



EUROPEAN COMMISSION
SECRETARIAT-GENERAL

The Secretary General

Brussels,
SG.B.5/VD-LR/psc - sg.dsg1.b.5(2013)3988813

Mr Jagdip A Singh

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

**Decision of the Secretary General pursuant to Article 4 of the Implementing Rules to
Regulation (EC) No 1049/2001¹**

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

Dear Mr Singh,

I refer to your email of 14 January 2013, registered on the same day, in which you lodge a confirmatory application, in accordance with Article 7 (2) of Regulation (EC) No 1049/001 regarding public access to European Parliament, Council and Commission documents (hereinafter 'Regulation 1049/2001').

I also refer to the holding replies dated 5 and 26 February 2013 as well as to the first confirmatory reply dated 6 June 2013.

1. SUBJECT OF YOUR APPLICATION

In your confirmatory application, you request a review of the position taken by the Director-General of Directorate-General for Competition (hereafter: DG COMP) in his reply letter of 18 January 2013 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*".

¹ OJ L 345/94 of 29.12.2001.

As it was stated in the first confirmatory reply, the Commission identified a list documents falling within the scope of your request, which are part of the Commission's administrative file in case SA.27256 (NN 30/2009) (ex N 660/2008) – 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.

In the aforementioned reply of 6 June 2012, and owing to the fact that the consultation process with the Irish authorities had not yet been completed, the Secretariat General did not deal with the first category of documents. However, it assessed a decision regarding the second category, which you have already received.

Having consulted the Republic of Ireland pursuant to Article 4(5) of Regulation 1049/2001, the present decision concerns the first category of documents. The documents concerned are listed in the Annex 1 of this decision.

2. CONTEXT OF YOUR REQUEST

As regards documents originating from the Irish authorities mentioned in the enclosed Annex, they were produced in the framework 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.

Indeed, they are part of the notifications 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). After 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:

1) Full access can be granted to the following documents under:

Part A:

1. Request for delay extension;
3. Amendment of section 268 of Principal Act;
4. Relevant extract from TAXES CONSOLIDATION ACT 1997;
5. Sani notification part 2;
8. Cover e-mails.

Part B:

1. Cover e-mails;
2. Cover e-mail;
3. Reply to request for information; cover e-mail and Appendixes from A to D;
4. Cover e-mail;
6. Response to the Commission.

2) Partial access can be given to these documents under:

Part A:

2. Supplementary Information Sheet;
6. Sani notification;
7. Appendix 1;
8. Reply to request for information and List of Exhibits.

Part B:

1. Reply to request for information and Questions to the Irish authorities;
2. Final responses to questions and Reply to request for Information;
5. Response to the Commission letter.

3) Finally, access cannot be granted to documents under:

Part A:

2. List of Aid Beneficiaries;
8. Exhibits A-G.

Part B:

1. Transaction structure;
2. Calculation Market share;
3. Appendixes E and F.

The reasons for partial or refused access are set out below.

3.1 POSITION OF THE REPUBLIC OF IRELAND

As I have stated above, the Commission carried out a second consultation to the Irish authorities pursuant to Article 4 (5) of Regulation 1049/2001 before taking a definitive decision on the disclosure of the requested documents.

The re-consultation was sent on 4 March 2013 to the Irish authorities, who were invited by the Commission to follow a more detailed assessment in view of granting at least partial disclosure to their documents. The Commission thus asked the Irish authorities to identify those parts in the documents that do not contain information that should be protected.

The Republic of Ireland sent its reply, with a delay longer than the 5 working days previewed, on 28 June 2013 where it refuses any kind of disclosure. However, after a *prima facie* assessment, no clear reasons were found to support this decision in its entirety. In consequence, the Commission decided to give access to part or to some of the documents following the ruling of the Court of Justice by which the Court highlights that the Member State is required to state the reasons for its objection with reference to the exceptions provided for in the Regulation². Indeed, the mentioned judgement stresses that where no such reasons were provided, the institution must, if for its part it considered that none of those exceptions applied, give access to the document that had been asked for.

Therefore, the Commission found itself in the position to grant access to the documents or parts of the documents that could be disclosed.

Nevertheless, since the Commission is taking this decision against the objections of the Irish authorities, it will inform these authorities of the decision to disclose the documents. It will not proceed to the actual disclosure until a period of ten working days has elapsed, in accordance with Article 5(6) of the detailed Rules for the Application of Regulation No 1049/2001 set out in Decision 2001/937/EC, ECSC, Euratom.

This time-period will enable the Irish authorities to inform the Commission whether they will object to the disclosure using the remedies available to them, i.e. an application for annulment and an application for interim measures before the General Court. Once this period has elapsed, and if the Irish authorities have not signalled their intention to avail themselves of the remedies at their disposal, the Commission will forward the documents to you.

3.2 PROTECTION OF COMMERCIAL INTERESTS

Article 4(2) first indent of Regulation No. 1049/2001 stipulates that:

"The 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, unless there is an overriding public interest in disclosure."

² Judgment of 18 December 2007 in the case C-64/05 P, Sweden v Commission, [2007] ECR I-11389.

Except for document 2.1, all the documents at issue mentioned above for which access is totally or partially refused contain detailed commercial and financial information concerning the investigated State aid case, such as aid amounts, beneficiaries, project description, calculations of market share, structure of the transaction or elements of business strategy. They also entail key information on the case provided by the Irish authorities in their letters to the Commission which could harm the commercial interests of the member state itself. All this data needs 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) 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 (...)*".

3.3 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 judgement in the Bavarian Lager³ 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 45/2001⁴ establishes that personal data shall only be transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced.

Indeed, document 2.1 (List of Aid Beneficiaries) in Part A include names of individuals 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 data⁵.

³ Judgement of the Court of 29 June 2010, Case C-28/08 P *Commission v the Bavarian Lager Co. Ltd.*, [2010] ECR I-06055.

⁴ 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 of the free movement of such data, OJ L 8 of 12.1.2001, p.1.

⁵ OJ L 8 of 12.1.2001, p.1.

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"*⁶.

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 beneficiaries of Aid are considered as personal data in the meaning of Article 2 (a) of the Data Protection Regulation. 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.

For these 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.

4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception under Article 4(2) first indent of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, first, be a public interest and, second, outweigh the harm caused by disclosure, i.e. outweigh the protected interest.

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 interests⁷ 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.

⁶ Paragraph 63 of the aforementioned *Bavarian Lager* judgement.

⁷ See the judgement of the Court of First Instance in case T-403/05, *MyTravel Group plc./Commission*, not yet reported, paragraph 65.

5. MEANS OF REDRESS

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

Yours sincerely,



Catherine Day

Enclosure: (1) Annex – List of documents

(2) PART A:

Full access:

1. Request for delay extension;
3. Amendment of section 268 of Principal Act;
4. Relevant extract from TAXES CONSOLIDATION ACT 1997;
5. Sani notification part 2;
8. Cover e-mails.

Partial access:

2. Supplementary Information Sheet;
6. Sani notification;
7. Appendix 1;
8. Reply to request for information and List of Exhibits.

(3) PART B:

Full access:

1. Cover e-mails;
2. Cover e-mail;
3. Reply to request for information; cover e-mail and Appendixes from A to D;
4. Cover e-mail;
6. Response to the Commission.

Partial access:

1. Reply to request for information and Questions to the Irish authorities;
2. Final responses to questions and Reply to request for Information;
5. Response to the Commission letter.