1 NN 30/2009 – Ireland – MSF 2002 – Hotel capital allowances in respect of Ritz Carlton

Questions to the Irish authorities following the meeting of 3 September 2009

1. BENEFICIARIES OF THE AID

Although it is clear from the submission of the Irish authorities that the Investors (and not Carrylane) will avail themselves of the capital allowance, it cannot be excluded at this stage that part of the advantage resulting from the allowance is passed on to Carrylane. This is certainly the case regarding the buy-back agreement in place between the Exhort Co-ownership and Carrylane, but there might be other aspects through which some of the benefit accrues actually to Carrylane.

Please clarify the following:

1. Please provide a step-by-step description of the project from its inception until the opening of the hotel (i.e. who initiated the project? was it Carrylane who started building the hotel and sought to involve third party investors to get the necessary financing or did the investors contract Carrylane to build the hotel on their behalf? Did the financial contribution of the investors precede the signing of the investor lease agreements? etc.)

2. It appears that some of the beneficiaries were involved from the outset and contributed towards the construction of the hotel whereas other investors stepped in at a later stage and acquired ownership in the hotel. In this respect, do the eligible costs specified by the Irish authorities refer to the construction costs or the costs of acquiring the ownership (the two are not necessarily the same). Please indicate the figures for construction costs, costs of acquiring ownership and the eligible costs.

3. Did the price of acquiring ownership by the Investors potentially take into account the fact that the Investors will be eligible for the capital allowance (i.e. did this price contain a premium through which part of the benefit resulting from the capital allowance was transferred to Carrylane) or did it simply cover the construction costs?

4. As not all the Investors were present at the time the investment started back in 2005, who covered the remaining part of the construction costs? Was it Carrylane?

5. In their draft reply of 25 August 2009 the Irish authorities indicated that Carrylane agreed to construct the hotel on behalf of the Investors on trading account as a property developer and not for its own use and retention on capital account as a hotel operator. In case the Investors ordered the construction of the hotel and paid for the construction (thus becoming the owners), why was there a need for the long-term investor leases between Carrylane and the Investors (in which Carrylane seems to act as the owner of the Hotel)?

6. In what way are the investor lease agreements related to the expenditure incurred by the investors when contributing towards the construction/acquiring ownership in the hotel?
7. Please specify how the rents to be paid by the Investors on the basis of the long term investor lease agreements are established. How high are these rents? Are they market conform? Why is there a need for the Investor to pay this rent in light of the fact that they already contributed significant sums to construct/acquire ownership in the hotel?

8. Are the terms of the occupational leases (by which the Investors lease the hotel back to Carrylane as hotel operator) market conform? Ireland indicated that the rents the Suite Investors receive are based on market yields for commercial property based on the Investors' net acquisition costs of the property for the first 7 years and thereafter based on arm's length room revenue. Please explain how these rents are established for the first seven years and what ensures that they are based on market yields. Please also explain why there is a different arrangement for the years following the seventh year and whether this could also be considered market practice.

9. How are the rents to be paid by Carrylane to the Exhort Co-ownership established? Can these rents also be considered market conform?

10. When calculating the advantage for Carrylane resulting from the buy-back agreement with the Exhort Co-ownership, the Irish authorities specified the value of the capital allowance foregone to be €86.6m spent by Corporation tax rate of 12.5 % i.e. €10.8m. What does the figure of €86.6m refer to? (it does not correspond to the €101m paid by the Exhort Co-ownership to purchase their property from Carrylane nor to the €80m that Treasury Holding will have to pay to buy it back)

11. Why is such buy-back agreement not in place with the other Investors?

12. Some of the lease contracts (Exhibit B and E of the reply of 1 April 2009) refer to 'Ritz Hotel Limited (now Carrylane Limited)'. What is the reason for this? Is/Has there been a connection between the two companies? Is Carrylane linked to the Ritz-Carlton Hotel Company in any way?
14. Ireland specified that Carrylane has entered into a management agreement with Ritz-Carlton Hotel Company employing Ritz-Carlton as hotel manager. It was indicated that Ritz-Carlton is paid an arms length fee for its management operations. Could you provide more details about this fee? How is it established and why can it be considered arms length? Is it a fixed fee or performance related remuneration?

2. AMOUNT AND INTENSITY OF THE AID

15. Ireland also included into the eligible costs and the aid amount the Suites that were temporarily acquired by Ilesca Limited. This company is a 100% subsidiary of Treasury Holdings (similarly to Carrylane) and will not claim capital allowance for its investment. Ilesca Ltd hoped to identify a number of other third party investors who would acquire ownership of the unsold suites from it, however in the current economic environment it has not been possible to achieve this. Ireland claims that "Ilesca Ltd was included in the Notification documentation so as to provide the full picture to the Commission and to avoid the need to revisit the matter in the event that new third party Investors are sourced to acquire the unsold suites from Ilesca Ltd and claim the capital allowances in the future".

However, Ireland also specified that the underlying legal basis deems Investors to have incurred eligible expenditure on the construction of a new hotel if they acquire the suites within 12 months of the hotel first coming into use. As the hotel opened for business in October 2007, no further investor seems to be able to acquire the right to the capital allowance. Thus it seems that the part currently held by Ilesca cannot any more benefit from the capital allowance. Please confirm this.

16. As the form of aid is accelerated depreciation, the aid element needs to be calculated. Ireland used the highest possible aid intensity of 12.5% determined under the approved scheme N 832/2000 (extended by N 232/2006) to calculate the aid element. However, this intensity only applies to beneficiaries subject to personal income tax. Calculated this way, the aid element is higher than the maximum that can be allowed in the region concerned under the Regional aid guidelines 1999-2006 and the Multisectoral Framework 2002.

P. 29 of the decision in the case N 832/2000 indicates that the aid intensity depends on certain parameters such as the corporate and personal tax rates.

Since some of the beneficiaries, however, are subject to corporate income tax, the actual aid element might be lower.

Ireland is invited to resubmit the table in p. 1 of the draft reply of 25 August 2009 with a breakdown of expenditure incurred by the three groups of beneficiaries showing separately expenditure made by beneficiaries subject to personal income tax and those subject to corporate income tax in order to calculate the aid element.

3. MARKET ANALYSIS
17. In order to substantiate Ireland's position that the relevant geographic market in this case should be the EEA, please explain what the main attraction of the area is, capable of drawing visitors from all over the EEA (in the Atlantica case referred to by Ireland, for instance, there was a theme park).

18. Please provide information on the country of origin of the guests since the opening of the hotel in 2007 and their percentage share in the total.

19. Please provide more detail about Treasury Holdings being the passive landlord of two hotels in Dublin. What does passive landlord mean? Which are the hotels in question?
20. Regarding the question of the relevant product market, it seems that the data provided by Ireland include all types of accommodation. However, the Commission services consider at this stage that not all hotels in the EEA/Ireland are a real substitute. According to the hotel website, the Ritz-Carlton Powerscourt is a 'luxury hotel showcasing Palladian-style architecture and offering guests a host of amenities. Two championship-calibre golf courses on the grounds, a 30,000-square-foot luxury spa and a Gordon Ramsay signature restaurant are among this Ireland luxury hotel’s distinctive attractions.' Thus Ritz-Carlton Powerscourt is arguably best suited for guests looking for remoteness and proximity to nature and specific amenities rather than city travellers.

a. In light of this, please provide arguments as to which types of hotel could be considered close substitutes for Ritz-Carlton Powerscourt and submit new data enabling the calculation of market share and capacity increase pursuant to p. 24 (a) and (b) of the Multisectoral Framework 2002 on this possibly narrower market.