Subject: Application for access to documents according to Regulation 1049/2001 - GESTDEM 2012/2341 relating to case SA.33585 (2011/CP) - Alleged unlawful use of State aid by the Irish National Asset Management Agency

Dear Sir,


Your application will be dealt with as quickly as possible. However, in view of the assessment of the objections raised with respect to disclosure of the documents you applied for, we have to extend the prescribed period by another 15 working days before you receive a reply. We apologize for this delay.

Yours sincerely,

Alberto BACCHIEGA
Head of Unit

\(^{1}\) JO L145 of 31.05.2001, p. 43

Please specify the name of the case and the case number in all correspondence.


E-mail: stateaidgroffe@ec.europa.eu
Subject: Application for access to documents according to Regulation 1049/2001-GESTDEM 2012/2341 relating to case SA.33585 (2011/CP) – Alleged unlawful use of State aid by the Irish National Management Agency

Dear M,

Thank you for your letter of 11 May 2012, registered on 11 May 2012 under reference GestDem 2012/2341, applying for the access to documents in accordance with Regulation 1049/2001\(^1\) regarding public access to European Parliament, Council and Commission documents.

1. Documents concerned

Your request concerned the access to the following documents:

- The Decision of the Competition Commissioner approving the Irish National Asset Management Agency (NAMA) scheme - "the scheme" - whereby homes are sold with buyers protected against 20% declines in property values over a five year period,
- Documentation and responses to queries provided by NAMA to the Commission in relation to the scheme,
- Documentation and responses to queries provided by the Irish Competition Authority to the Commission in relation to the scheme,
- Documentation and responses to queries provided by the government of Ireland and its agencies to the Commission in relation to the Scheme and

\(^1\) OJ L145, 31.05.2001, page 43.
• Copies of representations made by any party, including financial institutions, to the Commission in relation to the scheme.

Please note, that the documents available to the Commission you refer to in your letter were submitted through SA.34054 (2011/PN) and SA.33585 (2011/CP), in the context of pre-notification contacts of the Commission with the Irish authorities (Department of Finance) with the view to ascertain whether the envisaged scheme (the Deferred Payment Initiative, hereinafter "the Initiative") could have any State aid implications under Article 107(1) of the Treaty on the Functioning of the European Union (hereinafter "TFEU"). No formal notification has been submitted thereafter. However, it remains open to the Member State concerned to do so in which case the Commission will start a formal investigation of the scheme.

2. Transmission of documents

With respect to the first document you request access to: "The Decision of the Competition Commissioner approving the Irish National Asset Management Agency (NAMA) scheme - "the scheme" - whereby homes are sold with buyers protected against 20% declines in property values over a five year period", I wish to inform you that no decision was taken by the Commission in this respect.

Furthermore, after careful consideration in light of Regulation 1049/2001, I came to the conclusion that your request for access to pre-notification documents comes within the scope of the exceptions in Article 4 of Regulation 1049/2001.

3. Applicable exceptions

3.1. Objections against disclosure from a Member State

The documents you requested originate from the Irish authorities.

We have contacted the authorities of the Member State concerned in view of your request, inviting it, if it wants to object to the disclosure of documents concerned, to state reasons with reference to the exceptions of Article 4 (1) to (3) of Regulation 1049/2001. On 1 June 2012 we have received the Member State's reply by which it objects to the granting of access to the requested documents.

The Member State invoked the exceptions laid down in Article 4 of Regulation 1049/2001 related to: (i) the protection of the Commission's decision-making process, (ii) the protection of the purpose of investigations, (iii) the protection of financial, monetary and economic policy of a Member State and (iv) the protection of commercial interests of natural and legal persons.
With regards to the protection of the Commission's decision making process the Member State referred to the Commission's Code of Best Practices for the conduct of State aid control procedures which provides that: "Pre-notification contacts are held in strict confidence. The discussions take place on a voluntary basis and remain without prejudice to the handling and investigation of the case following formal notification." The Member State also emphasised that "all of the requested documents ... were submitted ... on a voluntary, confidential and without prejudice basis and in the context of informal contacts with the Commission" and that it is in the interest of cooperation in good faith and mutual confidence between the Commission and the Member State that pre-notification contacts take place in the strictest confidence, in accordance with the Commission's best practice guidance.

Further, the Member State pointed out that "pending receipt by the Department of Finance of written confirmation from the Commission that it has closed its file in relation to the Initiative, NAMA understands that the requested documents are covered by a general presumption that access to all the documents in the Commission's administrative file ... shall be refused, without the necessity for the Commission to undertake an individual examination of those documents". The Member State then referred to the Commission v Technische Glaswerke Ilmenau (TGI) judgment\(^2\) and to the fact that therein the European Court of Justice recognised the existence of a general presumption that disclosure of documents in the State aid administrative files of the Commission would in principle undermine the purpose of the investigation. The Member State also submitted that "provision of access of the Commission's administrative file has the potential to severely undermine the right of defence of the State".

The Irish authorities invoked also the exception related to the protection of the financial, monetary or economic policy of the Member State. In this regard they emphasised that "the introduction and operation of the asset relief scheme for banks in Ireland was apt to remedy a serious disturbance in the Irish economy". The Member State also pointed out that the requested documents relate to the internal development of policy of aspects of the financial and economic policy of the Irish State.

Finally, the Member State argued that the requested documents include confidential information, which is covered by the exception related to the protection of commercial interests and the obligation of professional secrecy set out in Article 339 of the TFEU. Such confidential information relates but is not limited to: (i) a draft version of confidential and commercially sensitive agreements between NAMA and the banks participating in the Initiative, (ii) confidential and commercially sensitive data regarding NAMA's internal estimation of the likely financial and cash flow impact of the Initiative for NAMA, (iii) confidential economic study commissioned by NAMA and (iv) confidential details of the State aid analysis carried out by NAMA.

On the basis of the above and in accordance with Article 4(5) of Regulation 1049/2001 access to the requested documents has to be refused.

\(^2\) See case C-139/07 P Commission v Technische Glaswerke Ilmenau.
3.2. Exceptions invoked by the Commission

3.2.1. Protection of the purpose of the State aid investigation

As has been stated above, the requested documents that the Commission has in its disposal are part of pre-notification (preliminary) contacts of the parties involved seeking the Commission's views on the envisaged scheme and its compatibility with State aid rules.

According to the Commission's Code of Best Practices for the conduct of State aid control procedures pre-notification contacts provide the Commission services and the Member State concerned with the possibility to discuss the legal and economic aspects of a proposed measure informally and in strict confidence prior to notification should the Member State decide to notify. The Code also emphasises the necessity to "allow discussions, in an open and constructive atmosphere, of any substantive issues raised by a planned measure".

The result of such preliminary contacts is a preliminary assessment of a non-binding nature which is not an official position of the Commission but informal guidance from the Commission's services on the completeness of the draft notification and the prima facie compatibility of the planned project with the common market. Such informal guidance does not preclude further assessment of the matter should new relevant information be brought to the Commission's attention.

Given the non-definitive nature of the assessment under a preliminary contacts procedure and the possibility of starting a formal investigation of the scheme, e.g. in the event of a notification by the Irish authorities, disclosure of the documents in the case file would be prejudicial to any further investigative steps that the Commission may take on that file.

It is worth noting in this regard that in the TGI judgment the Court of Justice ruled that with regard to Article 4(2) third indent of Regulation 1049/2001, there is a general presumption that disclosure of documents in the administrative files in State aid procedures in principle undermines the protection of the purpose of investigations. The Court reasoned that this follows from the fact that under the State aid procedural rules, interested parties (i.e. third parties), except for the Member State responsible for granting the aid, have no right under the procedure for reviewing State aid to consult the documents in the administrative file and that account must be taken of that fact for the purposes of interpreting the exception laid down by Article 4(2) third indent, of Regulation No 1049/2001. Furthermore, the Court of Justice stated that, should such access be granted under Regulation 1049/2001, the nature of the procedure is likely to be modified and thus the system for review of State aid would be called into question.

It has to be noted as well that the Commission's Code of Best Practices creates a legitimate expectation by the Member States that their submissions will, in principle, be treated with

3 Ibidem, para. 61.
5 Ibidem.
confidence at least until there is a final and binding decision on the proposed scheme. Moreover, as stated above the Member State concerned objected to disclosure of the documents requested. In these circumstances disclosure of documents would prejudice the future sincere and open cooperation between the Commission and the Member States which would put at risk the effective conduct of State aid pre-notification investigations.

It follows from the above that the requested documents are manifestly covered in their entirety by the exception related to the protection of the purpose of the investigation set out in Article 4(2) third indent of Regulation 1049/2001.

### 3.2.2. Protection of the financial, monetary or economic policy of a Member State

According to Article 4(1)(a) fourth indent of Regulation 1049/2001, the Commission shall refuse access to a document where disclosure would undermine the protection of the public interest as regards the financial, monetary or economic policy of the Union or a Member State.

Most of the documents which are subject to the request for access to documents relate to the internal development of policy within NAMA intended to improve the liquidity of the housing market in Ireland and thereby to remedy a serious disturbance of the Irish economy. Disclosure of the documents requested may therefore have a prejudicial effect on the Member State's scope of manoeuvre in developing its economic policy.

Therefore, the documents requested are covered by the exception provided for in Article 4(1)(a) fourth indent of Regulation 1049/2001.

### 3.2.3. Protection of the commercial interests of a natural or legal person and protection of the financial, monetary or economic policy of a Member State

According to Article 4(2) first indent of Regulation 1049/2001, the Commission shall deny access to a document where disclosure would undermine the protection of commercial interests of any person or entity.

The requested documents include confidential and commercially sensitive information as described above in the section related to the objections from the Member State. Please note that I cannot be more specific with regard to the content of the individual documents concerned, since this would have the effect of partly revealing their content and, thereby, deprive the exception of its purpose.  

Disclosure of these documents would prejudice the commercial interests of NAMA and third parties concerned. Therefore, the documents requested fall within the exception provided for in Article 4(2) first indent of Regulation 1049/2001.

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4. **Overriding public interest in disclosure**

According to Article 4(2) of Regulation 1049/2001, the exceptions to the right of access under section Article 4 (2), first and third indent, shall be lifted if an overriding public interest in disclosure of the requested document. For a public interest in disclosure exists, that interest, first, must be public (as opposed to private interests of the applicant) and, second, higher, i.e. in this case it must prevail over the interests protected under Article 4(2) first and third indent of Regulation 1049/2001.

In your request, you do not set of arguments that are of overriding public interest in disclosure. Similarly, the Commission has not itself identified an overriding public interest. Therefore, the interest that prevails in this case lies rather in protecting the effective State aid investigation of the Commission and the commercial interests of parties involved.

5. **Partial access**

I also examined the possibility of granting partial access to the documents concerned in accordance with Article 4(6) of Regulation 1049/2001. However, since the documents are manifestly covered in their entirety by the invoked exceptions, no such access can be granted.

6. **Means of redress**

If you want this position to be reviewed you should write to the Commission’s Secretary-General at the address below, confirming your initial request. You have 15 working days in which to do so from receipt of this letter, after which your initial request will be deemed to have been withdrawn.

The Secretary-General will inform you of the result of this review within 15 working days from the registration of your request, either granting you access to the document or confirming the refusal. In the latter case, you will be informed of how you can take further action.

All correspondence should be sent to the following address:

Ms. Catherine Day  
Secretary-General  
European Commission  
B-1049 BRUSSELS

Yours faithfully,

Alexander ITALIANER
Per e-mail only:

Subject: Confirmatory application for access to a document under Regulation 1049/2001 - Gestdem 2012/2341

Dear M,

I refer to your e-mail of 28 June 2012, registered on 29 June 2012, in which you require, pursuant to Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents¹, a review of the position taken by the Directorate-General for Competition on 27 June 2012, in reply to your initial application of 11 May 2012.

In your initial application, you requested access to following documents:

1. The decision of the Competition Commissioner approving the Irish National Asset Management Agency (hereafter: NAMA) scheme - "the scheme" - whereby homes are sold with buyers protected against 20% declines in property values over a five year period;

2. Documentation and responses to queries provided by NAMA to the Commission in relation to the scheme;

3. Documentation and responses to queries provided by the Irish Competition Authority (hereafter: ICA) to the Commission in relation to the scheme;

4. Documentation and responses to queries provided by the government of Ireland and its agencies to the Commission in relation to the scheme, and

5. Copies of representations made by any party, including financial institutions, to the Commission in relation to the scheme.

¹ OJ L145, 31.05.2001, p.43.
A first assessment of your application leads to the following conclusions:

Regarding the first three items of your request, at this point in time, there are no documents corresponding to your request:

1. The decision of the Commission, approving the NAMA scheme has not yet been established;

2. As there have been no direct contacts between the Commission and NAMA, in relation to the pre-notification of the scheme, there are no documents or responses to queries provided by NAMA to the Commission;

3. As there was no direct contact between the Commission and the ICA, there are no documents or responses to queries provided by the ICA to the Commission in relation to the pre-notification of the scheme.

As regards item (5) of your request, I would like to inform you that the Commission has not received any documents from financial institutions in the context of the pre-notification of the scheme. However, the Commission has been contacted by citizens in relation to the compliance of the above-mentioned scheme with the State aid rules. The documents sent to the Commission are mainly economic essays or specialised articles publicly available as well as press releases and information contained in public websites. Consequently, I assume you are not interested in having access to this correspondence. If this is not the case, please let us know.

Finally, we are currently handling item (4) of your request. The analysis of the documents concerned is still ongoing. As this may lead to a new consultation of the Irish authorities, we are not in a position to reply to your confirmatory request within the prescribed time limit expiring 20 July 2012. Consequently, we have to extend this period by another 15 working days in accordance with Article 8(2) of Regulation 1049/2001. The new deadline expires on 10 August 2012.

Yours sincerely,

Marc Maes
Deputy Head of Unit
Brussels,
SG.B.5/MIA/psi - sg.dsg1.b.5(2012)1130961

Mr Jagdip A Singh

*Per e-mail only:*

ask+request-131-9e531431@asktheeu.org

Subject: Confirmatory application for access to a document under Regulation 1049/2001 - Gestdem 2012/2341

Dear Mr Singh,

I refer to your e-mail of 28 June 2012, registered on 29 June 2012, in which you require, pursuant to Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents¹, a review of the position taken by the Directorate-General for Competition on 27 June 2012, in reply to your initial application of 11 May 2012.

I also refer to the holding reply dated 20 July 2012, in which the time limit for replying to your confirmatory request was extended by 15 working days, pursuant to Article 8(2) of the Regulation. This extended time limit expires today.

Unfortunately, we are still not in a position to provide you with a final reply to your request. We need to consult the Irish authorities before taking a definitive decision on the disclosure of the requested documents. I can assure you that we are doing our utmost to provide you with the final reply on your application as soon as possible. I regret this additional delay and sincerely apologise for any inconvenience this may cause.

Yours sincerely,

Marc Maes
Deputy Head of Unit

¹ OJ L145, 31.05.2001, p.43.
Dear M

Thank you for your e-mail of 23 November 2012 concerning your confirmatory application for access to documents Gestdem 2012-2341.

Unfortunately, we have not yet been able to take a final decision in this matter. This is due to ongoing internal consultations with the services involved. The final decision will be taken by the Secretary General of the College on the resolution of the internal consultations. However, I can assure you that we are doing all we can to provide you with a response as soon as possible. I would also like to stress that this delay, in reality, does not imply a refusal and an explicit decision will be delivered soon.

Yours sincerely,

Maria Isabel Alvarez Cuartero
'Accès aux documents'

European Commission
SG/B/5 - Transparency

BERL 05/296
B-1049 Brussels/Belgium

-----Original Message-----
From: [redacted]
Sent: Friday, November 23, 2012 8:08 PM
To: SG ACCES DOCUMENTS
Subject: Re: Confirmatory application for access to documents pursuant to Regulation 1049-2001 - GESTDEM 2012-2341 -

Dear Competition (COMP),

Further to your letter of 9th August 2012 - that is, three and a half months ago - I write to remind you that you are well beyond
the 15 day deadline for an extension.

Please can you advise me precisely when you will reply to the request.

Yours faithfully,

-----Original Message-----

Dear Mr Singh,
Kindly find herewith a letter concerning your confirmatory application for access to documents (gestdem 2012-2341).

Yours sincerely,

Paul SIMON
Unit SG.B.5, Transparency
European Commission

Please use this email address for all replies to this request:

This message and all replies from Competition (COMP) will be published on the AsktheEU.org website. For more information see our dedicated page for EU public officials at http://www.asktheeu.org/en/help/officers
Chère Isabel,


M. SINGH nous informe de l'introduction d'une plainte auprès du Médiateur du au retard à lui fournir une réponse à sa demande confirmative.

En te remerciant,

Carlos Remis  
SG.B.5. 
Transparence.  
Berl. 05/329.

-----Original Message-----
From:  
Sent: Thursday, January 10, 2013 3:52 PM  
To: SG ACCES DOCUMENTS  
Subject: Internal review of access to information request - Ireland National Asset Management Agency Deferred Mortgage Initiative

Dear Competition (COMP),

Because I have not heard back from you, and my request for documents is now 7.5 months old, I have today initiated a complaint with the Ombudsman.

I would respectfully continue to urge you to comply with the request. The request is not going away.

Yours faithfully,

-----Original Message-----

Dear,

Thank you for your e-mail of 23 November 2012 concerning your confirmatory application for access to documents Gestdem 2012-2341.
Unfortunately, we have not yet been able to take a final decision in this matter. This is due to on-going internal consultations with the services involved. The final decision will be taken by the Secretary General in the name of the College on the resolution of the internal consultations.

However, I can assure you that we are doing all we can to provide you with a response as soon as possible. I would also like to stress that this delay, in reality, does not imply a refusal and an explicit decision will be delivered soon.

Yours sincerely,

Maria Isabel Alvarez Cuartero
'Accès aux documents'

European Commission
SG/B/5 - Transparency

BERL 05/296
B-1049 Brussels/Belgium

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Please use this email address for all replies to this request:

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This message and all replies from Competition (COMP) will be published on the AsktheEU.org website. For more information see our dedicated page for EU public officials at http://www.asktheeu.org/en/help/officers

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Chère Isabel,

Merci de bien vouloir trouver ci-après, un nouveau rappel envoyé par M. SINGH Jagdip, montrant son impatience à recevoir une réponse à sa demande confirmative - Gestdem 2012/2341.

Bien à toi,

Carlos Remis
SG.B.5.
Transparence.
Berl. 05/329.

-----Original Message-----
From: 
Sent: Monday, January 14, 2013 2:51 PM
To: SG ACCES DOCUMENTS
Subject: Internal review of access to information request - Ireland National Asset Management Agency Deferred Mortgage Initiative

Dear Competition (COMP),

I would like to make a confirmatory application regarding my request for documents.

Might I respectfully point out that consulting a third party on third party documents to assess whether to release them does not mean that the opinion of the third party is binding upon the EU institution and that you may go ahead with a decision if you do not receive any reply from the third party,

Yours faithfully,

-----Original Message-----

Dear M

Thank you for your e-mail of 23 November 2012 concerning your confirmatory application for access to documents Gestdem 2012-2341.

Unfortunately, we have not yet been able to take a final decision
in this matter. This is due to on-going internal consultations with the services involved. The final decision will be taken by the Secretary General in the name of the College on the resolution of the internal consultations. However, I can assure you that we are doing all we can to provide you with a response as soon as possible. I would also like to stress that this delay, in reality, does not imply a refusal and an explicit decision will be delivered soon.

Yours sincerely,

Maria Isabel Alvarez Cuartero
'Accès aux documents'

European Commission
SG/B/5 - Transparence

BERL 05/296
B-1049 Brussels/Belgium

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Please use this email address for all replies to this request:

This message and all replies from Competition (COMP) will be published on the AsktheEU.org website. For more information see our dedicated page for EU public officials at http://www.asktheeu.org/en/help/officers

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Subject: Confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2012/2341

Dear Sir,

I refer to your letter of 28 June 2012, registered on 29 June 2012, in which you lodge a confirmatory application, in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents\(^1\) (hereafter “Regulation 1049/2001”).

I further refer to the holding replies of 20 June 2012 and 9 August 2012.

1. **Scope of your Request**

   In your confirmatory application, you request a review of the position taken by the Director-General for Competition (hereafter "DG COMP") on 27 June 2012, in its reply to your initial application of 11 May 2012.

   In your initial application, you requested access to following documents:

   (1) The decision of the Competition Commissioner approving the Irish National Asset Management Agency (hereafter "NAMA") scheme – (hereafter ""the Scheme") -whereby homes are sold with buyers protected against 20\% declines in property values over a five year period;

   (2) Documentation and responses to queries provided by NAMA to the Commission in relation to the Scheme;

   (3) Documentation and responses to queries provided by the Irish Competition Authority (hereafter "ICA") to the Commission in relation to the Scheme;

   (4) Documentation and responses to queries provided by the government of Ireland and its agencies to the Commission in relation to the Scheme, and

   (5) Copies of representations made by any party, including financial institutions, to the Commission in relation to the Scheme.

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\(^1\) OJ L145, 31.05.2001, p. 43.
When handling your confirmatory application, the Secretariat General has verified the state of play with regard to the pre-notification of the above-mentioned Scheme. You were informed by letter of 20 July 2012 that, at that point in time, no documents existed corresponding to the description given in point (1) to (3) of your request. I confirm that no such documents exist.

As regards the documents requested under point (5) of your request, you were informed in the same letter that the Commission did not receive any documents from financial institutions in the context of the pre-notification of the scheme. The Commission received documents from citizens, mainly economic essays, specialized articles and press releases, which are publicly available. We assumed that you were not interested in obtaining access to this correspondence. As you did not react to this letter, the publicly available material sent to the Commission is not included in the scope of your request.

Therefore, the present decision is limited to the documents falling within the description given in point (4) of your request and which are mentioned in the Annex to this letter. The Commission has identified 14 documents covered by point 4 of your request. Documents (1) to (3), (4) and (5) to (7) are e-mails. Documents (3.1), (3.1.1) to (3.1.4), (4.1) and (4.2) were respectively attached to the e-mails (3) and (4).

Please note that documents (3.1.3) and (3.1.4) are already publicly available on the Internet. Copies are attached.

The reasons for refusing access to the other documents or parts thereof are set out under Section 4 below.

2. CONTEXT

The documents mentioned in the enclosed Annex belong to the administrative file of the Commission in State aid cases SA.34054 (2011/PN) and SA.33585 (2011/CP). These documents were received in the framework of pre-notification contacts of the Commission with the Irish authorities (Department of Finance) following queries by the Commission in the context of an investigation on the basis of a complaint from a citizen with regard to the draft "Deferred Consideration Initiative" (hereinafter "the Scheme") dated 6 September 2011.

Following the complaint and the pre-notification of the Scheme by the Irish authorities, the Commission has carried out a preliminary investigation with a view to ascertaining whether the envisaged Scheme could have any State aid implications under Article 107(1) of the Treaty on the Functioning of the European Union (hereinafter "TFEU"). Following its examination and based on the information available at that stage, the Commission's services arrived to the preliminary assessment that the Scheme does not a priori constitute State aid under Article 107(1) TFEU.
According to the Commission's Code of Best Practices for the conduct of State aid control procedures (hereafter "the Code of Best Practices") pre-notification contacts provide the Commission's services and the Member State concerned with the possibility to discuss the legal and economic aspects of a proposed measure informally and in strict confidence prior to notification, should the Member State decide to notify. The Code of Best Practices also emphasizes the necessity to "allow discussions, in an open and constructive atmosphere, of any substantive issues raised by a planned measure".

Please note that the result of such preliminary contacts is a preliminary assessment of a non-binding nature which is not an official position of the Commission but an informal guidance from the Commission's services on the compliance of the draft notification with formal requirements and/or the prima facie compatibility of the planned project with the internal market. Such informal guidance does not preclude further assessment of the matter should new relevant information be brought to the Commission's attention.

The Commission thus wishes to underline the non-definitive nature of the assessment under a preliminary contacts procedure. It is further important to note that the documents transmitted to the Commission through the pre-notification may contain information, which is not relevant anymore and/or may become obsolete in relation to the final measure adopted by the Member State.

In this particular case, and although the investigation based on the above-mentioned complaint was subsequently closed, the Commission wishes to inform you that it cannot be excluded at this stage that the Commission may be requested through other complaints to further investigate the Scheme, should the new relevant information be brought to the Commission's attention or should the Irish authorities decide to notify a draft related to this Scheme in the future.

3. CONSULTATION OF THE IRISH AUTHORITIES

Since your confirmatory application concerns documents transmitted by the Irish authorities in the framework of the above-mentioned pre-notification, the Commission consulted these authorities pursuant to Articles 4(4) and 4(5) of Regulation No 1049/2001. Pursuant to Article 4(5) a Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

During this consultation, the Commission drew the attention of the Irish authorities to the judgment of the Court of Justice of 18 December 2007, according to which a Member State objecting to the disclosure of documents must state reasons for its position in terms of the exceptions laid down in Article 4(1) to (3) of Regulation No

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3 Judgment of the Court of Justice of 18 December 2007, Sweden v Commission, Case C-64/05, [2007] ECR I-11389
1049/2001. The Commission would like to recall that the Irish authorities were also consulted at the initial stage of the examination of your request. The position of these authorities, as reflected below, is based on the replies to both consultations.

Following the latter consultation, the Irish authorities agreed to grant partial access to the following documents: (1), (2), (4.2), (5), (6) and (7). The Irish authorities have not confirmed their agreement to disclose documents (3) and (4). However, these are cover e-mails with no substantial content. Therefore, if you insist in obtaining access to these documents, please let us know.

On the other hand, the Irish authorities have objected to disclosure of the documents (3.1), (3.1.1), (3.1.2) and (4.1) in their entirety as well as to the remaining parts of documents (1), (2), (4.2), (5), (6) and (7), since they consider them to be covered by several exceptions provided for in Regulation 1049/2001. The Irish authorities invoked on the one hand, with regard to all the withheld documents and parts thereof, the protection of the public interest as regards the protection of financial, monetary and economic policy of a Member State [Article 4(1) (a), fourth indent], and, on the other hand, the protection of the commercial interests of a natural or legal person, including intellectual property [Article 4(2), first indent] with regard to some parts of the documents concerned.

4. **REASONS FOR NON-DISCLOSURE**

4.1. Protection of the economic policy of a Member State

The Irish authorities state that the disclosure of the documents concerned and parts thereof would undermine the protection of the financial and economic policy of Ireland. They rely on the ground for exception provided for in Article 4(1) (a), fourth indent of Regulation No 1049/2001, according to which "[t]he institutions shall refuse access to a document where disclosure would undermine the protection of the public interest as regards (...) the financial, monetary or economic policy of the Community or a Member State."

In this respect, the Irish authorities stated the following: [a]s acknowledged by the Commission in its decision approving the establishment of NAMA, the introduction and operation of the asset relief scheme for banks in Ireland was apt to remedy a serious disturbance in the Irish economy,....therefore the activities of NAMA are central to the financial and economic policy of the Irish State. These authorities also pointed out that the requested documents relate to the internal development of policy within NAMA and as such to the development of aspects of the financial and economic policy of the Irish State.

4.2. National legislation of the Member State

The Irish authorities further stressed that, based on the Irish national legislation on access to documents, NAMA could not be required to disclose any of the requested documents under equivalent provisions of national law as it is not currently subject to Freedom of Information Acts 1997 to 2003.
Regarding the reference to the national legislation put forward by the Irish authorities, the Commission wishes to point out that, at paragraph 84 of the judgment in case C-64/05 P Sweden v Commission referred to above, the Court of Justice recognizes that there is nothing to exclude the possibility that compliance with certain rules of national law protecting a public or private interest, opposing disclosure of a document and relied on by the Member State for that purpose, could be regarded as an interest deserving of protection on the basis of the exceptions laid down by that regulation. In the Commission's view, the protection afforded by provisions of national law in question with regard to the withheld documents, is adequately preserved by the application of the above-mentioned exception and agreement to grant access to such documents would circumvent the Irish national legislation.

The Commission considers that the reasons given by the Irish authorities are prima facie capable of justifying the application of this exception. Furthermore, most of the documents which are subject to the request for access to documents relate to the internal policy development within NAMA intended to improve the liquidity of the housing market in Ireland. Disclosure of the documents requested may therefore have a prejudicial effect on the Member State's room for manoeuvre in developing its economic policy.

4.3. Protection of the commercial interests of a natural or legal person

Finally, the Irish authorities argue that the documents requested are also covered by the exception laid down in Article 4 (2), first indent of Regulation 1049/2001, which stipulates that [t]he institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property and that, consequently, they cannot be disclosed.

In their reply, the Irish authorities further claimed that the requested documents include confidential and commercially sensitive information, which is covered by the exception related to the protection of commercial interests and the obligation of professional secrecy set out in Article 339 of the TFEU and that disclosure of these documents would undermine the commercial interests of NAMA.

They add that [s]uch confidential information relates but is not limited to: (i) a draft version of confidential and commercially sensitive agreements between NAMA and the banks participating in the Initiative, (ii) confidential and commercially sensitive data regarding NAMA's internal estimation of the likely financial and cash flow impact of the Initiative for NAMA, (iii) confidential economic study commissioned by NAMA and (iv) confidential details of the State aid analysis carried out by NAMA.

The Commission considers that the reasons given by the Irish authorities are prima facie equally capable of justifying the application of the above-mentioned exception to sensitive commercial information contained in documents (3.1.1) (3.1.2), (4.1) and parts of document (3.1). These documents or parts thereof thus include confidential and commercially sensitive information as described above.
Please note that I cannot be more specific with regard to the content of the individual documents concerned, since this would have the effect of partly revealing their content and, thereby, deprive the exception of its purpose⁴.

In conclusion, since, first, the Irish authorities have objected to the disclosure of the above-mentioned documents and have provided reasons put forward in terms of three of the exceptions set out in Article 4 of Regulation No 1049/2001 and, second, these reasons are prima facie proper, the Commission must refuse their disclosure. This position is in line with paragraph 90 of the above-mentioned judgment of Court of Justice.

5. OTHER GROUNDS FOR REFUSAL

The Irish authorities invoked other grounds for refusal of the above-mentioned documents, namely the protection of the Commission's decision-making process and of the purpose of investigations, which, in the Commission's view, would require further clarification.

However, since the above-mentioned exceptions and the reasons provided show that the concerned documents or parts thereof cannot be disclosed, the Commission sees no need for additional clarifications and will, therefore, not refer to these additional grounds for refusal.

6. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

According to Article 4(2) last sentence of Regulation 1049/2001, the exception laid down in Article 4(2), first indent of Regulation 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must firstly be public and secondly outweigh the damage caused by disclosure. In other words, it must prevail over the interest protected by virtue of Article 4(2), first indent of Regulation 1049/2001. The Irish authorities concluded that there was no overriding interest in disclosure of the requested documents.

In your confirmatory application, you state that the Scheme is potentially significant in the Irish market. In order to justify the existence of an overriding public interest, you add that NAMA's portfolio of property is significant in the Irish market and that the fact that property has declined in value by 30% on average since NAMA acquired the underlying loans [...] provides a basis for suspecting that NAMA may become a hostage to fortune and seek to manipulate pricing so as to meet its financial objectives.

However, I have concluded that the arguments you put forward do not show the existence of a public interest in disclosure that would outweigh the interest of protecting the commercial interests of NAMA. I must recall that the documents and parts of documents concerned are also covered by the exception set out in Article 4(1)(a), fourth indent of Regulation 1049/2001, aimed at protecting the financial, monetary or economic policy, which is not subject to a public interest test.

7. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may, under the conditions of Article 263 TFEU, bring proceedings before the General Court or, under the conditions of Article 228 TFEU, file a complaint with the European Ombudsman.

Yours faithfully,

[Signature]

Catherine Day

Enclosures