



**An Coimisiún Imscrúdúcháin
(Gníomhaireacht Náisiúnta
um Bhainistíocht Sócmhainní)**

**Commission of Investigation
(National Asset
Management Agency)**

**The Honourable John D. Cooke
Sole Member**

**Second Interim Report
17th May 2018**

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Second Interim Report of the Commission of Investigation (National Asset Management Agency)

Request for the revision of the timeframe for submitting the final report under section 6 (6) of the Commissions of Investigation Act 2004

1. Introduction

- 1.1. The NAMA Commission was established by order of the Government, on 13th June 2017, pursuant to s. 3 of the Commissions of Investigation Act 2004 (“the Act of 2004”). That Order is set out in the Commission of Investigation (National Asset Management Agency) Order 2017 (S.I. No. 267 of 2017). The Commission is charged with investigating matters of significant public concern regarding the disposal by the National Asset Management Agency (“NAMA”) of its Northern Ireland loan portfolio, referred to as “Project Eagle”.
- 1.2. Under s. 8 of its Terms of Reference, the Commission was asked to deliver a final report by the end of June 2018, subject to s. 6(6) of the Act of 2004.
- 1.3. A First Interim Report of the Commission was submitted to the Taoiseach on 12th September 2017, as required by paragraph 8 of the Terms of Reference.
- 1.4. This second Interim Report of the Commission is submitted to the Taoiseach, pursuant to s. 33(3) of the Act of 2004, which provides:-

“If a commission requests that the time frame for submitting its final report be revised under s. 6(6), the commission shall submit an interim report to the specified Minister with the request.”

And section 6(6) provides:

“Even though a commission’s terms of reference are not amended, the specified Minister may, at the Commission’s request, revise the time frame for the submission of its final report to the extent consistent with the objective of having the investigation conducted and the report submitted as expeditiously as a proper consideration of the matter referred to the commission permits.”

- 1.5. The purpose of this Second Interim Report is to set out the present status of the Investigation and the steps carried out by the Commission since its establishment; and to outline the work that remains to be done with a view to estimating as accurately as possible the time required to complete the task, in order to seek a revision of the time frame under s. 6(6) of the Act of 2004.

2. The work of the Commission to date

- 2.1. Since the submission of its First Interim Report in September 2017, the Commission has made considerable progress in its work. The Commission has engaged two additional Junior Counsel, who commenced work in October 2017 and December

2017 respectively. The Commission now has four Junior Counsel and a Solicitor working with it.

- 2.2. A specialised document management system and database was installed in the Commission in September 2017. Once the system was operational and staff were trained, the Commission was then in a position to commence taking the transfers of significant additional quantities of digital material relevant to its Terms of Reference.
- 2.3. The Commission first divided the tasks set out in the six sub-paragraphs of paragraph 2 of the Terms of Reference¹ into distinct strands of work based mainly on heads (a) to (c) taken together and the remaining heads (d), (e) and (f) taken individually. The Commission then adopted a work programme in relation to each of these strands, to enable it to complete its investigation. In relation to its investigation, the Commission has had regard to information already available, including that gathered by, and contained in the reports of, the Comptroller & Auditor General, the Committee of Public Accounts and the Northern Ireland Assembly Committee on Finance and Personnel. The task of identifying and obtaining relevant documentation is continuing in relation to all strands.

3. Status of the Investigation by reference to the different strands

Head 2(d): Conflicts of Interest.

3.1. Under this head, the Commission is asked to investigate:-

*“Having regard to NAMA’s statutory obligations under the National Asset Management Agency Act 2009 and appropriate commercial practice...
If any conflicts of interest arising in relation to members of NAMA’s Northern Ireland Advisory Committee were managed appropriately in the circumstances.”*

In investigating this issue, the Commission is currently analysing all documentation received in relation to NAMA and its Northern Ireland Advisory Committee. Statements have been sought from a number of witnesses and the Commission has commenced taking evidence in this strand.

Head 2(e): Alleged Payment of “Success Fees”.

3.2 Here, the Commission is directed to investigate:

“When and how NAMA became aware of fees allegedly payable to a former member of the Northern Ireland Advisory Committee by bidders on Project Eagle, and if this issue was managed appropriately by NAMA during the sale of the Northern Ireland loan portfolio.”

¹ In this Interim Report, the six requirements to be investigated under sub-paragraphs a) to f) of paragraph 2 of the Terms of Reference are referred to as the Heads of the Terms of Reference.

3.3 On 5th February 2018, following its preliminary analysis of the relevant documentation then available, the Commission sought a detailed statement from NAMA on the issues under this head. This statement was received, accompanied by supporting documents, on 26th February 2018. The Commission has written to other parties who may have information in relation to this head and hopes to receive statements from them soon.

Head 2(f): Decisions & Actions of the Minister for Finance and Department of Finance

3.4 The Commission is asked to investigate:

“If decisions and actions of the Minister for Finance and the Department of Finance relating to the disposal of the Northern Ireland portfolio, including communications with members and officials of the Northern Ireland Executive and meetings with potential bidders, were appropriate in the circumstances.”

3.5 As part of its investigation of this strand, the Commission has received and is analysing documentation from NAMA, the Department of Finance and the Northern Ireland Department of Finance and Personnel. Following its preliminary analysis of the documentary evidence, the Commission has written to and received statements from a number of possible witnesses and will commence hearings for this strand soon.

Heads 2(a), (b) and (c): The Management of the Disposal Transaction

3.6 As mentioned, the Commission has grouped heads 2(a), (b) and (c) together into one work strand as there is a significant degree of overlap between the three and each involves an examination of largely the same extensive documentation.

3.7 These heads require the Commission to investigate whether:

“Having regard to NAMA’s statutory obligations under the National Asset Management Agency Act 2009 and appropriate commercial practice...

- (a) If the disposal strategy for its Northern Ireland loan portfolio (including the timing of the disposal and sale as a single portfolio) was appropriate in the circumstances;*
- (b) If the minimum price applied (and how it was derived) in relation to its Northern Ireland loan portfolio were appropriate in the circumstances;*
- (c) If the management of the sales process by NAMA (including procedures and controls applied, timeframes, access to potential bidders and record-keeping) was appropriate in the circumstances and demonstrated best corporate governance.”*

3.8 It was clear to the Commission, having carried out a preliminary examination of the material available, that these heads involve the most extensive volumes of documents of various kinds extending over the longest period of time, from approximately mid-2013 to mid-2014. As explained below, significant efforts have been made by the

Commission to gather in all relevant documentation pertaining to them. The Commission is aware that the majority of the relevant documentation is held by NAMA in the form of memoranda, minutes, spreadsheets, working papers and large volumes of exchanges of emails spanning the period prior to, during and after the sale of the portfolio.

3.9 As had been envisaged in the First Interim Report, the Commission prepared an objective summary of the key facts, events, dates and meetings surrounding the sale of the portfolio, based on an initial review of the documentation available at that time. This was provided to NAMA on 29th November 2017. This summary was considered by the Agency which reverted with comments on 20th December 2017. These comments have been considered by the Commission.

3.10 The work of the Commission on this strand of its work is continuing. It has commenced seeking statements from relevant witnesses. However, as will be detailed below, the Commission's progress has been delayed by the difficulties encountered in the provision of relevant documentation.

4. Receipt and analysis of documentation

4.1. As outlined in the First Interim Report, the Commission was aware that a significant amount of relevant documentation was held by NAMA, by the Office of the Comptroller & Auditor General ("OCAG"), by the Committee of Public Accounts and by the Department of Finance. Once its document management system was installed, the Commission commenced seeking the provision of that documentation.

Office of the Comptroller and Auditor General

4.2. The Commission was aware, from the C&AG's report, that, for the purposes of the review carried out by OCAG, NAMA had conducted a search of its electronic documents, which had resulted in the creation of a database, containing in excess of 40,000 documents.

4.3. Having considered that report, the Commission requested that NAMA produce the 40,000 documents that had previously been collated into a database for the C&AG. NAMA informed the Commission, in October 2017, that there was no simple way for it to reproduce, in short order, the 40,000 documents referred to in the C&AG's report in a way that it could be certain that it matched the original set. NAMA indicated, at this point, that it had run a fresh Electronic Data Request, which incorporated all of the keywords used in the original EDR for the C&AG and additional keywords that NAMA believed to be relevant to the Commission's Terms of Reference. NAMA expressed confidence that all documents provided to the C&AG would be included within that data set. However, NAMA also stated that, given that the Terms of Reference are specific, they were keen to explore with the Commission the merits of trying to re-create what had been made available to the C&AG during its work.

4.4. In light of the views expressed by NAMA, the Commission thought it prudent to discuss the documents with OCAG. It met with the Comptroller & Auditor General and members of his staff on two occasions in September and November, to discuss whether a transfer of the documents held by that office pertaining to its investigation of Project Eagle could be arranged. Following the provision by the office of the C&AG of a list of documentation which it held, the Commission requested a transfer of all these relevant documents. Having sought and obtained the consent of NAMA to this transfer, the Office of the C&AG transferred documents on 10th November 2017 and 7th December 2017. These documents comprised both those extracted by the staff of OCAG during the course of its review and working papers of the staff of that Office relating to the review.

Committee of Public Accounts and Department of Finance

4.5. The Commission has also consulted extensive documents available from the PAC website and the Department of Finance.

5. Accessing and Verifying Completeness of Relevant Documentation

5.1. In outlining here the reasons that have given rise to the need for an extension, it should be made clear that the Commission has continued to receive voluntary co-operation from NAMA. In circumstances where NAMA has felt that it has not been able to provide voluntary co-operation, e.g. for the purposes of data protection and other considerations, statutory directions to produce documents have been issued by the Commission.

5.2. As past and recent Tribunals of Inquiry and Commissions of Investigation have illustrated, in order to guarantee the completeness of an investigation and to both ensure that hearings of witnesses are conducted in the light of full production of all relevant and potentially relevant documents and for the avoidance of disputes and delays from the late appearance of relevant items, it is vital that the Commission is satisfied that, so far as possible, it has in its possession all of the materials pertinent to the issues raised by the Terms of Reference.

5.3. As already indicated, since its establishment, the Commission has been engaged in obtaining access to documentation, e-mails, correspondence, working papers, minutes and other records relating to the issues raised by the heads of the Terms of Reference. The Commission has adopted two distinct approaches to the retrieval of relevant documentation. Where the Commission has been aware of specific, identified documents which are known to exist and to be in the possession of the Agency, the Commission has requested them directly from NAMA. To date, the Commission has made sixteen individual requests for documents and all of them have been complied with in full by the Agency.

5.4. Secondly, the Commission has sought the production of all relevant documentation generated during the course of the preparation for and during the sale of the portfolio.

In this regard, the principal reason for delay has been the complexity and immense volume of the documentation generated (mainly, but not only, within the Agency) by the sale process and procedure, coupled with the steps necessary to identify, retrieve, transfer and then verify that all material relevant to the issues raised by the heads of the Terms of Reference have been received by the Commission.

- 5.5. The Commission had been assured by NAMA, during preliminary discussions in July and August 2017, that the Agency was in the process of the electronic collection and compilation of documents related to the transaction. The Commission asked that these documents be collated and indexed for review. It was understood by the Commission that this process would take some time and, therefore, the Agency was given the time to complete the exercise. The Commission received an assurance from the Agency, in September 2017, that they and their solicitors continued to work on indexing these documents.
- 5.6. In September 2017, the Commission was informed by NAMA and their solicitors that they had engaged the services of an outside service provider to undertake the work of identifying, retrieving, checking and transferring this material. The Commission also understands that the process adopted by the firm involved the use of a search software program based on the use of filters and key-word searches designed to capture all relevant items, to the exclusion of material that was deemed, by the algorithm, not to be relevant.
- 5.7. The documentation which the Commission had hoped to have received in or around September 2017 was transferred in separate tranches between 23rd February 2018 and 5th March 2018. At the time of writing, the total amount of documentation received from the Agency is approximately 34,000 documents. An analysis of the documentation provided to the Commission on behalf of the Agency showed, *inter alia*, that documents, which had been specifically identified by the Commission as relevant and/or had been provided as relevant by other parties, were not being captured by the methodology used to filter the documentation. Therefore, it became clear to the Commission that the methodology used by NAMA and its agents was not sufficiently reliable to capture confidently all relevant items.
- 5.8. As mentioned above, in order to ensure that hearings are conducted consistently with fair procedures, the Commission is obliged to satisfy itself that it is in possession of all documents that are relevant to the roles of each potential witness so that they can be brought to the attention of the witness in advance. In order to satisfy itself that it is in possession of all relevant documentation for the period under investigation, the Commission accordingly requested, on 13th March 2018, the production of all emails, together with attachments, for the parties named in an accompanying schedule, for a defined period during the currency of the sale process. This request was reiterated, following further contact with NAMA, on 16th April 2018. The Commission understands that an initial search for these emails has given rise to approximately 400,000 documents, however, following further discussion with NAMA and by reducing the number of individuals for whom documentation was

sought, it is anticipated that the amount of documentation to be transferred will be less than that figure.

5.9. In this connection, one further complication which has arisen is that a significant amount of the documentation directly relevant to the preparatory work in the disposal transaction takes the form of chains of e-mails sent, received or copied between the staff engaged on the Project. To address possible data protection concerns and having regard to the Commission's mandate to proceed, so far as possible, by means of voluntary co-operation, the Commission considered it prudent to write to the individuals in question to obtain their voluntary consent to the transfer of the materials. The list of individuals who were thus identified included some personnel who are no longer with the Agency and/or who are now resident outside the State.

5.10. As of the date of this report, the Commission has received written consents from all but two of the individuals on the list. These two individuals are out of the country and, following communication with their legal advisor, the Commission understands that the written consents will be forthcoming.

6. Contact with related bodies

United Kingdom National Crime Agency.

6.1. As had been envisaged in the First Interim Report, the Commission met with representatives of the National Crime Agency in October 2017 and received a briefing on their investigation into the Project Eagle transaction. The Commission remains in contact with the NCA.

7. Time frame for completion of the Report

7.1. As summarised above, the work of the Commission is well advanced. The hearing of witnesses based on the statements received or about to be received from key personnel relevant to the Heads of the Terms of Reference will be continued and finalised. The difficulties encountered in the identification and retrieval of documents have brought about delays which have been longer than might have been foreseen but, subject to the receipt and consideration of the body of documents referred to in paragraph 5.8 above, the Commission is confident that these problems will very soon be resolved.

7.2. While the issues raised by the heads of the Terms of Reference are primarily concerned with appraising the appropriateness of strategies adopted, decisions taken or practices and policies pursued for and during the course of the disposal transaction, rather than with adjudicating on disputes of fact or conflicts of evidence already known, it is anticipated that the complexity and detail of its financial aspects are such that those who worked on or were otherwise involved in the transaction will be entitled to sufficient time in accordance with section 35 of the Act of 2004 to make submissions or requests in response to the draft.

8. Final Report of the Commission and Revision Sought

8.1. Based on the course of the Investigation to date; on the number of outstanding interviews or witness hearings that will be required; and on the time needed to draft and circulate the draft report under the above section, the Commission estimates that it will require a revision of the time frame until 31st December 2018 and so requests.

Delivered to the Taoiseach as the specified Minister and in accordance with the provisions of Sections 6 (6) and 33 (3) of the Commissions of Investigation Act 2004

On the 17th day of May 2018.



John D Cooke

Sole Member of the Commission.