



# EStAL

EUROPEAN  
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QUARTERLY

## ESTAL TENTH ANNIVERSARY LECTURE

### EU State Aid Law – Not a Pretty Sight

*Sir Jeremy Lever*

## OPINION

### Grid Fee Exemption under German Energy Law for Large-Scale Energy Consumers – A State Aid Déjà Vu?

*Lukas Ernst and Christian Koenig*

## ARTICLES

### State Aid Management in the United States

*Diane P. Wood*

### Implications of the State Aid Modernisation for the Assessment of Large Investment Projects

*Hans W. Friederiszick and Nicola Tösini*

### NO<sub>x</sub> Emission Trading Rights: A Government Gift or Value Created by Undertakings?

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### State Aids to the Publishing Industry and Cultural Policies in Europe

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### State Aid Control in South-East Europe: The Endless Transition

*Marco Botta*

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# The Djebel Case: FDI Found Incompatible

Annotation on the judgment of the Court of Justice of 18 January 2012  
in Case T-422/07, Djebel – SGPS v Commission

Ana Rita Andrade\*

## I. Introduction

Historically, Portuguese companies have always looked out of the country and ultimately overseas for an answer to their needs of growth. Many of Portugal's best entrepreneurs have moved abroad in search of new opportunities, namely in Brazil, traditionally one of the most frequent destinations.

This was the case of the *Pestana Group*, a major Portuguese group in the hotel and tourism sector. Djebel, a holding company of the group, was granted aid to support its objective of internationalization – an investment in Rio de Janeiro, consisting of a full functioning five star hotel.

Like Djebel, other Portuguese Companies, in the late 90's – early 2000, were granted aid for the same objective: internationalization, *i.e.* Foreign Direct Investment (hereinafter referred to as FDI<sup>1</sup>). However, in addition to Djebel's case<sup>2</sup> and in a row, two other incentives under the same European and National framework were considered incompatible by the European Commission and, therefore, illegal (cases *Cordex*<sup>3</sup> and *Orfama*<sup>4</sup>).

On 18 January 2012, the European Court of Justice (ECJ) upheld this understanding on the case *Djebel*.<sup>5</sup>

## 1. The Project and the Aid

Djebel is a Portuguese holding company part of the *Pestana Group*, one of the largest national hotel groups based in the tax-free zone of the Autonomous Region of *Madeira*.

In 1999, Djebel decided to invest in Brazil, an important overseas market, due to the strong historical, cultural and linguistic ties that the country has with Portugal. That same year, Djebel contacted *F. Turismo – Capital de Risco, S.A. (FCR)*, a company managing a risk capital fund (FCR F. Turismo) with private and public capital, in order to obtain financial backing for the acquisition of the share capital of *RASH – Administração de Hotéis de Turismo, Lda*

(*RASH*), a Brazilian company whose only asset was a hotel in Rio de Janeiro (*Hotel Rio Atlântico*), which at that time was already a five star establishment in full operation.

In October 1999 and in the amount of over €14 million, Djebel acquired the intended shares in the capital of *RASH*, but it was only on January 2001 that the company made a formal request to the Portuguese government applying for a financial aid – in the form of a soft loan covering 25 % of its eligible costs (approximately €3,6 million).

## 2. Legal European and National Background

Djebel's application for the soft loan was made based on an approved scheme (State aid scheme No 667/99)

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1 Foreign direct investment (FDI), as per the definition used by EURO SATS, is "the category of international investment that reflects the objective of obtaining a lasting interest by an investor in one economy in an enterprise resident in another economy. The lasting interest implies that a long-term relationship exists between the investor and the enterprise, and that the investor has a significant influence on the way the enterprise is managed. Such an interest is formally deemed to exist when a direct investor owns 10 % or more of the voting power on the board of directors (for an incorporated enterprise) or the equivalent (for an unincorporated enterprise)". According to the definition used by Quigley (European State Aid Law and Policy, second edition, 2009, p. 223), FDI "result[s] from a firm's desire to develop new business outlets by investing and selling on foreign markets rather than by exporting. Investment generally takes the form of setting up a joint venture or a subsidiary abroad, either by acquiring shares or purchasing a local firm".

2 Case C4/2006, decision of 10.05.2007 (OJ 2007 L 219/30), hereinafter referred to as "Decision".

3 Case C36/2004, decision of 21.02.2007 (OJ 2007 L 156/23).

4 Case C41/2004, decision of 07.03.2007 (OJ 2007 L 183/46).

5 Case T-422/07, *Djebel SGPS v Commission*, [2012] ECR n. y. r. Full decision in Portuguese (language of the case) and French available at <http://curia.europa.eu/>.