



**National Asset  
Management Agency**

# **Code of Practice on the Commercial Interests of Non Participating Institutions**

**This Code of Practice was approved by the Minister of Finance on 5th day of July 2010.**

# 1. Scope and Objectives of the Code of Practice

- 1.1 This document is designed to fulfil NAMA's obligation under section 35(1) of the National Asset Management Agency Act 2009 (the "Act") to publish certain codes of practice. In the event of any conflict between the Act and this code of practice, the Act will take precedence. Terms used in this Code have the same meaning as terms defined in the Act.

NAMA has statutory powers, including those set out in Section 12 of the Act, to manage loans and assets, and to conduct its affairs in a way that best serves its objectives as defined in Section 10 of the Act. NAMA may be subject to guidelines and directions from the Minister as set out in Section 13 and 14 of the Act. NAMA will act at all times to obtain the best achievable financial return to the State.

- 1.2 NAMA is responsible for managing a portfolio of loans and assets which it has acquired under the provisions of the Act. These include two categories:
- NAMA-managed - key credit decisions and relationship management carried out by NAMA with loan administration carried out by the Participating Institutions to facilitate the efficient management of the portfolio.
  - Participating Institution-managed - relationship management and loan administration carried out by Participating Institutions within NAMA parameters and credit decisions conducted by a Delegated Authority hierarchy with NAMA oversight.
- 1.3 The purpose of this Code of Practice, pursuant to section 35(1) (e) of the Act, is to declare publicly how NAMA will take account of the commercial interests of credit institutions that are not participating institutions, both in respect of loans and assets under its direction and control (both NAMA-managed and Participating Institution-managed), and generally in relation to its operations and performance.
- 1.4 The aim of this Code of Practice is to clarify, for the benefit of key stakeholders, how the commercial interests of non participating institutions will be taken account of by NAMA in discharging its duties to fulfil its purposes as set out in 10 of the Act and the purposes of the Act generally set out in Section 2 of the Act. Key stakeholders identified include:
- Taxpayers
  - Government / Minister
  - Debtors
  - Participating Institutions
  - Non-Participating Institutions
  - Other Creditors
  - Service Providers.

A reference to stakeholders, means anyone who has reasonable material commercial or public policy interests in NAMA's operations and activities.

- 1.5 This Code of Practice, as approved by the Minister of Finance, serves to codify the manner in which NAMA's legal powers and functions will be exercised through the Board, in this case relating to the commercial interests of Non Participating Institutions. As such, it may be changed from time to time by the Board subject to approval by the Minister. The Board will review this Code at least annually and submit the outcome of such review to the Minister with such revisions as it considers appropriate for approval.
- 1.6 In accordance with Section 35(3) of the Act, NAMA will have regard to the Code and be guided by it.

## 2. Application of the Code

This Code of Practice applies to all respects in which NAMA decisions and actions relate to the commercial interests of Non Participating Institutions.

### Key Credit Decisions

NAMA's primary role is to manage the acquired loan portfolio which at the present time is expected to run off over a 7 to 10 year timeframe. However, as with a financial institution, the management of these loans has significant bearing on their subsequent credit performance.

NAMA's options with respect to Debtor management include, but are not limited to:

- New money – extending further credit to an existing Debtor as a means to support them as part of an agreed recovery plan;
- Loan restructuring – varying the terms of the original acquired loan; and
- Enforcement and recovery – exercising rights under the loan contracts, such as vesting, sale or enforcement of security (including guarantees), with a view to enhancing NAMA cashflows relative to what could be expected under the loan agreement itself.

## **3. Key Principles**

- 3.1** NAMA in its dealings with non participating institutions under the Act, will have due regard to the commercial interests of the non participating institutions, act reasonably in the exercise of its powers under the Act and adopt a consultation approach where appropriate.

NAMA acknowledges the commercial interests of Non Participating Institutions in respect of common Debtors. Where the Debtor has consented to contact and exchange of information with the Non Participating Institution, NAMA will endeavour to ascertain the opinion of the Non Participating Institution with regard to that Debtor and its plans and strategy.

NAMA will adopt a long term view, where appropriate, to its interaction with Non Participating Institutions and is cognisant of the role played by Non Participating Institutions in the commercial property market in Ireland and the future role of such Non Participating Institutions in the provision of funding options to Debtors.

### **3.2 Priority of objectives**

NAMA's purposes are defined in Section 10 of the Act including the objective to protect and enhance the value of acquired assets in the interests of the State and contributing to the achievement of the objectives in Section 2 of the Act, having regard to guidelines and directions from the Minister as provided for in Section 13 and 14 of the Act.

### **3.3 Risk management, including with regard to debtors**

NAMA has published a code of practice in relation to risk management, including with regard to debtors.

### **3.4 Decision making process**

NAMA operates a strong corporate governance framework including delegated authorities from the Board of NAMA to the Chief Executive.

### **3.5 Contact Points and Referrals**

The NAMA Head of Portfolio Management is the key point of contact for Non Participating Institutions. Each Non Participating Institution will formally notify NAMA of a senior primary contact point. In the event that the executives of NAMA and a Non Participating Institution cannot reach agreement on material issues, either party can refer the matter in writing to the Chairman of their respective institution who will meet with the Chairman of the other institution to review the relevant matter with a view to resolving the matter and without prejudice to the commercial position of either party.

NAMA will not be bound by oral communications except where confirmed in a formal letter written by an authorised officer of NAMA.

### **3.6 Consultation with Non Participating Institutions**

The objective of this consultation is to ascertain if a common approach in respect of a common debtor already exists or a common approach can be agreed. Where it is apparent that a common approach exists and has been confirmed by the Non Participating Institution to NAMA, NAMA will continue to consult with and advise the Non Participating Institution of its dealings with the Debtor on the basis that such consultation is reciprocated by the Non Participating Institution. Such consultation will take place at the appropriate levels within the institutions.

Exchange of information concerning a Debtor with a Non Participating Institution will be subject to Debtor consent and other applicable legal obligations to which NAMA and the Non Participating Institution are subject. Where Debtor consent is not forthcoming, NAMA will be limited in the type of consultation it may engage in. Consultation and exchange of information must be reciprocal as without such cooperation from the Non Participating Institutions, consultation will be limited.

NAMA commits to respond to matters of concern to Non Participating Institutions within a reasonable time of the concern being raised.

Where NAMA has cause to reconsider a previously agreed common approach to the Debtor, NAMA will endeavour to communicate that change and the basis of the change to the Non Participating Institution and will expect the Non Participating Institution to reciprocate in the same circumstances.

NAMA expects each Non Participating Institution to inform it if a Credit Facility or part of a Credit Facility relevant to a Common Debtor is covered by any approved EU asset relief scheme.

### **3.7 Syndicate Facilities**

Where a Participating Institution transfers a Credit Facility to NAMA and such Credit Facility is one of a number of facilities which are the subject of a syndicate agreement between Lenders (“Lenders”), at least one of which is a Participating Institution and at least one of which is a Non Participating Institution, and a Debtor or group of persons (“Group of Debtors” which term shall include any one “Debtor”), the relationship between NAMA and the Non Participating Institution will be governed by such agreement previously entered into between the Lenders in relation to the operation of the facilities and the enforcement of the security held for the facilities.

NAMA will consult other syndicate members in relation to the management of the syndicate following the acquisition of its interest in the syndicate.

In the event that following the purchase of a Credit Facility, NAMA holds a sufficient proportion of indebtedness from the Group of Debtors as would enable NAMA, under the terms of the relevant inter-creditor agreement, to instruct the person holding the security for the Lenders or otherwise make a direction, NAMA will make a decision to carry out, or not to carry out, such actions on the following basis:

- The group of Debtors has been given an opportunity to make full disclosure of all relevant information to the Lenders;
- The Lenders have been given an opportunity to analyse and evaluate the relevant information;
- The Lenders have been given an opportunity to consider the commercial rationale of and priority of new money; and
- The Non Participating Institution has informed NAMA whether its interest in any of the Credit Facilities in the syndicate is covered by an approved EU asset relief scheme.

### **3.8 Security**

The legal rules of priority shall apply where NAMA and a Non Participating Institution have a charge on the same assets.

### **3.9 Pricing**

Pricing decisions, particularly of new money/restructuring arrangements will be on a risk-adjusted basis consistent with the commercial objectives of NAMA, as determined by NAMA from time to time.

### **3.10 Risks associated with Non Participating Institutions**

NAMA recognises that its own objectives in managing loans and assets may be adversely affected through the in-action or actions of Non Participating Institutions. NAMA will seek to manage this risk through consultation with Non Participating Institutions.

### **3.11 Powers and rights of NAMA**

NAMA has specified powers and rights under the Act. In accordance with the EU state aid approval, NAMA commits to exercise its powers as follows:

- a) Vesting orders (section 153 of the Act)  
NAMA will not use a vesting order for syndicated loans without the agreement of the other syndicate members. Similarly, for any other mortgage on the property, NAMA will get agreement of the holders of equivalent charges, in terms of ranking and priority, before using this power.
- b) Compulsory Purchase Orders (CPO – Section 158 of the Act)  
NAMA will only exercise the general power to seek a compulsory purchase order contained in Section 158(1) (a) of the Act in circumstances where there are issues concerning

ransom strips or access or related issues and the particular facts or the circumstances involved do not clearly fall within the terms of any of the five other situations set out in subsections (1) and (2) of section 158

For these purposes a ransom strip is any estate or interest in or over land (as “land” is defined in the Land and Conveyancing Law Reform Act 2009) whatsoever without which, in line with good conveyancing practice in Ireland, there is a material impediment or physical impediment to the use or sale of the land for its intended use or purpose or a material impediment to the vesting good and marketable title in the land.

- c) **Power to unilaterally amend contracts**  
NAMA will consult with the EU Commission prior to exercising the powers under section 102(3) of the Act. Where the contract is with a Non Participating Institution or relates to a Non Participating Institution NAMA will consult with the Non Participating Institution before a term of the contract is amended.
- d) **Limitations on rights of transfer of assets**  
NAMA will not exercise its powers under section 139 of the Act taking account of circumstances involving syndicated loans without the agreement of other syndicate members. Similarly, NAMA will address the position of other loans on the property and ensure the rights of holders of those loans are not degraded.
- e) **Sharing of tax information**  
NAMA will not use its power to request tax information from the Revenue Commissioners available to it under section 204(3) of the Act.
- f) **Section 228(2) of the Act**  
NAMA will consult with the EU Commission before invoking Section 228(2) as a defence to a claim.
- g) **Annual Report to Competition Authority and EU Commission**  
NAMA will report by the 31 January each year with respect to the prior year ending 31 December on the use of its post acquisition powers under the Act.
- h) **Power to void transactions**  
In the event that a Non Participating Institution in the course of its due diligence prior to providing funding or as part of its credit operations wishes to ascertain whether a particular dealing may be a voidable dealing within the meaning of section 172(1) of the Act, it may request confirmation from NAMA and NAMA will use reasonable efforts to confirm the position to the Non Participating Institution.

### **3.12 Sale of Credit Facilities and underlying assets by NAMA to Non Participating Institutions**

NAMA as part of its management of Credit Facilities with common Debtors, irrespective of the level of interests may offer the Non Participating Institution the opportunity to acquire NAMA's stake in the Credit Facility or the underlying assets at a commercial price where no common approach can be found in the management of such common Debtors or underlying assets.

## **Glossary (terms defined in the Act have the same meaning as the Act)**

### **Acquired Bank Asset**

means a Bank Asset that NAMA or a NAMA Group Entity has acquired, and in which NAMA or a NAMA Group Entity retains an interest.

### **Adviser**

means an entity that provides professional services to NAMA.

### **Associated Debtor**

has the meaning given by section 70 of the Act

Section 70 'For the purposes of this Act, a person is an "associated Debtor" of a Debtor if the person—

- (a) is or was at any time directly or indirectly indebted or otherwise obligated to a Participating Institution under or in connection with a credit facility, and
- (b) is or was at any time—
  - (i) a body corporate that was a subsidiary of, or a related company (within the meaning given by section 140(5) of the Companies Act 1990) to, the Debtor,
  - (ii) a nominee of the Debtor, including a person who may or does in fact act at the express or implied direction or instruction of the Debtor or another associated Debtor of the Debtor,
  - (iii) acting in the capacity of trustee of a declared or undeclared trust the beneficiaries of which include (directly or indirectly)—
    - (I) the Debtor,
    - (II) a person referred to in subparagraph (ii), or
    - (III) a body corporate controlled by the Debtor or a person referred to in that subparagraph,
    - (iv) in partnership, within the meaning of the laws of any relevant place, with the Debtor, in relation to a bank asset which at the time of the partnership was, or subsequently became, of a class of bank assets prescribed under section 69(1),
    - (v) a body corporate of which the Debtor is the sole member, or
    - (vi) a body corporate controlled by the Debtor, or
  - (c) a member of any other class of person prescribed by the Minister for the purposes of this subsection.

### **Bank Asset**

includes—

- (a) a Credit Facility,
- (b) any Security relating to a Credit Facility,
- (c) every other right arising directly or indirectly in connection with a Credit Facility,
- (d) every other asset owned by a Participating Institution, and
- (e) an interest in a bank asset referred to in any of paragraphs (a) to (d).

**Board**

means the Board of NAMA referred to in section 19 of the Act;

Section 19 ‘The Board consists of—

- (a) 7 members appointed by the Minister (in this Act referred to as “appointed members”), and
- (b) the Chief Executive Officer of NAMA and the Chief Executive of the NTMA as ex-officio members.’

**Charge**

includes—

- (a) a mortgage, judgment mortgage, charge, lien, pledge, hypothecation or other security interest or encumbrance or collateral in or over any property,
- (b) an assignment by way of security, and
- (c) an undertaking or agreement by any person (including a solicitor) to give or create a security interest in property.

**Common Approach**

means where the mutual interests of all parties are aligned and an agreed approach has been documented.

**Creditor**

means a Participating Institution who extends credit to a person under a legal contract where the creditor has right to claim any of the Debtors assets if he or she fails to pay back interest or principal

**Credit Facility**

includes every kind of financial accommodation (including a loan facility, a line of credit, a hedging facility, a derivative facility, a bond, a letter of credit, a guarantee facility, an invoice discounting facility, a debt factoring facility, a deferred payment

arrangement, a leasing facility, a guarantee, an indemnity and any other financial accommodation giving rise to a payment or repayment obligation) provided to a Debtor or Associated Debtor, whether alone or together with another person or persons and whether as part of a syndicate or otherwise.

**Credit Institution**

has the same meaning as it has in the Central Bank Act 1997.

**Debtor**

means a person who is or was indebted or obligated to a Participating Institution under or in connection with a Credit Facility.

**Delegated Authority**

means authority obtained from another such as NAMA

**Enforcement Action**

means actions necessary to recover debts in full. This may include but is not necessarily limited to legal action.

**Establishment Day**

means the 21 December 2009, being the day appointed by the Minister under section 8 of the Act

**Guarantor**

means a person who has entered into a guarantee or indemnity in connection with a bank asset.

**Minister**

means the Minister for Finance.

**NAMA**

means the National Asset Management Agency.

**NAMA Group Entity**

means—

(a) a Subsidiary of NAMA (within the meaning given by section 155 of the Companies Act 1963), or

(b) any other body corporate and any trust, partnership, arrangement for the sharing of profits and losses, joint venture, association, syndicate or other arrangement formed,

registered, incorporated or established by NAMA for the purpose of performing any of its functions under this Act.

**NTMA**

means the National Treasury Management Agency.

**Officer of NAMA**

means—

(a) the Chief Executive Officer of NAMA, and

(b) any person assigned to NAMA in accordance with section 42 of the Act.

**Participating Institution**

means a Credit Institution that has been designated by the Minister under section 67 of the Act, including any of its subsidiaries that has not been excluded under that section.

**Security**

includes—

(a) a Charge,

(b) a guarantee, indemnity or Surety,

(c) a right of set-off,

(d) a debenture,

(e) a bill of exchange,

(f) a promissory note,

(g) collateral,

(h) any other means of securing—

(i) the payment of a debt, or

- (ii) the discharge or performance of an obligation or liability, and
- (i) any other agreement or arrangement having a similar effect.

**Service Provider**

means an entity that provides outsourced services to NAMA.

**Subsidiary**

means a subsidiary (within the meaning given by section 155 of the Companies Act 1963) or a subsidiary undertaking (within the meaning given by the European Communities (Companies: Group Accounts) Regulations 1992 (S.I. No. 201 of 1992)).

**Surety**

means a person who has provided a Security in connection with the repayment by a Debtor of a Credit Facility or in connection with a Guarantor's obligations under a guarantee or indemnity.

**Written communication**

means communicating in writing including by letter, facsimile, and/or email.