

COMMISSION DECISION

of 10 May 2007

on State aid C 4/2006 (ex N 180/2005) — Portugal — Aid to Djebel

(notified under document number C(2007) 1959)

(Only the Portuguese text is authentic)

(Text with EEA relevance)

(2007/582/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to those provisions⁽¹⁾ and having regard to their comments,

Whereas:

I. PROCEDURE

(1) By letter of 5 April 2005 (sent via their Permanent Representation), registered as received by the Commission on 7 April, the Portuguese authorities notified the Commission of their intention to grant aid to Djebel — S.G.P.S., S.A. (hereinafter Djebel) in order to help finance an investment by the company in Brazil. At the Commission's request, Portugal submitted additional information by letters of 25 July, 26 September and 23 December 2005 (sent via their Permanent Representation), registered as received by the Commission on 27 July and 28 September 2005 and 3 January 2006.

(2) By letter of 22 February 2006, the Commission informed Portugal that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid.

(3) By letter of 31 March 2006 (registered as received on 4 April), the Portuguese authorities presented their comments in the context of the abovementioned procedure.

(4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union*⁽²⁾. The Commission called on interested parties to submit their comments. There were no comments from third parties.

II. DETAILED DESCRIPTION OF THE AID

The companies involved

(5) Djebel is a company located in Madeira, Portugal.

(6) The company is part of the Pestana Group, which is the main hotel group in Portugal and is not covered by the definition of an SME. It does not comply with the Commission Recommendation of 3 April 1996 concerning the definition of small and medium-sized enterprises⁽³⁾ or autonomy criteria set out in Article 3 of the Annex to the Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises⁽⁴⁾. It is therefore a large company.

(7) Djebel manages a holding company in Brazil that invests in and manages hotels and tourist activities.

(8) The Pestana Group had already acquired a hotel in Mozambique before 1999 and has acquired a further four hotels in Brazil in addition to the one covered by the present notification.

The project

(9) The project consists in the acquisition by Djebel of shares in the capital of RASH — Administração de Hotéis de Turismo, Lda, a Brazilian company whose only asset is the Hotel Rio Atlântico, located in Rio de Janeiro, Brazil.

(10) The capital of RASH was acquired in October 1999 and the hotel was already fully operational at the time of the acquisition.

⁽¹⁾ OJ C 91, 19.4.2006, p. 25.

⁽²⁾ See footnote 1.

⁽³⁾ OJ L 107, 30.4.1996.

⁽⁴⁾ OJ L 124, 20.5.2003.

The aid

- (11) The cost of acquiring the shares of RASH amounted to EUR 14 720 474.
- (12) Portugal intends to grant a soft loan of EUR 3 680 119, corresponding to 25 % of the eligible costs, for the abovementioned project. The amount of aid is EUR 574 466, giving a net aid intensity of 3,90 %.
- (13) An additional amount would be granted by the State to Djebel to cover the costs related to studies and technical assistance, financial guarantees and legal assistance under the *de minimis* Regulation ⁽⁵⁾.
- (14) The present aid scheme was notified under Portuguese aid scheme N 667/1999, approved by the Commission on 8 August 2000 ⁽⁶⁾. That scheme, which ran from 2000 to 2006, was designed to promote modern and competitive entrepreneurial strategies. Under it aid for foreign direct investment projects by large companies had to be individually notified to the Commission.
- (15) On 24 May 1999 Djebel submitted a proposal to F. Turismo — Capital de Risco, SA (FCR), which is a risk capital fund owned by public and private companies, concerning its participation in the planned project. According to the Portuguese authorities, interventions by this fund do not contain elements of State aid within the meaning of Article 87 of the EC Treaty.
- (16) The formal application for aid under State aid scheme N 667/1999 was submitted on 31 January 2001. Portugal explained that the document presented to FCR in 1999 constituted the original aid application and that the project was subsequently carried out on the assumption that it would be eligible for aid under the relevant Portuguese law. Owing to internal delays, the Portuguese authorities notified the aid only in April 2005.

III. GROUNDS FOR INITIATING THE PROCEDURE

- (17) The Commission, in its decision to initiate the procedure in respect of the present case, stated that it would

examine the measure in the light of the derogation under Article 87(3)(c) of the EC Treaty in order to determine whether the aid could be considered to facilitate the development of a certain economic activity without adversely affecting trading conditions to an extent contrary to the common interest.

- (18) The Commission also stated that it would examine the measure on the basis of criteria normally used for assessing aid to large companies for foreign direct investment (FDI) projects ⁽⁷⁾. In these cases it normally weighs the benefits of the measure, in terms of contributing to the international competitiveness of the EU industry concerned, against possible negative effects in the Community, such as the risks of relocation and any adverse impact on employment.
- (19) The Commission also takes into account the necessity of the aid by reference to the risks associated with the project in the country concerned as well as to the deficiencies of the company, such as those faced by SMEs. One other criterion relates to a possible positive regional impact. Lastly, the Commission excludes any aid to export-related activities.
- (20) In this connection, the Commission questioned what the impact would be of the project on the tourism sector in Portugal (and thus in the European Union) and whether or not it would affect trading conditions in the European Union to an extent contrary to the common interest.
- (21) The Commission was also doubtful whether the aid was necessary and/or provided any incentive for the applicant to carry out the investment since the project had been completed even before Djebel formally applied for State aid. It requested Portugal to submit comments and provide any information that might help in the assessment of the case.

IV. COMMENTS SUBMITTED BY THE PORTUGUESE AUTHORITIES

- (22) Portugal considered that the necessity of the aid was justified by the fact that the acquisition of RASH constituted the first foreign direct investment project in Brazil by the Pestana Group. This is a group whose activity was focused virtually in its entirety on the Portuguese market. Portugal stated that the challenge of international expansion into Brazil, a high-risk country but also one with a high development potential and with close historical and cultural links with Portugal, became a decisive issue for the Pestana Group's development.

⁽⁵⁾ Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid (OJ L 10, 13.1.2001, p. 30) and Commission Regulation (EC) No 1998/2006 (OJ L 379, 28.12.2006), which deals with the same subject.

⁽⁶⁾ By letter SG(2000) D/106085 (OJ C 266, 16.9.2000, p. 4).

⁽⁷⁾ See Cases C 77/97, *Austrian LiftGmbH-Doppelmayr* (OJ L 142, 5.6.1999, p. 32) and C 47/02, *Vila Galé-Cintra* (OJ L 61, 27.2.2004, p. 76).

- (23) Portugal pointed out to the Commission that the request for aid from the company was drawn up on 24 May 1999 and was submitted to F. Turismo — Capital de Risco SA, a company managing the risk capital fund FCR F. Turismo. The notified request constituted a second phase in the assessment of the project. It should, therefore, be evaluated in the light of the circumstances prevailing at the time, namely in May 1999.
- (24) In this context and according to the Portuguese authorities, the fact that the investment was carried out without the aid shows that the promoter was confident about obtaining the aid and that it had to seize this business opportunity. The Portuguese authorities argued that the beneficiary should not be penalised because it took longer to present the application than to carry out the investment. They also referred to the handicaps and exceptional risks of the operation, such as the high volatility of the Brazilian real and the fact that this is the company's first investment in Brazil.
- (25) Portugal took the view that this investment in Brazil contributed to improving the competitiveness of the Pestana Group and reinforcing its standing in the global tourism sector, thanks in particular to the enhanced recognition of the 'Pestana Hotels and Resorts' brand, with the accompanying enhanced visibility of Portugal as a destination.
- (26) Moreover, the Group's experience in Mozambique is not remotely comparable to its experience of internationalisation in Brazil, given the different characteristics of the two markets. Whereas the Mozambique market, despite its high potential, is still only in an embryonic phase of development, Brazil is an open market with a high level of competition and one which presents a far more challenging prospect than Mozambique. In terms of the Pestana Group's current process of internationalisation, its experience in Mozambique did nothing to attenuate the high risk and anxiety associated with this operation.
- (27) Lastly, the Portuguese authorities claimed that the aid would have a limited effect on trading conditions in the European Union, notably because:
- the amount of the aid is only EUR 574 466, representing 3,9 % of the eligible investment;
 - the Pestana Group has a market share of only 2 % in Portugal, which is negligible in European terms;
 - the Brazilian market has around 10 000 hotels, of which some 7 % are owned by foreign companies;
 - Brazil is a competitive market but one with a very low level of concentration;
 - the company's European competitors operating in Brazil already have very high market shares, led by the French group ACCOR, with 108 hotels, and followed by the Spanish Sol Melia group, with 23;
 - in view of the dimension of the Brazilian market, the project is not of a sufficient size to produce any appreciable increase in local supply or to affect the positions of European companies already operating in Brazil.
- Portugal concluded that there was no possibility that the investment concerned, which involved the purchase of only one hotel, could have any significant impact on trading conditions in the European Union and that there was even less possibility that such an impact could be contrary to the common interest.
- (28) There were no comments from third parties.

V. ASSESSMENT

Presence of aid within the meaning of Article 87(1) of the EC Treaty

- (29) Under Article 87(1) of the EC Treaty, 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market'.
- (30) The Commission, in its decision of 22 February 2006, concluded that the aid fell within the scope of Article 87(1) of the EC Treaty for the following reasons:
- Under the notified measure, a large enterprise will receive funds for investing in the tourism sector in Brazil as part of an internationalisation strategy. This measure amounts to preferential treatment of the beneficiary firm, gives it an advantage or an incentive compared with other firms and thereby distorts or threatens to distort competition.
 - Aid will be granted to a firm in the EU tourism market, where there is or could be trade between Member States or on which firms from other Member States might wish to participate. The measure could therefore affect trade between Member States.
 - The measure is funded through State resources.

(31) The Commission considers that the arguments adduced by Portugal (see paragraph 27) are insufficient to modify these conclusions for the following reasons:

- The Pestana Group was the leading Portuguese hotel group, a position which it still holds today, and it owned some 15 hotels in Portugal at the time of the request for aid. It is clearly advantageous for the national tourism sector as a whole to have one of the most important Portuguese brands represented in South America. The international scale of 'Pestana Hotels and Restaurants' gave the Group enhanced visibility, boosted its negotiating power and strengthened its business activity in the hotel sector. These factors helped to increase its size and to enhance its capacity for investing in the Portuguese market.
- Since the start of its process of internationalisation, the Pestana Group has made a number of investments in Portugal, namely (i) the construction of three new hotels, (ii) the take-up of the management of the Pousadas de Portugal network, (iii) the purchase of a two other inefficient hotel companies and subsequent modernisation of their hotels, and (iv) the development of sizeable tourist projects, such as the Cidade da Criança in the Autonomous Region of Madeira.
- In view of the size of the Pestana Group, a significant increase in the number of jobs created in Portugal would not be the only consequence of buying a hotel in Brazil. Such an increase has indeed already taken place, but primarily as a result of the various abovementioned investments which the Group recently made in Portugal and which are largely due to the momentum generated by its process of internationalisation. In 1999 the Group had a total workforce of only 1 800, whereas by 2005, only six years later, the figure already exceeded 3 500.
- By helping with the acquisition of a hotel as part of the internationalisation initiative of a Portuguese company in Brazil, the notified measure favours a certain undertaking or the production of certain goods. The Commission considers that aid granted to undertakings of the European Union for foreign direct investment is comparable to aid granted to undertakings that export almost all of their production outside the Community. In such cases, given the interdependence between the markets on which Community undertakings operate, it cannot be excluded that aid may distort competition within the Community⁽⁸⁾.

⁽⁸⁾ See Judgment by the European Court of Justice in Case C-142/87, *Tubemeuse* [1990] ECR I-959, paragraph 35.

Compatibility of the aid with the EC Treaty

Incentive effect

- (32) The Commission indicated that it would assess the compatibility of the aid with the EC Treaty in the light of the derogation under Article 87(3)(c) of the Treaty, which authorises aid 'to facilitate the development of certain economic activities' where such aid does not adversely affect trading conditions to an extent contrary to the common interest. The Commission also indicated that it would take into account certain criteria which it had applied in previous cases of aid to large companies for outward foreign direct investment projects (see paragraph 18) with a view to striking a balance between the benefits of the measure, in terms of contributing to the international competitiveness of the EU industry concerned (e.g. whether the aid is necessary by reference to the risks associated with the project in the country of investment), and its possible negative effects on the EU market⁽⁹⁾.
- (33) The Commission noted in this context that, as regards the incentive effect of the aid, there appeared to be some indications that the aid did not meet this criterion. In addition, it had doubts as to the impact of the measure on the common market. This included, *inter alia*, the necessity of the aid given the risks associated with the project in the country concerned as well as the deficiencies of the company (similar to those that may be faced by SMEs).
- (34) As a general principle of State aid legislation, in order for aid to be compatible with the common market, it must be demonstrated that the aid leads to an additional activity by the beneficiary which would not be carried out without the aid. Otherwise, the aid would simply distort competition without having any positive counter-effect.
- (35) The Commission doubted already in the decision to initiate the procedure in the present case that the aid was necessary for Djebel to carry out this investment.
- (36) In its decision of 22 February 2006, the Commission emphasised that the notified project was not the first internationalisation project of the Pestana Group, of which Djebel forms part. The Group was already active in Mozambique and it was therefore doubtful whether the aid was needed in order to carry out the first internationalisation experience of the Pestana Group in Brazil⁽¹⁰⁾.

⁽⁹⁾ See Cases C 41/04, *Orfama* (Decision of 7 March 2007) and C 36/04, *Cordex* (Decision of 21 February 2007).

⁽¹⁰⁾ See Case C 47/02, *Vila Galé-Cintra*, which involved a first internationalisation experience.

- (37) Moreover, Djebel is owned by the major hotel group in Portugal. From 1999, the firm has expanded its activity in Brazil, where it currently has nine hotels and is among the ten largest hotel chains. This seems to indicate that the investment would have gone ahead even without the prospect of obtaining the aid. Moreover, an aid granted now for an investment that took place over seven years ago is unlikely to have any practical link with the investment anymore.
- (38) In order for aid to have an incentive effect, it must also be established that a request for support was introduced before the investment started.
- (39) The Commission points out that the investment took place in October 1999, more than one year before the beneficiary formally applied for aid under State aid scheme N 667/1999 (on 31 January 2001) and so did not comply with the 'incentive effect' criterion normally required by the Community rules on national regional aid ⁽¹¹⁾.
- (40) The Portuguese authorities argued that the proposal for the participation of FCR in the investment, which took place on 24 May 1999 (prior to the investment), is sufficient proof that this criterion is met. The Commission does not consider that such a proposal for the participation of a risk capital firm in the investment can, on its own, be considered to constitute an application for State aid capable of justifying its incentive effect.
- (41) The Commission also stresses that the investment took place around five and a half years before the notification was submitted to it by the Portuguese authorities.
- (42) On the basis of the above, the Commission concludes that there is no evidence that the aid proposed by Portugal was necessary to compensate for any specific risks associated with the project. Thus, it considers that the aid was not necessary in order for the Pestana Group to carry out the investment in Brazil and to trigger that investment. In its view, the aid has no incentive effect.
- (43) The Commission has also maintained in previous cases that aid for foreign direct investment is likely to strengthen the beneficiary's overall financial and strategic position and thus affect its relative position relative to competitors on the EU market ⁽¹²⁾.
- (44) The Commission stresses that the Pestana Group increased its commercial activity in the hotel sector following the investment in question, which was not its first investment abroad. According to the information provided by the Portuguese authorities, even though it did not benefit from the aid, the investment in Brazil helped to strengthen the competitiveness of the Pestana Group and its visibility in the general tourism market, thanks in particular to the projection of the 'Pestana Hotels and Resorts' brand.
- (45) Lastly, the Commission notes that, even if the investment by Djebel had had a positive impact in Portugal, this cannot, in principle, be attributed to the aid since, as explained above, it has no incentive effect in this case as the project was concluded prior to Djebel's requesting the aid and was not necessary to carry out the investment.
- (46) When assessing the compatibility of aid, the Commission takes a close look at the balance between its positive and negative effects and determines whether its beneficial effects for the Community outweigh its negative effects on competition and trade on the Community market. On the basis of the above, it has no reason to believe that the granting of aid to Djebel in respect of its investment in Brazil would help to improve the competitiveness of the European industry or would have a positive effect on the EU regions concerned. On the contrary, the aid would strengthen the position of the beneficiary to the detriment of its competitors receiving State aid in a market that is characterised by intensive competition. Therefore, the Commission considers that the aid would not have any positive effects for the Community that could outweigh its negative effects on competition.
- VI. CONCLUSION
- (47) The Commission concludes that Portugal has failed to demonstrate that, without the aid, Djebel would not have carried out the project concerned. The aid would thus simply have a distorting effect on competition in the common market without contributing to any additional activity on the part of the beneficiary. On this basis, the aid cannot be considered to facilitate the development of an economic activity within the meaning of Article 87(3)(c) and is thus incompatible with the common market.
- (48) Given the above, the Commission does not consider it necessary to assess other aspects that cast doubts on the compatibility of the aid expressed in its Decision of 22 February 2006,

⁽¹¹⁾ See point 4.2 of the Guidelines on national regional aid, which states that an application for aid must be submitted before work on the project is started in order to ensure that the required incentive effect exists (OJ C 74, 10.3.1998, p. 13).

⁽¹²⁾ See Case C 77/97, *Austrian Lift GmbH-Doppelmayr* (OJ L 142, 5.6.1999, p. 32).

HAS ADOPTED THIS DECISION:

Article 2

This Decision is addressed to the Portuguese Republic.

Article 1

Done at Brussels, 10 May 2007.

The notified soft loan of EUR 3 680 119 proposed by Portugal to Djebel for its investment in Brazil is incompatible with the common market since it does not meet the criteria set out in Article 87(3)(c) of the EC Treaty and must not be therefore be granted.

For the Commission
Neelie KROES
Member of the Commission
