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1 April 2009

Subject: State aid N 660/2008 – Ireland – LIP – Hotel Capital Allowances in respect of the Ritz Carlton, Powerscourt, Co. Wicklow.

Dear Ms Rodriguez Galindo,

I wish to acknowledge receipt of your letter of the 19th of February 2009 in relation to the above-mentioned matter and welcome the fact that the Commission has granted 10 extra working days for the issuing of this reply.

Before addressing the specific questions which you have raised in your letter I would like to clarify an important point in the introductory paragraph of your letter. You state that the Irish authorities notified on the 19th of December 2008 “*their intention to grant regional aid under the Guidelines on National Regional Aid 2007-2013 to Ritz Carlton...*” . While the Irish authorities are notifying this aid under the Regional Aid Guidelines 2007-2013 it should be pointed out that the “aid” in question is aid already granted rather than aid to be granted, in the sense that all the legal rights to receive the aid were fully conferred on the beneficiaries by the 31st of December 2006.

As pointed out in the notification:

- (i) The original planning permission was granted for the development as long as ago as 1999, the deadline for full planning permission being 31 December 2004;

- (ii) Construction work on the project commenced in January 2005 and concluded in October 2007. The tax relief was reduced to 75% for expenditure incurred in 2007¹;
- (iii) The Hotel opened for business in October 2007.
- (iv) The project satisfied all of the transitional arrangements laid down in the Commissions decision N832/2006 and was cost determined by the 31st of December 2006 including:
 - Certification of the 15% condition of the local authority;
 - Certification of the estimated level of expenditure outstanding as of 31st December 2006 – with this certified level functioning as a hard cap or ceiling on the level of expenditure qualifying for tax relief post December 2006;
 - A requirement to have a binding written contract in place by the 31st of July 2006 under which construction expenditure is incurred.

In this regard, the guidelines on National Regional Aid for 2007-2013 paragraph 105 provides that *“the Commission intends to apply these guidelines to all regional aid to be granted after 31st December 2006. Regional Aid awarded or to be granted before 2007 will be assessed in accordance with the 1998 guidelines on national regional aid .”*

It is our contention that the aid has been granted before the 31st of December 2006 albeit notified under the current guidelines. I believe this is a fundamental distinction and one of which I trust the Commission will adopt in assessing the notification. Subject to the Commission deeming this aid appropriate and compatible with EC law the only issue is the draw-down of the aid as distinct from the grant of the aid . I believe the Commission will fully appreciate that where aid is granted in the form of accelerated tax relief over a number of years that the draw down does extend beyond the period for the grant of aid being in this instance the 31st of December 2006.

We note the Commission’s observation that the notification is seriously incomplete and has raised a series of questions which I trust that this letter and the Exhibits attached will comprehensively address.

1. The Application of the RAG 2007-2013 to the Investment Project in Question

It is fully acknowledged that under the new Regional Policy Guidelines 2007-2013 no new regional aid can be granted for investment projects located in the Mid-East sub-region of Ireland. However, as stated above, it is not the intention of the Irish authorities to grant new regional aid in this region. What is at issue here is a project which has qualified for the Capital Allowances Depreciation Regime for Hotels in Ireland by virtue of State Aid N832/2000 and state aid N232/2006 on Capital Allowances Depreciation Region for Hotels in Ireland and the transitional extension to that regime respectively.

¹ In accordance with 2.3.2 of State Aid Notice 232/2006.

The issue is not the granting of new aid but rather the belated notification of “aid ” in the form of tax relief which investors had qualified for prior to the 31st of December 2006.

As to why the present notification was submitted to the Commission in December 2008 this can be easily explained.

The normal procedure with regard to tax reliefs is that if investors qualify for relief under any scheme they benefit by virtue of fulfilling the conditions set out in the Finance Acts, which would normally provide for such reliefs. The implementation and draw-down of the benefits would be a matter between the investors and Irish Revenue. Individual hotel projects, in respect of which tax reliefs are claimed would not necessarily come to the attention of the Department of Finance or indeed any other department, while such tax regime was in place.

In relation to the Capital Allowance Scheme for Hotels, as approved by the Commission, no issue of notification to the Commission would arise, except in the case of large projects under the Regional Aid Guidelines.

In relation to the Ritz Carlton project the advisors to the investors in this project, [REDACTED] did not consider, notwithstanding the size of the project, that State Aid arose or that a State Aid notification to the Commission was required. For that reason they did not bring the project to the Department’s attention until last year. They were of the view that the project in question comprising as it does of a minimum of 3 separate projects and that each of these projects fell below the notification thresholds of the framework and Regional Aid Guidelines provisions for large projects.

On examination of the nature of the project the Department, as a precautionary measure and to ensure full transparency with the Commission, took the view that the project could be considered as one indivisible economic unit and that splitting the project into 3 may be construed as artificially dividing what would otherwise may be regarded as a large project, and decided that the matter should be notified to the Commission.

Since the Regional Aid Guidelines of 1998 had lapsed and the only guidelines for national regional aid in being were those for 2007-2013 the decision was made to notify the Commission and to do so under the new guidelines.

2. Beneficiaries of the Notified Aid

The Commission states in its letter that according to its decision in N232/2006 (ex no. N832/2000) “*beneficiaries under the Scheme are large companies*”. The full sentence in that letter of approval states that the “*beneficiaries under the Scheme are large Companies, because in relation to small and medium sized enterprises Ireland employs the exemption regulation for SME*”. Accordingly, the scheme does not preclude small enterprises or individuals from receiving aid under the Capital Allowances Depreciation Regime for Hotels in Ireland. In the present case there is in fact one company Carrylane involved in this project which is 100% owned by a large company Treasury Holdings and therefore it could not be regarded as an SME.

In any event, any suggestion that small and medium enterprises would be precluded from the benefits of the Irish tax regime on hotels would constitute discrimination and be contrary to the general principles of EC law and Irish Constitutional law.

Le Levant

We welcome the fact that the Commission has drawn our attention to its decision of the 20th of May 2008 on state aid implemented in France for building the cruise vessel Le Levant.

We believe once the Commission has examined the information in this letter and the documentation attached that it will conclude that the Ritz Carlton project is similar to the Le Levant project in both attracted investors through a tax scheme.

As in the Le Levant case the individual investors activity, in the present case, is limited essentially to an investment aimed at making a return, with no real participation in the hotel's operation.²

Carrylane may be regarded as in a similar position to CIL in the Le Levant case, and only it can be classified as an undertaking³ under Article 87.1 of the Treaty⁴. As the individual investors are not undertakings in this sense, the benefits that they have obtained through state resources under the Ritz Carlton financing arrangements do not constitute State Aid⁵.

When one examines the development component⁶ of the Ritz Carlton project I believe the Commission can be satisfied that the aid to Carrylane has contributed substantially to the regional development of the Mid-East region and can reasonably conclude that the aid is proportionate to the regional development benefits and thus compatible with the common market.

The construction of the hotel and its continuing operation have generated significant levels of economic activity and development. In additional employments terms alone 350 predominantly full time positions have been created at the hotel. The construction of the hotel generated between 450 and 500 full time construction posts. The hotel is now among the largest employer in County Wicklow. The hotel will be important in firmly anchoring north County Wicklow as a long stay tourist destination whereas previously the county primarily attracted day visitors with little real economic spin off to the locality.

Accordingly, due to the high level of employment created and the enhancement of the tourist potential of the area, the Irish authorities are of the opinion that the level of aid granted is

² Le Levant paragraph 102

³ Apart from one of the individual investors who incorporated

⁴ Le Levant paragraph 103

⁵ Le Levant paragraph 103

⁶ Le Levant paragraph 125

proportionate and well targeted at overcoming barriers to investment in high quality hotel development in the rural area concerned and thus conforms with the aim of the capital allowance scheme which was to promote regional development.

[REDACTED]

3) In the notification it is said that the hotel is owned by 62 separate entities. What is the legal form of this joint-ownership? Does the structure of the joint-ownership allow the investors be effectively involved in the operation of the hotel? Is the investors' activity limited to an equity holding aimed at making a return, with no real participation in the hotel's operation? The Irish authorities are requested to provide a copy of the joint ownership articles of association/agreement.

The hotel is fully owned by three categories of investors constituting 62 separate entities for the purposes of the notification. Schedule 1 sets out in diagrammatic form a summary of the various ownership interests and legal agreements between the parties. The 62 entities co-own the full interest in the property, however there is no single joint ownership vehicle.

The structure of the 62 entities (together referred to as the "Investors") is as follows:

- (i) 60 independent investors in the hotel suites (the "Suite Investors") who have each acquired a full ownership interest in one or more hotel suites.
- (ii) The Exhort Co-ownership which is a group of investors constituting 156 unconnected private individual passive investors and one passive corporate who own the hotel common areas and 20 hotel suites. We attach as Exhibit A the Co-ownership & Agency Agreement dated 31 January 2007 which sets out how the members of the Exhort Co-ownership regulate certain aspects of their ownership. [REDACTED]
- (iii) The final owner is Ilesca Limited which is a subsidiary of Treasury Holdings but is a temporary owner of the unsold hotel suites pending their resale to new independent investors, when sourced. While Ilesca Limited is included in the list of aid beneficiaries for completeness purposes, Ilesca will not be claiming capital allowances in respect of the property, it is merely a temporary owner pending sale of the suites to third party investors.

The ownership structure neither envisages nor allows the Investors to be involved in the operation of the hotel. The Investors' activity is limited to an investment holding aimed at making a return with no real participation in the hotel's operation. We have set out in the attached List of Exhibits, a list of the relevant clauses in each of the agreements, which confirm that the Investors have no involvement in the hotel's operation.

Exhibits B to D contain the various ownership agreements which the Investors have acquired from Carrylane (as developer). The ownership interests are each by way of long leases [REDACTED]

[REDACTED]

- (4) ***Please describe in more detail the hotel operator Carrylane Limited. According to the information provided in the notification, Carrylane Limited constructed the hotel and is 100% owned by Treasury Holdings. Ilesca Limited, which is presented as one of the owners of the hotel (and beneficiaries of the aid) is a 100% subsidiary of Treasury Holdings.***

Carrylane (a 100% subsidiary of the developer Treasury Holdings) was incorporated to acquire the lands at Powerscourt, develop the hotel and ultimately run the hotel.

Carrylane acquired a [REDACTED] year lease of the undeveloped hotel site from a third party, it entered into building agreements to have a hotel built on the site and sold the entire hotel by way of long leases of [REDACTED] years or more (see Exhibit B, C and D attached) to the various Investors discussed above, realising revenue from the various sales.

In its capacity as hotel operator it leased back the development under a series of occupational leases (see Exhibit F and G attached) lasting in excess of 40 years, enabling it to run the hotel as operator.

Ilesca Limited (also a 100% subsidiary of the developer Treasury Holdings) was incorporated to acquire unsold hotel suites on a temporary basis. Those hotel suites are currently being marketed for sale to new third party investors. As noted at 3(iii) above Ilesca Limited will not be claiming capital allowances in respect of the property.

- (5) ***Please give details about the terms and conditions of Carrylane Limited's management agreement with the Ritz Carlton Hotel Group. The Irish authorities are requested to provide a copy of the management agreement.***

Ritz-Carlton Hotel Group is an independent third party involved in the operation and management of hotels. Carrylane has entered into a management agreement (See Exhibit

E⁷ attached) with Ritz-Carlton Hotel Company B.V (“Ritz-Carlton”) to enable Carrylane to carry on its hotel operations using the Ritz-Carlton brand and employing Ritz-Carlton as hotel manager. Carrylane is required to fund hotel operating losses and costs and Ritz-Carlton is paid an arms length fee for its management operations. It is not an owner or the developer of the hotel. We have set out in the attached List of Exhibits a further list of some of the key clauses from this agreement.

Carrylane has effectively delegated the day to day management of the hotel to Ritz-Carlton; however it (and not Ritz-Carlton or the Investors) carries all risks and rewards regarding the operation of the Hotel.

(6) *Please provide details about the terms and conditions of the leasing agreement between the investors (owners of the hotel) and the hotel operator Carrylane Limited, in particular:*

The hotel is independently owned by the Investors under long leases of [REDACTED] years or more and is let back to Carrylane under operational lease arrangements (see Exhibit F and G) in excess of 40 years.

(a) *What do the investors and Carrylane Limited get as a return?*

Carrylane will earn a return from operating the hotel as the operating profits (if any) accrue to it. The Investors do not contribute to operating losses or costs at the hotel. The Investors earn a return through claiming capital allowances granted on hotel, through earning rent from Carrylane and through intended capital appreciation in the value of their asset over the period of ownership. The Suite Investors receive a fixed rent for years one to seven and thereafter their rent is based on a percentage of average room revenue. Further details of the rent payable to the Investors are contained in Exhibits F and G.

(b) *Is it foreseen in the agreement that Carrylane Limited can become an owner of the hotel at the end of the period of the operation of the hotel?*

[REDACTED]

[REDACTED]

⁷ We would re emphasise that the operating agreement attached as Exhibit E contains business secrets/commercially sensitive information and should be covered by the obligation of professional secrecy.

[REDACTED]

- (c) *Could it be considered that the tax benefit is partially transferred to Carrylane Limited, for instance, through a reduction in the rent charged during the operating period?*

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

- (d) *The Irish authorities are requested to provide a copy of the leasing agreement.*

The lease agreements are attached as Exhibits F and G.

(7) Please indicate who bears the sole responsibility for the commercial activity of the hotel. Do the investors run any real risks in respect of the hotel's operating results?

- (7) Carrylane bears sole responsibility for the commercial activity of the hotel. The Investors do not run the risk in relation to hotel operating results. We have set out in the attached List of Exhibits a list of the relevant clauses in each of the agreements which confirm that the Investors have no involvement in the hotel's operation.

(8) Please provide details on the management mandate/operating activities of Carrylane Limited, in particular whether Carrylane Limited is responsible for all aspects of operating the hotel and has all the necessary powers, so that the investors cannot interfere in its operation in any way:

- (8) Carrylane is ultimately responsible for the operation of the hotel albeit that it has, as discussed at point 5 above, sub-contracted or delegated a significant number of the related functions in full to Ritz-Carlton. Under the terms of the operating agreement entered into between the two parties. This is discussed in more detailed below. As referred to above, the Investors cannot interfere in any way with the operation of the hotel.

(a) Is Carrylane Limited responsible for technical and commercial management of the hotel?

Yes, Carrylane, is primarily responsible for the technical and commercial management of the hotel which it has sub-contracted to Ritz-Carlton under the terms of the operating agreement entered into between the two parties.

(b) Has Carrylane Limited full powers with regards to the staff recruitment and management?

(c) Has Carrylane Limited full powers to manage the joint-ownership's property and business and can carry out all tasks relating to administration, including laying-up (terminate operation) of the hotel?

(d) Is Carrylane Limited authorized to conclude all the contracts and commercial transactions?

[REDACTED]

We have set out in the attached List of Exhibits a list of the relevant clauses addressing items (a) to (d) above.

CONCLUSION

We welcome this opportunity to clarify matters in relation to this specific project and would request a meeting to discuss the matter before the Commission Services comes to a final decision on the matter.

Yours sincerely,

Derek Moran,
Assistant Secretary.
Budget, Taxation
and Economic Division.