



Brussels, 25.01.2018
C(2018) 464 final

<p>In the published version of this decision, some information has been omitted, pursuant to articles 30 and 31 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...]</p>		<p style="text-align: center;">PUBLIC VERSION</p> <p>This document is made available for information purposes only.</p>
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Subject: State Aid SA.43791 – Ireland
Alleged aid to and through the National Asset Management Agency

Sir,

1. PROCEDURE

- (1) On 26 February 2010, the Commission took a no objection decision on the Irish asset relief scheme for banks in Ireland ("the NAMA Decision"¹).
- (2) On 3 August 2010, 29 November 2010, and 29 July 2014, the Commission took no objection decisions² on the transfers of tranches of impaired assets from the participating institutions to the National Asset Management Agency ("NAMA").

¹ Commission Decision in case N725/2009, Establishment of a National Asset Management Agency (NAMA): Asset relief scheme for banks in Ireland, OJ C 94, 14.04.2010, p. 10.

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- (3) On 4 December 2015, five Irish property developers lodged a complaint with the Commission alleging that Ireland has granted unlawful State aid to and through the operation of NAMA. On 11 December 2015, the Commission services forwarded a copy of the complaint to Ireland.
- (4) The Commission services met with the complainants' representatives on 19 January 2016 and 2 June 2016. The Commission received additional submissions from the complainants on 27 January 2016, 29 February 2016, 6 April 2016, 29 April 2016, 31 May 2016, 1 July 2016 and 28 October 2016.
- (5) On 22 January 2016, the Commission received initial comments on the complaint from Ireland. The Commission services met with the Irish Department of Finance on 25 February 2016. Ireland submitted on 15 March 2016 responses to the questions raised in that meeting. Ireland submitted additional documentation on 21 October 2016, following a request for information of 24 August 2016 from the Commission services.
- (6) On 14 December 2016, the Commission received a letter from the complainants requesting confirmation that their complaint received priority treatment and requesting clarification on why the Commission had not been able to adopt a decision or send an initial administrative letter to the complainants within twelve months after receiving the initial submission³. The complainants' letter included also new allegations on NAMA regarding State aid being granted through certain tax exemptions and further information regarding the acquisition by NAMA of a piece of land in the Dublin Docklands. The complainants also alleged that certain entities of the NAMA Group would make use of tax minimization strategies.
- (7) On 11 January, 3, 10 and 22 February, and 10 March 2017, the Commission received additional letters from the complainants' representatives including clarifications on the confidentiality of the complaint, questions on the classification of the complaint as a priority case and clarifications on the new allegations included in their letter of 14 December 2016.
- (8) On 20 January, 21 February and 2 March 2017, the Commission services replied to the letters from the complainants' representatives clarifying the status of the complaint. As several of the complainants' submissions contained new information and new allegations, the Commission services explained that obtaining the clarifications from Ireland on these additional elements and the assessment of all this recent information required additional time. For this reason the Commission had not been able to take a position within the indicative twelve month period, to which the complainants had referred in their letter of 14 December 2016, since the initial complaint had been lodged.

² Commission Decision in case N331/2010, Transfer of the first tranche of assets to NAMA, OJ C 37, 5.02.2011, p. 3.

Commission Decision in case N529/2010, Transfer of the second tranche of assets to NAMA, OJ C 40, 9.02.2011, p. 6.

Commission Decision in case SA.38562/2014, Transfer of the last tranches (from tranches 3 to 9) of assets to NAMA, OJ C393, 7.11.2014, p.5

³ Reference was in particular made to Section 7-2.2 paragraph 8 of the State Aid Manual of Procedures, as available on: http://ec.europa.eu/competition/state_aid/studies_reports/sa_manproc_en.pdf.

- (9) On 2 and 24 February, 20 March, 7 and 21 April, and 1 June 2017, the Commission received further background information from Ireland including responses on the new allegations at the request of the Commission services. The Commission services also met with the Irish Department of Finance on 10 March 2017.
- (10) On 2 June 2017, the complainants' representatives clarified that the allegations regarding the additional State aid to NAMA through certain tax exemptions and the alleged tax minimisation strategies can be assessed separately from the other allegations with the aim to finalise proceedings on the latter in the near term.
- (11) On 19 September 2017, the Commission received an additional letter from the complainants' representatives that the Commission's assessment concerning their complaint should not be unduly delayed by seeking further clarification from Ireland in view of a comment of the Irish Prime Minister on the future of NAMA and a potential change in its business plan⁴.
- (12) On 19 October 2017, the Commission services sent a request for information to Ireland. The main purpose of this request was to update and to provide more details regarding (quantitative) information provided by Ireland during the course of the procedure. Ireland sent its replies on 26 October 2017. In their replies, the Irish authorities also clarified that it is not the Minister for Finance's intention to alter or expand NAMA's mandate in the intervening period or to prolong its lifespan beyond the expected 2020/2021 date of its wind-down.
- (13) On 27 October 2017, the Commission services sent another request for information to Ireland to obtain some additional clarifications about NAMA's tax exemptions. Ireland replied to this request on 31 October 2017.
- (14) On 3 November 2017, the complainants forwarded a newspaper article and two parliamentary questions concerning alleged debt forgiveness by NAMA in the sum of EUR 200 million for NAMA-supported developers and the typical interest rate charged by NAMA for new loans to developers.
- (15) On 15 November 2017, the Commission services forwarded to Ireland the documents submitted by the complainants on 3 November 2017 along with some questions. The Irish authorities replied on 22 November 2017.

2. BACKGROUND

2.1. The NAMA Decision

- (16) In order to restore stability to the Irish banking system in the context of the financial crisis, the Irish authorities established NAMA on 22 December 2009⁵. The establishment of NAMA aimed to address the issue of asset quality in the Irish banking system by allowing participating financial institutions to sell to

⁴ In particular, the Prime Minister had allegedly referred to a proposal that NAMA would be repurposed to develop land. No further announcements in this respect were however made since then.

⁵ The National Asset Management Agency Act 2009 ("the Act"), on the basis of which NAMA was established, was passed into law on 22 November 2009 and came into operation on 21 December 2009.

NAMA assets whose declining and uncertain value prevented the longer-term shoring-up of bank capital and the return to normally functioning financial markets. As set out in NAMA's purposes⁶, it was to acquire and manage such eligible bank assets from participating institutions⁷ as is appropriate, dealing with those assets expeditiously and protecting or otherwise enhancing the value of those assets in the interests of the State.

- (17) Assets were transferred by "impaired borrower" exposures from all participating institutions, i.e. (i) Anglo Irish Bank, (ii) Allied Irish Bank, (iii) Bank of Ireland, (iv) Irish National Building Society and (v) Educational Building Society.
- (18) Eligible assets⁸ were expected to be concentrated on a relatively small number of very large real estate developers, involved across the whole cycle of property development. Loans to such developers were closely interconnected and inter-linked, which was viewed as significantly contributing to the impairment problems threatening credit institutions in Ireland.
- (19) The purchase was paid for by NAMA through the issuance of State-guaranteed senior debt securities for 95% of the purchase price and the issuance of (non-State-guaranteed) subordinated debt securities for 5%. The issued securities were directly passed on to the participating credit institutions pro rata to their share in the real economic value ("REV") of assets transferred to NAMA. The State-guaranteed debt securities could then be used by the participating credit institutions as collateral for financing from the financial markets, and if necessary, from the European Central Bank ("ECB"), helping to improve the liquidity position of those banks. As mentioned in the NAMA Decision⁹, NAMA or a NAMA group entity have also been allowed under the Act¹⁰ to borrow sums (in addition to the maximum funds raised for the purchase of the assets) as are required for the performance of its functions up to EUR 5 billion¹¹.
- (20) In the NAMA Decision, the Commission has found that the introduction of the NAMA asset relief scheme constitutes State aid to the participating credit institutions pursuant to Article 107(1) of the Treaty on the Functioning of the European Union ("TFEU"), but that this measure is compatible aid by virtue of Article 107(3)(b) TFEU. That scheme among others included a State guarantee on NAMA's senior liabilities and certain special powers, rights and tax exemptions granted to NAMA. In its NAMA Decision, the Commission relied on a number of commitments from the Irish authorities to ensure that NAMA, whilst it performs its objectives, does not unduly distort competition through the use of its powers, rights and exemptions¹² granted in the Act. In that Decision¹³, the Commission

⁶ As set out in section 10 of the National Asset Management Agency Act and summarized in recitals 11 and 33 of the NAMA Decision.

⁷ See recital 33 of the NAMA Decision.

⁸ See recitals 15 to 19 of the NAMA Decision.

⁹ See recital 40 of the NAMA Decision.

¹⁰ See section 50 of the NAMA Act.

¹¹ For example to complete unfinished developments if deemed profitable.

¹² The NAMA Act grants NAMA specific post acquisition powers aimed at making NAMA's access to the underlying real estate security (both physically and legally) easier and at allowing it to have close control over the process of realisation of such security in order to maximise recovery value. See in this respect also recitals 125 to 129 of the NAMA Decision.

also concluded that to the extent that the exemption from stamp duty upon acquisition would amount to aid to NAMA it would also be compatible (see recital (71)). Finally, the Commission also addressed¹⁴ a complaint by Senator Eugene Regan who among others expressed the concern that due to its scale, scope and powers NAMA may distort competition on the Irish real estate market.

- (21) The Commission then took three separate no objection decisions¹⁵ on the transfers of tranches of impaired assets to NAMA for a total notional value of EUR 74.1 billion for a purchase price of EUR 31.8 billion¹⁶. As mentioned in the NAMA Decision¹⁷, the Commission was given a commitment from the Irish authorities to claw back any payment in excess of the REV of the assets that became apparent after the review by the Commission of the individual notifications related to the transfer of each tranche of assets.

2.2. Background on NAMA

- (22) The 100% publicly controlled NAMA is the parent entity of a group that consists of several legal entities¹⁸. In particular, NAMA established an investment holding company in 2010¹⁹ – National Asset Management Agency Investment D.A.C. – which is majority-owned by private investors²⁰. That holding company in turn controls about a dozen operational entities. NAMA may however exercise a veto over decisions taken by the holding company and therefore NAMA has effective control of it. Graph 1 summarises the NAMA group structure.

¹³ See recital 84 of the NAMA Decision.

¹⁴ See recitals 77 and 139 of the NAMA Decision.

¹⁵ See footnote 2.

¹⁶ The market value of these loans at time of acquisition amounted to only about EUR 26.2 billion.

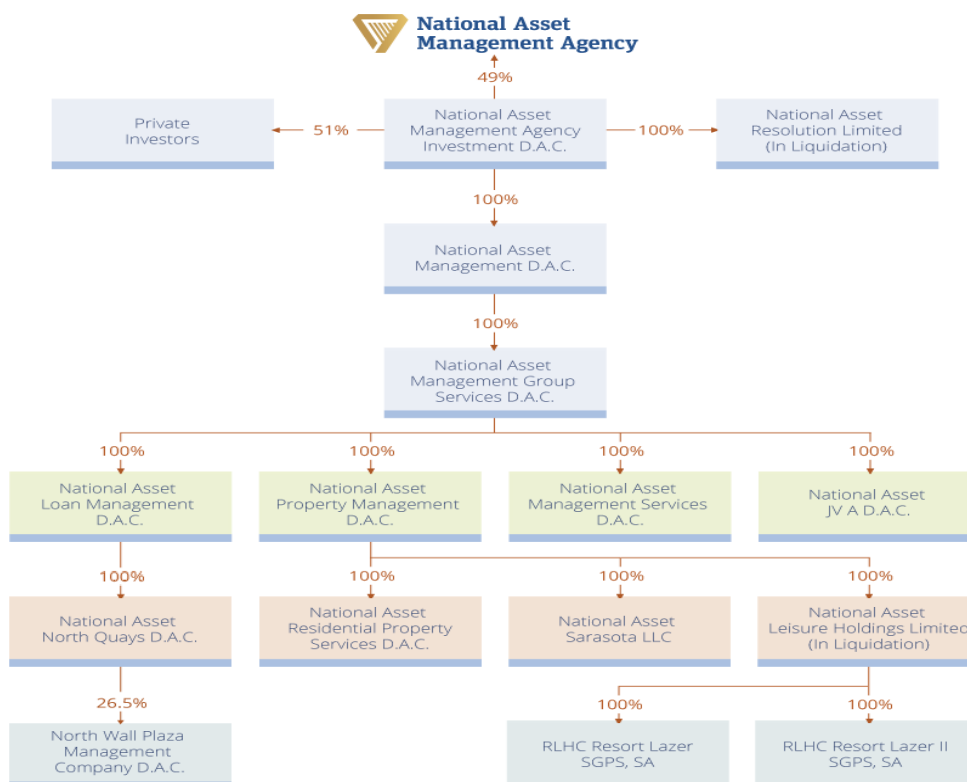
¹⁷ See recital 69 of the NAMA Decision.

¹⁸ See section 1 of the notes to the financial report - NAMA annual report and financial statements 2016: https://www.nama.ie/fileadmin/user_upload/NAMA_Annual_Report_2016_English_-_FINAL.pdf

¹⁹ NAMA set up special purpose vehicles – majority owned by private companies – to ensure it would be regarded as being outside of the government sector by Eurostat (subject to a number of conditions).

²⁰ 51% of its shares are owned by private companies and the remaining 49% are owned by NAMA.

Graph 1: Organization chart NAMA²¹



- (23) The government guaranteed debt securities²² were transferred to National Asset Loan Management D.A.C. The purpose of this company is to acquire, hold and manage the loan assets acquired from the participating institutions.
- (24) NAMA has pursued various debtor strategies which depend on the capacity of debtors to meet their obligations, the viability of the business plans proposed by the debtors, and the overall cooperation by the debtors. Since its inception, NAMA has applied the following strategies to achieve its objectives:
- a) A disposal strategy is pursued where NAMA does not foresee a long-term engagement with the debtor concerned and, instead, focuses on working with the debtor in the implementation of a disposal strategy over a short-term horizon. So far²³ NAMA has sold, or is expected to sell, loans to third parties for 54% of its debtor connections (which represents 37% of the original par debt²⁴ of the loans acquired by NAMA from the participating credit institutions);
 - b) Enforcement applies in those cases where debtors are unable to prove that they have the capacity to meet their debt obligations or where they have failed to co-operate with the process. In case the debtor disagrees to the

²¹ See NAMA website: <https://www.nama.ie/about-us/group-structure/>

²² These securities were listed on the Irish Stock Exchange.

²³ All percentages in this recital concern the situation at 30 June 2017 (the most recent data that Ireland could provide) and cover the entire EUR 74.1 billion of notional debt that was transferred to NAMA.

²⁴ Par debt refers to the original EUR 74.1 billion of notional value of the loans transferred to NAMA.

asset disposal, NAMA generally appoints a receiver²⁵ that decides on the best way to dispose of the property. So far, NAMA has sold the collateral after enforcing the loans of 13% of its debtor connections (representing 23% of the original par debt of the loans acquired by NAMA).

- c) In cases where its existing debtors or receivers convince NAMA that they have good, viable projects that could maximise debt repayment and hence create value for NAMA (by minimising loan losses), the former are allowed to maintain possession of the property and NAMA can extend new loans to fund these projects after they have passed a commercial viability test (see also below). Upon completion of the project, the sale proceeds are used to repay the old and new loans. So far, NAMA has applied this strategy for 8% of its debtor connections (representing 30% of the original par debt of the loans acquired by NAMA).
- d) A limited number of debtors have been able to refinance their debt on the market allowing them to repay the full par debt to NAMA. This has so far been the case for 2% of NAMA's debtor connections representing just 1% of the original par debt of the loans acquired by NAMA.
- e) Finally, 23% of NAMA's debtor connections are redeeming or have redeemed their debt without having been restructured and without new loans from NAMA. This represents some 9% of the original par debt of the loans acquired by NAMA from the participating credit institutions.

Table 1: NAMA's debtor strategies (situation at 30 June 2017)

	debtor connections ²⁶		par debt	
	#	%	bn EUR	%
Sale of loans to third parties	431	54%	27.1	37%
Enforcement with sale of collateral	100	13%	16.9	23%
Extension of new loans to fund projects resulting in repayment	67	8%	22.3	30%
Refinanced by debtor and exit from NAMA (repayment to NAMA at par value)	15	2%	0.8	1%
Debt redemption without restructuring or new loans from NAMA	184	23%	7	9%
Grand total	797	100%	74.1	100%

(25) In line with its aim to complete its work by end 2020, NAMA has continued to reduce its size and disposed of assets²⁷. Total assets of NAMA amounted to EUR

²⁵ Following a public procurement process, NAMA established four panels of receivers (two in Ireland and two in the UK) in February 2013 to provide it with receivership, insolvency and enforcement services. For any particular receivership appointment / enforcement process being contemplated, NAMA runs a mini-tender amongst suitable receivers on the relevant panel.

²⁶ NAMA defines a debtor connection as a bundle of loans/assets that have been grouped together as they are connected or linked to a debtor or group of debtors through ownership, control, financial interdependence or strategic considerations to the extent that management by a single case manager or asset recovery manager makes strategic sense and to ensure that current and potential credit risk exposure to a debtor group is assessed and managed in a consistent manner.

²⁷ See NAMA annual report and financial statements 2016:
https://www.nama.ie/fileadmin/user_upload/NAMA_Annual_Report_2016_English_-_FINAL.pdf

5.4 billion at end of June 2017, while they peaked at EUR 36.2 billion at year-end 2013²⁸. Table 2 shows the evolution of the total assets held by NAMA.

Table 2: Evolution of total assets held by NAMA

	2010	2011	2012	2013	2014	2015	2016	Jun-2017
Total assets (in billion EUR)	29.7	30.7	27.2	36.2	15.6	11.6	7.3	5.4

- (26) NAMA had redeemed EUR 27.6 billion of senior bonds by end-2016. Following further repayments in 2017, NAMA has redeemed the full EUR 30.2 billion of senior debt originally issued to acquire tranches of impaired assets. The subordinated (non-State-guaranteed) bonds are expected to be redeemed by their first call date in March 2020.²⁹ Table 3 contains the cumulative amount of senior bond repayments since 2013. Graph 2 illustrates the actual redemption of the State-guaranteed senior bonds in comparison to the redemption target set in 2009.

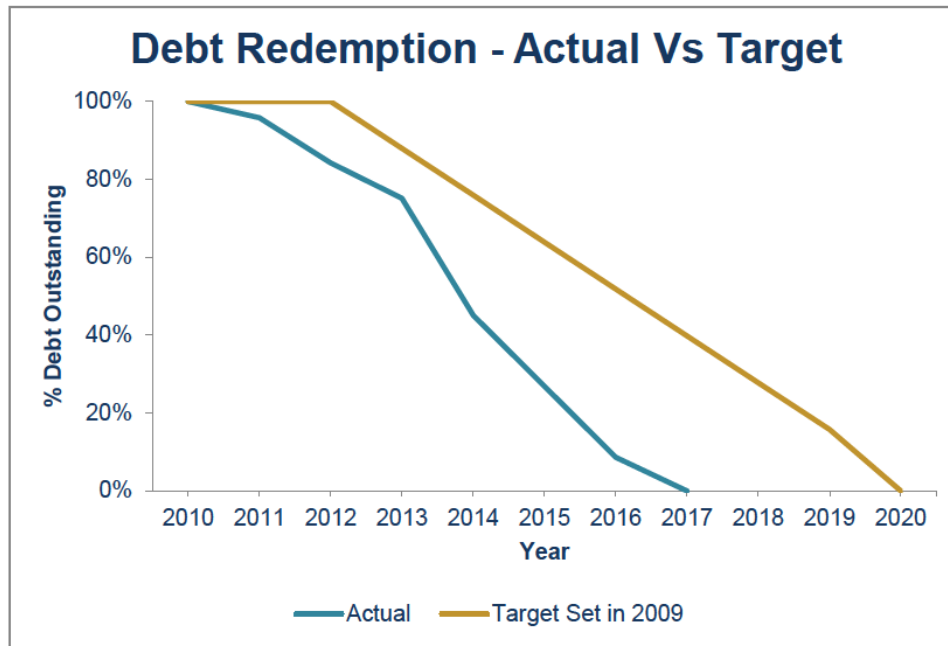
Table 3: Redemption of State guaranteed senior debt bonds

	2013	2014	2015	2016	2017
Cumulative amount of senior bond repayments by NAMA (in billion EUR)	7.5	16.6	22.1	27.6	30.2

²⁸ After acquiring the final set of impaired asset tranches from the participating institutions.

²⁹ See: https://www.nama.ie/fileadmin/user_upload/Press_Statement_-_Debt_Redemption_-_13_October_17.pdf

Graph 2: Redemption of State-guaranteed senior bonds (source: NAMA³⁰)



- (27) NAMA generated EUR 1.5 billion in after tax profit in 2016 and EUR 1.8 billion in after tax profit in 2015. NAMA expects to generate a surplus – currently projected to be EUR 3 billion – by the time it completes its work, subject to prevailing market conditions.³¹
- (28) On 13 October 2015 the Irish Minister of Finance announced that NAMA would use part of its land to play a more active role in residential development projects, on lands under its control, on a commercial basis and consistent with NAMA’s mandate to deliver the best financial return to the taxpayer.³² It was announced that NAMA would fund the delivery of up to 20 000 new residential units by 2020 as part of a EUR 4.5 billion programme and would also facilitate a new EUR 1.9 billion commercial real estate project in the Dublin Docklands area. In order to bring those projects forward, NAMA could provide additional lending to the developers whose loans had been acquired by NAMA from the participating institutions and to NAMA-appointed receivers who have taken control of a property from such developers in case of enforcement.

3. DESCRIPTION OF THE COMPLAINT

3.1. The alleged aid beneficiaries and alleged State aid measures

- (29) According to the complainants, both NAMA itself (either directly or through a receiver it appoints) and the developers (whose loans were acquired by NAMA) benefit from State aid when developing property. In the former case, NAMA takes control of a property and its development either directly or through the appointment of a receiver. Rather than selling the property, NAMA would provide funding to the receiver to develop it under a plan approved by NAMA.

³⁰ Ibid.

³¹ Ibid.

³² <http://www.budget.gov.ie/Budgets/2016/FinancialStatement.aspx#section27>

The costs of the NAMA receiver and professional and construction team will be taken from the proceeds of the sale of the property with the remainder used by NAMA to pay down the indebtedness of the developer. In the latter case, the developer retains control of a property and receives funding from NAMA to develop it with the proceeds being used to reduce the developer's debt to NAMA.

- (30) The complainants claim that NAMA is benefiting from a number of advantages which would constitute State aid, in particular allegedly:
- a) Having acquired the loans of a very significant number of property developers (including some of the complainants), NAMA obtained commercially sensitive and highly confidential business information relating to them. NAMA would now be competing with those property developers with the benefit of that information provided to it for an entirely different purpose;
 - b) NAMA has strong relationships with local authorities and government departments. In the context of development of land, which is regulated by public authorities, such special access is a large advantage to NAMA;
 - c) By virtue of section 214 of the NAMA Act, NAMA in itself is not liable for income tax, corporation tax or capital gains tax³³;
 - d) Through its acquisition of impaired loans from the five participating credit institutions, NAMA has indirectly³⁴ acquired land at steep discounts³⁵ compared to the current market value;
 - e) NAMA has unique and extraordinary powers granted under the NAMA Act of which the complainants however admit that these have already been considered by the Commission in the NAMA Decision; and
 - f) NAMA has access to funds at an interest rate lower than market operators through the State guarantee on its senior funding. Furthermore, this would also have enabled NAMA to generate further funds from repayment of loans by developers and the sale of finished properties to the market.
- (31) The complainants furthermore claim that NAMA does not act as a market economy operator and in this way NAMA would confer an economic advantage to NAMA-supported developers. Allegedly,

³³ As indicated in recital 6, the complainants also alleged that NAMA minimized the tax bill of certain of its operating entities, which are not tax exempt, through the use of special purpose vehicles (SPVs) by making use of Section 110 of the Irish Taxes Consolidation Act (TCA) 1997. Under Section 110 TCA (international) investors could set up investment vehicles that would not be taxed in Ireland. However, as explained in recital 10, the complainants also indicated that this allegation could be addressed separately from the other elements of the complaint. On this basis, the Commission will not assess the alleged tax minimisation by the NAMA SPVs further in this decision.

³⁴ The Commission notes that NAMA acquired impaired loans and not the land or real estate that served as collateral for these loans. It is only in case of enforcement that NAMA may take direct ownership of the land or real estate. Therefore, NAMA can only have indirectly (i.e. as collateral) acquired land.

³⁵ The complainants also assert that, given the real economic value of the loans is based on assumptions, it is not possible to accurately compare the transfer price with the market value of the loans. Furthermore, the market value allegedly took no account of the powers granted to NAMA under the NAMA Act and it is claimed that NAMA's interest was to keep the values as low as possible.

- a) These developers receive from NAMA new loans at rates which are much lower than commercial interest rates and even in the absence of sufficient (new) collateral. In addition, on certain tranches of old loans that are restructured, NAMA is even alleged to claim no interest at all³⁶. The complainants also assert that since the complaint has been lodged, NAMA has increased interest rates³⁷ for developers. The complainants note that the interest payments should also be seen together with incentive payments to the developers and the debt forgiveness that can be allowed for by NAMA in the context of debt restructurings;
- b) where NAMA has appointed a receiver and provided funding to the receiver to undertake the development of the property this ultimately allows reducing the indebtedness of the developer;
- c) a commercial bank would not forgive principal, extend existing loans or advance new debt to a distressed borrower (which according to the complainants NAMA has done in some cases). New financing provided by NAMA is furthermore claimed to be close to 100% loan-to-value, which developers would allegedly not be able to obtain from a commercial bank;
- d) NAMA has committed to providing vendor finance of up to EUR 2 billion in the property market, and in 2013 NAMA advanced EUR 360 million in such vendor finance;
- e) in 2012, NAMA launched the 80:20 deferred payment initiative, by which NAMA-supported developers and receivers could offer home-buyers 20% protection from the risk of falls in house prices for a five-year period; and
- f) when deciding to sell or develop land NAMA would not take into account the current market value of the land³⁸ and the funding cost of a market operator. This would result in decisions to develop land even though it would not be viable to do so for a developer operating on market terms (i.e. without State aid). The NAMA-supported developers would thus be able to compete with other developers on unfair terms and hence distort competition in the housing market by suppressing prices for newly built

³⁶ The complainants mention that this would be the case for some or all debt in respect of loans which are not performing.

³⁷ The complainants however admit that, as the proceeds of the development are likely to go ultimately to NAMA, from NAMA's perspective the interest rate it applies to those loans is immaterial since it will ultimately recover the proceeds from the sale (see also footnote 95).

³⁸ The complainants refer to a presentation made by NAMA (Oireachtas Committee on Housing and Homelessness, 12 May 2016, slides 16 and 17). The complainants in particular argue that NAMA's analysis underestimates the viability appraisal of residential property development, as NAMA would allegedly attribute no or only a very limited cost (up to EUR 20 000) to land acquisition (which would be below market prices). The complainants state that, if the profit from selling the undeveloped site exceeds the profit earned from the development, this would constitute a breach of section 10 of the NAMA Act (which requires NAMA either to "*[deal] expeditiously with the assets acquired by it*" or to "*[protect] or otherwise [enhance] the value of those assets*").

houses³⁹. The complainants claim that for this reason investors would avoid areas where NAMA develops property.

3.2. Alleged incompatible State aid to NAMA

- (32) The complainants assert that by expanding its operations to (the funding of) property development, the State aid measures approved in the NAMA Decision can no longer fall under the compatibility ground of the NAMA Decision (i.e. Article 107(3)(b) TFEU). The Irish economy has recovered significantly and the transfer of loans from the participating institutions has stopped. NAMA's current activities would hence have no more positive impact on the Irish banking market. In addition they note that it is inconceivable that the NAMA Decision “*could be properly interpreted as giving the State wide scope to grant aid to NAMA and NAMA Supported Developers without any further notification of such aid, particularly in circumstances where such aid is not expressly contemplated in the NAMA Decision nor is any consideration given to its potential effects on the property development and property development financing markets in Ireland*”.
- (33) The complainants argue that NAMA is now used as a vehicle to remedy an alleged market failure in the Irish property market instead of its original purpose to stabilise the Irish banking market. According to the complainants, NAMA is further limiting the ability of private developers to operate viably by depressing the prices and by crowding out private developers. Furthermore, the complainants signal that while there is a clear shortage of houses⁴⁰ in Ireland, there is no evidence of any market failure in the commercial property sector. Furthermore, there would be no evidence that NAMA's operations are the most appropriate solution for the residential housing shortage.
- (34) The complainants assert that NAMA has become an important player in the residential (particularly in Dublin)⁴¹ and the commercial (particularly in the Dublin Docklands)⁴² property sector. Furthermore, the complainants claim that NAMA is actively buying land in the Dublin Docklands, further increasing its position in that area⁴³. In its residential delivery programme NAMA would extend up to EUR 4.5 billion in development funding. This position is claimed to be in contrast of what is stipulated in the NAMA Act, which included the need to avoid undue concentrations or distortions in the market for development land. This undue concentration of NAMA's presence would have significantly impacted the viability and prices of the residential and commercial development market.

³⁹ The complainants state that real market operators must always factor in the cost of replacing the site which is sold. Based on the prices the complainants observe, the complainants doubt that when using a replacement cost, a normal profit is obtained by NAMA.

⁴⁰ The complainants refer to an analysis by the Society of Chartered Surveyors in Ireland.

⁴¹ NAMA is said to have capacity to deliver 40% of total demand for housing in Dublin over 2016-2020.

⁴² NAMA is said to have had an interest of 75% of developable land in the Dublin Docklands, having an interest in 15 of 20 of what are claimed to be the most sought-after development blocks in Dublin.

⁴³ The complainants refer in particular to a transaction whereby NAMA acquired a development site (the Hales Freight site) at 86-88, North Wall Quay, Dublin for a price of allegedly EUR 26 million, which is considered by the complainants as a high/aggressive price and NAMA's ability to fund such a price is claimed to be assisted by NAMA's low cost of funds. The complainants also submitted an expert opinion that concludes that NAMA does not need this site to develop its own adjacent interests.

- (35) Finally, the complainants assert that it is difficult to understand why NAMA is exposing the Irish taxpayer to any risks⁴⁴. Based on the projected terminal surplus of NAMA, the complainants consider it is not apparent that there is any material financial benefit to NAMA arising from its development activities.

3.3. Alleged incompatible State aid to real estate developers through NAMA

- (36) The complainants assert that by funding developers and receivers, the property development is either directly or indirectly funded through State resources. NAMA itself is said to borrow funds with the benefit of a State guarantee⁴⁵. The complainants assert that in the NAMA Decision the Commission did not envisage a scenario in which NAMA would use these resources to become a large-scale property developer or engage in the provision of State aid by providing development finance to developers at interest rates below market rates⁴⁶.
- (37) The complainants also claim that NAMA's actions are not in line with those of a commercial bank when managing the existing loan stock (e.g. through debt restructuring) and when granting new loans to 'NAMA-supported' property developers. As such NAMA would pass through the advantage of State aid measures granted in the NAMA Decision to selected real estate developers.
- (38) Similar to the aid to NAMA⁴⁷, the complainants see no compatibility ground for the alleged State aid to NAMA-supported developers, as they see no ground of this being eligible under Article 107(3)(b) TFEU.
- (39) The complainants assert that the State aid has and will continue to have the effect of:
- a) Severely restricting the ability of developers which are not supported by NAMA⁴⁸ to compete with receivers and developers supported by NAMA.
 - b) Restricting many consumers' choice of homebuilder to those preselected by NAMA.

⁴⁴ In this context, the complainants refer to the annual accounts of NAMA where the Dublin Docklands SDZ and Residential developments were highlighted as a key risk.

⁴⁵ The complainants assert that non-supported developers can expect to avail rates of finance between 9% and 17% (on average 13%) through a combination of debt and equity finance. NAMA is alleged to have a cost of finance in the region of 2.5%. Referring to the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 155, 20.6.2008, p. 10) the complainants assert that in absence of an appropriate guarantee premium such a State guarantee would qualify as State aid.

⁴⁶ The complainants also assert that NAMA, since the initial complaint has been lodged, has increased the interest rate to NAMA supported developers. They refer to the 10 April 2016 edition of the Sunday Business Report under the headline "*NAMA hikes developers' interest rates as building row escalates – Bad Bank's move seen as counter strike against developers challenging home-building plan*".

⁴⁷ See recital (32) of this Decision.

⁴⁸ The complainants claim that the cost of finance is on average between 20% and 25% of the total cost of a development project. According to them, the distorting effect is that in many instances developers supported by NAMA would not be in a position to source finance due to their historical indebtedness. However, NAMA is alleged to provide financing at an even lower rate than the prevailing market rates. Therefore, developers that are not supported by NAMA would not be able to develop and offer properties to consumers at "NAMA's prices".

- c) Restricting many consumers' choice of location for their home to the development sites controlled by NAMA.
- d) Jeopardising the return to normal market conditions of property development financing markets⁴⁹ through the presence of NAMA as a provider of development finance at interest rates which are less than those available.
- e) Jeopardising the recovery of the Irish property development and construction markets and the ability to generate sufficient housing to satisfy market demand.⁵⁰

4. POSITION OF IRELAND

4.1. Replies to the allegations of incompatible State aid to NAMA

- (40) Regarding the allegation that NAMA receives State aid, Ireland highlights that the transfer price paid by NAMA for the impaired assets exceeded their market value by EUR 5.6 billion and that in this way NAMA provided State aid to the participating credit institutions.
- (41) Furthermore, Ireland clarifies that NAMA has not borrowed any funds from the capital markets using the State guarantees. The senior bonds issued by NAMA were directly passed on to the participating credit institutions, which could use these State guaranteed securities as collateral for financing from the financial markets including from the ECB where necessary.
- (42) Ireland mentions that NAMA's funding costs are not lower than those of other market operators. More specifically, as the senior debt is now fully paid down, NAMA's cost of funding becomes more weighed towards the expensive subordinated debt (which is not State guaranteed) with an interest rate of 5.264%. According to Ireland, this puts NAMA at a disadvantage compared to other financial institutions, which would typically have a lower cost of debt.
- (43) Ireland also asserts that NAMA operates fully within the parameters of the NAMA Decision⁵¹. In particular, NAMA is obliged under the NAMA Act to pursue commercially viable and value maximising strategies. Since its inception, NAMA has funded enhancement works, also including development works, on the assets securing its loans. This is considered necessary to bring the assets to a condition that maximises NAMA's financial return, rather than cede value by

⁴⁹ The complainants claim that a large investor has said that capital invested in the Irish property market has been rationed due to NAMA's operations and another investor mentioned funding rates have increased due to higher risk perceived due to NAMA's operations.

⁵⁰ The complainants argue that by the time NAMA will exit the market, many developers who are not supported by NAMA will have been forced to exit the market due to their inability to compete. Following NAMA's exit, the market for new houses is claimed to descend in a state of crisis.

⁵¹ In this context, Ireland points out that the requirement on NAMA to deal with the assets expeditiously is best understood by reference to NAMA's original projected lifespan of ten years. NAMA was not set up as a permanent asset management vehicle which would have an indefinite timeframe in which to work out assets. However, NAMA could also not act as a 'fire sale' vehicle as this would run counter to the requirement of protecting and enhancing the asset value for the State.

disposing of assets prematurely. As mentioned in the NAMA Decision⁵², NAMA has also been allowed under the NAMA Act to borrow, such sums (in addition to the maximum funds raised for the purchase of the impaired assets) as are required for the performance of its functions up to EUR 5 billion⁵³. However, NAMA has in practice not availed itself of the possibility to borrow additional funds.

- (44) NAMA's funding of residential development of land is according to Ireland fully consistent with this value maximising strategy. As the Irish residential market recovered, many sites that served as collateral for loans held by NAMA became commercially attractive to develop. Similarly, a large number of sites have also been sold where it was projected that a greater return could be obtained by doing so⁵⁴. Ireland asserts that NAMA's housing development funding activities will enhance its eventual liquidation surplus by up to EUR 500 million. Ireland notes that this is fully consistent with NAMA's objective to maximize value for the State without prolonging the initially foreseen lifespan of NAMA.
- (45) Ireland further indicates that, in line with the commitments laid down in the NAMA Decision, it reports on an annual basis to the European Commission on the use of NAMA's post-acquisition powers. As indicated in those reports, to date NAMA has not used any of the six specific powers that were identified in the NAMA Decision as being potentially distortive.
- (46) Ireland asserts that NAMA does not have a significant information advantage. NAMA's approach towards the financing of residential development projects is no different than any other financial institution. Any bank when dealing with a portfolio of impaired loans, as part of their due diligence to decide on which debtor strategy to pursue, would seek information on a debtor's track record, their planned projects and other information. Ireland denies that NAMA has ever misused such information and notes that it would in any case have been outdated when NAMA set out its residential development funding programme.
- (47) Ireland notes that NAMA operates in accordance with the Irish environmental and planning laws and has the same access to the relevant governing bodies as any other market operator. The Irish authorities consider that NAMA does not benefit from preferential treatment due to its alleged strong relationships with local authorities and government departments.
- (48) Concerning NAMA's exemption from income tax, corporation tax and capital gains tax, Ireland explains that only NAMA, the wholly State-owned parent entity which holds 49% of NAMA Investment D.A.C.⁵⁵ is tax exempt. NAMA Investment D.A.C. and the underlying operating entities are taxable in Ireland. The tax exempt parent entity NAMA will only receive cash flows (i.e. the surplus generated by the taxable operating entities) at the moment when NAMA is wound

⁵² See recital 40 of the NAMA Decision.

⁵³ For example to complete unfinished developments if deemed profitable.

⁵⁴ Until now, NAMA has sold its interest in sites with capacity to deliver about 50 500 residential units. Further sales of this nature are expected before NAMA is wound down.

⁵⁵ The holding entity which in turn fully owns all underlying operating entities of the NAMA Group.

down following a decision by the Minister of Finance. At that moment, NAMA's surplus will fully⁵⁶ accrue to the State.

- (49) Ireland points out that NAMA does not directly control land and it is not a property developer. NAMA's role is that of a secured lender, like any other financial institution which holds real estate as security for associated loans. It is a matter for the debtor to maximise the potential of the underlying property assets in order to repay the associated debt. According to Ireland, in doing so NAMA acts as any market economy operator would do.
- (50) Finally, Ireland has also confirmed that its Minister of Finance does not intend to alter or expand NAMA's mandate in the next three years or to prolong its lifespan beyond the expected 2020/2021 date of its wind-down. NAMA's balance sheet had net loans and receivables of EUR 3.7 billion as at end-June 2017 and, for the next three years, NAMA will work through its remaining loans so as to realise maximum value from them.
- (51) For all of the above reasons, Ireland considers that NAMA is not a recipient of State aid and operates fully within the parameters of the NAMA Decision.

4.2. Replies to the allegations of incompatible State aid to real estate developers through NAMA

- (52) Ireland asserts that NAMA's residential development funding plan is based on the following four key principles:
1. A robust commercial viability test for each individual residential project is performed. In particular, the return of the development strategies is compared to all other viable strategies for the assets. Projects are considered commercially viable if and only if they are cash positive after the application of:
 - (i) a stressed interest rate of [more than 8%] applied to project funding, including current site value, while NAMA assumes its risk-adjusted cost of capital is much lower; and
 - (ii) a management fee⁵⁷ of [up to 10%] (of construction cost) for a developer or third-party platform or a project fixed fee in the case of

⁵⁶ Recital 38 of the NAMA Decision describes how the taxable holding entity National Asset Management Agency Investment D.A.C. distributes its profits to its shareholders. In short, the private investors who own 51% of the holding entity only receive capped annual dividend payments (an estimated EUR 15 million in total) over NAMA's lifetime and a capped equity bonus (of EUR 5 million) when the holding is wound up. NAMA which holds 49% of that holding will receive all remaining profits which constitute an estimated 98% of the profits generated by the NAMA Group. NAMA expects that it will be able to transfer a residual surplus to the State of EUR 3 billion.

⁵⁷ In order to enhance the debtor's ability to repay more debt, NAMA needs the developer to cooperate and maximise the loan repayment (and generate a commercial return to NAMA) by performing works on the developer's land. There is no legal obligation on the debtors to do this and the reality of the market is that no developer in the market will undertake services for zero return. A fee [of up to 10%] is applied for the purposes of viability testing but does not represent the actual fee payable to the developer as such fees are negotiated separately in light of the debtors' broader debt obligations to NAMA. In practice, the actual development fees paid to debtors are in the [between 4% and 9%] range (reflecting complexity, ability of developer to achieve cost savings, etc.). This is viewed as market based: Ireland mentions the management fees payable to [an Irish housebuilder] as development manager of a specific project amounted to [...]%. The majority (i.e. an estimated [more

receivership, while such fee is estimated to on average amount to only [between 3% and 6%].

2. An overall portfolio return comparable to that of other market operators⁵⁸ is to be achieved. At the outset of its development funding plan, NAMA expected an estimated internal rate of return ("IRR") of [more than 14%] or a minimum net profit margin of [more than 14%] based on conservative assumptions. The most recent figures suggest NAMA's realized portfolio IRR will even amount to [more than 20%].

3. Commercial interest rates are charged for new loans⁵⁹ extended to debtors and receivers or administrators (in enforcement scenarios). The standard interest rate charged by NAMA is 6-month Euribor plus an 8% margin for loans with 100% loan-to-cost but higher rates are sometimes used. For lower risk and lower loan-to-cost ratios, the interest rate may be adjusted accordingly.

4. NAMA would capture most or all of the profits from these projects above and beyond interest income and in excess of alternative management and disposal strategies. Profits are assumed to accrue to NAMA in order to repay the large amount of outstanding debt. Only in the limited number of cases where a debtor has fully redeemed its par debt to NAMA, can residual profits from development accrue to the debtors instead of to NAMA⁶⁰. Ireland confirms that no debtor who has not fully repaid their contractual debts to NAMA has received any share of profits with respect to NAMA financed development.

(53) Ireland notes that NAMA hired [an Irish professional services firm with experience of this sector] in 2015 to review its residential development funding plan and to confirm the market consistency of the assumptions used.⁶¹ Ireland provided the Commission with this report and with some examples of projects that were considered viable / not viable on the basis of the viability assessment methodology set out above. The [professional services firm's] report's main conclusions are that:

than 80%]) of the [Irish housebuilder] portfolio, is located in the Greater Dublin Area, rendering it comparable to NAMA's portfolio.

⁵⁸ Ireland mentions there is currently a listed housebuilder in the Irish market (Cairn Homes plc) which targets a minimum return of 15%. In December 2015, Cairn Homes (75%) and Lone Star (25%) jointly acquired a portfolio of impaired loans (known as Project Clear) from Ulster Bank for EUR 503 million. The initial par value of the loans was about EUR 2 billion and the loans were secured on 1 694 acres of land, which included 31 residential development sites. Cairn Homes intends to build over 14 000 homes on these sites over the coming years after having enforced the loans. For comparison, Glenveagh Properties plc, an Irish housebuilder that was listed on the Irish Stock Exchange in October 2017, indicated in its prospectus that it targets a minimum IRR of 15%.

⁵⁹ Regarding the assertion of aid being provided to developers through beneficial conditions, Ireland also argues that NAMA's returns are not solely based on interest income: by virtue of large outstanding par debt balances, NAMA captures surpluses above the land value, construction costs and finance costs.

⁶⁰ Debtors are entitled to keep all the profits after repaying their contractual debt facilities since NAMA has no legal claim on proceeds over and above the debts owed.

⁶¹ This report was commissioned before the complaint was filed and before NAMA started implementing its residential development funding plan.

- a. the assumptions used (e.g. interest rates, house prices and cost inflation rates, cost of capital) are conservative⁶² and reasonable in light of the available market evidence.
 - b. the overall return for NAMA is fully in line with that of large private property developers⁶³.
- (54) Ireland also explained that NAMA's decisions to advance funding to enable the development of certain assets under the control of debtors and receivers are made following submission of detailed commercial credit applications on each land site by debtors and receivers. Any such credit application must be supported by an analysis demonstrating that (a) the project is commercially viable and (b) site development will deliver a better return than upfront site disposal.
- (55) In sum, NAMA compares the financial impact of funding development of a site to that of a direct site sale when assessing how best to maximise recovery. Therefore, the Irish authorities consider that NAMA acts as a market economy operator and maximises value for the State. It is estimated that this approach can generate an additional surplus of up to EUR [...] million after allowing for a risk adjusted cost of capital⁶⁴. Ireland considers that NAMA's activities are akin to those of the large private equity purchasers of distressed loan portfolios in Ireland (for example Cerberus and Lone Star) who would employ similar strategies to maximise their returns. To fund these developments, NAMA largely relies on the generation of cash from its assets (i.e. repayment of loans) but this has and will not affect the redemption trajectory of its bonds (see also recital (26)). Indeed, NAMA has already redeemed 100% of its senior debt which is three years ahead of its original debt redemption targets (see also Graph 2).
- (56) Ireland emphasises that, contrary to the complainants' allegations, the viability assessment is based on the current market value of the land and includes an appropriate funding cost. Furthermore, the sales price for the properties is determined by an independent sales agent on the basis of market prices (from new and second-hand transactions in the same region)⁶⁵. In this context, Ireland notes that all parties involved (i.e. NAMA, the debtor and the sales agent) have an incentive to maximize the sales price further ensuring that it is market-consistent.

* Confidential information.

⁶² An example of a conservative assumption is that NAMA's base case model assumes that all income is delayed by [between 9 and 15] months, without change to the timing of costs.

⁶³ NAMA forecasted a pre-finance margin on sales of [more than 20%]. This is said to compare favourably with targets set by large UK listed housebuilders – i.e. gross margin targets of 20% to 25%.

⁶⁴ Ireland projects that NAMA will generate a total terminal surplus of EUR 3 billion (which will then be transferred to the State).

⁶⁵ Ireland also refers to the Residential Property Price Register which is published by the Property Services Regulatory Authority: this provides price data on all residential sales in Ireland. This public database ensures that relevant market comparisons are readily available when pricing is being determined for newly-completed residential units. NAMA must provide its consent for any asset to be offered for sale in the market by a debtor or receiver.

- (57) Finally, Ireland points out that NAMA's residential development funding plan (for maximum 20 000 houses⁶⁶) would meet between 15% and at most 20% of market demand so in view of the Irish authorities it cannot distort competition. For comparison, NAMA has already sold sites with the capacity to build about 50 500 residential units and will sell even more later giving other developers plenty of opportunities to compete. The developments funded by NAMA hence amount to less than half of the capacity it has already sold to private developers. Ireland adds that several developers have announced plans to build thousands of houses in Ireland over the next few years⁶⁷.
- (58) With respect to the Dublin Docklands, the Irish authorities explained that NAMA's role is limited to facilitating the delivery of development.⁶⁸ In particular, NAMA helps to ensure that (and in some cases funds) the necessary planning permissions are obtained in order to maximize the value of the site. NAMA then sells its interest in the sites to developers, sometimes maintaining a minority stake⁶⁹ in order to maximize its return upon completion of the development.
- (59) On the acquisition of additional land (the Hales Freight site) in the Dublin Docklands, Ireland mentioned that the acquisition was a clear enhancement to the value of NAMA's adjacent plots and provided an expert report to support this claim⁷⁰. Normally NAMA would not purchase additional sites, but this exception to the rule ensured the potential to significantly improve the recovery value⁷¹. Finally, Ireland notes that the acquisition price of this site amounted to [less than EUR 24 million] instead of EUR 26 million as alleged by the complainants.
- (60) Concerning the deferred payment initiative, Ireland explained that this scheme ran from May 2012 until end of May 2014 and was offered on just over 412 properties. However, for only 103 of those 412 properties the purchasers actually

⁶⁶ It is still unclear whether NAMA will be able to achieve this target. By end September 2017, 5 566 houses had been completed with 2 886 houses being under construction.

⁶⁷ E.g. Cairn Homes plc plans to build over 10 000 homes (mainly in the Dublin area), New Generation Homes is planning at least 1 000 homes (on top of earlier developments) and O'Flynn Group (one of the complainants) has plans for 10 000 homes over the next 7 years. Cairn Homes' CEO has even stated, in an interview with the Sunday Business Post (of 13 December 2015), that he does not believe NAMA's activities (i.e. the funding of residential property development) will distort the market.

⁶⁸ For one site, NAMA also funds the development itself (i.e. [less than EUR 200 million]) but would make a market return on this funding (see recital (96)).

⁶⁹ The delivery strategies employed by NAMA include (i) outright sale of sites, (ii) sale of long leasehold interests and development rights with NAMA retaining freehold interest, (iii) retention of minority shareholder interests in regulated Irish Collective Asset-management Vehicles (ICAVs) which acquired sites, and (iv) financing of planning permission applications and/or site remediation works on a value accretive and arm's length basis.

⁷⁰ Valuation advice indicated that the acquisition had the potential to provide an additional 58 986 square feet of net internal area commercial space and an additional 40 300 square feet (or 39 extra apartments) of saleable residential apartment space by combining this with the adjoining sites that NAMA already had an interest in. Furthermore, combining the sites allows for an optimum layout of the block and common areas, reduces construction cost duplication, facilitates the planning process and allows control over the development delivery and timeframe for the overall block.

⁷¹ Ireland provided a report by [an experienced Irish commercial property advisory firm] highlighting that the combination of the original land with the acquisition of the additional land (at the price at which NAMA acquired the site) would enhance the overall value to NAMA by EUR 8.6 million. The acquisition price has been based on the 'marriage value' (i.e. the improvement in the total value of both sites) being equally split between NAMA and the original owner.

signed up for the price protection offered by the scheme. In total EUR 4.41 million is owed to NAMA in deferred payments⁷², which are payable on the fifth anniversary of the completion of the sale of the property. Ireland emphasizes that no payments were made to purchasers.⁷³ In addition, it is expected that 100% of the deferred payments being owed to NAMA will be made since the national residential prices have increased by 44% since May 2014⁷⁴. Ireland notes that NAMA devised this initiative to encourage sales and instil confidence back into the market at a time when residential property prices were still declining. Finally, Ireland considers that due to the small scale of the initiative it could not have distorted competition on the Irish residential property market.

- (61) With respect to the provision of vendor finance by NAMA, Ireland notes the following. NAMA advanced a total of EUR 384 million in eight vendor finance transactions involving the sale or refinance of commercial property securing its loans. Six of those loans have now been repaid in full. The two remaining loans had an outstanding principal balance of EUR 201.5 million⁷⁵ as at 30 June 2017 and are scheduled to be repaid in the course of 2018. Ireland asserts that NAMA's vendor financing of the eight transactions was on commercial terms by reference to EURIBOR/LIBOR plus a margin⁷⁶ and that financing was provided for maximum 75% of the purchase price. Finally, Ireland referred to a publicly available document on NAMA's website⁷⁷ which clearly lays out the conditions under which NAMA was prepared to provide vendor finance.
- (62) Finally, with respect to the alleged debt forgiveness of EUR 200 million referred to by the complainants (see recital (14)), Ireland notes the following. NAMA inherited properties held as loan security where it had to issue credit facilities to maintain and enhance the property in order to maximise its return. In some instances there were significant structural, health and safety and fire remediation issues with properties such that NAMA had to advance additional loan facilities to resolve these issues, e.g. bringing them into compliance with planning and housing legislation, before the assets were in marketable and saleable condition. Failure to do so would have meant that the assets would have lost significant value. It is currently expected that about EUR 200 million of such additional loan facilities are unlikely to be repaid. Ireland emphasizes that this amount does not relate to loans extended in the context of NAMA's residential development funding programme and does not constitute debt forgiveness to developers. For

⁷² Of which still EUR 1 831 260 is payable in 2018 and the remaining EUR 1 774 300 in 2019.

⁷³ The deferred contractual payments due from purchasers are collected directly from the purchaser's mortgage provider and paid to NAMA following an independent valuation of the property, to determine the amount owing. The banks that participated in this scheme were Bank of Ireland, AIB (through the EBS platform) and Permanent TSB.

⁷⁴ According to the CSO Residential Property Price index.

⁷⁵ Ireland highlights that one of those two loans concerns a syndicated loan involving Irish, UK and other European banks that NAMA acquired from [a NAMA participating institution] and that was refinanced by all syndicating banks. NAMA as a 25% syndicate member was obliged to participate in the refinancing as the other syndicate members all agreed to this. NAMA's share in this loan amounts to [less than EUR 200 million].

⁷⁶ The minimum margin where NAMA was the sole lender was [more than 2%] and the highest was [less than 5%] margin. The syndicate bank UK transaction referenced in footnote 75 (where NAMA holds only a minority interest of 25% with no veto rights) has a margin of [less than 1.5%] at a loan-to-value of [more than 50%].

⁷⁷ See https://www.nama.ie/fileadmin/user_upload/documents/NAMAVendorFinanceLeaflet2013.pdf

these reasons, Ireland considers that the article submitted by the complainants misrepresents the situation and cannot be taken as evidence that NAMA would not operate with the aim of maximising debt recovery.

- (63) For all of the above reasons, Ireland considers that there is no element of State aid in NAMA's activities, that the NAMA-developers do not benefit from State aid and that there cannot be a distortion of competition in the property development and property development financing markets.

5. ASSESSMENT OF THE MEASURE

5.1. Existence of aid

- (64) According to Article 107(1) TFEU any aid granted by a Member State or through State resources in any form whatsoever which distorts, or threatens to distort, competition by favouring certain undertakings, in so far as it affects trade between Member States, is prohibited.
- (65) The qualification of a measure as State aid within the meaning of that provision therefore requires the following cumulative conditions to be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an advantage on its recipient; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and have the potential to affect trade between Member States.
- (66) Furthermore, aid measures are categorised as "new" or "existing" aid. This determines the applicable procedure. Whereas existing aid may, in accordance with Article 108(1) TFEU, be lawfully implemented so long as the Commission has made no finding of incompatibility, Article 108(3) TFEU provides that plans to grant or alter existing aid must be notified, in due time, to the Commission and may not be implemented until the procedure has led to a final decision.⁷⁸ Contrary to new aid, which is considered "unlawful" if the Member State grants the aid in breach of the standstill obligation of Article 108(3) TFEU, existing aid must be regarded as lawful so long as the Commission has not found that it is incompatible with the internal market under the constant review provided for in Article 108(1) TFEU.⁷⁹
- (67) Accordingly, Article 24(2) of Regulation 2015/1589 of 13 July 2015⁸⁰ ("the 2015 Procedural Regulation") stipulates that complaints by interested parties may only concern alleged unlawful aid.⁸¹ By contrast, complainants cannot allege the incompatibility of lawful aid. Therefore, the Commission cannot be forced by a complainant to open the formal investigation procedure on an existing aid measure which is still considered lawful. It is up to the Commission to decide whether it considers appropriate to initiate an existing aid procedure against a

⁷⁸ Case C-590/14 P *DEI and Commission v Alouminion tis Ellados*, ECLI:EU:C:2016:797, para. 45.

⁷⁹ Case C-322/09 P *Nya Destination Stockholm Hotell & Teaterpaket*, ECLI:EU:C:2010:701, para. 52.

⁸⁰ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 248, 24.09.2015, p. 9.

⁸¹ Complaints can also allege "misuse of aid", which however has not been alleged or demonstrated in the present case within the meaning of Article 1(g) of the 2015 Procedural Regulation.

Member State under Article 108(1) TFEU, as further specified in Articles 21-23 of the 2015 Procedural Regulation.

- (68) Pursuant to Article 1(b)(ii) of the 2015 Procedural Regulation, the notion of existing aid includes "*authorised aid, that is to say, aid schemes and individual aid which have been authorised by the Commission or by the Council*". Therefore, in the present case, to the extent that an alleged aid measure has already been authorised by the NAMA Decision, it constitutes existing aid, and thus the respective part of the complaint can be rejected on that basis alone.
- (69) Therefore, in the following recitals, the Commission will also examine whether some of the alleged measures are covered by the NAMA Decision and thus constitute existing aid. According to the case-law, the scope of the NAMA Decision is determined not only by reference to the actual wording of that decision, but also by taking account of the aid measures notified by the Member State concerned.⁸² With respect to alleged measures that are not existing aid, the Commission will assess whether they constitute State aid under Article 107(1) TFEU and, in the affirmative, whether they are compatible with the internal market.

5.1.1. State aid to the participating credit institutions

- (70) The Commission concluded in recitals 80-84 of the NAMA Decision that the participating credit institutions (i.e. Anglo Irish Bank, Allied Irish Bank, Bank of Ireland, Irish National Building Society and Educational Building Society) would receive State aid through NAMA. For completeness, the Commission recalls that this aid was declared compatible in the NAMA Decision, the following decisions concerning the transfer of assets to NAMA (see recital (2)) and the individual restructuring State aid decisions of the participating credit institutions. Therefore, it is existing aid, which the Commission is not required to (re)assess in the current decision. This is stated for the sake of clarification, given that in any event the complaint does not relate to aid to the participating credit institutions.

5.1.2. Alleged State aid to NAMA

- (71) The NAMA Decision does not explicitly identify NAMA as a beneficiary of State aid. However, in recital 84 of that Decision the Commission notes that if NAMA was to be considered as an undertaking, its exemption from stamp duty⁸³ upon acquisition may also be viewed as direct State aid to NAMA. While the NAMA Decision does not take a position on whether NAMA qualifies as an undertaking it does conclude in its recital 129 that if the stamp duty exemption amounts to aid to NAMA, it would be compatible by virtue of the compatibility of the scheme as a whole with Article 107 (3)(b) TFEU.
- (72) The complainants however consider that NAMA has benefited and still benefits from various other State aid measures (see recital (29)) that would not be covered by the NAMA Decision. The Commission will not in this decision assess the

⁸² Case C-537/08 P *Kahla Thüringen Porzellan v Commission*, ECLI:EU:C:2010:769, para. 44.

⁸³ This exemption from stamp duty only applies for the transfer of loans and the enforcement of security on a non-performing asset. Ireland estimates that the total cumulative value of this exemption for NAMA so far amounts to about EUR 2 million.

complainants' allegations (see recital (6) and footnote 33) concerning tax minimisation by NAMA's operating entities on the basis of Section 110 TCA as the complainants have agreed (see recital (10)) to separate this issue from the other allegations in their complaint. The other measures and allegations brought forward by the complainants will be assessed in the remainder of this decision.

- (73) The complainants allege (see recital (30)a)) that NAMA benefits from confidential information it lawfully obtained from developers after acquiring their loans from the participating institutions. More specifically, NAMA had required the developers to provide their business plans⁸⁴ in order to be able to determine the most appropriate debtor strategy (see recital (23)). There are no indications that NAMA has misused this sensitive information to compete with the concerned developers. The Irish authorities strongly deny this allegation and point out that if NAMA would have wanted to use this information, *quod non*, it would in any case have been outdated by the time NAMA set out its residential development funding plan in 2015. The Commission notes that not only is there no proof for this allegation but since it in any event would not concern a foregoing of State resources, it would not fulfil one of the cumulative conditions that need to be met for a measure to constitute State aid within the meaning of Article 107(1) TFEU. This allegation hence concerns a measure that is not State aid and must therefore be rejected.
- (74) In the complaint it is also alleged (see recital (30)b)) that NAMA benefits from its strong relationships with local authorities and government departments. The Irish authorities replied to this allegation by pointing out that it operates in accordance with the Irish environmental and planning laws and has the same access to the relevant governing bodies as any other market operator. The complainants did not provide specific proof for this claim. In any event, even if the allegation were true, it seems that no State resources would be foregone. Therefore, this allegation concerns a measure that is not State aid and must be rejected.
- (75) With respect to the allegation (see recital (30)c)) concerning NAMA's exemption from income tax, corporation tax and capital gains tax, the Commission notes that recital 45 of the NAMA Decision mentions that the NAMA Act contains provisions concerning NAMA's specific tax status. Indeed, section 214 of the NAMA Act, which was an integral part of the notification submitted by Ireland for the adoption of the NAMA Decision, clearly lays down NAMA's tax exemptions. Against this background, the Commission notes that only NAMA itself, the 100% public parent entity which holds 49% of NAMA Investment D.A.C. is tax exempt. NAMA's operating entities do not benefit from this exemption and are taxable in Ireland⁸⁵. While only the exemption from stamp duty is discussed in detail (see recital (71) above) in the NAMA Decision, NAMA's other tax exemptions were mentioned in the NAMA Decision and included in the notification by Ireland. Therefore, even if they constituted State aid within the meaning of Article 107(1) TFEU, they would in any case be part of the scheme as approved in the NAMA Decision.⁸⁶ On this basis, the Commission

⁸⁴ NAMA received business plans from 778 debtors and receivers during the years 2010-2012.

⁸⁵ The statement in recital 45 of the NAMA Decision that *the tax treatment of NAMA is equivalent to other market operators*, concerns NAMA's operating entities and not the public parent entity.

⁸⁶ For completeness, the Commission points out that the Irish authorities explained that the tax exempt parent entity NAMA has so far not received any cash flows from its operating entities and hence

considers that NAMA's tax exemptions fall within the scope of the NAMA Decision, and therefore constitute existing aid.

- (76) In the complaint (see recital (30)d)), reference is made to NAMA having (indirectly) acquired land at steep discounts compared to its current market value. This would allegedly give NAMA an advantage by allowing it to develop land that would not be viable for other developers. In doing so, NAMA would distort competition on the housing market. The Irish authorities have pointed out that NAMA does not directly control land. NAMA's role is that of a secured lender, like any other financial institution or private equity company which holds real estate including development land as security for associated loans. It is the objective of the debtor or insolvency practitioner to maximize the potential of the underlying property assets in order to repay the associated debt. NAMA, like any other market operator in such a situation works with its debtors and insolvency practitioners with the aim of meeting this common objective.
- (77) The Commission notes that NAMA indeed purchased loans rather than land from the participating credit institutions. At that time, the transfer price paid by NAMA was EUR 5.6 billion higher than the market value of the loans. While it is true that the market value of the land that secures the loans acquired by NAMA has since (partially) recovered, this does not change the fact that NAMA paid a price for the loans⁸⁷ (and hence indirectly for the land that served as collateral) which exceeded the then prevailing market price. Therefore, it is not the purchaser of the loans (NAMA) that benefitted from any aid through that transaction, but the sellers, i.e. the credit institutions.⁸⁸ Above that, as will be explained further in this decision (see recital (92)), NAMA does take into account the current market value of the land when choosing to develop sites and when setting housing prices. The Commission therefore considers that NAMA has not benefited from any advantage by the alleged measure and that no State resources have been foregone in that direction. Since the alleged measure does not fulfil two of the cumulative conditions that need to be met to constitute State aid within the meaning of Article 107(1) TFEU, this allegation is rejected.
- (78) With respect to the complainants' reference to NAMA's extraordinary powers (see recital (30)e)), those powers fall within the scope of the NAMA Decision, and thus constitute existing aid. The Commission fully took into account these post-acquisition powers in the NAMA Decision⁸⁹ when declaring the NAMA scheme

would in any case not have had to pay taxes until now. NAMA will only receive cash flows at the moment when it is wound down (expected in 2020/2021). At that time, NAMA's surplus will fully accrue to the State in line with section 60(3) of the NAMA Act. The Irish authorities can also fully control any cash flows between entities of the NAMA Group through their direct control over NAMA and NAMA's veto over decisions by the operating entities. Finally, the Commission notes that taxing the parent entity would result in a percentage of the surplus going to the State in the form of taxes and the entire residual surplus in the form of a direct payment to the Ministry of Finance. Without taxation, the State would receive 100% of the surplus in the form of a direct payment. If everything happens at the moment of wind-down as foreseen, there is no effect on the timing of the payments of the State.

⁸⁷ The Commission validated the method to determine the REV of the loans in the NAMA Decision and the actual transfer prices and real economic values in its three subsequent decisions (see footnote 2).

⁸⁸ That aid was declared compatible in the NAMA Decision and the decisions mentioned in footnote 2 of the present decision.

⁸⁹ Recital 43 of the NAMA Decision explains that these specific post-acquisition powers are "aimed at making NAMA's access to the underlying real estate security (both physically and legally) easier and

compatible with Article 107 (3)(b) TFEU. Those powers were also described in detail in the notification submitted by Ireland for the adoption of the NAMA Decision. Furthermore, the Commission had received commitments⁹⁰ from Ireland that the use of these powers would be restricted and would be the subject of a yearly report to the Commission. The most recent report (concerning 2016) noted that "*to date, none of the following powers have been exercised by NAMA: (i) the vesting order power; (ii) the compulsory purchase of land power; (iii) the power to amend contract terms; (iv) the power for the removal of limitations on the right of transfer of assets; (v) the power to request information from the Revenue Commissioners; or (vi) the power to assert section 228(2) [of the NAMA Act] as a defence to any claim that might be brought against NAMA*". NAMA has hence fully respected the commitments laid down in the NAMA Decision. Moreover, the national provisions providing for those powers have not been amended since their introduction. This allegation is therefore rejected, since it concerns existing aid.

- (79) Finally, the complainants allege (see recital (30)f)) that the State guaranteed senior debt is a cheap funding source for NAMA allowing it to fund property developments at terms that no private operator can obtain. Nevertheless, the Commission notes that in the NAMA Decision the Commission approved the granting of the State guarantee as part of the overall NAMA scheme. That guarantee was an integral part of the relief measure approved in the NAMA Decision and as such necessary and appropriate for that measure to fulfil its objectives. In that Decision, NAMA was primarily considered as a vehicle to pass on all of the aid to the participating credit institutions. Indeed, as indicated above (see recital (78)) the latter were the direct beneficiaries as they received the State-guaranteed bonds in exchange for their risky assets. In addition, the value of these bonds exceeded the market value of these assets by EUR 5.6 billion or 21% higher than the then prevailing market value. However, the State guarantee still forms part of the overall scheme aimed at restoring the stability of the Irish financial system and was already approved by the NAMA Decision, which explicitly refers to it as part of the approved scheme.⁹¹ Moreover, the State guarantee was included in the notification submitted by Ireland for the adoption of the NAMA Decision. For these reasons, even if the State guarantee constituted State aid to NAMA within the meaning of Article 107(1) TFEU, this State guarantee is covered by the authorisation of the NAMA Decision, and thus constitutes existing aid.
- (80) The complainants claim that the NAMA scheme as currently operated is substantially different from the scheme that was approved in the NAMA Decision. The complainants consider in particular that in that Decision the Commission did not approve or envisage that NAMA would engage in property development or finance such activities.

at allowing it to have close control over the process of realisation of such security in order to maximise recovery value". These powers are described in greater detail in recitals 43 and 44 of the NAMA Decision.

⁹⁰ See recitals 74 and 127-128 of the NAMA Decision.

⁹¹ See for example recitals 9, 29, 34, 36, 38, 40, 74 and 81 of the NAMA Decision.

- (81) The Commission points out that contrary to the complainants' allegation, by financing certain development projects NAMA does not go beyond its original mandate. Indeed, by choosing to extend additional financing to certain of its debtors or receivers to allow them to develop projects that have passed a viability test, NAMA maximises the repayment by its debtors. In doing so, NAMA acts fully in line with the objectives laid down in section 10 of the NAMA Act, i.e. *enhancing the value of those assets in the interests of the State and obtain the best achievable financial return for the State* without however prolonging NAMA's lifespan and hence also without breaching the requirement to deal *expeditiously with the assets*.
- (82) Furthermore, the Commission notes that the NAMA Decision in its recital 40 also explicitly allowed NAMA to borrow (with or without a State guarantee) an additional sum of up to EUR 5 billion. Footnote 16 of that Decision mentions that such additional funds can for example be used in order to *complete unfinished developments if deemed profitable*. It is therefore clear that the Commission had envisaged that NAMA could fund developments of its debtors under certain conditions. Contrary to what the complainants seem to believe, NAMA has in practice however not borrowed any additional funds. The Commission considers that NAMA's strategy of funding developments that have passed a viability test and that maximize the repayment by its debtors, without additional borrowing by NAMA, are therefore consistent with what was foreseen in the NAMA Decision. Most importantly, the State guarantee has not been modified since it was awarded and NAMA's objectives as laid down in the NAMA Act are also still the same.
- (83) In sum, the Commission considers that NAMA operates entirely along the lines of what was foreseen in the NAMA Act and the NAMA Decision. NAMA is winding down a portfolio of impaired legacy assets in a way that maximises the result for the State. This is a direct consequence of the measures as approved by the Commission in the NAMA Decision. The measures have also not been modified in a way that would make them new aid. Therefore, the Commission concludes that, even if the State guarantee constituted State aid to NAMA, it qualifies as existing aid within the meaning of Article 1(b)(ii) of the 2015 Procedural Regulation. Likewise, the Commission concludes that NAMA's tax exemptions and special powers also qualify as existing aid within the meaning of Article 1(b)(ii) of the 2015 Procedural Regulation.
- (84) The complainants also allege that in light of the improving macroeconomic situation in Ireland the State guarantee to NAMA cannot be declared compatible on the basis of Article 107(3)(b) TFEU. They also argue that no other basis for compatibility could be invoked as the alleged aid to NAMA would not be appropriate, proportionate, and transparent, and would also significantly distort competition. However, since the alleged aid measures constitute existing aid, the Commission does not need to assess the compatibility of those measures in order to reject the complaint. Therefore, those arguments by the complainant are inoperative.
- (85) For the sake of completeness and in an entirely incidental manner, the Commission notes that the restructuring of loans and the granting of additional funding to existing debtors and receivers to maximize repayment, as approved in the NAMA Decision, is consistent with the Commission's case practice and guidance. The Commission has on several occasions allowed banks in wind-down

to engage in some new business, subject to conditions, to protect value. For instance Dexia Crédit Local (DCL) was allowed to generate EUR 600 million of new business to existing customers over a period of just a few months⁹². Furthermore, in other cases⁹³ the Commission has established the practice that further advances on existing loans and/or restructuring such loans are allowed for banks benefitting from liquidation aid in so far as it is necessary to preserve the value of loans to allow for minimisation of State resources needed for the winding-down. In that same vein, point 74 of the 2013 Banking Communication⁹⁴ in principle prohibits new activity for banks in wind-down but allows it when it is limited to existing customers and on the condition that it enhances the value for the bank (e.g. through restructuring of loans). Similarly, asset management companies such as NAMA that deal with banks' impaired assets are also allowed to engage in new business with existing customers if that improves their return. Indeed, whether impaired assets are dealt with internally by a bank or through an external vehicle to which these assets are transferred, should not result in a different assessment from a State aid perspective. Contrary to other types of loans, real estate financing is especially suitable for such value-maximizing strategies, since it is possible to reliably estimate the cash flows and expected returns from such projects and hence to make an informed decision about whether to extend additional financing or not.

- (86) To sum up, the Commission considers that all the measures referred to by the complainants and assessed in this decision either do not amount to State aid or constitute existing aid.

5.1.3. *Alleged State aid to real estate developers through NAMA*

- (87) The Irish authorities consider that the cumulative conditions for the existence of State aid to the NAMA-supported developers are not fulfilled. In particular, they argue that in its transaction with the NAMA-supported developers, NAMA has acted like any market economy operator would do. Therefore, the NAMA-supported developers would not have received a selective advantage from NAMA.

⁹² See recitals 106-108 of Commission Decision of 28 December 2012 on State aid SA.33760 (12/N-2, 11/C, 11/N); SA.33763 (12/N-2, 11/C, 11/N); SA.33764 (12/N-2, 11/C, 11/N); SA.30521 (MC 2/10); SA.26653 (C9/09); SA.34925 (12/N-2, 12/C, 12/N); SA.34927 (12/N-2, 12/C, 12/N); SA.34928 (12/N-2, 12/C, 12/N) implemented by the Kingdom of Belgium, the French Republic and the Grand Duchy of Luxembourg in favour of Dexia, DBB/Belfius and DMA, OJ L 110, 12.04.2014, p. 1.

⁹³ See, for example, Commission decisions of 23 April 2010 in case N 194/2009 Liquidation aid to Bradford & Bingley, OJ C 143, 02.06.2010 p. 22; of 15 September 2010 in case C 26/2009 Restructuring of AS Parex Banka, OJ L 163, 23.06.2011; of 25 October 2010 in case N 560/2009 Aid for the liquidation of Fionia Bank, OJ C 76 of 10.03.2011; of 6 June 2011 in case SA.31945 Aid for the liquidation of Eik Banki P/F and Eik Bank Denmark A/S, OJ C 274, 17.09.2011, p. 3; of 29 June 2011 in cases SA.32504 and C 11/2010 Anglo Irish Bank and Irish Nationwide Building Society, OJ L 139 of 26.05.2012, p.18; and of 18 July 2011 in case C 15/2009 Hypo Real Estate, OJ L 60 of 01.03.2012, p.1.

⁹⁴ This recital reads as follows: *As long as the beneficiary credit institution continues to operate, it must not actively compete on the market or pursue any new activities. Its operations must in principle be limited to continuing and completing activities pending for existing customers. Any new activity with existing customers must be limited to changing the terms of existing contracts and restructuring existing loans, provided that such changes improve the respective asset's net present value.* Point 47 of the 2008 Banking Communication was not so specific but already indicated that an aided company in liquidation should not pursue any new activities, but merely continue the ongoing ones.

- (88) A selective advantage granted by NAMA to the NAMA-supported developers can indeed be ruled out if NAMA has treated the NAMA-supported developers as any market economy operator would do under similar circumstances. The Commission will therefore assess whether NAMA in its (i) pricing of new loans to NAMA-supported developers, (ii) restructuring of existing loans to NAMA-supported developers, and (iii) viability assessments of projects proposed by NAMA-supported developers, has acted in line with this principle. Finally, while not being subject of the complaint, the Commission will for completeness also examine whether the NAMA-supported developers received an advantage through the receipt of management fees for their work in development projects for NAMA.
- (89) For the application of the market economy operator principle, it is important to keep in mind that NAMA should be compared with comparable operators, such as for instance banks or private equity funds that hold or have acquired portfolios of impaired loans. The complainants seem to consider that the relevant benchmark consists of private property developers operating on the Irish market. However, NAMA's objective is to wind down a legacy portfolio of impaired loans and NAMA only funds developments to the extent that this maximises the debt repayment. NAMA is not a property developer itself and contrary to the latter only has a short-term horizon (i.e. until it is wound down). As Ireland points out (see recital (55)) NAMA's activities are akin to those of for instance the large private equity purchasers of distressed loan portfolios in Ireland. NAMA's actions should therefore not be compared to those of traditional property developers.
- (90) Concerning the pricing of new loans to the NAMA-supported developers, the Commission takes note of the [professional services firm's] report submitted by the Irish authorities which confirms that NAMA charges market-conform interest rates to these developers. Yet, according to another expert report submitted by the complainants the interest rates charged by NAMA would be significantly below the market rate (see in this context the complainants' allegations in recital (31)a). The Commission considers that given the circumstances in which the new loans are awarded to the NAMA-supported developers the level of the interest rate is not decisive. Indeed, NAMA's return mainly depends on the proceeds from selling the completed development and the new loans are awarded to enable these developments. In that sense, it can thus be argued that a market economy operator would consider its total return (i.e. interest from the loans plus profits from sale) rather than focus on whether the interest rate is market-conform on a standalone basis, as the complainants also acknowledge in their submission of 27 January 2017⁹⁵. Indeed, NAMA tries to maximize the return of impaired loans and only extends new financing to achieve that purpose. It is therefore appropriate to not

⁹⁵ In that submission, the complainants explicitly acknowledged this fact. In particular, they note: "*It should be borne in mind that, to a certain extent, the rate of interest which is applied by NAMA in respect of finance which it provides to NAMA-Supported developers in the context of a Work-out Scenario is notional. This is because ultimately it is NAMA that will recover the profit on any sale of property by a NAMA-Supported Developer by way of repayment on the developer's Long Term Debt. Were NAMA to increase the interest rate which it applies, this will simply reduce the level of profit generated by the development and consequently reduce the developer's repayment of its Long Term Debt. However, it will increase the revenue generated by NAMA in interest.*" and "*The net result for NAMA is likely to be the same regardless of the rate of interest which it applies i.e. the money which it would have received by way of repayment of the developer's Long Term Debt will now be received by way of interest payment on the finance provided in respect of the development*".

consider the interest rate of the new loan by itself but to focus on the return of the transaction as a whole (i.e. repayment and interest of old and new loans of that debtor). For this reason, the Commission will assess below (see recital (92)) whether NAMA's procedures to assess the viability of development projects and NAMA's criteria to restructure existing loans, on which basis it decides to grant new loans, is in line with what market economy operators would apply to make such decisions. The Commission will hence not assess the market-conformity of the interest rates of the loans on a standalone basis.

- (91) Regarding the restructuring of loans and incentive schemes for debtors, it should first be noted that this has only been used in relatively few cases. In particular, NAMA has applied this for [less than 20] of its 800 debtors (representing a carrying value of [less than EUR 5] billion⁹⁶). NAMA has only taken these steps for cooperating debtors with a good potential for generating an excess return for NAMA (e.g. through development projects). In 2010 and 2011 all debtors were given the opportunity to propose restructures which NAMA then reviewed. As a result of the review process⁹⁷, some restructures were executed with a view to preserving and enhancing asset values, thereby maximising financial return for the State as required by section 10 of the NAMA Act. Further, by concluding a restructuring agreement with selected debtors, NAMA generally acquired additional loan security over a debtor's unencumbered assets, which was not in place when NAMA acquired the loan from the credit institutions. NAMA has followed a rigorous approach, laid down in its "Debtor Arrangements Policy" which ensures that loan restructuring and incentives⁹⁸ were only offered if this resulted in a better return for NAMA. It is important to note that debtors availing of restructures would not have been able to pay more through any other arrangement, such as enforcement. Furthermore, the loan restructures did not entail any par debt forgiveness. In other words, the debtors continued to be fully liable for their par debt.⁹⁹ Finally, it has to be noted that NAMA has enforced about 23% of the original par debt it acquired from the participating credit institutions (see recital (24)b)). Hence, restructures were not liberally offered but instead only where NAMA's potential return is enhanced in line with its objective to maximize the return for the State. The complainants' arguments which allege that NAMA does not act as a market economy operator (see recital (31)c)) hence seem to be based on incorrect and incomplete information and must therefore be rejected. On this basis, the Commission concludes that NAMA operates like any market economy operator holding impaired loans as such operators would also

⁹⁶ This represents [less than 15%] of NAMA's EUR 31.8 billion acquisition value for all loans acquired and [less than 7%] of the total EUR 74.1 billion of par debt.

⁹⁷ The review process by NAMA showed that the debtors most eligible for restructuring tended to have a better asset base and value-add potential, in addition to a willingness to cooperate.

⁹⁸ The purpose of incentive mechanisms is to align the commercial interests of the debtor with those of NAMA (i.e. maximize repayment of the debt). Such a mechanism can for instance entail that profit above a target repayment level could be shared 90% to NAMA and 10% to the debtor. The target repayment level was however typically set at a level that is difficult to achieve.

⁹⁹ Since 2010, NAMA has written off approximately EUR 3.2 billion of par debt (less than 4.5% of the total EUR 74.1 billion of par debt) and just EUR 0.2 billion of debt or less than 1% when compared to the acquisition value of EUR 31.8 billion. Such write-offs were limited to situations where there was no further return realistically recoverable, nor additional collateral available to repay the debt. Write-offs cannot be considered as debt forgiveness as the former only occurs when no recovery is possible.

choose to restructure a loan if this maximizes their return from these loans and no better alternative approaches are available.

- (92) When deciding whether or not to extend additional loans to NAMA-supported developers, NAMA performs a viability assessment (see also recital (52)). More specifically, NAMA assesses whether directly selling the land (which served as collateral for a loan) is financially more attractive than extending additional credit to the borrower to develop that land and reap the benefit when selling the developed properties. The overarching principle of this test is that no development project will be financed by NAMA that would not be considered as commercially viable in the open market. The complainants however allege (see recital (31)f)) that neither the current market value of the land¹⁰⁰ nor the market funding costs are taken into account when making this assessment. In this way, NAMA would allow the development of land in situations where other market operators would not do so. However, as the Irish authorities have confirmed, the calculations take into account the current market value of the land¹⁰¹ and an appropriate cost of capital for NAMA. In addition, the [professional services firm's] report which Ireland submitted confirms that NAMA's methodology to assess which projects are commercially viable is sound and based on reasonable assumptions. The Commission has also received examples of projects that were considered viable / not viable on the basis of NAMA's methodology. The Commission considers that the fact that NAMA makes a case by case assessment in order to decide whether to have the land sold or to fund its development is fully in line with what a market economy operator would do in such a situation. As a result of this viability assessment, NAMA has until now decided to sell sites with the capacity to build 50 500 residential units while it intends to only finance the development for less than half of that number of residential units.
- (93) For projects underway during 2017, NAMA projects a total projected cash return of EUR 385 million which is [well in excess of] the independently assessed land value of [between EUR 200 and EUR 240 million]. Overall, the portfolio IRR of NAMA's residential funding programme is currently projected to amount to [more than 20%] which compares favourably to operators who follow a similar strategy as NAMA. As a result, the financing of commercially viable development projects will contribute significantly to NAMA's surplus. On the basis of the above elements, the Commission considers that the methodology underlying NAMA's viability assessment for development projects proposed by its debtors is sound and in line with what a market economy operator would apply. The Commission hence concludes that the complainants' claims concerning alleged deficiencies in this viability assessment methodology are unfounded.
- (94) In addition, the price for the developed houses or apartments is also set in line with normal market practice. For each project, an independent sales agent is appointed who advises a price in line with market comparables. This provides

¹⁰⁰ In this context, it is worth recalling that the complainants consider that for the market economy operator (MEO) test, NAMA should be compared to other property developers. However, as explained in recital (89), the relevant benchmark group are operators that hold or have acquired portfolios of impaired loans.

¹⁰¹ NAMA has contracted a leading Irish independent property advisory firm in order to update these valuations every six months. By constantly updating land values in a rising market NAMA ensures that projects will not be funded where a direct sale of the land would be more optimal.

assurance that the prices are set in line with or higher than the market. The houses are then openly marketed and advertised on property websites and other media. If the sales flow velocity is stronger than expected the independent sales agent will recommend price increases. In this context, it is also worth recalling that all parties involved (NAMA, the NAMA-supported developers, and independent sales agents) have an incentive to maximize the sales price (i.e. to reduce the outstanding debt respectively to maximize their sales commission). Therefore, the Commission concludes that also with respect to the price-setting for completed houses NAMA acts as a market economy operator would do.

- (95) Finally, for completeness the Commission notes that the NAMA-supported developers receive management fees¹⁰² for the work they perform in developing projects for NAMA with the objective of maximizing debt repayment to NAMA. In particular, the developers are allowed to deduct pre-agreed reasonable asset management fees from the proceeds of house sales. On average, these fees amount to 5% of construction costs and in no case do they exceed 7.5% of these costs. These fees are payment for the fact that the developer manages the construction works from start to finish. It is therefore normal market practice to pay developers such a management fee. Ireland also provided evidence that these fees are less generous than those paid by a private operator in the Irish market. On this basis, the Commission concludes that the NAMA-supported developers do not receive an advantage through the receipt of management fees from development work carried out for NAMA.
- (96) With respect to NAMA's activity in the Dublin Docklands, the Commission notes the following. NAMA initially had interests in 15 sites¹⁰³ in the Docklands. However, NAMA's strategy in this respect has generally been to divest of majority positions¹⁰⁴ in these schemes to third parties on the open market once optimal planning has been achieved with the objective of maximising NAMA's commercial return. NAMA mainly facilitates delivery of development (e.g. by funding the planning) but does not directly undertake development works. Of the EUR 1.9 billion necessary to develop the Docklands blocks in which NAMA originally had an interest, [less than EUR 300] million will be financed by NAMA. In other words, over 85% of the development costs will be funded by third parties. In all but one of the blocks where NAMA contributes to the funding, NAMA only finances the planning costs¹⁰⁵. In one case, NAMA chose to also

¹⁰² In return for these fees, the developers actively manage development projects from inception (pre-planning) to completion (sale of completed residential units). The fee typically reflects a wide variety of factors such as the complexity of the project, the reputation or technical capability and experience of the debtor and their asset management platform, particularly with regard to their ability to deliver projects on time and achieve construction cost savings.

¹⁰³ These sites can deliver about 3 million square feet of office space out of a total of 3.5 million square feet planned in the Docklands. However, this accounts for only about 8% of Dublin's overall office stock, which stands at about 40 million square feet. Furthermore, it is expected that by 2020 about 12.5 million square feet of additional office space will be constructed in Central Dublin.

¹⁰⁴ Only two of the fifteen sites initially held by NAMA are still in the planning stage. NAMA has already sold its interest in the thirteen remaining sites (with in some cases NAMA retaining minority interest to maximize its return). NAMA's residual interests in the Docklands will be sold at a point in time which maximises NAMA's return, for example when a project has secured a tenant. It is currently expected that NAMA will have exited its residual interests in the Docklands by end 2020.

¹⁰⁵ Once all planning permissions have been obtained, the value of a site goes up since development can then start. By financing this process, NAMA enhances the site value and hence increases its profit.

finance the construction costs at market terms as this leads to an enhanced return for NAMA (i.e. an additional surplus of [between EUR 30 and EUR 50 million] or an IRR of [more than 15%]).

- (97) With respect to the acquisition of the Hales Freight site¹⁰⁶ (see also footnote 43), the Commission takes note of the fact that NAMA had commissioned an expert report¹⁰⁷ before its final decision to acquire that site. That expert report compares the value of NAMA's interest in the relevant block with and without the Hales Freight site. The analysis suggests that a price of [less than EUR 24] million represents fair value¹⁰⁸ for that site. On that basis NAMA decided to proceed with the acquisition of the site for that price. Combining the Hales Freight site with its existing interests in that block allowed NAMA to maximize its profits¹⁰⁹ in line with its objective. The Commission observes that NAMA made no further acquisitions in the Docklands. Finally, the Commission takes note of the complainants' argument¹¹⁰ that NAMA could also have developed its interests without the Hales Freight site. While this may be true, it does not show that a development without the acquisition of that site would have resulted in a higher profit for NAMA, neither that the acquisition of the Hales Freight site would be a transaction implausible for a market economy operator found in the circumstances of NAMA. Therefore, the Commission concludes that NAMA acted like a market economy operator when acquiring the Hales Freight site.
- (98) On the basis of the reasons described above (see recitals (96) and (97)), the Commission concludes that NAMA's activity in the Dublin Docklands, including its acquisition of the Hales Freight site, is fully in line with the market economy operator principle.
- (99) NAMA set up a deferred payment initiative in 2012, which offered home-buyers 20% protection from the risk of falls in house prices for a five-year period (see recital (31)e)). According to Ireland, this initiative which ran for two years was set up to encourage sales at a moment when housing prices were still falling. In order to generate cash flows from disposal of unsold residential assets, and in line with its objective to maximize value for the State, NAMA devised this scheme in conjunction with three banks (see also recital (60)). The Commission notes that housing prices in Ireland continued to decline until the first quarter of 2013 while the deferred payments initiative was announced on 8 May 2012. Against this background, the Commission considers that a market economy operator could have launched similar initiatives in order to stimulate demand for properties it intended to sell. Therefore, NAMA's course of action was a plausible action for a

¹⁰⁶ This site occupies about 60% of the valuable river frontage of a much larger block in which the NAMA appointed receiver has secured interests on three sides of this site.

¹⁰⁷ This expert report is dated 22 March 2016 and hence also predates the complainants' first mention of this acquisition in their letter of 14 December 2016.

¹⁰⁸ Unlike market value, fair value is the appropriate benchmark for the valuation of property where an element of marriage value or synergistic value may arise through the combination of specific interests. This concept is defined in the International Valuation Standards Framework.

¹⁰⁹ See footnote 70 for details on the advantage of combining the sites.

¹¹⁰ The complainants submitted an expert report which argues that the Hales Freight site does not form an obstacle for the development of the remainder of the block in which NAMA holds interests. In fact, the expert argues that the Hales Freight site is likely to be dependent on NAMA's interests for a number of practical considerations related to parking access or services provision.

market economy operator facing similar circumstances. On the basis of the above, the Commission concludes that NAMA's deferred payments initiative does not constitute State aid within the meaning of Article 107(1) TFEU.

- (100) On the issue of vendor financing raised by the complainants (see recital (31)d)), the Commission takes note of Ireland's claim that such financing was provided by NAMA on market terms. Ireland supports its argument by referring to the terms of a syndicated loan in which NAMA had a minority share. Those terms, which are set by commercial banks that control the syndicate, indeed confirm that the margins applied by NAMA for its other vendor finance transactions are in line with what market economy operators charge. On this basis, and given that NAMA was fully transparent (on its website) about the conditions it was willing to apply for vendor finance, the Commission concludes that NAMA did not confer State aid through its vendor finance transactions.
- (101) For completeness, the Commission notes that the complainants' reference to a press article (see recital (14)) cannot be taken as evidence that NAMA engages in debt forgiveness and thereby confers State aid to property developers. As Ireland has pointed out (see recital (62)) the amount of EUR 200 million cited in the article does not concern NAMA's residential development funding programme but relates to additional financing NAMA had to extend in order to be able to sell certain properties it inherited as loan security. As explained above (see footnote 99), NAMA only writes off debt where there is no further return realistically recoverable or additional collateral available to repay the debt. The Commission considers that in doing so, NAMA does not behave differently from a market economy operator and hence does not confer State aid on its debtors.
- (102) In the light of the above, the Commission considers that NAMA has consistently acted in accordance with the market economy operator principle. As a result, it can be concluded that the NAMA-supported developers have not received a selective advantage from NAMA. Consequently, there is no need to examine the other cumulative conditions for the existence of State aid within the meaning of Article 107(1) TFEU. The Commission has therefore reached the conclusion that the treatment of the NAMA-supported developers by NAMA does not constitute State aid pursuant to Article 107(1) TFEU.

6. CONCLUSION

In light of the foregoing assessment, the Commission decides that the alleged measures:

- are "existing", and thus do not constitute new nor unlawful aid with regard to the alleged State guarantee and the alleged extraordinary post-acquisition powers granted to NAMA, as well as the alleged tax exemptions of NAMA; and
- do not constitute State aid within the meaning of Article 107(1) TFEU with regard to the alleged aid to real estate developers through NAMA, the alleged access to confidential information by NAMA, the alleged relationships of NAMA with local authorities and government departments, and the alleged indirect acquisitions of land at steep discounts by NAMA.

and rejects the complaint insofar as it refers to the above measures and is covered by the present decision.

If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site: <http://ec.europa.eu/competition/elojade/isef/index.cfm>.

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Member of the Commission

