



EUROPEAN COMMISSION
SECRETARIAT-GENERAL

The Secretary General

Brussels,
SG.B.5/MIA/psi – sg.dsg1.b.5(2013)893876

Mr Jagdip A Singh

By e-mail only:
ask+request-131-9e531431@asktheeu.org

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 documents¹ (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.

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 procedures² (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 2007³, 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

² 2009/C 136/04, available at:

<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:136:0013:0020:EN:PDF>

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*.

⁴ Case T-204/99, *Olli Mattila v. Council and Commission*, (2001) ECR [2001] page II-2265, para. 87; case T-105/95, *WWF UK v. Commission*, [1997] ECR II-313, at para. 65.

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,

A handwritten signature in black ink, appearing to read 'Catherine Day', with a checkmark at the end.

Catherine Day

Enclosures