duration and frequency of the contravention.
- (e) The serious departure from standards by Mr Guinane.
- (f) Mr Guinane's conduct after the contravention.
- (g) Mr Guinane's previous record.
- (h) The need for sanctions to have a credible deterrent effect.

14. The conclusion to Enforcement's written submissions stated:

"For the reasons set out above, Enforcement therefore supports the imposition of the following sanctions on Mr Guinane:

- a. a monetary penalty;*
- b. a reprimand;*
- c. a period of disqualification;*
- d. a direction to pay a contribution to the costs incurred by the Central Bank in holding the Inquiry.*

In summary, it is Enforcement's position that the serious nature of the Contravention in which Mr Guinane was found to have participated should be reflected in the sanctions imposed, particularly given his senior role and his conduct, which fell distinctly short of the standard of conduct expected from a Chief Executive Officer. Those sanctions should act as an effective deterrent in order to protect the public interest and to ensure that the financial system operates in the best interests of consumers. Therefore, the sanctions must be

sufficient to achieve that objective, whilst also being proportionate in all the circumstances of the case and to Mr Guinane's circumstances."

15. Enforcement did not make any submission with regard to the amount of the monetary penalty that they believed should be imposed on Mr Guinane. It agreed that the maximum amount of the monetary penalty that I may impose is €500,000.

16. Enforcement clarified its position on costs and stated:

*"Enforcement submits that it would be appropriate, as part of any sanctions imposed, for the Inquiry Member to consider directing Mr Guinane to pay a contribution to the costs of the Inquiry by way of a fixed amount. For the avoidance of doubt, Enforcement is not seeking a direction from the Inquiry Members for a contribution by Mr Guinane towards Enforcement's costs in respect of undertaking the investigation, which led to the Inquiry, or the participation of Enforcement at the Inquiry."*⁷

17. Counsel for Mr Guinane also made extensive written submissions⁸ on sanctions and gave initial responses to the guidance from the LPT and the submissions made by Enforcement. I have taken them into account in their entirety. I do not seek to summarise the whole of their detailed submissions here, other than to point to the following legal arguments and conclusions that counsel for Mr Guinane derived from the Written Findings and expanded upon in the submissions and which it was argued constituted mitigating factors when considering sanction:

- (a) The need for proportionality.
- (b) The requirement for leniency evident in certain case law.
- (c) The 'extraordinary pressures' on Mr Guinane and the lack of support that he received from others in PTSB.
- (d) Recognition of the limits of Mr Guinane's responsibility.

⁷ Submissions on behalf of the Enforcement Directorate ("Enforcement") regarding Sanctions, received on 29 November 2024, pages 16 and 17, paragraph 74.

⁸ Outline Submissions on behalf of the Person Concerned in respect of the question of sanction, received on 17 January 2025.

- (e) The responsibility of others in respect of the contravention.
- (f) The impact of the findings in relation to the IL&P Group compliance function.
- (g) A lack of intent on Mr Guinane's part to disadvantage customers.
- (h) The once-off nature of the participation.
- (i) Mr Guinane's unblemished record.
- (j) Mr Guinane's co-operation with the Central Bank.
- (k) The overall delay in the Central Bank's investigation of Mr Guinane since the relevant events that gave rise to the Inquiry.
- (l) The lack of any gain by Mr Guinane as a result of his participation in PTSB's contravention.
- (m) Mr Guinane's state of mind at the time that I found relevant to his participation in the contravention by PTSB.

18. Submissions on behalf of Mr Guinane concluded:

*"For the reasons set out, and those to be offered, it is respectfully submitted that no sanction should be imposed but that, if a sanction is to be imposed, the factors and principles set out above incline towards a sanction on the very low end of the scale."*⁹

THE SANCTIONS HEARING

19. At the sanctions hearing, counsel for Mr Guinane and counsel for Enforcement were given the opportunity to make oral submissions supplementary to their written

⁹ Outline Submissions on behalf of the Person Concerned in respect of the question of sanction, received on 17 January 2025, paragraph 118.

submissions and to respond to any submissions made by the other participant and to the guidance provided by the LPT.

20. In answer to my questions, counsel for Enforcement reiterated that the Central Bank has not to date imposed sanctions at the conclusion of an inquiry conducted under Part IIIC of the 1942 Act and there is no available Central Bank precedent. Counsel for Enforcement stated:

“Well, in this particular instance, as I have already pointed out, there isn't a comparator case. So there have been situations in other contraventions where there have been settlements reached. But obviously settlement is very different because it involves various other factors that might discount what would otherwise be imposed. So there isn't a benchmark for you, Inquiry Member, but that's -- just to be clear, there is nothing unusual in that..... Part IIIC, when it was enacted, created a new regulatory regime and a new administrative sanctions procedure, and I suppose everybody has to start somewhere. So the only guidance that's given in the Act is the cap of half a million euro, and there is no other guidance.”¹⁰

21. Enforcement suggested that I would need to reach a decision on sanctions on the basis of first principles. Counsel for Enforcement addressed the argument by Mr Guinane's counsel that Enforcement had not set out the basis upon which the 2019 Sanctions Guidance “*can retrospectively apply in respect of conduct / participation occurring prior to that date*”.¹¹ Enforcement stated that the 2019 Sanctions Guidance was “*just the giving of examples by way of guidance*” in support of the 2014 Inquiry Guidelines. Counsel for Enforcement said that it was open to me to disregard the 2019 Sanctions Guidance.¹²

22. I asked Enforcement to clarify its position in relation to any direction requiring Mr Guinane to pay a contribution to the costs incurred by the Central Bank in holding the Inquiry. Enforcement confirmed that it was not seeking a direction to pay costs incurred by Enforcement in investigating Mr Guinane or arising from Enforcement's participation in the Inquiry. Enforcement submitted that it was within my discretion to make a

¹⁰ Transcript of Inquiry Hearing, dated 29 January 2025, page 68.

¹¹ Outline Submissions on behalf of the Person Concerned in respect of the question of sanction, received on 17 January 2025, paragraph 107.

¹² Transcript of Inquiry Hearing, dated 29 January 2025, page 22.

decision about the other costs of the Inquiry, but that Enforcement was not requesting a direction in respect of such costs.¹³

23. Counsel for Enforcement expressly confirmed that Enforcement did not wish to make any submission with regard to the amount of the monetary penalty that they argued I should impose.¹⁴
24. Counsel for Mr Guinane referred me to the written submissions submitted on Mr Guinane's behalf, and went on to emphasise a number of issues that they believed to be relevant in determining if any sanction was appropriate and, if so, what form it should take. These issues included the following:
- (a) The public interest does not require the imposition of any sanction in the circumstances of the Inquiry.
 - (b) Nobody else in PTSB was the subject of an inquiry.
 - (c) Any penalty imposed on Mr Guinane should be in the same proportion to his income as the fine imposed on PTSB in respect of the same contravention was to PTSB's income.
 - (d) Mr Guinane had cooperated fully in the context of the investigation.
 - (e) The findings of this Inquiry demonstrated a complete lack of intent on the part of Mr Guinane.
25. Counsel for Mr Guinane went on to say that it was difficult to comprehend how there could ever be any danger or risk or consequence for the public that justified the imposition of any of the sanctions that were being sought by Enforcement.¹⁵ It was emphasised that the existing High Court precedents on professional regulatory sanctions to which the Inquiry was referred were relevant to Mr Guinane and emphasised the need for leniency, save where the protection of the public was in issue. It was noted that in the case of *Central Bank of Ireland v Lynch*¹⁶ Irvine P. said that the

¹³ Transcript of Inquiry Hearing, dated 29 January 2025, page 38.

¹⁴ Transcript of Inquiry Hearing, dated 29 January 2025, page 39.

¹⁵ Transcript of Inquiry Hearing, dated 29 January 2025, page 49.

¹⁶ *Central Bank of Ireland v Lynch* [2022] IEHC 319.

sanction should be proportionate to what she described as the “*gains made or losses avoided*”. Mr Guinane’s counsel stated that Mr Guinane did not profit from the contravention. It was highlighted that the purpose of any sanction is to protect the public and also to uphold the standards of the regulatory environment relating to banking and to maintain public confidence in those standards and the regulatory process. It was said that in a professional regulatory environment the equivalence of suspension is reserved to only the very most serious cases, and that it could not be said that this was one of those cases.¹⁷

26. Counsel for Mr Guinane emphasised that under the 1942 Act it is not mandatory to impose a sanction where a finding is made against a regulated person¹⁸ and they went on to say:

- (a) Therefore the 1942 Act envisages that there are certain circumstances in which a sanction will not be appropriate.
- (b) No conceivable purpose could be served by a disqualification.
- (c) No application had been made for costs.
- (d) The public nature of the finding would, in itself, operate as a kind of sanction.
- (e) That no other person in any other financial institution had been the subject of any inquiry to date in relation to the so-called ‘tracker mortgage’ issue.
- (f) Mr Guinane has been singled out by the Central Bank and I should take this into account, together with the fact that it is 15 years since the events that are the subject of the Inquiry.
- (g) The Central Bank wishes to make an example of Mr Guinane and requires a sanction in order to do so and for that reason the Central Bank is making no concessions and urging that sanctions are applied notwithstanding the findings of mitigation in respect of Mr Guinane’s alleged conduct.

¹⁷ Transcript of Inquiry Hearing, dated 29 January 2025, page 72.

¹⁸ Transcript of Inquiry Hearing, dated 29 January 2025, page 54.

27. Overall, it was submitted by counsel for Mr Guinane that, consistent with the written submissions, the Written Findings did not justify any sanction.

DETERMINING SANCTION

28. I have considered the submissions and guidance that I have received from Mr Guinane, Enforcement and the LPT. I have also considered the case law to which I have been referred and the legal principles that apply to the conduct of this Inquiry and to the decision that I must make.
29. My starting point is the statutory basis upon which the Inquiry is being held. The applicable regime for present purposes is Part IIIC of the 1942 Act, as it was at the relevant time. Save for section 33AS thereof, the 1942 Act does not impose particular requirements or guidance in determining which, if any, of the sanctions set out in sections 33AQ(5) and (6) of the 1942 Act should be imposed where an inquiry under Part IIIC of the 1942 Act finds that a person concerned in the management of a regulated firm has participated in a prescribed contravention. Section 33AS provides that, if the Inquiry decides to impose a monetary penalty under section 33AQ, it may not impose an amount that would be likely to cause a person to be adjudicated bankrupt. Such consideration will only arise after the Inquiry has determined first, the appropriate sanction(s), if any, and second, if that sanction includes a monetary penalty, the amount of that penalty.
30. I will therefore approach my decision on sanction on the basis of applying general principles of law to the conclusions I have set out in the Written Findings. In my view, there is considerable consistency between the approach adopted to determining sanctions and penalties in the case law and the guidance issued by the Central Bank in relation to sanction, which is referred to in paragraph 4 above.
31. I conclude from the submissions and guidance that I have received, and from general principles of Irish and EU law that, in determining the appropriate and just sanction, I should have regard to the requirements of natural and constitutional justice; the proportionality of the sanction; the gravity of the regulatory breach; the individual circumstances of the case and Mr Guinane's conduct (including any aggravating or mitigating circumstances); the need to protect the public; and, the dissuasive or deterrent effect of the sanction on Mr Guinane and others.

32. Support for this approach can be found in the case law to which I was referred on the imposition of sanctions and penalties on individuals who have been found to be in breach of other legal and regulatory obligations. I have found this case law to be of assistance, while remaining mindful of the particular legal context applicable to each decision.

33. In *Central Bank of Ireland v Lynch*, Irvine P. concluded that the Court was under a duty in a confirmation hearing to:

*“satisfy itself that there was adherence to the prescribed procedures and also adherence to the requirements of natural and constitutional justice in the manner in which the respondent was found to have committed the suspected contraventions and in the manner in which the sanction was decided upon.”*¹⁹

34. In *Dowling v An Bord Altranais*²⁰ (“**Dowling**”), Ní Raifeartaigh J. at paragraph 67 approved an approach to deciding on sanctions based on the following:

“The first three matters referred to by Charleton J. in the Hermann case were matters relating to the seriousness of the conduct, the principle of deterrence and the protection of the public.”

Ní Raifeartaigh J. also stated at paragraph 71 that:

“As Charleton J. pointed out in Hermann, the decision-making body must, in addition to the seriousness of the misconduct, the principle of deterrence, and the protection of the public, also consider mitigating factors.”

I wish to ensure that any sanction satisfies the requirement of proportionality.

35. Kelly P. in *Law Society v D’Alton*²¹ observed:

“In approaching the question of penalty, I have to have regard to: (a) the protection of the public; (b) the maintenance of the reputation of the solicitors’

¹⁹ *Central Bank of Ireland v Lynch* [2022] IEHC 319, paragraph 20.

²⁰ *Dowling v An Bord Altranais* [2017] IEHC 62.

²¹ *Law Society v D’Alton* [2019] IEHC 177, paragraph 33.

profession 'as one in which every member of whatever standing, may be trusted to the ends of the earth' (per Bingham M.R.[in Bolton v. Law Society [1994] 1 W.L.R. 512]); (c) the punishment of the wrongdoer; (d) the discouragement of other members of the profession who might be tempted to emulate the behaviour of the wrongdoer; and (e) the concept of proportionality. The sanction must be proportionate and appropriate."

36. The concept of proportionality is a familiar one across different contexts. For instance, the decision of *Heaney v. Ireland*²² set a proportionality test for analysing the constitutionality of legislative restrictions on rights.
37. Proportionality is also a general principle of EU law. I found (at paragraph 6.29 of the Written Findings) that the Inquiry is operating within the scope of EU law, a position which was not contested.
38. I wish also to ensure that the sanctions must work as a deterrent, not only to Mr Guinane, but to other regulated persons working in a regulated activity or capacity in financial services.
39. I am also content to take account of the 2014 Inquiry Guidelines and the Outline of the ASP 2018 issued by the Central Bank and referred to at paragraph 4 above, even though they post-date the Relevant Period. I have done so on the basis that they are simply guidance. They are not binding on me and I am free to attach whatever weight I see fit to all or part of each of the guidance documents. I find that they are useful and relevant here in that they set out a helpful analysis of the issues that are relevant in deciding on appropriate and proportionate sanctions following a breach of a statutory or regulatory duty and are consistent with the underlying legal and due process requirements. The relevant factors identified in the 2014 Inquiry Guidelines are set out at paragraph 5 above under four broad headings, which provide a generic framework for making a decision on sanction:
 - (a) The Nature, Seriousness and Impact of the Contravention;
 - (b) The Conduct of the Individual after the Contravention;

²² *Heaney v Ireland* [1994] 3 IR 593.

- (c) The Previous Record of the Individual; and
- (d) Other General Considerations.

40. I have considered what impact, if any, the long passage of time since the conduct that constituted the participation in a prescribed contravention occurred should have in determining the appropriate and just sanction. Counsel for Mr Guinane referred me to *Dowling* and stated that the LPT noted in their guidance that this judgment:

*“...is authority for the proposition that where there has been a significant prosecutorial delay in bringing proceedings to a conclusion, that may be a factor weighing in favour of the registrant when it comes to sanction” and stated it “is worthy of much greater prominence than the, almost in passing, mention it receives in the LPT’s Guidance”.*²³

41. In *Dowling*, Ní Raifeartaigh J. noted that “*there was a period of almost 9 years*”²⁴ between the death of the patient and the respondent board imposing sanction. She stated: “*To put it at its most neutral, there has been a significant lapse of time since the event in question*”.²⁵ Counsel for Mr Guinane stated that the lapse of time between the participation in a contravention found by me in January 2009 and the hearing on sanction in January 2025 is even greater – at 16 years. They pointed to Ní Raifeartaigh J.’s comment:

“I rely instead on the dictum in Gallagher that if there has been delay in a disciplinary process, it may be taken into account when the question of sanction is under consideration. I am not persuaded that the absence of an employer-employee relationship renders the principle irrelevant, because the principle seems to me to be simply one of fairness to the person whose professional position and other circumstances in the real world are likely to have been affected by the uncertainty hanging over him or her while the disciplinary process is ongoing. Further, I am of the view that a period of delay may be relevant to the imposition of sanction even where the overall delay or

²³ Outline Submissions on behalf of the Person Concerned in respect of the question of sanction, received on 17 January 2025, paragraph 91.

²⁴ *Dowling v An Bord Altranais* [2017] IEHC 62, paragraph 2.

²⁵ *Dowling v An Bord Altranais* [2017] IEHC 62, paragraph 72.

*circumstances are not such as to warrant prohibition of the proceedings themselves.*²⁶

42. In the Written Findings I have identified a number of conclusions that mitigate the gravity of Mr Guinane's participation in the prescribed contravention by PTSB. I do not propose to repeat them here. However, I have summarised the matters that counsel for Mr Guinane's regard as mitigating factors when considering if any sanction should be imposed at paragraph 17 above. I confirm that I have taken all of these mitigating factors into account.
43. Having taken into account all of the matters referred to above and mindful of my duty to conduct the Inquiry with as little formality and technicality, and with as much expedition, as a proper consideration of the matters before me allow and to observe the rules of procedural fairness, I have exercised my judgement as the independent sole Inquiry Member and come to following conclusion.

CONCLUSION ON SANCTIONS

Caution or reprimand

44. I find that a reprimand is an appropriate sanction to impose on Mr. Guinane. I have found, for the reasons set out in the Written Findings, that Mr. Guinane participated in a serious contravention of a regulatory requirement by his employer, PTSB, that caused consumers harm. I conclude that it is appropriate and fair in these circumstances that he should be issued with a reprimand.

Costs

45. I note that Enforcement has not sought to recover its own costs incurred in investigating Mr. Guinane or in participating in this Inquiry. It has left it to me to decide if any of the other costs incurred by the Central Bank in pursuing this Inquiry should be borne by Mr. Guinane. I have concluded that they should not. Whilst Mr. Guinane's legal representatives made little effort to assist in the swift progress of this Inquiry, I do not believe that any of the Central Bank's costs in the Inquiry were increased by, or arose as a result of, unreasonable or obstructive conduct by Mr. Guinane or his legal

²⁶ Dowling v An Bord Altranais [2017] IEHC 62, paragraph 73.

representatives. The Investigation Report that led to the Notice of Inquiry being issued raised a large number of issues that Mr. Guinane had a legitimate right to challenge and/or explain. My Written Findings expand on the position set out in the Investigation Report on a number of these issues and reach conclusions on Mr Guinane's conduct that are more favourable to Mr Guinane than might otherwise have been inferred from the Investigation Report. Furthermore, there are a number of features that increased the costs incurred by the Central Bank that are particular to this Inquiry, and which arose from matters that are not attributable to the subject of the Inquiry. The costs of this Inquiry reflect the fact that it is one of the first inquiries held under Part IIIC of the 1942 Act in respect of an individual to proceed to a hearing and the consideration of sanctions. Decisions on procedure and the proper conduct of the Inquiry were required at every stage, and Mr. Guinane and the other participants were given the opportunity to exercise their rights to make submissions upon such procedures and the conduct of the Inquiry. The costs of the Inquiry have been increased by the need to agree and implement appropriate procedures during the course of the Inquiry and the Inquiry has proceeded at a slower pace as a consequence. In addition, dealing with the claim of legal privilege by PTSB also caused repeated delays in the progress of the Inquiry and materially increased the cost of the Inquiry. The Inquiry was also delayed as a consequence of the need for the Law Society of Ireland to intervene in the firm of solicitors that was acting for Mr. Guinane during the first part of this Inquiry. This caused several months of delay to, and increased expenditure on, the Inquiry. I find that it would not be fair or appropriate to require Mr. Guinane to make a contribution to the costs that were incurred by the Central Bank as a consequence of any of these extraordinary circumstances.

46. In all of the circumstances, I conclude that there should be no direction requiring Mr. Guinane to pay any part of the costs incurred by the Central Bank in holding this Inquiry. It is appropriate and just for the Central Bank to bear its own costs in this Inquiry.

Disqualification

47. In considering whether the Written Findings provide a basis for deciding that a direction disqualifying Mr. Guinane from being concerned in the management of a RFSP is fair, necessary or appropriate, I have considered all of the submissions that I received and

the guidance and precedents to which I was referred. I have taken particular account of a number of factors including;

- (a) the seriousness and impact of the contravention;
- (b) Mr. Guinane's conduct in participating in the contravention;
- (c) Mr. Guinane's otherwise unblemished record;
- (d) Mr Guinane's conduct in dealing with Enforcement during the investigation and in the course of this Inquiry;
- (e) the extent to which such a direction would have any other beneficial purpose in the conduct or regulation of the financial services sector;
- (f) the long period of time in which Mr. Guinane has been under the shadow of a Central Bank investigation and then been the subject of a Central Bank inquiry since he was first informed that he was to be investigated in 2018, including the impact of this period on Mr. Guinane and his ability to pursue his career in financial services; and most importantly
- (g) the extent to which Mr. Guinane's future involvement in the management of a RFSP may create a risk of harm to the interests of customers or to others in the financial services sector.

48. Mr Guinane's contravention arose as a result of his failure to consider the interests of consumers who were customers of PTSB and to ensure that PTSB acted in their best interest. PTSB's customers during the Relevant Period were overwhelmingly consumers. He has had to focus on his regulatory responsibilities to such customers throughout the long period of his investigation by Enforcement, and of being the subject of this Inquiry. I conclude from the evidence and the submissions I have heard that it is now unlikely that Mr. Guinane would knowingly fail to take into account the interests of customers were he to resume a role with a RFSP. The evidence that I have heard, from Mr. Guinane and about Mr. Guinane and his conduct during the Relevant Period and in the course of his dealings with Enforcement during the period in which he was investigated, does not lead me to conclude that there is a risk that he would knowingly

seek to take advantage of customers. Furthermore, none of the actions that he took, or failed to take, were motivated by any desire on his part to profit personally at the expense of others. I note that whilst he was CEO of PTSB, PTSB recognised its failings in its treatment of customers as a result of the contravention and moved quickly to provide recompense to them once it was asked to face up to and explain its actions.

49. The contravention in which Mr. Guinane participated was a serious contravention. His participation arose from a serious lack of care, rather than a deliberate intent on his part, in circumstances where his regulatory responsibility should have been obvious. It is therefore relevant to assess whether the risk that he would fail to recognise or consider his regulatory obligations, if he were to assume a role in the management of a RFSP, has now diminished. I take into account that Mr Guinane has consistently stated that he has little memory of the circumstances of the contravention and his involvement in it. He did not seek to minimise the actions of PTSB that he authorised and which gave rise to the contravention. I conclude from Mr Guinane's evidence in this Inquiry and from the seven-year duration of the investigation and the Inquiry, that he now has much greater awareness of the need to consider the regulatory implications of any decision he may be called upon to make or implement with regard to consumers who are customers of a RFSP.
50. I therefore find myself in the unusual position of considering whether any useful purpose is served by disqualifying Mr. Guinane from being concerned in the management of a RFSP, even though I have concluded that he participated in a serious breach of a regulatory duty toward customers.
51. The Written Findings do not provide sufficient reason to conclude that Mr. Guinane would pose a threat to the public were he to become concerned in the management of a RFSP in the future and be properly cognisant of his responsibilities to customers. I conclude that the very long period of time in which Mr Guinane's conduct has been under investigation or scrutiny, during which he has had to contemplate and face up to his responsibilities to consumers who are customers under the regulatory regime applying to financial services, has had an effect similar to a period of disqualification. Mr Guinane is now likely to be aware of his responsibilities towards such customers and motivated to discharge them. I therefore find that, in the particular circumstances of this Inquiry, a direction disqualifying Mr Guinane from being concerned in the management of a RFSP is not required. The evidence I have considered and the

findings I have reached, lead me to conclude that the risk of harm to customers or to others in the financial services sector from Mr Guinane's future involvement in the management of a RFSP does not justify a disqualification direction.

Monetary penalty

52. In coming to a decision on whether a direction to pay a monetary penalty would be appropriate in all the circumstances of this Inquiry and, if so, how much such penalty should be, I have again considered the Written Findings and all of the submissions and evidence that are relevant to sanction. Amongst the factors that are particularly significant in reaching a conclusion on this issue are the following:
- (a) The customer detriment that arose as a result of the contravention, as set out in paragraphs 150 to 152 of Chapter 7 and in Chapter 8 of the Written Findings, including the financial and personal impact on vulnerable consumers.
 - (b) The loss of trust amongst customers in the financial services sector to which this contravention contributed.
 - (c) The lack of any profit or gain, or any intention to seek such, by Mr Guinane.
 - (d) The serious lapse in judgment and knowledge by Mr Guinane that led to the contravention. The failure by the chief executive officer of the retail banking division of a major RFSP firm to be properly aware of PTSB's duties to its customers has to be regarded as serious. It suggests that there may be a need for some penalty for senior managers who fail to discharge their regulatory duties that would serve as a counter balance to the otherwise overwhelming interest that senior executives may see in promoting the best interests of their employer and its shareholders.
 - (e) The gravity and extent of the failing. In this case, the failing arose from a serious lack of care and attention, in circumstances where it should have been apparent that a clear choice was being made between the interests of PTSB and the interests of its customers. However, the failing was not intentional, it was brief and it was not repeated. The lack of care and attention meant that it was not reconsidered and its impact was felt over a 15 month period.

- (f) The steps taken by PTSB under Mr Guinane's management to swiftly address and effectively remedy the detriment suffered by its customers once it was asked to face up to and explain its actions.
 - (g) The totality of the sanctions that I am imposing as a result of the Written Findings.
 - (h) All of the mitigating factors in Mr Guinane's conduct that are identified in the Written Findings including those to which counsel for Mr Guinane referred and which are summarised in paragraph 17 above.
 - (i) The impact that the long period of the investigation and Inquiry has had on Mr. Guinane.
53. Above all, I wish to ensure that any monetary penalty is proportionate and has the required deterrent effect. The penalty should be in proportion to the particular facts and circumstances that gave rise to Mr. Guinane's participation in the contravention including the harm occasioned by the contravention, and the benefits and rewards that Mr Guinane derived from his employment during the Relevant Period. The sanctions imposed as a result of this Inquiry should have a deterrent effect both on Mr Guinane and on other managers of RFSPs. Mr Guinane should not, however, be a scapegoat for broader failings in PTSB or in the lending sector. The sanction must take account of his individual failures, and the particular circumstances of Mr. Guinane's participation in the contravention by PTSB.
54. I conclude that in all the circumstances of this Inquiry, the Written Findings justify the imposition of a monetary penalty on Mr Guinane.
55. As Mr Guinane did not gain any financial benefit from the contravention, I have taken into account Mr Guinane's gross and net remuneration during the Relevant Period in considering the amount of the monetary penalty. I received evidence from Mr Guinane and from PTSB regarding Mr Guinane's remuneration during the Relevant Period. The evidence was broadly consistent. The Relevant Period concluded 15 years ago.

56. In all the circumstances of this case and taking account of all of the matters set out above including the limited extent and seriousness of Mr. Guinane's participation in PTSB's breach, the detriment caused by the contravention and mindful of the other work that he undertook during the course of his employment throughout the Relevant Period in what was a responsible position during an extremely difficult time for PTSB, I conclude that Mr Guinane should pay to the Central Bank a monetary penalty of €80,000. A monetary penalty of this amount is, approximately 40% of his net total remuneration arising from his employment with PTSB during the Relevant Period.
57. The monetary penalty is intended to encourage Mr Guinane and other senior managers to be aware of their personal risk in failing to identify and meet their regulatory responsibilities. I intend the financial implications to be material when weighed against the benefits they may obtain by solely seeking to further the financial interests of their employer. In adopting this approach I anticipate that public trust and confidence in the regulatory system will be maintained. Public trust and confidence is enhanced if the public believe that those leading RFSPs have a real and personal interest in complying with their regulatory responsibilities when making judgments about issues affecting customers.
58. I have considered the sanctions in their totality, i.e. my decision on costs, disqualification, the monetary penalty and the reprimand. In my view, the sanctions of a monetary penalty of €80,000 and a reprimand strike the correct balance in ensuring a deterrent effect on Mr Guinane and others working in financial services, maintain public trust and confidence in the regulatory system, are proportionate and fair, reflect the relative gravity of the contravention and the detriment suffered by customers, and take account of the overall circumstances of Mr Guinane's participation in PTSB's contravention, including the mitigating factors set out in the Written Findings and summarised above.
59. Section 33AQ(5) of the 1942 Act states that the monetary penalty limit I may impose on Mr Guinane may not exceed €500,000. I have determined the appropriate and proportionate monetary penalty without reference to this limit. As the amount I have identified as being appropriate and proportionate does not exceed the statutory limit of €500,000, the monetary penalty remains at €80,000.

60. In order to satisfy the requirements of section 33AS of the 1942 Act, I have considered the information and submissions that I have received in response to my request for information about Mr Guinane's current financial position, and I conclude that the payment of a monetary penalty of €80,000 will not cause Mr Guinane to be adjudicated bankrupt.

DECISION

61. I conclude that the appropriate sanction on Mr Guinane in respect of his participation, while being a person concerned in the management of IL&P Group, in the prescribed contravention by PTSB set out in Annex A to the Notice of Inquiry²⁷ is that he should be issued with a reprimand by the Central Bank and he should pay a monetary penalty of €80,000 to the Central Bank. This Written Decision shall take effect as a direction to pay a monetary penalty of €80,000 pursuant to section 33AQ of the 1942 Act.

²⁷ See Appendix 1.

APPENDIX 1

NOTICE OF INQUIRY



Banc Ceannais na hÉireann
Central Bank of Ireland
Eurosystem

CENTRAL BANK OF IRELAND

NOTICE OF AN INQUIRY PURSUANT TO PART IIIC OF THE CENTRAL BANK ACT 1942 (AS AMENDED) CONCERNING MR DAVID GUINANE

The Central Bank of Ireland (the **Central Bank**) has determined that it has reasonable grounds to suspect that Mr David Guinane (the **Person Concerned**), being a person concerned in the management of permanent tsb p.l.c (**PTSB**) during the period of 19 January 2009 to April 2010 (the **Relevant Period**), participated in the commission of a prescribed contravention by PTSB. The prescribed contravention which PTSB is suspected of having committed and the prescribed contravention by PTSB in which the Person Concerned is suspected of having participated is set out in **Annex A** to this Notice of Inquiry.

Pursuant to section 33AO of the Central Bank Act 1942 (as amended)(the **Act**), the Central Bank will now hold an Inquiry to determine whether or not the Person Concerned participated in the commission by PTSB of the suspected prescribed contravention. In the event that an oral hearing is convened, the Person Concerned will be provided with advance notice of same and will be invited to attend the Inquiry hearing at the Central Bank of Ireland, New Wapping Street, North Wall Quay, Dublin 1 or such other location as may be advised. Pursuant to section 31(1)(a) of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020, the Central Bank may choose to hold part of or all of any Inquiry hearing(s) remotely. In the event that an oral hearing is not convened, the Person Concerned will be provided with the opportunity to provide submissions and evidence to the Inquiry.

The Inquiry Guidelines are published on the Central Bank's website and set out the procedures which the Central Bank ordinarily proposes to follow when holding an Inquiry under Part IIIC of the Act (the **Inquiry Guidelines**).

An Inquiry is comprised of one or more impartial decision-maker(s) appointed by the Central Bank, with no prior involvement in the subject matter of the Inquiry or supervision or authorisation of the regulated entity, known as the Inquiry Member(s). The Central Bank has, pursuant to section 33BE of the Act, appointed **Mr Peter Hinchliffe** to act as the sole member of the Inquiry (the **Inquiry Member**).

The grounds on which the Central Bank's suspicions are based are set out in the *Investigation concerning David Guinane pursuant to the Administrative Sanctions Procedure* (the **Investigation Report**) which is contained in **Annex B** to this Notice of Inquiry. Please note that PTSB has asserted legal professional privilege over certain material contained in the Investigation Report.

The material over which legal professional privilege is asserted by PTSB is detailed in the Investigation Report and is provided to you on a confidential basis and subject to the provisions of section 33AK(6) of the Act and to legal professional privilege asserted by PTSB. Any onward disclosure of such information may constitute a breach of confidence as against PTSB, in relation to which PTSB has reserved all its rights.

All information contained in the Investigation Report should be treated as confidential and must not be used for any purpose other than your participation in the Inquiry.

In order to facilitate the efficient running of the Inquiry the Person Concerned is asked to complete an Inquiry Management Questionnaire (**IMQ**) (which is set out in **Annex C** to this Notice of Inquiry) and to return it no later than close of business, **Wednesday 8 December 2021** to the Regulatory Decisions Unit (**RDU**) at RDU_AS4@centralbank.ie.

Upon receipt and review of the response to the IMQ, the Inquiry Member will determine whether to convene an Inquiry Management Meeting (**IMM**). If the Inquiry Member decides to hold an IMM, RDU will inform the Person Concerned of the location, date and time of the IMM and the matters which the Inquiry Member wishes to address at the IMM. It should be noted that, pursuant to section 33AP(5) of the Act, in the event that the Person Concerned fails to attend any part of the Inquiry (including any IMM), the Inquiry may proceed in his absence. Further, pursuant to section 33BA(1) of the Act, the Inquiry Member may summons a person to appear before the Inquiry to give evidence, to produce specified documents or to do both and to require the person to attend the Inquiry from day to day unless excused or released from further attendance.

Pursuant to section 33AP(3) of the Act, the Person Concerned may, before the date of the Inquiry hearing, lodge with the Inquiry any written submissions and/or evidence that the Person Concerned wishes the Inquiry to take into account when considering the matters to which the Inquiry relates. It should however be noted that the IMQ identifies certain issues in respect of which written submissions must be provided together with the completed IMQ. Following receipt of responses to the IMQ and/or any IMM the Inquiry Member will issue directions in respect of the timeline for the lodging of any submissions, evidence or any other related material.

In addition to responding to the IMQ and/or any IMM, the Inquiry Member invites the Person Concerned to submit a response to any factual or legal conclusions in the Investigation Report with which they disagree on or before close of business on **Friday, 7 January 2022**.

In the event that the Inquiry makes a finding that the Person Concerned participated in the prescribed contravention suspected to have been committed by PTSB in the Relevant Period, it may impose certain sanctions. A full list of the sanctions that are available to the Inquiry in respect of any contraventions found to have been committed during the Relevant Period are set out in section 33AQ of the Act. Further details of the Central Bank's approach to sanctions can be found in the Central Bank's Administrative Sanctions Procedure Sanctions Guidance and in the Inquiry Guidelines as referred to above.

This Notice of Inquiry has been issue on this 9th day of November 2021 pursuant to section 33AP(1) of the Act.

Regulatory Decisions
Unit Legal Division
Central Bank of
Ireland PO Box 559
Dublin 1
[RDU_AS4@centralbank.i
e](mailto:RDU_AS4@centralbank.ie)

ANNEX A

Outline of the Suspected Prescribed Contravention

Following an investigation, the Central Bank suspects on reasonable grounds that from January 2009, PTSB understood that Special Condition 706 (a special condition in PTSB's tracker mortgage contracts relating to certain customers' enduring right to a tracker rate, (**SC706**)) was ambiguous. It is also suspected that PTSB was advised that this issue could affect up to 10,000 customers, but was immediately applicable to 400 such customers who were at that time on a fixed rate and had SC706 in their mortgage contracts. From 19 January 2009 to April 2010 (the **Relevant Period**), it is suspected that PTSB decided to apply and/or decided to continue to apply a rate that was less favourable to customers, save in circumstances where individual customers raised specific queries in relation to that rate.

The Central Bank suspects on reasonable grounds that PTSB treated those customers who did not complain about the tracker rate that was applied after a fixed rate period, unfairly and contrary to their best interests compared to those that did i.e. by only giving those who complained or queried a more favourable tracker rate. It is suspected that this approach was in breach of the principle contained in Chapter 1, General Principle 1 of the Consumer Protection Code 2006 (the **2006 Code**) which required PTSB to "*ensure that in all its dealings with customers and within the context of its authorisation it acts honestly, fairly and professionally in the best interests of its customers and the integrity of the market.*"

The Central Bank also suspects on reasonable grounds that Mr Guinane participated in PTSB's contravention of Chapter 1, General Principle 1 of the 2006 Code (a prescribed contravention) by signing off on the proposal made to him on 19 January 2009 i.e. the strategy to only give the more favourable rate back to those customers who specifically requested their original and lower interest rate, or queried or complained. At that time Mr Guinane was CEO of PTSB and a member of PTSB's Group Senior Management Team which reported directly to Irish Life & Permanent plc's CEO. The Central Bank thus suspects on reasonable grounds that David Guinane was, during the Relevant Period, a person concerned in the management of PTSB.

The Central Bank suspects on reasonable grounds that Mr Guinane made the decision on 19 January 2009 at a time when he was fully aware of the factual position i.e. that 400 customers would be immediately impacted, and that [REDACTED]

The redacted content in Annex A to Appendix 1 contains reference to legal advice that was available to PTSB and about which Mr Guinane received reports prior to 19 January 2009.

ANNEX B

Investigation Report entitled “*Investigation concerning David Guinane pursuant to the Administrative Sanctions Procedure*” and related documentation

Annex B will be provided electronically by RDU to legal@patrickward.ie and patrick@patrickward.ie via the Kiteworks system

ANNEX C

INQUIRY MANAGEMENT QUESTIONNAIRE

To: Patrick Ward & Co.
Solicitors Equity House
Ormond Quay
Upper Dublin 7
Email address: legal@patrickward.ie
patrick@patrickward.ie

From: Regulatory Decisions Unit
Legal Division
Central Bank of
Ireland PO Box 559
Dublin 1
Email address: RDU_AS4@centralbank.ie

Please arrange to complete this Questionnaire and return it to the Regulatory Decisions Unit (RDU) by email to RDU_AS4@centralbank.ie on or before close of business on Wednesday, 8 December 2021.

The purpose of this Questionnaire is to enable the Inquiry Member to establish whether an Inquiry Management Meeting (IMM) is required for the purpose of issuing directions prior to any Inquiry hearing and to determine what directions may be required to ensure the fair and prompt conduct of the Inquiry.

Please note, in the event that you fail to respond to this Questionnaire within the time specified above, the Inquiry Member may proceed to issue directions and confirm the dates and arrangements for any Inquiry hearing without further consultation with you.

Inquiry Details

The purpose of the Inquiry is to determine whether Mr David Guinane participated in the commission of a prescribed contravention which permanent tsb p.l.c (**PTSB**) is suspected of having committed as set out in Annex A to the Notice of Inquiry.

The Inquiry Member

The Central Bank of Ireland (the **Central Bank**) has, pursuant to section 33BE of the Central Bank Act 1942 (as amended) (the **Act**), appointed **Mr Peter Hinchliffe** to act as the sole member of the Inquiry (the **Inquiry Member**).

1 Inquiry Arrangements

- 1.1 The Inquiry Member was appointed on 2 August 2021. As matters stand and subject to any applications that may/may not arise, the Inquiry Member will determine the date and length of the Inquiry hearing after reviewing the response to this Questionnaire and, if appropriate, after hearing from you at any IMM.
- 1.2 Please set out whether you propose to attend any IMM or Inquiry hearing.

2 Representation

- 2.1 Will you be represented during the Inquiry by a legal practitioner?
- 2.2 As set out in correspondence between RDU and Patrick Ward & Co Solicitors dated 4 and 7 October 2021, all correspondence in this matter will be directed to Patrick Ward & Co, who act for you in this matter. In the event that you wish for correspondence to be directed elsewhere, please furnish details of the name, address and contact details.

3 Applications

- 3.1 Except as provided by section 33AZ(2) of the Act, Inquiries shall be held in public. Please indicate if you wish to make an application for consideration by the Inquiry Member that the Inquiry hearing should be held in private. If so, and you wish to make written submissions in respect of such an application, such written submissions must be submitted together with this completed Questionnaire.
- 3.2 Please indicate if there are any other issues in respect of which you wish to make applications to the Inquiry Member prior to an IMM or the commencement of the Inquiry hearing. For the avoidance of doubt, relevant applications may be made to the Inquiry Member during the course of the Inquiry. However, it would assist in the prompt and fair conduct of the Inquiry if the Inquiry Member was made aware of any possible applications at an early stage.

4 Submissions

- 4.1 Please indicate whether you propose to provide written submissions and/or evidence in advance of the Inquiry hearing. The Inquiry Member will issue directions following receipt of this Questionnaire setting out the date upon which any such submission(s) and/or evidence must be submitted to RDU.
- 4.2 Please indicate whether you wish to make oral submissions to the Inquiry Member at any IMM or at the Inquiry hearing.

5 Notice of Inquiry

- 5.1 Please outline whether you admit or deny participating in the commission of the suspected prescribed contravention set out in Annex A to the Notice of Inquiry.
- 5.2 Based on your review of the Notice of Inquiry and the accompanying documentation please outline:
- I. any factual or legal conclusion relating to the suspected prescribed contravention by PTSB which you accept;

- II. any factual or legal conclusions relating to the suspected prescribed contravention by PTSB which you dispute;
- III. any factual or legal matters relating to your actual or alleged participation in the suspected prescribed contravention by PTSB which you accept;
- IV. any factual or legal matters relating to your actual or alleged participation in the suspected prescribed contravention by PTSB which you dispute;
- V. any additional factual information or legal submissions that you believe are relevant to the conclusions that the Inquiry should reach with regard to the findings of the Investigation Report.

6 Documents to be considered by the Inquiry Member

- 6.1 Please set out whether there are any documents or other information or evidence in your possession which you believe should be considered by the Inquiry Member, which you wish to furnish to RDU. Please identify such documents or other information or evidence and provide copies or details of same with the completed Questionnaire.
- 6.2 Please set out whether there are any documents or other information or evidence which have not been provided to you with the Notice of Inquiry, which you believe to be in the possession of someone other than yourself and which you believe should be considered by the Inquiry Member and provided to you. Please provide a brief description of the relevant documents/categories of documents or other information or evidence in each case identifying in whose possession you believe them to be and why you believe them to be relevant to the prompt and fair conduct of the Inquiry.

7 Witnesses

- 7.1 Please set out whether there are potential witnesses that you believe should appear at the Inquiry hearing to give evidence and/or to produce specified documents.
- 7.2 If the answer to the above is yes, please set out details of the names and addresses of the potential witnesses together with a brief outline of the evidence and/or documents which you believe the proposed witnesses are in a position to provide.

8 Experts

- 8.1 Please advise whether you wish to rely on expert evidence at the Inquiry hearing and, if so, please set out details of the name(s) and area(s) of expertise of your proposed expert(s) and how long you anticipate such evidence or questioning will take.
- 8.2 Please advise whether you propose to furnish any expert report(s) to RDU. Please note any expert report(s) must be furnished in advance of the commencement of the Inquiry hearing as directed by the Inquiry Member.

9 Any other matters

- 9.1 Do you believe that there are any particular matters that would appropriately be dealt with by way of an Inquiry Management Meeting?

- 9.2 If so, please outline what these matters are and why you believe these matters should be dealt with at an Inquiry Management Meeting rather than at the commencement of the Inquiry hearing.

Next steps

Upon review of this completed Questionnaire the Inquiry Member will decide whether to hold an IMM and will notify you accordingly and/or will issue directions to you through RDU. Any application(s) or request(s) made by you in response to any of the above questions will be considered by the Inquiry Member and the Inquiry Member may issue a direction in respect of those application(s)/request(s) in due course.

If you have any queries in relation to the completion of this Questionnaire contact details for RDU are as follows:

**Regulatory Decisions
Unit Legal Division
Central Bank of
Ireland PO Box 559
Dublin 1
Email address: RDU_AS4@centralbank.ie**

APPENDIX 2

TABLE OF HEARINGS

No	Hearing Date	Hearing Type	Public/Private
1	9 February 2022	Inquiry Management Meeting	Private
2	3 May 2022	Inquiry Management Meeting	Private
3	8 July 2022	Inquiry Management Meeting	Private
4	28 February 2023	Inquiry Management Meeting	Private
5	26 June 2023	Inquiry Management Meeting	Public and private
6	11 October 2023	Legal Issues Hearing	Public and private
7	12 October 2023	Legal Issues Hearing	Public and private
8	13 October 2023	Inquiry Management Meeting	Public
9	21 February 2024	Substantive Inquiry Hearing – Day 1: • Opening Statements	Public
10	22 February 2024	Substantive Inquiry Hearing – Day 2: • Mr. Niall O’Grady	Public and private
11	23 February 2024	Substantive Inquiry Hearing – Day 3: • Ms. Ailbhe O’Doherty	Public and private
12	26 February 2024	Substantive Inquiry Hearing – Day 4: • Mr. Kevin O’Connor	Public and private
13	27 February 2024	Substantive Inquiry Hearing – Day 5: • Mr. Joseph Fleming	Public and private
14	28 February 2024	Substantive Inquiry Hearing – Day 6: • Mr. Cathal MacCarthy	Public and private
15	29 February 2024	Substantive Inquiry Hearing – Day 7: • Mr. Frank Wynn	Public and private
16	4 March 2024	Substantive Inquiry Hearing – Day 8: • Mr. William Hannan • Ms. Louise Gallagher	Public and private
17	5 March 2024	Substantive Inquiry Hearing – Day 9: • Mr. Diarmuid Bradley	Public

No	Hearing Date	Hearing Type	Public/Private
		• Mr. Gerry Martin	
18	6 March 2024	Substantive Inquiry Hearing – Day 10: • Mr. David Guinane	Public and private
19	7 March 2024	Substantive Inquiry Hearing – Day 11: • Mr. David Guinane	Public and private
20	14 March 2024	Substantive Inquiry Hearing – Day 12: • Closing Submissions	Public and private
21	15 March 2024	Substantive Inquiry Hearing – Day 13: • Closing Submissions	Public and private

APPENDIX 3

CATEGORIES OF DISCLOSURE

The Inquiry gave directions on 28 July 2022 requiring the disclosure of the following categories of documents, which had been requested by the Person Concerned following correspondence with Enforcement.

Category 1

“All those documents falling into the category of ‘gathered documents’ entitled Witness Interview Correspondence – [including witness transcripts and administrative correspondence regarding interviews and transcripts] to include all notes and/or recordings of interviews and/or discussions between a members (or former member) of staff of PTSB on the one hand and the Central Bank on the other hand concerning or relating to Condition 706, irrespective of whether same are in transcript form or not, other than such documentation as has already been furnished to Mr. Guinane.”

Category 2

“Any document relevant to SC706 and/or the general issues under investigation marked as a gathered document and dated between 1 January 2009 to 30 April 2011 which has not already been provided to Mr Guinane’s legal representatives.”

Category 3

“All communications, by any method of communication, including any records of communication between: - a) the Compliance Unit of PTSB (including staff members of the unit) and the Central Bank; b) to the extent not captured by the foregoing, Joe Fleming and/or Frank Wynn of PTSB and Central Bank; c) to the extent not captured by the foregoing, Terry Murphy of the Central Bank of Ireland and Joe Fleming of PTSB and/or Frank Wynn of Irish Life and Permanent; within the period 1 January 2009 to 30 April 2011....but excluding the Anti-Money Laundering Division [and any other Central Bank units or divisions which may be subsequently agreed]”

Category 4

“All documents within each of the categories of ‘gathered documents’ identified at paragraph 4(II) of Enforcement’s letter of 10 May 2022 relating to: a) Condition 706 (b) the interpretation of Condition 706 created between, or sent to the Central Bank in the period between, 1 January 2009 to 31 December 2010, including but not limited to internal memoranda, internal correspondence, briefing documents and the minutes of any meeting”

APPENDIX 4
DRAMATIS PERSONAE

Person Concerned		
No.	Name	Description
1.	David Guinane	Mr Guinane commenced employment in Irish Permanent Building Society (IPBS) in 1985 as a branch manager and occupied a number of roles with PTSB in the subsequent years. He was a marketing manager between 1989-1991, a bank assurance general manager between 1991 and 1996. He was also managing director of Capital Home Loans between 1996 and 2001, a general manager intermediaries between 2001 and 2005, general manager retail between 2005 and 2007. He then became Chief Executive Officer (“CEO”) of PTSB in 2007. He departed PTSB in 2012. Mr Guinane occupied the position of CEO, PTSB during the Relevant Period. Mr Guinane gave oral evidence to the Inquiry on 6 and 7 March 2024.
Other Persons Referred to in the Findings Report		
No	Name	Description
2.	Diarmuid Bradley	Mr Bradley joined Irish Permanent Building Society (IPBS) in 1992 as a general manager. He took on the role of general manager strategy with Irish Life & Permanent Group (IL&P) in 1997 and in 2001 was appointed deputy CEO of PTSB and remained in that role until he left in 2005. Mr Bradley gave oral evidence to the Inquiry on 5 March 2024.
3.	Joseph Fleming	Mr Fleming was a chartered accountant who joined internal audit in PTSB in 1989 and subsequently moved to management accounts as a management accounting manager. In 2000, he took up the role of compliance officer in PTSB and subsequently took the role as head of compliance in

		PTSB in 2007. During the Relevant Period, he was head of compliance in PTSB. He left PTSB in May 2016. Mr Fleming gave oral evidence to the Inquiry on 27 February 2024.
4.	Louise Gallagher	Ms Gallagher is the joint head of the Enforcement Investigations Division of the Central Bank of Ireland. Ms Gallagher joined the Enforcement Investigations Division as a deputy head of division in 2015 and became head of division in 2018. Ms Gallagher gave oral evidence to the Inquiry on 4 March 2024.
5.	William Hannan (Bill)	Mr Hannan was appointed to the role of group head of compliance in 2004 in Irish Life & Permanent Group. Additionally, in 2006 he was appointed to the role of group head of risk and compliance for IL&P Group during the Relevant Period. Mr Hannan gave oral evidence to the Inquiry on 4 March 2024.
6.	Cathal MacCarthy	Mr MacCarthy was a solicitor who joined Irish Permanent Building Society in 1992 as a secretary and legal officer. In 1994 he became chief legal officer and stepped down as secretary. He became group chief legal officer in 1999 and was group chief legal officer of IL&P Group during the Relevant Period. Mr MacCarthy gave oral evidence to the Inquiry on 28 February 2024.
7.	Gerry Martin	Mr Martin joined Irish Permanent in 1979 and held various administrative and branch manager appointments until 1994. In 1994 he was appointed area sales manager. He was subsequently appointed to the senior management roles of head of intermediaries (2001) and head of commercial lending (2006). In 2006, he was appointed general manager –

		commercial lending and in 2009 was appointed intermediaries and general manager – retail. He left PTSB in April 2013. Mr Martin gave oral evidence to the Inquiry on 5 March 2024.
8.	Kevin O'Connor	Mr O'Connor commenced employment with Irish Life Building Society as an in-house solicitor in 1986. He then worked as an in house solicitor with First National Building Society (which became First Active) from 1993 to 2000. He then re-joined Irish Life & Permanent in 2000 and continued to work there as an in-house solicitor until 2019 when he retired. Mr O'Connor gave oral evidence to the Inquiry on 26 February 2024.
9.	Ailbhe O'Doherty	Ms O'Doherty commenced working in PTSB in 2002 in the mortgage operations function as an administrator. She then moved onto a sales based role from 2004 to 2006. In 2006 she was appointed as a mortgage specialist in the marketing department. In late 2007 she was promoted to the role of mortgage product development manager and held that role though the Relevant Period. Ms O'Doherty gave oral evidence to the Inquiry on 23 February 2024.
10.	Niall O'Grady	Mr O'Grady commenced employment with PTSB in 1998 as deputy head of marketing and from 2001 to 2009/2010 held the role of general manager marketing in PTSB during the Relevant Period. Mr O'Grady gave oral evidence to the Inquiry on 22 February 2024.
11.	Andrew Walsh	Mr Walsh is the group legal counsel of PTSB and prepared a witness statement in his capacity as group legal counsel of PTSB where he has been employed since 2014. The witness statement was agreed between the participants and oral evidence was not required by Mr Walsh.

12.	Frank Wynn	Mr Wynn joined Irish Life Assurance and worked in various departments in Irish Life between 1979 and December 2006. He took up the role of deputy head of group compliance in 2006. He became the general manager – group compliance and operational risk for IL&P Group from December 2009. Mr Wynn gave oral evidence to the Inquiry on 29 February 2024.
13.	Ruth Brophy	Ms Brophy joined PTSB in 1999 and moved to the compliance department in 2004 as a specialist. Ms Brophy was interviewed by the Enforcement Investigations Division of the Central Bank on 30 November 2017 and 12 April 2019.

Other Members of the Marketing Team Referred to in the Findings Report	
No	Name
14.	Jaime King
15.	Ronan O'Rourke
16.	Ruta Walsh

Other Members of the Operations Team Referred to in the Findings Report	
No	Name
17.	Ann Furlong
18.	Daragh Larkin
19.	Susan O'Riordan

APPENDIX 5

GLOSSARY OF ABBREVIATIONS AND TERMS AND REPORTS

Table 1: Abbreviations and Terms

1942 Act	The Central Bank Act, 1942 (as amended).
2006 Code	The Consumer Protection Code 2006
Administrative Sanctions Procedure/ASP	The Administrative Sanction Process of the Central Bank under Part IIIC of the 1942 Act, which provides the Central Bank with the power to administer sanctions in respect of the commission of prescribed contravention(s) by persons concerned in their management.
Central Bank	Central Bank of Ireland.
Central functions	PTSB Marketing, PTSB and IL&P Group Compliance, PTSB and IL&P Group Legal and PTSB Operations functions.
CEO	Chief Executive Officer
Core Books	All documentation that Mr Guinane, Enforcement or the Inquiry believed to be relevant to the Inquiry were assembled into electronic folders referred to as the Core Books.
Doc ID	Document identifiers used to reference the documentation relied upon in the Inquiry hearing.
ECB	European Central Bank
ECHR	European Convention on Human Rights
European Convention on Human Rights Act 2003	2003 Act

Enforcement	Enforcement Directorate of the Central Bank.
ExCo	An executive team reporting to David Guinane as CEO of PTSB more fully described at para 7.1 B(d)
Financial Regulator	The Irish Financial Services Regulatory Authority was the regulator of all the financial institutions in Ireland from May 2003 to October 2010. With effect from 1 October 2010, pursuant to the Central Bank Reform Act 2010, the regulator became part of a single unitary organisation – the Central Bank of Ireland. The term Financial Regulator is used throughout the Written Findings to refer to the pre October 2010 iteration of the regulator.
General Principle 1	General Principle 1 of the Consumer Protection Code 2006
Group Senior Management Team	IL&P Group Senior Management. Described in greater detail on page 4 of the Narrative of Facts document dated 31 March 2023 and the accompanying footnote.
Hogan	PTSB IT system
IL&P Group	Irish Life & Permanent Group Holdings plc Irish Permanent plc was authorised by the Central Bank on 21 September 1994 as a credit institution and a regulated financial services provider (RFSP). In April 1999, Irish Permanent plc merged with Irish Life plc resulting in a combined banking and life assurance company named Irish Life & Permanent Group Holdings plc (IL&P Group).

	IL&P acquired the Trustee Savings Bank (TSB) in 2001. In 2002, IL&P Group's re-branded retail banking operation known as PTSB was launched following the integration of Irish Permanent and TSB bank operations. PTSB was the trading name of IL&P Group for banking purposes from 19 January 2009 to April 2010 (the Relevant Period). IL&P Group changed its name and became permanent tsb Group Holdings plc on 30 May 2012.
IMM	Inquiry Management Meeting.
Inquiry	Inquiry means the inquiry convened by the Notice of Inquiry.
Inquiry Evidence Protocol	The Evidence Protocol adopted by the Inquiry on 15 December 2022, which outlined a particular approach to how documents and witness statements would be treated by the Inquiry.
Inquiry Guidelines	Inquiry Guidelines means the Central Bank's publication <i>Inquiry Guidelines prescribed to section 33BD of the Central Bank Act 1942 2014</i>
Inquiry Hearings	The Inquiry Hearings include the " Legal Issues Hearing " which was held on 11 and 12 October 2023 to address the relevant legal issues and the " Substantive Inquiry Hearing " which took place over 13 days from 21 February 2024 until 15 March 2024. The Inquiry Hearings were held in public but went into private session when required to do so under the Inquiry Privilege Protocol as agreed between the Inquiry Participants.

Inquiry Member	The Inquiry Member means the person appointed by the Central Bank pursuant to section 33BE of the 1942 Act, namely Mr Peter Hinchliffe. The term 'Inquiry' and 'Inquiry Member' are used interchangeably throughout the Written Findings.
Inquiry Participants/participants	The Person Concerned, Enforcement and PTSB are referred to as the "Inquiry Participants".
investigation	The investigation conducted by Enforcement concerning David Guinane and his alleged participation in an alleged breach by PTSB of Chapter 1, General Principle 1 of the Consumer Protection Code 2006 pursuant to the Administrative Sanctions Procedure. Mr Guinane was notified of the commencement of an investigation into him in his capacity as CEO of [PTSB] pursuant to section 33AO(2) of the 1942 Act in a letter dated 28 December 2018 from the Enforcement Investigations Division of the Central Bank. A subsequent letter to Mr Guinane dated 20 August 2020 followed from Ms McGrade of the Enforcement Investigations Division of the Central Bank amending the prescribed contraventions outlined in the letter dated 28 December 2018.
Investigation Report	Report dated 27 May 2021 setting out the result of the Investigation concerning the Person Concerned pursuant to the Administrative Sanctions Procedure provided by Enforcement to RDU on referral of the Investigation.

Legal Issues Hearing	An oral hearing was held on 11 and 12 October 2023 to address some of the relevant legal issues in the Inquiry.
Legal Practitioner Team/LPT	The Inquiry Member appointed a Legal Practitioner Team, as provided for by section 33AY(3) of the 1942 Act, to provide legal assistance and advice to him, as required, during the Inquiry process.
legal professional privilege/LPP	PTSB asserted legal professional privilege over certain documents at the Inquiry which is outlined in the Inquiry Privilege Protocol dated 23 May 2023.
mortgage	The term mortgage includes mortgage, mortgage contract and mortgage loan agreement.
Narrative of Agreed Facts	A Narrative of Agreed Facts between Enforcement and the Person Concerned dated 31 March 2023 more fully set out at paragraph 7.1.
Notice of Inquiry	The Notice of Inquiry dated 9 November 2021 informing the Person Concerned that the Central Bank had decided to hold an inquiry under Part IIIC of the Act to determine whether Mr Guinane was a person concerned in the management of PTSB and participated in the commission by PTSB of a prescribed contravention during the Relevant Period and attached at Annex A
Outline of the Administrative Sanctions Procedure	The 2018 Outline of the Administrative Sanctions Procedure document, which provides a general overview of the Central Bank's ASP, but does not purport to represent a definitive legal interpretation of Part IIIC of the 1942 Act.

Outline Procedure	Inquiry Outline Procedure, adopted by the Inquiry on 22 April 2022.
Outline of the SPC	The Outline of the SPC is contained in Annex A of the Notice of Inquiry and details the suspected prescribed contraventions alleged against PTSB and the Person Concerned.
Person Concerned/Mr David Guinane	Mr David Guinane, being the person named in the Investigation Report and the Notice of Inquiry, who the Central Bank determined it had reasonable grounds for suspecting had participated in the commission of a suspected prescribed contravention by PTSB.
PLWA	The Privilege Limited Waiver Agreement entered into between the Central Bank and PTSB.
prescribed contravention	A prescribed contravention is defined in section 33AN of the 1942 Act as being a contravention of “(a) a provision of a designated enactment or designated statutory instrument, or (b) a code made, or a direction given, under such a provision, or (c) any condition or requirement imposed under a provision of a designated enactment, designated statutory instrument, code or direction, or (d) any obligation imposed on any person by this Part or imposed by the Bank pursuant to a power exercised under this part”.
Proposal Email or Proposal	Email dated 16 January 2009 from Niall O’Grady to David Guinane with subject line “Tracker”.
PTSB	PTSB was the trading name of IL&P Group for banking purposes from 19 January 2009 to April 2010 i.e. the Relevant Period however the

	banking licence was held by IL&P Group which was at all material times the RFSP. PTSB was launched in 2002 as IL&P Group's rebranded retail banking operation following the integration of Irish Permanent and Trustee Savings Bank (TSB) bank operations. TSB was acquired by the IL&P Group in 2001.
Regulatory Decisions Unit/RDU	The Regulatory Decisions Unit of the Central Bank, whose responsibility when informed by Enforcement of the decision to hold an inquiry is to convene an inquiry/inquiries as per paragraph 2.2 and 2.3 of the Inquiry Guidelines.
Relevant Period	The period from 19 January 2009 to April 2010.
Relied Upon Documents	168 documents relied upon by Enforcement in preparing the Investigation Report.
RFSP/Regulated financial service provider	Has the meaning given to that term in section 2(1) of the 1942 Act and includes the term "regulated entity".
SC706	Special Condition 706 being a condition included by PTSB in certain mortgage loan agreements as more fully described in Paragraph 7.1.C.
SPC	Suspected prescribed contravention. See Annex A to the Notice of Inquiry at Appendix 1.
SVR	Standard Variable Rate
Substantive Inquiry Hearing	An oral hearing was held from 21 February 2023 to 15 March 2024 to hear opening statements, witness evidence and closing submissions.
Written Findings/Findings	The document comprising the Inquiry Members' written findings together with any background

	information and supporting documentation included in those findings.
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Table 2: Reports referred to in Findings Report

KPMG Report	The Report on the Agreed Upon Procedures prepared by KPMG dated 18 January 2011. This report was prepared by KPMG at the request of PTSB “to perform certain procedures related to PTSB’s 706 Condition mortgage account remediation project (the ‘706 Project’).”
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