An Inquiry pursuant to Part IIIC of the Central Bank Act 1942 (as amended) concerning the Irish Nationwide Building Society ("INBS"), Michael Fingleton, William Garfield McCollum, Tom McMenamin, John S. Purcell and Michael P. Walsh (the "Inquiry")

MODULE 1 – DECISION ON WHETHER TO CONDUCT HEARING OF EVIDENCE IN PUBLIC OR PRIVATE

Introduction

1. On 21 September 2016 the Inquiry Members issued a determination that this Inquiry would proceed in public. The determination issued following an application by [redacted] for the Inquiry to be held in private. [redacted] application was made on a number of grounds including that a private inquiry was necessary to protect the confidentiality of the customers of INBS. Having heard detailed submissions from [redacted] the Legal Practitioner Team and Enforcement, the Inquiry Members were satisfied that appropriate safeguards could be put in place to provide protection to borrowers during the course of the Inquiry. However, the Inquiry Members confirmed that "*These safeguards will be the subject of directions from the Inquiry Members in advance of each module and will be continuously reviewed during the course of the Inquiry*" and that "*This decision may be varied or revoked by the Inquiry Members in accordance with section 33AZ(3)*".

2. The hearing of the evidence in relation to Modules 2, 3 and 4, concerning Specified Prescribed Contraventions ("SPCs") 5, 6 and 7 respectively, was conducted in public in accordance with the determination made on 21 September 2016. Where information was contained in documents presented to the Inquiry that could identify borrowers, such information was redacted. Warnings were given to the witnesses in relation to the risk of inadvertent identification of borrowers.

3. The Inquiry is now preparing for hearings in relation to Module 1 of the Inquiry, concerning SPCs 1, 2, 3, and 4. The allegations in these SPCs concern the manner in which specific commercial loans were granted and monitored and a suspected failure on the

part of INBS and persons concerned in its management to ensure that internal policies in relation to commercial lending were complied with in respect of these specific loans. The allegations can be broadly characterised as follows:

a. The initial loan application stage (SPC 1);
b. The loan approval process (SPC 2);
c. The taking of security, obtaining valuations, adherence to maximum loan to value ratios (SPC 3); and
d. The monitoring of commercial lending (SPC 4).

4. It is anticipated that Module 1 will be divided into six hearings, 5 relating to specific loans (the loan modules) and one in relation to context (the context module).

5. The context module will involve a consideration of contemporaneous documentation such as internal and external audit reports and regulatory correspondence relevant to the above allegations. Appropriate witnesses in relation to context will be called.

6. The evidence that will be presented to the Inquiry in the loan modules will necessarily include a significant number of loan specific documents contained in loan files relating to 98 loans made to nine borrowers and oral evidence in relation to these loans.

7. The Inquiry Members formed an initial view that evidence in relation to the loan modules should be heard in private given the confidentiality of the customers' banking information. The loan hearings will be preceded by opening statements which could be heard in public. The context module could also be heard in public and the same safeguards that were applied during the hearings for SPCs 5, 6 and 7 would be applied. The Inquiry Members sought legal submissions from the LPT on this proposal. The LPT provided submissions on 5 February 2020. These were furnished to Enforcement and the Persons Concerned. Enforcement provided its submissions on 8 May 2020. No further submissions were received.

8. Having set out the legislative framework and cited the relevant case law regarding the confidentiality of banking information and the circumstances in which such information might be disclosed in the public interest, the LPT concluded that the proposal to hold the context module in public and the loan modules in private "*should strike an appropriate balance between the public interest in knowing how the affairs of INBS were conducted and the borrowers' entitlement to keep their banking affairs confidential."* Enforcement agreed with the LPT's analysis of the law and that the authorities cited supported its conclusion.

Legal Framework

9. Section 33AZ of the Central Bank Act 1942, (as amended) ("the Act") provides:

> *"(1) Except as provided by subsection (2), the Bank shall hold its inquiries in public.*
>
> *(2) The Bank and the financial service provider or other person to whom an inquiry relates may agree that the inquiry should be held in private, but even if they do not agree, the Bank may nevertheless decide to hold an inquiry in private if it is satisfied that-*
>
> > *(a) evidence may be given, or a matter may arise, during the inquiry that is of a confidential nature or relates to the commission, or to the alleged or suspected commission, of an offence against a law of the State, or*
> >
> > *(b) a person's reputation would be unfairly prejudiced unless the Bank exercises its powers under this section.*
>
> *(3) The Bank may at any time vary or revoke a decision made under subsection (2)."*

10. Under Section 33AZ the default position is that an inquiry is to be conducted in public. However, the section confers a discretion on the Inquiry Members to hold an Inquiry in

private where evidence of a confidential nature may be given. The provisions of Section 33AZ are replicated in paragraph 3.2 of the Inquiry Guidelines.

11. Paragraph 5.8 of the Outline Procedure provides a mechanism for the Inquiry to address issues of confidentiality and protection of the interests of third parties whilst conducting a public hearing. Paragraph 5.8 states:

> *"Where the Inquiry hearing (or the relevant part of the Inquiry hearing) is being heard in public and evidence relates to confidential and/or commercially sensitive information, the Inquiry Members may give any direction they consider appropriate to protect the confidentiality or commercial sensitivity of such information."*

Evidence of a Confidential Nature

12. Evidence relating to the banking information of INBS customers is evidence of a confidential nature within the meaning of Section 33AZ(2)(a). Having regard to the authorities cited by the LPT[1] it is clear that a bank owes a duty of confidentiality to its customers and that that duty of confidentiality extends to third parties who may come into possession of customers' banking information. Further, the courts have recognised the public interest in the maintenance of banking confidentiality. Lynch J in National Irish Bank v Radio Telifis Eireann [1998] 2 IR 465 stated:

> *"There is no doubt but that there exists a duty and a right of confidentiality between banker and customer as also exists in many other relationships such as for example doctor and patient and lawyer and client. This duty of confidentiality extends to third parties into whose hands confidential information may come and such third parties can be injuncted to prohibit the disclosure of confidential information. There is a public interest in the maintenance of such confidentiality for the benefit of society at large."*

[1] For example, Tournier v National Provincial and Union Bank of England [1924] 1 KB 461 and National Irish Bank v Radio Telifis Eireann [1998] 2 IR 465

13. As regards the wider public interest in maintaining the confidentiality of banking information, in McKillen v Times Newspapers Ltd [2013] IEHC 150 McEochaidh J stated:

> *"The interest in such confidentiality extends not only to the parties who enjoy the confidence, but every citizen and resident in the State would like to see such relationships protected. To put it bluntly, no-one would like to see their banking details on the front page of any newspaper and therefore there is a public interest in protecting and upholding those confidences."*

14. The duty of confidentiality is broad. As stated by McKechnie J in Walsh v National Irish Bank [2007] IEHC 325, confidentiality in respect of a customer extends to: "*the state of his account or the amount of his balance, the securities offered and held, the extent and frequency of transactions or indeed any information acquired by the bank during, or by reason of, its relationship with the customer*."

15. The entitlement to confidentiality is not absolute however. For example, Kelly J in Cooper Flynn v Radio Teilifis Eireann [2000] 3 IR 344 stated:

> *"It is therefore clear that a duty and right of confidentiality exists between a banker and his customer. That is not to be equated with an entitlement to any form of legal privilege. The duty and right of confidentiality is not absolute and must, in an appropriate case, be weighed and balanced against countervailing rights, obligations and entitlements."*

16. Citing O'Brien v Radio Teilifis Eireann [2015] 2 IR 130 the LPT submitted that there is a public interest in being informed about the manner in which a financial institution ran its affairs, in particular where that financial institution came into State ownership. In that case, Binchy J confirmed that: "*like many rights however, the right [to banking confidentiality] is not absolute and may be displaced in certain circumstances where warranted in the public interest*". At paragraphs 96 and 97 he stated:

> *"96. In this case the issue of significant public interest that the defendant has raised arises under the broad heading of the corporate governance of IBRC. There is no doubt at all about the public interest in the affairs of IBRC. As MacEochaidh J. said in the case of McKillen v. Times Newspapers Ltd & Mark*

Tighe [2013] IEHC 150 "the bank is run effectively at the direction of or by persons appointed by the Minister for Finance; and the whole operation is now, effectively, a public interest operation."

97. That of itself does not entitle the public to know every detail of the affairs or operation of IBRC and certainly not confidential information concerning its customers. The public interest is in knowing that it is properly governed and operated, and where there are any significant shortcomings in this regard, and in particular where such shortcomings may lead to significant losses, which have to be borne at the expense of the public purse, in my view the public is entitled to be informed of such matters."

Conclusion

17. As noted above, the default position under Section 33AZ is that inquiries under Part IIIC of the Act are to be conducted in public. There is a public interest in maintaining public confidence in the Administrative Sanctions Procedure and the Inquiry Members agree with Enforcement's observation that transparency is key to such public confidence. There is a public interest in this particular inquiry into the manner in which commercial lending was carried out at INBS as specifically recognised by Hedigan J in Purcell v Central Bank of Ireland [2016] IEHC 514 at paragraph 8.10 of his judgment.

18. There are however competing public interests that must be balanced in determining the extent to which this Inquiry may proceed in public. There is a public interest in maintaining the confidentiality of the banking information of the customers of INBS. There is a further public interest in conducting the Inquiry with as much expedition and efficiency as a proper analysis of the evidence will allow.

19. At the time of its determination in September 2016 the Inquiry Members anticipated that with appropriate protective measures (such as the use of pseudonyms and redaction) it would be possible to conduct the inquiry in public. However, it has become apparent that the nature and extent of the confidential customer information that will

necessarily be considered in the 5 loan specific hearings are such as to make it impracticable to conduct those hearings in public. While, theoretically, safeguards could be put in place to protect the identity of customers and maintain the confidentiality of their banking information such measures become impractical for the following reasons:

a. There is a risk of documentation becoming unintelligible if information that would identify or assist in the identification of borrowers was excluded.
b. Given the number of borrowers and individual commercial loans that are under consideration, the use of pseudonyms or redaction has the potential to lead to confusion. Witnesses may be restricted in their ability to give their evidence fluently which has the potential to diminish the quality and reliability of their evidence.
c. Given that evidence in relation to specific loans will form the basis of the five loan specific hearings there is a significant risk that borrower information will be inadvertently disclosed.
d. Redaction of customer details from the documentation relevant to the 98 loans in question is likely to be costly and time consuming and would not be proportionate in the circumstances.

20. The Inquiry Members are of the view that the decision to hold the loan hearings in private and the opening statements and context hearing in public is the appropriate balance of the countervailing public interest considerations.

21. The Inquiry Members have therefore decided of their own motion and in accordance with Section 33AZ(3) to vary their decision of 21 September 2016 to conduct the Inquiry in public as follows: The hearings in relation to Module 1, other than the opening statements and the context hearing, shall be conducted in private.

Marian Shanley

Geoffrey McEnery

Ciara McGoldrick

2 July 2020