



EUROPEAN COMMISSION

Brussels, 14.04.2010
C(2010) 2139 final

**Subject: State aid NN 30/2009 (ex N 660/2008) — Ireland
Hotel Capital Allowances for the Ritz-Carlton Hotel, Powerscourt, Co. Wicklow**

Sir,

1. PROCEDURE

- (1) By electronic notification registered on 19 December 2008 at the Commission (SANI 1856), the Irish authorities notified the Commission of their intention to grant regional aid under the guidelines on national regional aid for 2007-2013 ('RAG 2007-2013')¹ for an investment project for the Ritz-Carlton Hotel in Powerscourt, Co. Wicklow.
- (2) By letter dated 19 February 2009 the Commission requested additional information on the aid notified. By letter of 12 March 2009 the Irish authorities asked the Commission to extend the deadline for providing additional information, which the Commission accepted.
- (3) The Irish authorities submitted the information requested by letter of 1 April 2009, which confirmed that the aid in favour of the Ritz-Carlton Hotel had already been awarded by the end of 2006. Accordingly, the aid measure was transferred to the non-notified State aid registry under number NN 30/09.
- (4) By letters dated 23 July 2009 and 7 December 2009 the Commission requested additional information. The Irish authorities responded by letters of 12 October 2009, 5 January 2010 and 25 February 2010.
- (5) A meeting between the Irish authorities and Commission staff took place in Brussels on 3 September 2009.

¹ OJ C 54, 4.3.2006, p. 13.

Mr Micheál MARTIN,
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Ireland

2. DESCRIPTION OF THE PROJECT AND THE AID

- (6) The Irish authorities intend to promote regional development by providing regional aid in the form of capital allowances (accelerated depreciation) for an investment project concerning construction of a hotel in Powerscourt, County Wicklow, in the Mid-East sub-region of Ireland.

2.1. Construction, ownership and operation of the hotel

2.1.1. Construction

- (7) The project started as a proposal for development of a hotel by Treasury Holdings. Treasury Holdings was established in 1989 as a property investment and development vehicle and has a number of investments in wholly or part-owned subsidiaries involved in property investment, development and trading in the residential, retail and office sectors throughout Ireland, the UK and China. The company also provides management and support services to other companies in the same group.
- (8) Apart from its involvement in the Ritz-Carlton Powerscourt Hotel, Treasury Holdings is not an operator of any other hotel or accommodation business. Treasury Holdings is only a passive landlord of two hotels in Dublin, but has no operational involvement with either. It simply owns the properties and receives rent from the occupants.
- (9) Carrylane Ltd ('Carrylane'), a subsidiary owned 100% by Treasury Holdings, was established as the vehicle for developing the Ritz-Carlton Powerscourt Hotel. In its capacity as a property developer, Carrylane acquired a greenfield site from an unconnected third party on which to construct the hotel on behalf of the ultimate owners².
- (10) Consequently, Carrylane was the entity that initiated the entire project, obtained planning permission to build the hotel and commenced building it. During that time Carrylane identified a number of third-party investors to take ownership of various parts of the hotel either as co-owners or as suite owners (see below). These investors acquired ownership of the underlying land by way of long lease agreements (i.e. investor leases) and contracted Carrylane to build the hotel on their behalf under development agreements.
- (11) On signing their respective investor leases and development agreements with Carrylane, a small amount of funds was paid as deposit by the various investors as a financial contribution to the project. However the majority of funds due under the leases and the development agreements were paid when the building work was complete and the hotel ready for opening. Accordingly, before having received this money from the investors, Carrylane funded the remaining cost of developing the hotel from its own bank borrowings.
- (12) As the third-party investors took full ownership of the hotel, they are, subject to complying with the necessary conditions, entitled to claim capital allowances in respect of the actual development costs of the hotel paid for under the terms of the development agreements with Carrylane³. Carrylane itself is not entitled to claim capital allowances.

² The legal form in which this site purchase was arranged was by granting Carrylane Limited a 10000-year lease over the undeveloped site and land.

³ The price paid for land under the investor leases does not qualify for capital allowances.

- (13) Carrylane priced the sale of the various parts of the hotel with a view to making a reasonable commercial return on the costs it incurred in developing the hotel. The difference between Carrylane's revenue to date from the sale of various parts of the completed hotel and the total cost of developing the entire hotel, including its financing costs, adds up to a profit of approximately [2-10]* %⁴.
- (14) According to Ireland, the price payable under the development agreements did not depend on the actual capital allowances granted. In this respect, Ireland said that a typical profit range on such a development without capital allowances would be 10 to 20%. As the return on the current transaction does not exceed this figure, this would support the view that Carrylane did not command a premium from the investors due to the availability of the capital allowances but simply earned a normal, reasonable profit margin on its development activities. Ireland acknowledges, however, that the availability of the capital allowances might have made it easier to market and sell the hotel suites.

2.1.2. Ownership

- (15) According to the notification, three categories of investors made up of 62 separate entities co-own the full interest in the property. However, there is no single joint ownership vehicle. The three categories into which the 62 entities ('investors') fall could be summarised as follows:
- i. Sixty independent investors in hotel suites ('suite investors') have each acquired a full ownership interest in one or more hotel suites. [...] of the suite investors are private individuals investing personal income; the other [...] consist of [...] partnerships and [...] corporate entities. The partnerships or corporate entities were created for the sole purpose of passive investment in the project.
 - ii. Exhort Co-ownership is a grouping of 156 individual investors and one corporate entity ([...]) formed to acquire the majority of the common areas associated with the hotel property (e.g. restaurants, reception areas, leisure centre, etc.) plus 20 hotel suites. [...] is [...] %-owned by one individual, with the other [...] % owned by another member of the same family. It is not a hotel operator and is not linked to any other corporate entity. The Exhort Co-ownership group of 157 investors is governed by a legal co-ownership agreement and the investors acquired their interests as a single group. None of the members holds a controlling interest in terms of ownership or voting rights. The Co-Ownership was set up for the sole purpose of acquiring and holding an interest in the hotel property on behalf of the investors and procuring the construction of the hotel.
 - iii. Finally, Ilesca Ltd, a subsidiary owned 100% by Treasury Holdings, is the temporary owner of the unsold hotel suites (a total of [...] hotel suites in addition to the club lounge area), until they are sold on to new independent investors, once found. The Irish authorities indicated that, although Ilesca Ltd is included on the list of aid beneficiaries for the sake of completeness, it will not be claiming capital allowances for the property, as it is merely a temporary owner until the suites are sold to third-party investors. However, under Irish tax law, third-party purchasers would be entitled to claim capital

* Business secret

⁴ Assuming third-party sales of EUR [...] million are actually achieved from the sale of the hotel suites currently held by Ilesca Limited.

allowances in respect of the hotel suites acquired from Ilesca. For this reason, Ilesca's hotel suites were included in the notification. While Ilesca's hotel suites can still qualify for capital allowances if sold to a third party, the amount of expenditure qualifying for a capital allowance is forever restricted by reference to the price which Ilesca paid for the hotel suites.

- (16) The Irish authorities explained that an important distinction exists between the Exhort Co-ownership investors and the suite investors. This distinction is explained below.
- (17) The suite investors incurred expenditure on construction of the hotel under their development agreements with Carrylane (in its capacity as property developer) and retain long-term ownership of their hotel suites. As arms-length landlords, the suite investors are entitled, under Irish law, to the capital allowances.
- (18) The Exhort co-owners are investors who also incurred expenditure on construction of the hotel under their development agreements with Carrylane (in its capacity as property developer) and who have temporary ownership of the hotel for the duration of the transaction. Accordingly, this group of owners (Exhort Co-ownership) were to take ownership of the hotel for the duration of the seven-year writing-down period for the capital allowances. The mechanism for achieving this is a buyback arrangement entered into by Exhort Co-ownership to return the property to Carrylane's parent, Treasury Holdings, in seven years' time. Notwithstanding this buyback, Exhort Co-ownership is the claimant of all the capital allowances in relation to this aspect of the hotel.
- (19) Since Exhort Co-ownership purchased its property from Carrylane for EUR [...] million but agreed to return it to Carrylane's parent, Treasury Holdings, for EUR [...] million⁵, Carrylane is receiving a gross premium of EUR 21 million. Taking into account the opportunity cost of the capital allowances forgone by Carrylane plus associated costs, including stamp duty on the repurchase, this arrangement results in a net benefit for Carrylane of around EUR 5.2 million.
- (20) The Irish authorities consider that the purpose of the buyback agreement between Carrylane and Exhort Co-ownership is to make it easier for Exhort Co-ownership to leave the venture once the investors have availed themselves of the capital allowances. The buyback agreement also provides a mechanism by which the sharing of the value of Exhort Co-ownership's hotel capital allowance is agreed between Carrylane as property developer and Exhort Co-ownership.
- (21) In contrast to Exhort Co-ownership, the suite investors are not and never have been party to any buyback arrangements. They acquired their hotel suites primarily for capital appreciation in the long term and not merely to benefit from the capital allowance.

2.1.3. Operation of the hotel

- (22) Carrylane, in its capacity as hotel operator, leased back specific parts of the hotel from the various investors under a series of occupational leases lasting in excess of 40 years, thereby enabling it to run the hotel as operator.

⁵ This figure of EUR [...] million reflects Exhort Co-ownership's bank borrowing to fund the development price payable to Carrylane for constructing and developing the hotel property.

- (23) The suite owners have granted occupational leases to Carrylane (as hotel operator) for a term of at least 45 years, with an option to terminate them after 25 years and every 10 years thereafter.
- (24) The intention was to grant a lease with rent linked to net revenue from the hotel. However, as new hotels take some time to stabilise their trading performance, instead of linking the rent to net revenue in the early years, a fixed rent was established to ensure a minimum return for investors for the first seven years. The aim was to reduce the risk of a lower return due to pre-stabilisation losses which would have made the hotel suites less attractive to potential investors.
- (25) Accordingly, for the first seven years the rent is payable at a yield of just under [2-6] % on the total amounts paid by the suite owners (i.e. the lease premium under the investor lease plus the development price under the development agreement with Carrylane).
- (26) Thereafter the investors' rent will depend completely on the net revenue earned from the hotel and, accordingly, offers potential rent from year 8 onwards exceeding the rent payable during the first seven years, as it will be based on the net revenue generated from the hotel suites.
- (27) Due to the buyback arrangements in place between Carrylane and Exhort Co-ownership, the rent payments due from Carrylane as occupational tenant to Exhort Co-ownership under the occupational lease differ from those payable by Carrylane to the suite owners.
- (28) As Carrylane will pay a buyback price sufficient to repay the bank borrowing used by Exhort Co-ownership to fund the development costs for its share of the hotel, the rent charged to Carrylane is set at a level sufficient to meet (i) Exhort Co-ownership's interest obligations under its loan and (ii) the Exhort Co-ownership's obligations under its investor lease from Carrylane. Furthermore, in the case of Exhort Co-ownership, Carrylane has warranted the amount of capital allowances which will be available to Exhort Co-ownership.
- (29) The rental yield on Exhort Co-ownership's part of the transaction equals [2-4] %. Ireland explained that the difference in rental yields between the suite owners and Exhort Co-ownership is due to the different nature of the two groups of investors, in particular the fact that the suite owners have acquired outright ownership, have no buyback arrangements and have received no warranty in respect of the level of expenditure qualifying.
- (30) Carrylane, in its capacity as hotel operator, will earn a return from operating the hotel, as the operating profits (if any) accrue to it. The investors will not contribute to operating losses or costs at the hotel and cannot interfere in any way with operation of the hotel.
- (31) Furthermore, Carrylane has entered into a management agreement with Ritz-Carlton Hotel Company B.V. ('Ritz-Carlton') to enable Carrylane to conduct its hotel operations using the Ritz-Carlton brand and employing Ritz-Carlton as hotel manager. It is neither the owner nor the developer of the hotel. Carrylane has effectively delegated the day-to-day management of the hotel to Ritz-Carlton. However, it (and not Ritz-Carlton or the investors) bears all the risks and reaps all the rewards stemming from operation of the hotel. Carrylane is required to fund the hotel's operating losses and costs, whereas Ritz-Carlton is paid an arms-length fee for its management operations.

- (32) The fee arrangements involve a number of component parts (a base royalty fee, a management fee and a marketing fee) which are based on fixed percentages of gross revenue. In addition, incentive royalties are also payable by reference to certain levels of profitability which have not yet been met.

2.2. The investment project

- (33) The investment project consists of building a large but compact 200-room, seven-storey, five-star luxury resort hotel.
- (34) According to the notification, the original planning permission for the development was granted in 1999. Construction work on the project commenced in January 2005 and was completed in October 2007. The hotel opened for business in October 2007.

2.3. Legal basis of the aid

- (35) The aid is granted on the basis of authorised scheme N 832/2000 ‘Capital Allowances Depreciation Regime for Hotels’, which was subsequently extended by State aid scheme N 232/06 ‘Transitional Extension to Capital Allowances Depreciation Regime for Hotels in Ireland’. Aid under the scheme is granted automatically if the applicant satisfies all the relevant criteria set out in the national tax legislation. The national legal basis for the aid is Chapter 1, Part 9 of the Taxes Consolidation Act 1997.
- (36) The scheme provides for aid in the form of capital allowances (accelerated depreciation). The normal depreciation rate for industrial buildings in Ireland is 4% per annum over 25 years. Under the scheme, investments in hotel-keeping can be depreciated over a period of seven years, i.e. at a rate of 15% during the first six years and then at 10% of the expenditure incurred in the last year. Eligible costs are limited to the cost of productive investment (buildings). No operating aid is involved. The scheme allows no cumulation with other aid.
- (37) The approved State aid scheme N 832/2000 applied only to expenditure incurred up to 2006. However, the scheme was amended by the Finance Act 2006, which extended the cut-off date for incurring qualifying expenditure until 31 July 2008. The Finance Act 2006 also provided for transitional measures to ensure that only projects already in the pipeline would be eligible for the extended qualifying period and that relief could apply to 75% of qualifying expenditure incurred in 2007 and 50% for the period from 1 January 2008 to 31 July 2008.
- (38) The transitional arrangements were subject to the following requirements:
- iv. to have a binding written contract in place by 31 July 2006 under which construction expenditure is incurred;
 - v. to have submitted a full written application for planning permission by 31 December 2004;
 - vi. to have incurred at least 15% of the total construction expenditure on the relevant building by 31 December 2006 and to have obtained certification thereof by the local authority;

vii. to have obtained from the local authority certification of the estimated level of expenditure outstanding as of 31 December 2006, which serves as a ceiling for the overall amount of construction expenditure eligible for the allowance.

(39) These transitional arrangements were introduced after approval under State aid scheme N 232/06 ‘Transitional Extension to Capital Allowances Depreciation Regime for Hotels in Ireland’.

2.4. Cost of the project

(40) In all instances the total amounts paid by the various investors are made up of (i) the price paid under the development agreements entered into with Carrylane to build the hotel on their behalf plus (ii) the upfront premiums paid to Carrylane for the land under the investor leases. The price paid for the land does not qualify for the hotel capital allowance. A formula set out in Irish tax law which excludes non-qualifying items (such as site cost) from the amount qualifying is applied to the total amount paid in order to calculate the amount qualifying for the hotel capital allowance (the ‘eligible expenditure’). Eligible costs are limited to the cost of productive investments (building). The figures for each investor group are summarised in the table below.

Investor Group	Total Amount Paid	Eligible Expenditure
Exhort Co-ownership	EUR [...]	EUR [...]
Suite owners	EUR [...]	EUR [...]
Ilesca	EUR [...]	EUR [...]
Total	EUR 224 408 314	EUR 212 360 683

2.5. Aid amount

(41) The aid takes the form of a capital allowance (accelerated depreciation) which results in fiscal advantages for the beneficiaries. The relief will be claimed on an annual basis until 2014 (for the tax year 2013).

(42) As explained in the Commission Decision concerning the underlying scheme N 832/2000, the aid element is the difference between the tax advantage at the net present value under the usual depreciation rule and under the accelerated depreciation rule. This, in turn, depends on parameters such as the corporate tax rate and the top personal tax rate in Ireland plus the reference rate.

(43) In order to calculate the aid element, the Irish authorities provided the corporate tax rate and the top individual tax rate applicable in 2005 (i.e. at the start of the project) along with a breakdown showing the portion of expenditure incurred by individuals (subject to personal income tax) and corporate bodies (subject to corporate income tax). On this basis, taking into account the fact that, under the transitional arrangements of amended scheme N 232/06, only 75 % of the eligible expenditure incurred in 2007 qualifies for the relief, the aid element resulting from the capital allowance is EUR 17.8 million.

(44) The Irish authorities confirmed that the aid for the project will not be cumulated with aid received for the same eligible costs from other local, regional, national or Community sources.

- (45) In addition, maintaining the investment for a minimum of seven years after completion of the project is one of the conditions imposed on the relief.

2.6. Regional aid ceiling

- (46) Powerscourt is situated in County Wicklow, in the Mid-East sub-region of Ireland. This was an assisted area in the period 2000-2006 by virtue of Article 107(3)(c) of the Treaty on the Functioning of the European Union (TFEU⁶) with the standard aid intensity ceiling gradually reduced to a net grant equivalent (NGE) of 18% in 2004-2006 in accordance with the Irish regional aid map for 2000-2006⁷. It is no longer an assisted area for regional State aid purposes in the period 2007-2013.

2.7. Contribution to regional development

- (47) The Irish authorities indicated that Carrylane has contributed substantially to development of the Mid-East sub-region. They emphasised that construction and continuous operation of the hotel have generated significant levels of economic activity and development. Construction of the hotel generated between 450 and 500 full-time jobs for builders. A further 350 full-time jobs have been created at the hotel itself. The hotel is now among the largest employers in County Wicklow. The Irish authorities expect the hotel to become a long-stay tourist destination, whereas previously the county had primarily attracted day-trippers, with few real economic spin-offs for the local area.

2.8. Reporting

- (48) The Irish authorities have given commitments to submit to the Commission:
- on a five-yearly basis, starting from approval of the aid by the Commission, an interim report (including information on the amounts of aid being paid, on implementation of the aid contract and on any other investment project started at the same establishment); and
 - within six months after payment of the last tranche of the aid, based on the notified payment schedule, a detailed final report.

3. ASSESSMENT OF THE AID MEASURE AND COMPATIBILITY

3.1. Existence of aid

- (49) Pursuant to Article 107(1) of the TFEU, classification of a national measure as State aid presupposes that the following conditions are all met: (i) the measure in question confers an advantage for undertakings through State resources; (ii) the advantage is selective, i.e. it favours certain undertakings or the production of certain goods; and (iii) the measure distorts or threatens to distort competition and is capable of affecting trade between Member States.

⁶ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.

⁷ State aid N 523/99 — Ireland — Regional aid map 2000-2006.

3.1.1. Advantage conferred through State resources

- (50) The hotel capital allowances scheme allows derogations from the general tax legislation in the form of accelerated depreciation of eligible hotel capital expenditure. Therefore, they confer an advantage on the taxpayers concerned. As a result of the capital allowances, tax revenue is deferred and, consequently, Ireland's resources are diminished. The aid is therefore granted through State resources.
- (51) The advantages conferred by the capital allowances have an immediate financial impact on the investors in the form of tax savings. As explained in paragraph (15), the investors are a large number of individuals together with a small number of partnerships or corporate bodies formed for the sole purpose of this investment project.
- (52) One further precondition for classifying a measure as State aid is that the advantage conferred favours certain undertakings (or the production of certain goods). The definition of undertaking in Article 107(1) of the TFEU covers every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed. Any activity consisting of offering goods and services on a given market is therefore an economic activity⁸.
- (53) However, in the *Cassa di Risparmio* case the Court of Justice of the European Communities drew a distinction between 'an operator in direct contact with the market and, indirectly, [of] another entity controlling that operator as part of an economic unit which they together form' and found that 'the mere fact of holding shares, even controlling shareholdings, is insufficient to characterise as economic an activity of the entity holding those shares, when it gives rise only to the exercise of the rights attached to the status of shareholder or member, as well as, if appropriate, the receipt of dividends, which are merely the fruits of the ownership of an asset'⁹.
- (54) Case law thus demonstrates that the classification as an undertaking must be based not just on the legal form but also on an assessment of the economic realities of each specific case. The investors' status as an undertaking must therefore be established by an assessment of business relationships in the package in order to determine how the economic activity of operating the Ritz-Carlton Hotel in Powerscourt is actually conducted.
- (55) In the case at hand the ownership structure neither envisages nor allows the investors to be involved in operation of the hotel. The investors' activity seems to be limited to an investment holding aimed at making a return with no real participation in operation of the hotel.
- (56) This seems to be the case in both the investment lease agreements, under which the investors acquired ownership of the underlying land from Carrylane, and the occupational lease agreements, under which they leased the parts of the hotel owned by them back to Carrylane as hotel operator. The various agreements provide that: (i) the investors will not interfere with or attempt to interfere with the running of the hotel business; (ii) Carrylane has the sole and exclusive right to use, manage and operate the demised areas/suites as

⁸ See, for example, the Judgment of the Court of Justice of 10 January 2006 in Case C-222/04 — *Ministero dell'Economia e delle Finanze/Cassa di Risparmio di Firenze*, [2006] ECR. I-289, paragraphs 107 and 108.

⁹ *Cassa di Risparmio*, paragraphs 109 to 114.

part of the hotel and for the benefit of the business of the hotel as a whole; (iii) Carrylane has the sole and exclusive right to appoint, re-appoint, dismiss and deal in any manner with the hotel manager without comment or interference from the investors. Although the investors are not actively involved in the hotel's economic activities, they are not in the same situation as mere shareholders and retain direct ownership of the hotel premises. Therefore the Commission cannot exclude that at least some of them may be defined as an undertaking within the meaning of Article 107(1) of the TFEU for the purposes of this investment.

- (57) In addition to the investors as immediate recipients, the advantages resulting from the capital allowances might also extend to the operator, i.e. Carrylane. Carrylane was the entity initiating the whole project and in charge of it from conception to realisation and operation. It offered the investors the package consisting of the capital allowances plus the rent and capital appreciation expected from ownership. Moreover, one of the terms of each sale was that all owners must lease their hotel suites back to Carrylane as hotel operator for the duration of the occupational lease. It was thus envisaged from the start that, instead of the investors, Carrylane would be responsible for operation of the hotel.
- (58) It is not uncommon to find such an 'outsourced' package, where a company that wishes to acquire an asset but which cannot make that investment from its own funds for lack of resources brings in outside investors who purchase the asset and place it at the disposal of the operator, who then uses it and, at the end of the period of operation laid down by law, becomes its owner. In packages of this type, part of the tax benefit is transferred to the buyer, while the investor retains the other part, thus ensuring a return on the investment. The transfer of the benefit to the buyer normally takes the form of reduction of the rent charged during the operating period (a 'lease' package).
- (59) In the case in point, the benefit of the capital allowances is clearly and explicitly shared in the buyback arrangements between Carrylane and Exhort Co-ownership, which can be quantified as worth approximately EUR 5.2 million. In addition, there appear to be other channels for passing on (part of) the benefit of the capital allowances to Carrylane.
- (60) As the Irish authorities also acknowledge, the availability of the capital allowances might have made it easier to market and sell the hotel. Indeed, without the capital allowance many of the investors might not have been interested in the package in the first place. This is especially true of Exhort Co-ownership, whose benefit results solely from the allowance, as it gains neither from the rent paid to it by Carrylane under the operational lease agreement (the rent solely covers Exhort Co-ownership's interest obligations under a loan taken out to finance its share in the hotel and its obligation to pay for the long-term lease of the underlying land) nor from the buyback agreement with Carrylane.
- (61) It is not clear how far Carrylane might have been able to raise the funds necessary to build the hotel under the same conditions without the capital allowance. In any event, the very purpose of the capital allowance is to facilitate financing of hotel investments. As a submission¹⁰ by the Irish Hotel Federation to the Department of Finance says, 'the income tax-related capital allowance has two benefits. It facilitates the financing of a project which would not attract financing from the regular financial/banking mechanisms and it

¹⁰ Tax Reliefs on Hotel Developments. Submission to the Department of Finance, March 2005: <http://www.ihf.ie/reports/publicpolicy/0503taxrelief.pdf>.

increases the after-tax return from the investment. In other words, individuals would be willing to advance the money because of the income tax returns, whereas banks might not be willing to lend the finance on a business-case basis.’ Indeed, without this effect the allowance would simply be a windfall gain for the investors with no benefit for the State in terms of increased economic activity from more hotels.

- (62) The Commission therefore considers that Carrylane, as developer and operator of the hotel, also benefited from the capital allowance in the form of better availability of financing.
- (63) As Carrylane sold the hotel on the explicit condition that the investors lease their part of it back to Carrylane as hotel operator, a third way in which the capital allowance available to the investors might confer an advantage on Carrylane is in the form of the reduced rent payable by it under occupational leases.
- (64) In this respect, in the view of the Irish authorities, the rent payable to the individual suite owners is in line with the market, as from year 8 onwards the rent will depend completely on room-based revenue which, in turn, is driven by market forces. The Commission notes, however, that during the first seven years of the occupational leases (i.e. the period for which the capital allowance is available to the investors), Carrylane is paying a fixed rent which results in a yield of just under [2-6] % for the suite owners.
- (65) According to Ireland, the aim of this arrangement is to ensure a minimum return for investors for the first seven years, in order to avoid the risk of a lower return due to early losses in the pre-stabilisation period of the new hotel which would have made the hotel suites less attractive to potential investors.
- (66) However, Ireland has not demonstrated whether the [2-6] % yield is equivalent to a normal market return. Moreover, for another group of beneficiaries, i.e. Exhort Co-ownership, the rent payable under the seven-year occupational lease ensures an even lower yield of [2-4] %. The Irish authorities argue that the difference in rental yields between the suite owners and Exhort Co-ownership is due to the different nature of the two groups of investors, in particular the fact that the suite owners have acquired outright ownership, have no buyback arrangement and have received no warranty in respect of the level of expenditure qualifying.
- (67) The Commission considers that this line of argument does not allow it to establish that the rent payable by Carrylane to Exhort Co-ownership is in line with the market. In fact, one of the reasons given by Ireland for the lower rental yield on the Exhort Co-ownership element of the transaction is the warranty it has received in respect of the capital allowance. It therefore follows that usual market conditions without the benefit of the capital allowance would justify a higher rental yield and, thus, higher rents.
- (68) The Commission therefore considers that part of the benefit of the capital allowance is also transferred to Carrylane in the form of a reduction in the rent paid to the investors.
- (69) As for the role of Ritz-Carlton in the project, the Commission notes that it was hired by Carrylane to provide hotel management and operational services. It has no ownership interest in the hotel and there is no reason to doubt that the management fee, based on fixed percentages of gross revenue, is an arms-length arrangement. The fee arrangements were negotiated between Carrylane and Ritz-Carlton as two independent parties. The role

of Ritz-Carlton is that of an external provider of specific hotel management services for an appropriate remuneration (as is common in the industry). The Commission therefore considers that Ritz-Carlton gains no advantage from the capital allowance.

3.1.2. Selective character of the measure

- (70) As already established in the assessment of the underlying State aid scheme N 832/2000, the accelerated depreciation is available only to the trade of hotel-keeping and thus makes this sector more competitive. Therefore, it is selective.

3.1.3. Effect on trade between Member States and distortion of competition

- (71) As the hotel and tourism sector is an industry competing at EU-wide level, the capital allowance will influence competition and trade patterns between Member States.
- (72) Consequently, the Commission considers that the measure notified constitutes State aid to Carrylane and possibly to the investors or to some of them within the meaning of Article 107(1) of the TFEU.

3.2. Legality and compatibility of the aid measure

- (73) In the notification the Irish authorities indicated that the legal basis for the notified aid is automatic capital allowances depreciation aid scheme N 232/06 (ex N 832/2000).
- (74) Section 3 of the Commission Decision concerning State aid scheme N 232/06 states that, under the scheme in question, *'the legal right to receive the aid will be fully conferred to the beneficiary by the end of December 2006 (i.e. before the expiry date of the 1998 guidelines on national regional aid)'*. Under this Commission Decision, the final level of tax relief in respect of each project had to be fully determined by 31 December 2006.
- (75) The Irish authorities stated that the aid in question has already been granted, in that all the legal rights to receive the aid were fully conferred on the beneficiaries by 31 December 2006. The project satisfied all the transitional arrangements laid down in Commission Decision N 232/06 and the cost was determined by 31 December 2006, along with the following arrangements:
- viii. The original planning permission was granted for the development as long ago as 1999, the deadline for full planning permission being 31 December 2004;
 - ix. Certification of the 15 % condition from the local authority;
 - x. Certification of the estimated level of expenditure outstanding as of 31 December 2006, this certified level serving as a ceiling on the level of expenditure qualifying for tax relief after December 2006;
 - xi. A requirement to have a binding written contract in place by 31 July 2006 under which construction expenditure is incurred.
- (76) Accordingly, regional investment aid exceeding the threshold for individual notification should have been notified to the Commission before 31 December 2006 in accordance with the rules in force at the time. The notification threshold under the regional aid rules applicable for the period 2000-2006 was EUR 13.5 million in the region concerned. This was exceeded in this case.

- (77) The case was, however, notified under the RAG for 2007-2013, although the region is no longer eligible for regional aid in 2007-2013 and, therefore, no new regional aid can be granted for investment projects in the Mid-East sub-region of Ireland during that period. However, the Irish authorities have no intention of granting new regional aid in this region. The issue is not about granting new regional aid but about the belated notification of aid in the form of the automatic capital allowance for which investors had qualified prior to 31 December 2006 under an existing State aid scheme. The Irish authorities reason that, since the 1998 guidelines on national regional aid¹¹ ('RAG 1998') had lapsed and the only guidelines for national regional aid in existence were those for 2007-2013, the decision was made to notify the aid for the project to the Commission under the new guidelines.
- (78) Since the aid was granted before 31 December 2006, the Commission, in line with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid¹², has examined the measure in the light of Article 107 of the TFEU and, in particular, of the rules in force at the time when the aid was granted¹³, i.e. RAG 1998 and the multisectoral framework on regional aid for large investment projects¹⁴ ('MSF 2002').

3.3. Compatibility with the general provisions of RAG 1998

- (79) The Commission verified whether the aid is being granted in conformity with the Decision approving the relevant aid scheme¹⁵ which confirmed the compatibility of the scheme with RAG 1998. The Commission considers that the aid complies with the general compatibility criteria laid down in RAG 1998:
- xii. The aid notified is for initial investment (cf. points 4.4 and 4.11 of RAG 1998).
 - xiii. The Mid-East sub-region of Ireland, where the investment is taking place, was entirely eligible for regional aid under Article 107(3)(a) of the TFEU with a regional aid ceiling of 18 % NGE in the period 2004-2006.
 - xiv. The beneficiary's own contribution to the eligible costs is above the required 25 % threshold (cf. point 4.2 of RAG 1998).
 - xv. Aid under the scheme in question is granted automatically if an aid applicant satisfies all the relevant criteria set out in national tax legislation. As stated in the Commission Decision approving the scheme N 832/2000, it is current practice of the Commission not to ask for the implementation of the rule that the application for the aid is to be submitted before work is started on the project (cf. point 4.2 of RAG 1998) in case of a tax system.
 - xvi. The eligible costs involve the costs of buildings (cf. points 4.5 and 4.6 of RAG 1998).

¹¹ OJ C 74, 10.3.1998, p. 9, as amended by OJ C 285, 9.9.2000, p. 5.

¹² OJ C 119, 22.5.2002, p. 22.

¹³ This is also in line with point 105 of the guidelines on national regional aid for 2007-2013, OJ C 54, 4.3.2006, p. 13.

¹⁴ Communication from the Commission 'Multisectoral framework on regional aid for large investment projects', OJ C 70, 19.3.2002, p. 8.

¹⁵ State aid N 232/06 (ex N 832/2000).

- xvii. The investment will be maintained for at least five years after completion (cf. point 4.10 of RAG 1998).
- xviii. The rules on cumulation of aid are observed (cf. point 4.18 of RAG 1998).

3.4. Compatibility with MSF 2002

3.4.1. Aid intensity

- (80) The total advantage resulting from the capital allowance is EUR 17.8 million. This accrues primarily to the private investors who are likely not to be involved in the economic activity of hotel operation. To the extent that they are nevertheless to be considered as undertakings within the meaning of Article 107(1) of the TFEU and the advantage obtained by them is not covered by the *de minimis* Regulation 69/2001¹⁶, the Commission considers the benefit they receive as State aid necessary to achieve the regional objective sought by the measure.
- (81) Part of this aid or advantage is shared with the hotel developer and operator, i.e. Carrylane, under the buyback agreement with Exhort Co-ownership, easier access to financing for Carrylane to build the hotel and the reduced rent payable by Carrylane, as hotel operator, to the owners.
- (82) The advantage for Carrylane resulting from the buyback agreement was estimated at approximately EUR 5.2 million, but the Commission is not in a position to quantify the amount of the additional benefits accruing to Carrylane.
- (83) Nevertheless, in a worst-case scenario analysis the Commission assumed that the entire advantage resulting from the capital allowance accrues to Carrylane and therefore qualifies as State aid within the meaning of Article 107(1) of the TFEU. If the aid measure meets the criteria laid down in RAG 1998 and MSF 2002 even on that basis, the same holds true of the potentially lower amount of aid from which Carrylane actually benefits.
- (84) Given that the eligible expenditure is EUR 212.4 million and the applicable standard regional aid ceiling is 18 % NGE, the adjusted maximum aid intensity in NGE based on the scaling-down mechanism in points 21 and 22 of MSF 2002 is 9.6 %.
- (85) The total aid resulting from the capital allowance is EUR 17.8 million which corresponds to an aid intensity of 8.4 % NGE. As this is below the maximum aid intensity allowed under the scaling-down mechanism (9.6 %), the aid intensity for the project complies with the adjusted regional aid ceiling even in the worst-case scenario.

3.4.2. Compatibility with point 24(a) and (b) of MSF 2002

- (86) Since the total amount of aid (EUR 17.8 million) exceeds the notification threshold of EUR 13.5 million in the worst-case scenario, the compliance of the proposed aid with point 24(a) and (b) of MSF 2002 has to be assessed.
- (87) The Commission's decision to allow regional aid to large investment projects falling under point 24 of MSF 2002 depends on the market share of the beneficiary before and after the investment and on the capacity created by the investment. To carry out the

¹⁶ OJ L 10, 13.1.2001, p. 30.

relevant tests under point 24(a) and (b) of MSF 2002, the Commission first has to identify the product(s) concerned by the investment and to define the relevant product and geographical markets.

Product concerned by the project

- (88) In accordance with point 52 of MSF 2002, the ‘product concerned’ is normally the product covered by the investment project and its substitutes considered to be such either by the consumer (by reason of the product’s characteristics, price and intended use) or by the producer (by virtue of the flexibility of the production installations).
- (89) In the case in point, the product is construction and operation of a five-star luxury resort hotel in Powerscourt, County Wicklow, in the Mid-East sub-region of Ireland.

Relevant product market

- (90) Definition of the relevant product market entails examining what other products could be considered substitutes for the product envisaged by the investment project for the purposes of point 52 of MSF 2002.
- (91) In previous merger decisions¹⁷ the Commission has noted that the market for hotel accommodation could be segmented (i) by price or comfort level based on the grading or stars awarded to the hotel which indicate the standard and facilities customers may expect and/or (ii) by ownership, assessing chain hotels separately on the grounds that an integrated chain may have competitive advantages not available to other types of competitor (e.g. the ability to offer bulk discounts to customers and suppliers throughout its network). However, in these decisions the Commission did not find it necessary to define exactly the relevant product market in the hotel sector.
- (92) According to its website, the Ritz-Carlton Powerscourt ‘is a 200-room resort 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’. On the basis of the services offered it is classified as a five-star hotel.
- (93) Based on an analysis of its national hotel classification criteria, Ireland considers that four- and five-star hotels combined form the relevant product market. The contention that the relevant product market encompasses four- and five-star hotels is based on the premise that there is a high degree of substitutability within this segment of the tourism market. Costs are low or negligible should customers choose to react to price increases at individual hotel level or even at national or regional hotel level by switching to an alternative destination or alternative class of hotel accommodation. Such switching has been facilitated in recent years by an absolute and relative decrease in air travel costs as low-cost carriers have increased their market share. Wider use of the internet in the hotel sector, both for advertising and for booking accommodation, has increased customer power. Easy access to market information on relative accommodation prices and standards ensures that the hotel market is among the most efficient consumer markets.

¹⁷ Cf. Case No IV/M.1133 — Bass PLC/Saison Holdings B.V.; Case No COMP/M.1596 — Accor/Blackstone/Colony/Vivendi; Case No COMP/M.2997 — Accor/Ebertz/Dorint; Case No COMP/M.3858 — Lehman Brothers/SCG/Starwood/Le Meridien; Case No COMP/M.4816 — Blackstone/Hilton.

Potential hotel customers have real-time access to the latest prices and can make informed decisions based on this information.

- (94) In particular, in previous merger decisions the Commission has referred to the ‘chain of substitutes’ effect in the hotel sector, which means that on this market possession of a large share of sales at any particular price level is unlikely to confer any market power, because customers could easily substitute a slightly higher- or lower-priced hotel for their first choice. On that basis, the Bass PLC/Saison Holdings B.V. Decision distinguished between ‘upscale’ and ‘midscale’ hotel markets, and the Accor/Ebertz/Dorint Decision assessed the four- and five-star category as one relevant market.
- (95) In the light of the foregoing, the Commission accepts the proposal by the Irish authorities to define the relevant market in this case as the combined four-star/five-star hotel market.
- (96) As for the differentiation by ownership (i.e. a separate analysis of chain hotels), the Commission notes that in this case such a distinction is not pertinent. This State aid measure benefits a single hotel, i.e. the Ritz-Carlton Hotel in Powerscourt. The hotel is operated by the aid beneficiary, i.e. Carrylane, which bears all the risks and reaps all the rewards stemming from operation of the hotel. The Ritz-Carlton Hotel in Powerscourt is the sole hotel operated by Carrylane or its parent, Treasury Holdings.
- (97) As for the role of Ritz-Carlton, the Commission observes that it was hired by Carrylane solely to provide hotel management and operational services and receives an arms-length fee for providing such services. The Ritz-Carlton Hotel in Powerscourt is the only hotel representing the Ritz-Carlton brand in the relevant geographical market (Ireland or the Mid-East region). Therefore, in this case the Commission considers it appropriate to assess the position of a stand-alone hotel and not that of a hotel chain.

Relevant geographical market

- (98) Based on analysis of the origin of visitors to the hotel for 2008 and 2009 (up to mid-September), the Irish propose that, for the purposes of this notification, the relevant geographical market should be Ireland. Essentially this contention rests on the fact that almost 60% of the hotel guests in 2009 were from Ireland, while around 19% were from the rest of the EEA. However, the Irish authorities take the view that the marketing and sales promotion of the hotel generally target a wider area, i.e. the EEA and, indeed, the global market.
- (99) In previous merger decisions¹⁸ the Commission has noted that the relevant geographical market for hotels can be both national and local. National because the structure of supply could vary from one market to another since the hotel industry is linked to national economic trends and local because competition exists at local level between all types of hotels, since customer choice will be heavily determined by location.
- (100) The Commission therefore considers it necessary to assess this case at both national and local levels. The hotel is located in the Mid-East sub-region, which is a functional part of the Greater Dublin Region and would generally be considered to be part of the hinterland of Dublin City (a trip into the city centre by bus or car takes just 35 minutes). This closeness also opens up the possibility of attracting conference and business events from

¹⁸ See footnote 17 above.

the city. Consequently, in the present case the local level can be defined either as Dublin combined with the Mid-East region (that is, Dublin and Meath, Kildare and Wicklow Counties) or as Dublin City at the narrowest level.

Market shares

- (101) To examine whether the project is compatible with point 24(a) of MSF 2002, the market share of the aid beneficiary at group level before and after the investment has to be analysed. As the investment started in 2005 and finished in 2007, market shares in 2004 and 2008 must be assessed.
- (102) The beneficiary of the aid is Carrylane which, in turn, belongs to Treasury Holdings, a property investor and development vehicle. Treasury Holdings group, as passive landlord, owns two properties in Dublin that are rented out to tenants who run hotel operations in them. The Irish authorities explained that the term ‘passive landlord’ means that Treasury Holdings simply owns the property, receives a rent from the occupant (i.e. the hotel operators) and is not connected or involved in any way with the hotel operations carried out on the premises. The hotels in question are the five-star [...] Hotel and the four-star [...] Hotel in Dublin.
- (103) Since Carrylane or its parent company, Treasury Holdings, are not active in hotel operation apart from their involvement in the Ritz-Carlton Powerscourt, the Commission restricted the analysis to the Ritz-Carlton Powerscourt.
- (104) Market data were obtained from Bórd Fáilte, the Irish Government Tourism Authority. Market shares are measured only in volume terms based on the total number of rooms. In line with previous merger decisions, the Commission considers these data acceptable. In any event, since the relevant product market is defined narrowly (four- and five-star hotels), price differences are limited and market shares in volume terms are therefore close to those in value terms.
- (105) The table set out below gives an overview of shares on the different geographical markets.

	2004		2008	
	No of four- and five-star hotel rooms	% share	No of four- and five-star hotel rooms	% share
Ritz-Carlton Powerscourt	0		200	
Ireland	10 739	0.00 %	24 129	0.83 %
Dublin & Mid-East	5 530	0.00 %	7 722	2.03 %
Dublin	5 031	0.00 %	9 870	2.59 %

- (106) It should be noted that even when taking account of the [...] Hotel and the [...] Hotel, the combined share on the four- and five-star hotels market in 2004 was only 1.81 % in Ireland, 3.51 % in Dublin & Mid-East and 3.86 % in Dublin City. In 2008 the combined

market share of Ritz-Carlton Powerscourt, [...] and [...] was 1.63 % in Ireland, 3.99 % in Dublin & Mid-East and 5.1 % in Dublin City.

- (107) Therefore, on the basis of the figures provided above, the investment project under scrutiny is compatible with paragraph 24(a) of MSF 2002.

Capacity increase

- (108) The Commission also had to examine whether the investment project complies with point 24(b) of MSF 2002. In this context, the Commission had to verify if the compound annual growth rate (CAGR) of the apparent consumption of the products concerned over the last five years was above the CAGR of the European Economic Area's GDP (which would indicate that the market is not in structural decline).

- (109) In order to calculate the CAGR over the last five years, apparent consumption data covering the last six years are necessary¹⁹. Apparent consumption in the hotel industry can be measured in terms of the number of guest nights spent in a particular hotel category (in this case, four- and five-star hotels). The latest set of comparable data on guest nights in Ireland cover the period 2002-2007.

- (110) The CAGR of guest nights spent in four- and five-star hotels over the period 2002-2007 was 10.82 % in Ireland, 12.24 % in the East and Midlands Tourist Region and 8.85 % in Dublin.

- (111) Since the CAGR of the EEA's GDP over the same period was 2.38 %, the growth rate of the apparent consumption was well above the growth rate of the EEA's GDP. In any event, the 200 rooms created by the project make up less than 5 % of the four- and five-star hotel room stock on even the narrowest market (Dublin).

- (112) The Commission therefore concludes that the investment project under scrutiny is compatible with point 24(b) of MSF 2002.

3.5. Conclusion

- (113) The aid measure is in line with RAG 1998 and with the conditions of MSF 2002. Consequently, the aid measure is compatible with Article 107(3)(c) of the TFEU.

4. DECISION

- (114) The Commission regrets that Ireland put the aid into effect, in breach of Article 108(3) of the Treaty on the Functioning of the European Union.

- (115) However, on the basis of the foregoing assessment, the Commission has decided to consider the aid compatible with the Treaty on the Functioning of the European Union.

¹⁹ The CAGR is calculated as $[y(t) / y(t - 5)]^{1/5} - 1$.

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Your request should be sent by registered letter or fax to:

European Commission
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Yours faithfully,
For the Commission

Joaquín ALMUNIA
Vice-President of the Commission