National Asset Management Agency

**17th September 2010**

Ms Elizabeth Dolan
Senior Investigator
Office of the Commissioner for Environmental Information
18 Lower Lesson Street
Dublin 2



**Your ref: CEI/10/0005**

**Appeal of Mr. Gavin Sheridan under the European Communities (Access to Information on the Environment) Regulations 2007 (the "Regulations")**

Dear Ms Dolan

Thank you for your letter of 16 August 2010 enclosing the Appellant's response (undated) to the Investigator's preliminary view dated 29 June 2010.

We note also that your letter makes reference a particular view of commentators other than the Appellant in relation to Article 3(1) (iv).

We wish to make the following further submission to the Appellant's response to the Investigator's preliminary view.

**1. Article 3(1) (iv)**

The Appellant expounds the mistaken view that a body will be a "public authority within the meaning of the Regulations merely as a result of being "a board or other body … established by or under statute".



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Article 3(1) (vi) of the public authority definition in the Regulations cannot be read in isolation. The mere fact of being a body established by or under statute does not automatically bring that body within the definition of public authority in the Regulations. The tests provided for in Article 3(1) (a), (b) or (c) of the public authority definition must first be met before applying the secondary test of whether the body in question is one of the classes of body listed in Article 3(1) (i) - (vii). Article 3(1) (a), (b) or (c) require that there is a either a government or public administration or public advisory body or a legal entity performing public administrative functions or providing public services relating to the environment.

The simple fact of being a body established by or under statute as described in Article 3(1) (vi) of the public authority definition is of no consequence where the body, in this case the National Asset Management Agency ("**NAMA**"), is not a body falling within any of the criteria in Article 3(1):

(a) *a government or other public administration, including public advisory bodies, at national, regional or local level* or

(b) *any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment* or

(c) *any natural or legal person having public responsibilities or functions or providing services, relating to the environment under the control of a body or person falling within paragraph (a) or (b).*

To read Article 3 in the manner proposed by the Appellant is effectively to look at the cart but ignore the horse by looking only at an indicative list of bodies. But this indicative list of bodies is relevant <u>if and only if</u> they qualify under Article 3(1) (a), (b) or (c) as public authorities. The interpretation argued for by the Appellant totally ignores the qualitative criteria for determining what is a public authority for the purposes of the Regulations.

If the Draftsman intended every body listed at Article 3(1) (i) – (vii) of the Regulations to be a public authority regardless of the function performed, he would have confined himself to that list and omitted Article 3(1) (a), (b) and (c) from the Regulations entirely. The Appellant's interpretation renders those provisions redundant.

Alternatively, if the Draftsman intended to add to and expand the list of public authorities there would be no need for the words "and includes" and every body listed at Article 3(1) (i) – (vii) of the Regulations would instead have been added as items (d) – (j).

The words "and includes" demonstrate that the bodies listed at Article 3(1) (i) – (vii) of the Regulations are a sub-set of the group listed at Article 3(1) (a), (b) and (c). No other interpretation is consistent with the law as under the Constitution a Minister by way of Statutory Instrument only has power to implement the Directive – not to expand its scope.

NAMA does not meet any of the requirements of Article 3 (1) of the Regulations which requirements must be satisfied in order to be considered a "public authority" for the purpose of the Regulations. NAMA is not therefore subject to the Regulations.

The Appellant's argument that NAMA is a public authority by reason of Article 3(1) (vi) is not correct and should be rejected.

In respect of the other arguments made by the Appellant in his response to the Investigator's preliminary view, we would make the following further submission:

**2. Article 3(1)(b)**

To meet this test, NAMA would have to be a legal person performing public administrative functions. The Appellant's response appears to confuse the public policy purposes of the National Asset Management Agency Act 2009 (the "**Act**") (i.e. whether it is a public body) with the purposes and functions of NAMA. The goal of the Act is to restore confidence to the banking sector, remove uncertainty in relation to asset valuations, restore the flow of credit and protect the interests of tax payers and the Appellant has correctly identified these. However, these are the public policy purposes of the Act not of NAMA. The Appellant makes no reference to NAMA's purposes, which are to contribute to the achievement of the purposes of the Act by acquiring eligible bank assets (loans), dealing expeditiously with the acquired loans and protecting or otherwise enhancing the value of the acquired loans. The purpose is purely commercial – acquire the loans and manage them to get the best possible financial return.

Once acquired, the loans are held, managed and realised by NAMA with the sole objective of achieving the best achievable financial return for the State. This is not an administrative function.

NAMA has been assigned statutory purposes, functions and a range of powers and discretions to achieve its purposes. Our submission of 7 May 2010 set out how NAMA operates in acquiring loans from the participating institutions, its discretion about how to value and acquire those assets, the design and execution of the financial and legal due diligence standards and process, the asset quality standards required, the assessment of security and marketability of the title of underlying property, the terms and conditions of the acquisition and the terms under which the participating institutions (and other service providers) will carry out loan servicing.

Once a loan has been acquired, the Act provides that NAMA assumes the contractual position of the participating institution that transferred the loan. The fact that NAMA has statutory powers is not the determinant of whether it performs administrative functions. As NAMA is established by statute, the only place where its powers can be legally created is the Act. If NAMA was a company its powers would be created in its Memorandum of Association. In effect, NAMA's memorandum of association is the Act. NAMA will manage the loans it acquires in accordance with its contractual rights and obligations; NAMA has purchased a loan and the management of that loan will be in accordance with the loan agreement and security documents. NAMA cannot, by reason of its statutory status alone, manage the loan in a manner contrary to the loan contract.

**3. Article 3(1)(c)**

To meet this test, NAMA would have to be a legal person with public responsibilities or functions or be providing services relating to the environment.

NAMA has no statutory functions or responsibilities that relate to the environment nor does it provide services relating to the environment.

**4. Serving a public purpose**

NAMA was created to deal with the ongoing financial crisis. Its success will be measured by the contribution it makes to the achievement of the purposes of the Act. However, the

achievement of a public purpose forms no part of the criteria for the definition of a public authority under the Regulations. NAMA is a commercial undertaking that does not perform administrative functions.

NAMA is subject to the normal taxation regime in Ireland. While NAMA itself is exempt from income tax and capital gains tax, it is subject to VAT and stamp duty. The subsidiary companies through which NAMA operates are all subject to the same taxation rules as any other Irish incorporated company. The Appellant's assertion that NAMA is exempt from tax is not correct.

It is correct that the transfer of the loans is exempt from stamp duty but once the loans have been transferred to NAMA, stamp duty applies in full to every stampable transaction entered into by NAMA or any of its group companies.

The Appellant's assertion that NAMA is exempt from the application of Parts 2 and 3 of the Competition Act 2002 is not correct. NAMA is subject to competition law. The provisions of Parts 2 and 3 of the Competition Act 2002 do not apply to the transaction whereby the loans are transferred to NAMA. NAMA and its group companies are subject to competition law in all of their operations. NAMA is not exercising sovereign or administrative power. NAMA is engaged in economic activity and competition law applies in full to its activities and operations.

## 5. Private Ownership

NAMA has set up a number of subsidiary companies to carry out its functions. Private sector investment has been made into National Asset Management Agency Investment Ltd which is majority-owned by private investors who have invested €51m for a 51% shareholding.

National Asset Management Agency Investment Ltd has established a number of wholly owned subsidiaries including National Asset Loan Management Ltd (Company Number 480246) referred to by the Appellant. The various roles of the subsidiary companies include issuing the Government guaranteed debt instruments which are used as consideration for the purpose of acquiring the loans and issuing debt to finance NAMA's operations and holding and managing the transferred loans.

As stated above, while NAMA itself is (partially) tax exempt, the subsidiary companies are fully taxable and have tax equivalence to any other commercial entity operating in the State.

Once loans have been transferred, NAMA legally steps into the shoes of the participating institutions and is the lender of the loan portfolio. Thereafter it is tasked with holding, managing and realising the value of the acquired loans. It is only in a situation where NAMA may enforce on such loans that it *may* become the owner of land or buildings in the State.

The Appellant also seeks to argue that because the National Asset Loan Management Limited, a subsidiary of NAMA includes powers in its Memorandum of Association in relation to development of land that NAMA has an environmental remit. This is manifestly not the case. The fact that a company has the power to do certain things in relation to land does not equate to the requirements of the definition of public authority in the Regulations, namely, having public responsibilities or functions or providing services relating to the environment. NAMA does not provide services in relation to the environment. Indeed, the Appellants argument on this aspect of the appeal seems to have strayed far from the original application. One need only look at the categories of information sought in the original application to see that he is not seeking information on the environment. On the contrary, he is seeking private and confidential financial and personal information to which he is not entitled.

In conclusion, NAMA reiterates the points made in its submission of 7 May 2010, that it is not a public authority for the purposes of the Regulations and further that the requested information is not environmental information.

We look forward to hearing from you with the determination of the Commissioner in this matter in due course.

Yours sincerely

**Aideen O'Reilly**
**Head of Legal & Tax**