



EUROPEAN COMMISSION
SECRETARIAT-GENERAL

The Secretary General

Brussels,
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Mr Jagdip A Singh

By e-mail only:
ask+request-131-9e531431@asktheeu.org

Subject: Confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2012/5362

Dear Mr Jagdip A Singh,

I refer to your letter of 20 November 2012, registered on the same day, in which you lodge a confirmatory application, in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents¹ (hereafter "Regulation 1049/2001").

I also refer to the holding replies dated 5 and 26 February 2013.

1. SCOPE OF YOUR REQUEST

In your confirmatory application, you request a review of the position taken by the Director-General for Competition (hereafter "DG COMP") on 18 January 2013, in its reply to your initial application of 20 November 2012.

In your initial application, you requested access to documents relating "...to your decision on 14th October 2010-I State aid NN 30/2009 (ex N 660/2008) where you granted ex-ante approval to a tax avoidance scheme involving €212m which represented the cost of development of the Ritz Carlton Hotel at Powerscourt Estate in county Wicklow in the Republic of Ireland."

The Commission has identified the documents that fall within the scope of your request. These documents are part of the Commission's administrative file in case SA.27256 (NN 30/2009) (ex N 660/2008) in - Ireland – MSF – 2002 – Hotel Capital Allowances in respect of the Ritz Carlton, Powerscourt, Co. Wicklow.

They belong to the following categories:

- Correspondence originating from the Irish authorities;
- Correspondence originating from the Commission.

¹ OJ L145, 31.05.2001, p. 43.

The documents that fall under the above mentioned categories are listed in the Annex to this decision.

As you know, the Secretariat General (hereafter "the SG") conducts an independent review of any decision taken by the respective Directorate-General at the initial stage of the proceedings as referred to in Regulation 1049/2001.

As regards the documents originating from the Irish authorities, I inform you that the Commission has requested the opinion of the Irish authorities pursuant to Article 4(5) of Regulation 1049/2001. Owing to the fact, that the consultation process with the Irish authorities has not yet been completed, I reserve my position as regards the documents originating from this Member State. With regard to those documents, you will receive a separate decision in due time, once the ongoing consultation process with the respective national authorities has been completed.

Please note that the non-confidential version of the decision opening the procedure is in the public domain (see section 2 below). Therefore, I consider that it is not included within the scope of your request. Similarly, the information contained in the final confidential versions and in the respective drafts already published in the non-confidential version, has not been considered as being covered by your request.

2. CONTEXT

As regards the Commission's documents mentioned in the enclosed Annex, they belong to the administrative file of the Commission State Aid investigation in case SA.27256 (NN 30/2009) (ex N 660/2008) in - Ireland – MSF – 2002 – Hotel Capital Allowances in respect of the Ritz Carlton, Powerscourt, Co. Wicklow.

These documents were received in the context of the notification and contacts of the Commission with the Irish authorities (Department of Finance) following the Commission queries in the context of the above-mentioned investigation.

Following the notification by the Irish authorities of their intention to grant regional aid under the guidelines on national regional aid for 2007-2013 ("RAG 2007-2013") for an investment project for the Ritz Carlton Hotel in Powerscourt, Co. Wicklow, the Commission carried out an investigation with the view to ascertaining whether the envisaged aid could have any State aid implications under Article 107(3) (c) and of 108 (3) of the Treaty on the Functioning of the European Union (hereinafter "TFEU"). Following its examination and based on the information available the Commission took a decision on 14 April 2010 not to raise objections. The non-confidential version has been published on 24 April 2011 (JOCE C/122/2011).

3. ASSESSMENT UNDER REGULATION 1049/2001

I have carefully assessed your request and the concerned documents under the provisions of Regulation 1049/2001 and I am pleased to inform you that full access can be granted to documents [1, 3, 4 and 5] in part A and to documents [3, 5, 6, 8 and 12] in part B.

You will find the copies enclosed.

However, as regards document [2] in part A and documents [1, 2, 4, 9 and 11] in part B only partial access can be granted for the reasons set out below.

As regards documents [7 and 10] in part B access cannot be granted for the reasons set out below.

3.1. Protection of the commercial interests of a natural or legal person

Documents 7 and 10 in part B and the non-disclosed parts of document 2 in part A and documents 1, 2, 4, 9 and 11 are covered by the exception laid down in Article 4 (2), first indent of Regulation 1049/2001, which stipulates that “[T]he institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property”. Consequently, they cannot be disclosed.

The document [2] in part A and documents [1, 2, 4, 7, 9, 10 and 11] in part B contain detailed commercial and financial information concerning the investigated State aid case, such as aid amounts, beneficiaries, project description, structure of the transaction and of the ownership, details regarding the lease agreements, expected revenue and profits, elements of business strategy, market analysis, information on the relevant product and geographical market. The partially refused documents also contain information on ownership (final owner), management agreement between parties, and responsibilities, which has to be protected under the above-mentioned exception.

The entities and natural persons concerned by the investigation have a legitimate interest in preventing third parties from obtaining the strategic and other commercially sensitive information of the kind contained in the requested documents and the Commission has the obligation to protect such interest.

It has to be noted that the exception covering “commercial interests” in Regulation 1049/2001 is an expression of the Commission’s obligation of professional secrecy which flows from Article 339 TFEU (ex Article 287 EC Treaty) and Article 24 of Regulation 659/1999 and obliges the Commission to protect confidential information and business secrets received in the course of investigations. Disclosure of the commercially sensitive information contained therein would clearly be harmful for the commercial interests of the entities and natural persons concerned. Consequently, access to these documents has to be refused based on Article 4(2) 1st indent of Regulation 1049/2001, which stipulates “...that [t]he institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person (...).”

3.2. Protection of privacy and integrity of the individual

Article 4 (1) (b) of Regulation 1049/2001 provides that...*“The institutions shall refuse access to a document where disclosure would undermine the protection (...) of privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data. ”*

In its judgment in the Bavarian Lager² case, the Court of Justice has ruled that, when a request is made for access to documents containing personal data, Regulation 45/2001 becomes fully applicable. Article 8(b) of Regulation 45/2001 establishes that personal data shall only be transferred (...) if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced.

Indeed, the deleted parts of the document 2, Part B include names of individuals other than Commission officials and as such they qualify as personal data as defined in Article 2(a) of Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data³ (hereafter: Regulation 45/2001).

The Court of Justice has confirmed that *"where a request based on Regulation No 1049/2001 seeks to obtain access to documents including personal data, the provisions of Regulation 45/2001 become applicable in their entirety, including Articles 8 and 18 thereof"*⁴.

Pursuant to Regulation 45/2001, personal data must be processed fairly and lawfully. Any processing must be necessary for a specific purpose and proportionate to this purpose. Furthermore, pursuant to Article 8(b) of Regulation 45/2001, the Commission can only transmit personal data to a recipient subject to Directive 95/46/EC if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced.

I see no reason that would justify the public disclosure of these data in the public interest in the sense of Article 5(a) of Regulation 45/2001. Since you do not mention any reasons either, the necessity of the transfer of the personal data in question in the meaning of Article 8(b) of Regulation 45/2001, has not been established.

Furthermore, I am of the view that there are reasons to assume that disclosure of the personal data concerned might prejudice the legitimate interests of the data subjects concerned.

This is in particular true in the event of public disclosure of the names of natural persons, namely the surnames and/or first names of the concerned private individual investors is considered as personal data in the meaning of Article 2(a) of the Data Protection Regulation⁵. The importance of preserving the identity of the people concerned and thus protecting their reputation arises from the context in which their names appear in the documents subject to a competition investigation. Indeed, the investigation on the investment project concerned an alleged State aid contrary to EU competition law.

² Judgment of the Court of 29 June 2010, Case C-28/08P Commission v The Bavarian Lager Co. Ltd., ECR 2010 I-06055 (not yet reported)

³ OJ L 8 of 12.1.2001, p. 1.

⁴ Paragraph 63 of the aforementioned *Bavarian Lager* judgement.

⁵ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8 of 12.1.2001, p. 1

For the above-mentioned reasons, access to the names of the individuals appearing on the above-mentioned document has to be refused pursuant to Article 4(1)(b) of Regulation 1049/2001.

3.3. Overriding Public Interest in Disclosure

According to Article 4(2) last sentence of Regulation 1049/2001, the exception laid down in Article 4(2), first indent of Regulation 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must be firstly public and, second, it has to outweigh the damage caused by the disclosure. In other words, it must outweigh the interest protected by virtue of Article 4(2), first indent of Regulation 1049/2001.

I do not see any public interest in the sense of Regulation 1049/2001, that is to say objective and general in nature and indistinguishable from individual or private interests⁶, that would outweigh the public interest in protecting the commercial interests of the persons concerned. In this regard, it is important to bear in mind that the Commission's functions under Article 108 TFEU (ex Article 88 EC Treaty) carrying out its duties in the control of State aids are of an administrative nature.

Consequently, I consider that in this case the prevailing interests is the protection of the commercial interests of the persons concerned according to the exceptions laid down in Article 4 (2) first, indent of Regulation 1049/2001.

4. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may, under the conditions of Article 263 TFEU, bring proceedings before the General Court or, under the conditions of Article 228 TFEU, file a complaint with the European Ombudsman.

Yours sincerely,



Catherine Day

Enclosures:

- (1) Annex – List of documents
- (2) Copy of documents 1, 3, 4 and 5 in part A and to documents 3, 5, 6, 8 and 12 in part B (full access granted).
- (3) Redacted version of document 2 in part A and documents 1, 2, 4, 9 and 11 in part B (partial access).

⁶ See the judgment of the Court of First Instance in case T-403/05, MyTravel Group plc./Commission, not yet reported, paragraph 65