



EUROPEAN COMMISSION

Competition DG

Director General

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Mr Jagdip A. Singh

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

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 Mr Jagdip A. Singh,

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 1049/2001¹ 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)* judgment² 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.³ 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 1049/2001.⁴ 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.⁵

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.

⁴ *Ibidem*, at para. 58.

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.⁶

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.

⁶ See settled case law, in particular case T-204/99, *Olli Mattila v. Council and Commission*, [(2001) ECR page II-2265, para. 87; case T-105/95, *WWF UK v. Commission*, [1997] ECR II-313, para. 65 and case T-84/03 *Turco v Council* [2004] ECR p. II-4061, para 74.

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