OPINION OF ADVOCATE GENERAL COSMAS
delivered on 23 November 1999 *

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* Original language: Greek.

I — Introduction

1. In the present appeal, the French Republic seeks the setting aside of the judgment of the Court of First Instance of 27 January 1998 in Case T-67/94.[1] The contested judgment was given following an application by Ladbroke Racing Ltd for the annulment of Commission Decision 93/625/EEC.[2] That decision was concerned with the classification of a number of measures adopted by the French authorities which Ladbroke Racing Ltd had complained of to the Commission, claiming that they fell within Article 92(1) of the EC Treaty. The following two issues are among those raised by the present appeal: first, there is the question of the breadth of the judicial review conducted by the Court of First Instance when it assesses a determination by the Commission as to whether or not a national measure amounts to (unlawful) State aid; second, the Court of Justice is asked to rule on the conditions under which the principle of the protection of legitimate expectations may be relied on and applied so as to limit the obligation to recover unlawfully granted aid.

1 — Case T-67/94 *Ladbroke Racing* v *Commission* [1998] ECR II-1.

2 — OJ 1993 L 300, p. 15.

II — Facts and procedure

2. The facts of the case are set out in detail in paragraphs 1 to 36 of the contested judgment.

3. It is common ground that on 7 April 1989 Ladbroke Racing Ltd (a company incorporated under English law whose activities include organising and providing betting services in connection with horseraces in the United Kingdom and elsewhere in the European Union; hereinafter 'Ladbroke'), jointly with six other companies in the Ladbroke Group, submitted a complaint to the Commission in respect of a number of measures which had been adopted by the French Government in favour of the Pari Mutuel Urbain (hereinafter 'the PMU'). The PMU is an economic interest group (*groupement d'intérêt économique)* consisting of the principal racecourse undertakings, with exclusive rights in relation to racecourse organisation and to management of the totalisator betting rights of the racecourse undertakings in France.

4. On 22 September 1993 the Commission adopted Decision 93/625, in which it found that three of the seven measures adopted by the French Government for the benefit of the PMU constituted State aid under Article 92(1) of the Treaty but qualified for exemption under Article 92(3)(c) thereof. In the case of the other four measures, the Commission decided that the conditions for applying Article 92(1) were not met.

5. Ladbroke brought an action before the Court of First Instance for the annulment of Decision 93/625. The French Republic applied for leave to intervene in support of the Commission, which was granted by order of the President of the Second Chamber of the Court of First Instance of 30 August 1994.

6. The Court of First Instance found errors of law and of fact in certain points of the Commission decision challenged before it, of which the following five present particular interest:

— first, the point where it was found that, in so far as the amounts resulting from winnings which are not claimed by bettors have always been regarded as 'normal resources', those amounts form part of the 'non-public levies', and that their use to finance social security expenditure together with monitoring and supervision costs, horse-breeding incentives and investment connected with the organisation of horse-racing and totalisator betting cannot be regarded as State aid, since the State resources criterion is not met (Parts IV and V, point 1, of the decision);

— second, the Court of First Instance focused criticism on the point in the Commission decision relating to the legal classification of the national measures which changed the allocation of the public levies. The Commission had found that the tax arrangements applicable to horse-races were the responsibility of the Member States; increases or reductions in the rate of tax did not constitute fiscal aid provided that they applied uniformly to all the undertakings concerned. There was State aid, therefore, only where a significant reduction in the rate of taxation strengthened the financial situation of an undertaking in a monopoly position. According to the Commission, that was not the case here in so far as the reduction in 1984 in the public levy on bets was limited (some 1.6%) and was subsequently maintained; it was therefore not designed to finance a specific *ad hoc* operation. The French authorities had acted with the aim of increasing the resources of the recipients of the non-public levies on a permanent basis. The Commission accordingly concluded that, taking account of the special nature of the recipients' situation, the measure in question did not constitute State aid, but a 'reform in the form of a "tax" adjustment that [was] justified by the nature and economy [sic] of the system in question' (Parts IV and V, point 3, of the decision);

— third, the Court of First Instance did not accept that Decision 93/625 was correct at the point where the Commission found that the national measures which granted the PMU cash-flow benefits, consisting in authorisation to defer payment of the public levies, did not constitute a temporary waiving of resources by the public authorities or a specific *ad hoc* measure, and accordingly could not be classified as State aid (Parts IV and V, point 5, of the decision);

— fourth, the Court of First Instance did not follow the Commission in its reasoning that the one-month delay in the deduction of VAT constituted aid from 1 January 1989 onwards but was offset by a permanent deposit lodged with the Treasury;

— finally, the Court of First Instance considered that the Commission was mistaken in its view that, although the aid consisting in the exemption from the contribution for social housing (hereinafter 'the housing levy') had been incompatible with the common market from 1989 onwards, it did not have to be refunded as unduly paid because its recipient (the PMU) had entertained legitimate expectations at the time of obtaining it.

7. In view of the foregoing matters the Court of First Instance, by its judgment of 27 January 1998, annulled 'Commission Decision 93/625 ... in so far as it found that various advantages granted to the PMU, through (a) the amendment in 1985 and 1986 of the allocation of the levies, (b) cash-flow benefits granted to it by the authorisation to defer payment of certain levies on betting, (c) access to unclaimed winnings, and (d) exemption from the one-month delay rule for the deduction of value added tax, after 1 January 1989, do not constitute State aid for the purposes of Article 92(1) of the EC Treaty, and also in so far as it decided that the obligation on the French State to require repayment of the aid deriving from the PMU's exemption from the housing levy applies not as from 1989, but as from 11 January 1991'.

8. By application lodged on 26 March 1998, the French Government contests the judgment of the Court of First Instance, claiming that it should be set aside. More specifically, it seeks the annulment of the first paragraph of its operative part; in addition, it claims that the form of order sought by the Commission at first instance should be granted and that Ladbroke's application at first instance should be dismissed.

9. On 27 July 1998 Ladbroke brought a cross-appeal contesting the judgment of the Court of First Instance, but withdrew it by document dated 18 January 1999 addressed to the Court of Justice.

III — Grounds of appeal

10. The French Government puts forward two grounds of appeal. The first ground of appeal concerns those points in the contested judgment which resulted in the partial annulment of the Commission decision on the basis that it had incorrectly found that certain of the measures adopted by the French Government in favour of the PMU fell outside the scope of Article 92(1) of the EC Treaty. The second ground of appeal relates to the point in the contested judgment where it is found that it was not

open to the Commission to rely on the legitimate expectations which may have arisen on the part of the PMU in order to restrict the temporal scope of the obligation on the French authorities to recover one of the items of aid unlawfully granted to it.

A — *First ground of appeal*

11. This ground, by which it is alleged that Article 92(1) of the EC Treaty was misinterpreted and misapplied, comprises four separate parts which are examined below.

(a) First part of the first ground of appeal (national measure reducing the public levy by 1.6%)

12. The appellant challenges paragraphs 42 to 62 of the contested judgment, where the Court of First Instance found that, contrary to the Commission's assessment, the reduction from 1985 onwards in the share of the revenue from horse-race betting levied by the French State constituted State aid. According to the French Government, the Court of First Instance made a number of errors in law concerning the nature of its review, its understanding of the Commission's decision, the legal classification of the facts and the obligation to give a statement of reasons for judicial decisions.

(i) Scope of the judicial review

13. The Court of First Instance held in the contested judgment (paragraph 52) that the concept of State aid under Article 92(1) of the EC Treaty is objective; therefore, the question as to whether a national measure is to be characterised as State aid is subject to a comprehensive judicial review. In the absence of particular circumstances, which may be due to the complex nature of the State intervention in the economy, it is not, in principle, justified to attribute a broad discretion to the Commission when it determines whether a measure should be characterised as State aid or to restrict the judicial review conducted by the Court of First Instance so that it merely ascertains whether there has been a manifest error of assessment.

14. The appellant submits that the Court of First Instance misdefined the nature and extent of the judicial review which it had been called on to carry out. Ladbroke, on the other hand, maintains that the Court of First Instance was right not to restrict itself to ascertaining whether the Commission had manifestly erred in its assessment but to carry out a comprehensive review of the substance as regards the Commission's views on whether the French measures at issue in favour of the PMU fell within the scope of Article 92(1) of the Treaty.

15. In my view, the Court of First Instance did not err in law in relation to the scope of its review of the relevant determinations by

the Commission. It correctly points out in the contested judgment (paragraph 52) that the concept of State aid, as formulated in the Treaty, is purely one of law and is interpreted on the basis of objective factors. Thus, when the Court of Justice, the Court of First Instance and national courts are called on to consider whether or not it is correct to classify a national measure as State aid for the purpose of Article 92(1) of the EC Treaty, they must carry out — *in principle to the fullest possible extent* — a comprehensive review of the substance. That rule is reversed only where the court establishes that there are particular circumstances which prevent an extensive judicial review from being carried out. Those circumstances may consist in the complicated and technical nature of certain assessments which are directly connected with answering the question of law, namely the classification of a measure as State aid. It cannot be maintained that such special circumstances, restricting the opportunity for judicial intervention in the substance of the case, are automatically present whenever the interpretation and application of Article 92(1) of the EC Treaty are at issue.

16. It should be noted that the breadth of a court's jurisdiction when it reviews the legality of an administrative measure — such as the measure challenged at first instance — cannot be defined in an absolute and static manner. Apart from the need to adjust the breadth to the facts of each case, a need which exists beyond all doubt, a tendency may be observed in the case-law of the Court of Justice towards a dynamic broadening of judicial review and a strengthening of jurisdiction even in instances where it is necessary to solve complex legal problems with a strong economic flavour such as problems related to competition law. [3] That tendency reflects the basic endeavour of every judicial body — such as the Court of Justice — to ensure that judicial review is carried out as comprehensively as possible in the interests of observing the principle of legality and protecting the rights of the litigants. In conclusion, a comprehensive review as to the substance in cases such as the present one does not, of course, supplant the administrative work of the Commission but constitutes a correct exercise of judicial

3 — I consider that a typical example is the development of judicial review of Commission decisions relating to whether or not mergers of undertakings are compatible with Community competition rules.
It is settled case-law that, 'although as a general rule the Community judicature undertakes a comprehensive review... its review of complex economic appraisals made by the Commission is necessarily limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers'. The above self-imposed restriction on the Community judicature — which perhaps has an inherent contradiction (a 'comprehensive' investigation of the case whereas only the 'manifest' errors of the administrative authority are looked for) — is concerned in particular with decisions adopted by the Commission when monitoring whether the rules of fair competition are observed (see, in particular, Case C-7/95 P *Deere* v *Commission* [1998] ECR I-3111, paragraph 34, Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 34, and Case T-243/94 *British Steel* v *Commission* [1997] ECR II-1887, paragraphs 107 to 113).
In reality, however, the intention of the above judicial statement is not to restrict absolutely the scope for the Community judicature to intervene in the substance of the case, but to recognise that the Community judicature has the power to remain master of its tasks, defining itself the depth to which its investigation will go on each occasion. As is indeed apparent from the judgment in Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375, there is clearly a will on the part of the Community judicature to use that power with a view to carrying out a more comprehensive review than formerly. While the Court may, in the major premiss of its reasoning, consider the 'discretion' of the Commission 'especially with respect to assessments of an economic nature' (paragraphs 223 and 224), it nevertheless then proceeds to make findings of substance on issues which are very much economic in nature. It finds, for example, that the undertakings involved in the concentration 'did not have a privileged relationship for the distribution of potash-based products' and that 'the cluster of structural links ... is not in the end as tight or as conclusive as the Commission sought to make out' (paragraphs 230 to 237). Finally, it concludes by rebutting purely factual and specialist technical analyses of the Commission (see, in particular, paragraphs 237 and 244). That development is entirely legitimate if the familiarity which the Court of First Instance and the Court of Justice have with that category of legal disputes is taken into account. It would certainly be absurd to exclude the possibility of the Community judicature using the experience which it has acquired to fill the gaps in judicial review.

tasks in a legal order — like the Community legal order — governed by the principle of legality and the rule of law.

(ii) Particular nature of the system of levies on horse-racing as a basis for not categorising the national measure as State aid

17. The French Government considers that the Court of First Instance erred in its assessment of the legality and correctness of the Commission's arguments forming the basis of the latter's decision not to categorise the national measure at issue as (unlawful) State aid. It centres its argument on the failure by the Court of First Instance to take into account that the Commission had based its reasoning on the particular nature and general scheme of the system of levies on horse-racing in France. The particular nature of the system was directly related to three separate criteria which the Commission relied on in order to substantiate its view that the measure was not State aid. The appellant considers that the Court of First Instance entirely ignored the significance of the argument derived from the particular nature of the system at issue, an argument which had been clearly analysed in the pleadings submitted to it by the Commission and the French Government. It adds that the same argument had been taken into account by the Court of Justice in an earlier judgment where it had rejected Ladbroke's claims that the PMU was benefiting from State aid granted by the French Government. [4] In short, the appellant considers that the Court of First Instance misunderstood the grounds of the measure which was being contested before it, failed to assess a material submission which had been duly put before it, or in any event misconstrued the critical issue of the 'nature and general scheme of the system'.

18. The above criticisms by the appellant, which Ladbroke seeks to rebut in its pleadings, call for a number of comments, which I now set out below.

19. First of all, as the appellant acknowledges there are very few express references in the case-law to the 'nature and general scheme of the system' as a criterion for categorising a measure as State aid. In *Italy* v *Commission*, [5] which concerned the Italian textile industry, the Court found that the measure before it partially exempted the eligible undertakings 'from the financial charges arising from the normal application of the general social security system, without there being any justification for this exemption on the basis of the nature or general scheme of this system'. The Court did not go on to analyse in greater detail what is or may be included within the concept of the 'nature and general scheme of a system'. In fact, the Court founded its reasoning in *Italy* v *Commission* not on

4 — Case C-353/95 P *Tiercé Ladbroke* v *Commission* [1997] ECR I-7007, paragraphs 34 and 35.

5 — Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 15 et seq.

that criterion but on the exceptional nature of the national provision at issue in relation to the system which constituted the 'natural legal situation' in some way, while acknowledging at the same time that the particular characteristics of the system, had they been proved, might have justified the relevant divergences from the general rules.

20. The same conclusion is, moreover, reached by Advocate General Darmon in his Opinion in *Sloman Neptun*. [6] Contrary to the appellant's submissions, the analysis of the Advocate General in that case is centred on what is meant by the exceptional nature of a measure *vis-à-vis* the general scheme of the overall system in which it is set, as a criterion for finding that there is State aid within the meaning of Article 92(1) of the EC Treaty, and not on the 'nature and general scheme of the system' themselves. In other words, neither that Opinion nor the judgment in *Italy* v *Commission* contains sufficient guidance as to the significance of the particular characteristics of a system when applying Article 92(1) of the Treaty.

21. The judgment in *Tiercé Ladbroke* v *Commission* [7] is of greater interest for the present case. In that judgment, the Court, after describing the logic of the system of levies on totalisator betting (paragraph 34), notes that 'the system of statutory and fiscal retentions on bets on French horse-races was adopted in the light of the specific regulatory and economic conditions prevailing with regard to horse-racing and totalisator betting in France. There can be no requirement to transpose that system to totalisator betting on Belgian horse-races, which are organised under different regulatory and economic conditions. Moreover, since the levy rates in France and Belgium differ and the application of Belgian rates to bets placed in France is justified for reasons relating to the logic of the totalisator betting system referred to in paragraph 34 of this judgment, that levy cannot, in any event, be shared out between the various recipients on exactly the same basis in the two cases.' [8]

22. In that judgment, the Court took account of the particular nature and the general scheme of the system of retentions on totalisator horse-race betting in order to substantiate its position that (i) the differences in the retentions on bets in France and Belgium and (ii) the application of the Belgian rates to bets placed in France on Belgian horse-races were compatible with Community law. It follows, therefore, from that reasoning of the Court that the nature and general scheme of the particular framework within which the national measure at issue is set should be examined. The above view of the Court is all the more important for deciding the present case inasmuch as it was expressed in a judgment which concerned precisely the same legal and factual context as the one at issue here, namely the

6 — Joined Cases C-72/91 and C-73/91 *Sloman Neptun* v *Bodo Ziesemer* [1993] ECR I-887.

7 — Case C-353/95, cited in footnote 4 above.

8 — Paragraph 35.

issue of levies on totalisator horse-race betting in France.

23. I will now examine the individual criticisms made by the appellant of the judgment at first instance. I consider that the Court of First Instance neither ignored nor misconstrued the need to assess the nature and general scheme of the system within which the national measure was set before it concluded that the measure constituted State aid.

24. An initial indication that the Court of First Instance neither failed nor refused to consider the criterion of the 'nature and general scheme of the system' when examining the facts of the case with regard to Article 92(1) of the Treaty is provided by paragraph 76 of the contested judgment. After stating that the tax arrangements applicable to the PMU took into account not only the particular way in which totalisator betting was organised in France but all the characteristic features of French horse-racing, the Court of First Instance held that 'the Commission was entitled to take the view that the special system of levies, which determines the proportion of betting revenue allocated to the State, the bettors, the PMU and the racecourse undertakings, respectively, did not constitute a derogation from the tax arrangements generally applied to other activities, and that, consequently, the measure concerned had to be evaluated solely in the context of the special tax arrangements applicable to the horse-racing sector'. That finding of the Court of First Instance is, of course, not concerned with the specific measure, reducing the public levy by 1.6%, referred to by the French Government in the part of the first ground of appeal now under consideration; it demonstrates, however, that the Court of First Instance is at least aware of the particular features of the legal framework governing public levies on totalisator horse-race betting in France and is willing to take them into account.

25. So far as concerns the specific criticisms of the French Government now under consideration, it is to be noted that its reasoning is founded on an incorrect understanding of the Commission's decision. The Commission did not assess the particular nature of the French system of levies on totalisator horse-race betting in an automatic and vague manner when it decided that the measure reducing the public levies was not State aid; on the contrary, it first applied three criteria from which it derived three propositions — (i) that the measure at issue amounted merely to a limited reduction in the levy rates which does not strengthen the financial situation of an undertaking in a monopoly position; (ii) that the measure was permanent in nature; and (iii) that the measure was not designed to finance a specific *ad hoc* operation — in order to reach the conclusion that the measure amounted not to State aid but to 'a reform in the form of a "tax" adjustment that is justified by the nature and economy [sic] of the system in question'. Consequently, since the Court of First Instance disputed the interpretative value and correctness of those three criteria in paragraphs 56 to 62 of the contested judgment, it was also correct in disputing the conclusion reached by the Commission that the French measure at issue amounted to 'a reform in the form of a "tax" adjustment

that is justified by the nature and economy [sic] of the system in question'.

26. Nor could it have been found that the criterion of the 'nature and general scheme of the system' was separable from the three other abovementioned criteria and capable of independently constituting the legal foundation for the contested finding by the Commission. First, that approach is in direct conflict with the wording of the Commission decision. Second, justification of action by a Member State consisting of vague reliance on the particular character and the nature and general scheme of a system is not in any way a sufficient basis for that action to be taken outside the scope of Article 92(1) of the Treaty. If general arguments of that kind are to be used, there must be a substantive and thorough analysis of the facts of the case which supports the conclusion that those arguments are correct. In other words, if the particular nature and general scheme of the system of levies on totalisator horse-race betting in France could in fact justify, from the point of view of Community competition law, the adoption of a measure such as that at issue, the Commission was obliged to explain with detailed arguments the causal relationship linking the argument as to the 'particular character of the system' and its conclusion that the national measure was not to be categorised as State aid. Since the matters which had been put before the Court of First Instance for its consideration, as set out in the contested judgment, did not include specific and thorough arguments from which it could be clearly demonstrated that the national measure was justified by the nature and general scheme of the system of levies on horse-race betting in France, the decision of that Court, adjudicating on the substance, to regard the reduction in the levy as State aid does not display any error in law.

27. In that regard, there is no foundation in the submission that the Court of First Instance erred because it did not consider the three abovementioned Commission criteria in the light of the particular nature and general scheme of the system of levies on totalisator horse-race betting in France. First, the Court of First Instance did not examine whether those criteria were correct in the abstract but sought to ascertain their practical utility and legal correctness in the specific context of the dispute before it, that is to say in the context of the particular system of public levies on horse-race betting in France; it therefore took account of the nature and particular character of the system. Second, even if it were accepted that additional arguments could have been drawn from the parameter of the nature and general scheme of the system which might have led the Court of First Instance to accept the Commission's reasoning so far as concerns the three criteria adopted by it, again, as indicated above, those arguments had not been placed before the Court of First Instance for its consideration.

28. The French Government considers, furthermore, that even if it were accepted that the Court of First Instance took account of the nature and the general scheme of the system when it assessed whether the views taken by the Commission were lawful, the contested judgment should again be set aside in that regard because the legal classification of the rele-

vant facts was incorrect. The French Government levels criticism at paragraph 58 of the contested judgment, where the Court of First Instance overturned the Commission's reasoning — that the change in the levy rates was not intended to finance a specific operation — and concluded that that change, irrespective of its objective, in fact enabled the PMU to finance operations, and in particular 'to deal with the costs of computerisation and restructuring necessary for the organisation of its management responsibilities'. It also criticises paragraph 59 of the judgment, contending that the Court of First Instance was wrong in its view that the reduction in the rate of the public levy decided on by the French authorities by the adoption of the national measure at issue was not limited in nature.

29. By those submissions the French Government is in reality seeking to contest the findings of the Court of First Instance on the facts. Since the criticisms of the contested judgment are directed at factual appraisals of the court adjudicating on the substance, they must be rejected as inadmissible. [9]

9 — The Court has consistently held that appeals may be based only on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts. The Court of First Instance, as the court adjudicating on the substance, has exclusive jurisdiction to find the facts. The Court of Justice may merely review the legal classification of those facts and the legal consequences which the Court of First Instance has drawn from them, except where the substantive inaccuracy of the latter's findings is apparent from the documents submitted to the Court of Justice (distortion of the sense of evidence). See, for example, Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraphs 48 and 49, and Case C-8/95 P *New Holland Ford* v *Commission* [1998] ECR I-3175.

(iii) Contradictory reasoning of the Court of First Instance

30. The appellant contends that the grounds of the contested judgment are contradictory. It refers in particular to paragraph 154 thereof, where the Court of First Instance states that 'it is apparent from the contested decision that before the PMI was set up in January 1989 there was no trade between France and the other Member States, which means that before that date there was not even competition between the PMU and the other economic operators active on the Community market in bet-taking'. The French Government maintains that, since the Court of First Instance made that finding, it also had to hold that no measure which was adopted for the benefit of the PMU before 1989, and in particular the measure waiving part of the public levy in 1985 and 1986, could constitute State aid.

31. That appellant's argument is not correct. As Ladbroke rightly observes, a finding that there was no competition at the time when a national measure favouring certain undertakings was adopted does not necessarily mean that it is not State aid. The requirements for establishing the existence of State aid, which relate to conditions of trade and of the market, must be examined in a dynamic fashion. In other words, it is necessary to take account of likely prospects and developments with regard to inter-State commerce, trade and the con-

duct of undertakings or consumers and to show the dynamic character of the effects of the conduct under consideration on conditions of competition.

32. That obvious aspect of reviewing whether the requirements of Article 92(1) of the Treaty are met is also recognised by Advocate General Tesauro in his Opinion in *Belgium* v *Commission* [10] when he refers to 'the need to assess, in a *dynamic* perspective, whether the condition of hindrance to trade (and also that of distortion of competition) exists' and to appraise the 'foreseeable development of the pattern of trade'. [11] In the same case, the Court justified its finding as to the existence of State aid within the meaning of Article 92(1) of the EC Treaty by stating more specifically that 'it [was] possible that aid might distort competition within the Community' [12] inasmuch as '*it was ... reasonably foreseeable* [13] that Tubemeuse [the recipient of the aid] would redirect its activities towards the internal Community market'. [14]

33. Having regard to the above, the view of the Court of First Instance concerning State aid as a result of the reduction in the public levy on totalisator horse-race betting in France is entirely correct; its correctness in law is not undermined by the finding in paragraph 154 of the contested judgment that before 1989 there was no competition between the PMU and the other economic operators active on the Community market in bet-taking, nor is it contradictory with that finding.

(b) Second part of the first ground of appeal (cash-flow benefits in favour of the PMU)

34. This part of the first ground of appeal concerns paragraphs 63 to 82 of the contested judgment, where the Court of First Instance held that the Commission had misapplied Article 92(1) of the Treaty in finding that the cash-flow benefits granted by France, which enabled the PMU to defer the payment of certain betting levies, did not constitute (unlawful) State aid. The appellant essentially repeats its complaints connected with the first part of this ground of appeal concerning the scope of judicial review and the failure of the Court of First Instance to assess the particular nature and general scheme of the system of levies on totalisator horse-race betting in France. Those complaints should, however, be rejected for the reasons set out above.

35. In addition, the French Government criticises paragraphs 79 and 81 of the contested judgment. Those submissions must, however, be rejected.

10 — Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959.
11 — Point 29 of the Opinion.
12 — Paragraph 35.
13 — Emphasis added.
14 — Paragraph 38.

36. As regards paragraph 79, the French Government maintains that the Court of First Instance was wrong in finding that the contested Commission decision did not contain evidence supporting the conclusion that the change in the rules concerning payment to the Treasury of the public levies did not constitute an *ad hoc* derogation, but was a general amendment to the tax regime for the entire horse-racing sector and not only for the PMU.

37. The appellant is in reality attempting to induce the Court of Justice to reassess the facts of the case, in order to reverse the position of the Court of First Instance that the national measure at issue constituted an *ad hoc* provision for the exclusive benefit of the PMU. Its submissions must therefore be rejected as inadmissible in that they fall outside the scope of appellate review. Even if they were interpreted as pleas that the Court of First Instance distorted the content of the Commission decision or did not consider a material submission, they should still be rejected as unfounded. The Court of First Instance was aware of the passages in that decision referred to by the appellant (as is clear from paragraph 31 of the contested judgment), carried out a correct legal assessment of its entire content and concluded that it contained nothing to support the view that the provision in question amounted not to an *ad hoc* measure but to tax reform of a general nature.

38. In addition, as regards paragraph 81 of the contested judgment, the appellant challenges the view of the Court of First Instance that the Commission had advanced inadequate evidence in support of its position that the State measure at issue was made in the context of the exceptionally heavy taxation of the horse-racing sector, which was considerably higher than in other sectors.

39. The above submission relates to the assessment of matters which are for the Court of First Instance when it adjudicates on the substance and it cannot be examined on appellate review. Thus, this part of the first ground of appeal should be rejected in part as inadmissible and in part as unfounded.

(c) Third part of the first ground of appeal (making unclaimed winnings available to the PMU)

40. In paragraphs 96 to 112 of the contested judgment, the Court of First Instance overturned the Commission's conclusion that the French decree which placed unclaimed horse-race winnings at the disposal of the PMU did not amount to State aid because those sums constituted 'normal resources' and not 'State resources' within the meaning of Article 92(1) of the Treaty.

41. The French Government submits that the contested judgment should be set aside

to that extent. The sums in question have always been made available to the racecourse undertakings and the national measure merely altered (widened) the spectrum of possible uses to which they could be put, without there being any question of a transfer of State resources to the PMU. The French Government maintains that, having regard to the particular nature and the general scheme of the horse-race betting system, the revenue which remains available to the racecourse undertakings after the payment of winnings to bettors and deduction of the public levies necessarily constitutes normal resources. The fact that at a given moment the public authorities restrict the use of part of those resources to particular objectives does not convert them from normal resources into State resources. Furthermore, the appellant points out, an undertaking's 'private' funds are not converted into State aid by making their use subject to State regulation. [15]

42. I am unable to accept the above reasoning of the appellant. The latter relies in an unclear and speculative fashion on the particular features and special characteristics which are, in its view, exhibited by the system for allocating the revenue from totalisator horse-race betting in France, in an attempt to overturn the finding of the Court of First Instance that the relevant resources, irrespective of how they are described, were subject to State control and therefore constituted State resources. In paragraphs 105 to 111 of the contested judgment the Court of First Instance sets out in a legally correct manner the justification for its view that the national measure at issue is to be characterised as State aid.

43. More specifically, the Court of First Instance, after noting that the measure at issue enables the racecourse undertakings to cover certain social security costs of the PMU, finds, on the basis of certain criteria, that in France the amount which is collected from the winnings left unclaimed by bettors is under the control of the competent national authorities. Inasmuch as the relevant national provision extended the range of possible uses for those sums to activities of the racecourse undertakings other than those originally envisaged, it follows that all the national legislature did by means of that extension was 'in effect to waive revenue which would otherwise have been paid to the Treasury, so that, for the same reason, the condition for applying Article 92(1) of the Treaty, namely that State funds are transferred to the recipient, is satisfied in the present case'. [16]

44. It should also be noted that the path followed by the Court of First Instance when interpreting the concept of State aid is entirely consistent with the route traced by the Court of Justice in its case-law. It is sufficient to refer to its recent judgment in *Piaggio*, [17] which demonstrates the breadth of the concept of State aid for the purposes of Article 92(1) of the EC Treaty. That

15 — The appellant refers to paragraphs 65, 66 and 67 of the judgment in Case T-358/94 *Air France* v *Commission* [1996] ECR II-2109.

16 — Paragraph 109 of the contested judgment.

17 — Case C-295/97 *Piaggio* v *Ifitalia* [1999] ECR I-3735.

concept 'necessarily implies advantages granted directly or indirectly through State resources or constituting an additional charge for the State or for bodies designated or established by the State for that purpose'. [18] It was held in *Piaggio* that the application of a national rule for placing undertakings under special administration, which allows the undertakings concerned to continue trading, may amount to the grant of State aid where it confers on those undertakings certain advantages which burden the public authorities 'in the form of a State guarantee, a *de facto* waiver of public debts, exemption from the obligation to pay fines or other pecuniary penalties, or a reduced rate of tax'. [19]

45. In addition, it is stated in *Air France*, a case relied on by the appellant, that Article 92(1) of the Treaty applies to 'all the financial means by which the public sector may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector'. [20] Accordingly, the fact that the sums in question, while not held by the State throughout, are continuously subject to its control and therefore to the power of disposal of the competent national authorities is sufficient for them to be characterised as State resources and for the French provision at issue to be brought within the scope of Article 92(1) of the EC Treaty.

46. In conclusion, the submissions put forward by the appellant in the third part of the first ground of appeal are unfounded.

(d) Fourth part of the first ground of appeal

47. This part of the ground of appeal concerns paragraphs 113 to 122 of the contested judgment, where the Court of First Instance finds an error of fact on the part of the Commission. More particularly, when the Commission assessed, from the point of view of Community law, a national measure exempting the racecourse undertakings from the one-month delay rule for the deduction of VAT, it manifestly erred as to the facts in thinking that the system under which a permanent deposit is lodged with the Treasury in order to offset the exemption had existed since 1989 when it had in fact first applied in 1969.

48. The appellant maintains that it was not open to the Court of First Instance to rely on facts relating to the period before

18 — *Piaggio*, cited in footnote 17 above, paragraph 35. See also Joined Cases C-52/97, C-53/97 and C-54/97 *Viscido and Others* v *Ente Poste Italiane* [1998] ECR I-2629, paragraph 13.

19 — *Piaggio*, cited in footnote 17 above, paragraph 42.

20 — *Air France*, cited in footnote 15 above, paragraph 67.

1 January 1989 in deciding whether the Commission's assessment as to the legality of the exemption after 1 January 1989 was correct. In its view, the approach of the Court of First Instance is wrong in law or, in any event, its reasoning at this point is inadequate.

49. As Ladbroke correctly points out, the appellant's objections do not undermine the relevant findings of the Court of First Instance. They relate to the assessment of facts by the latter adjudicating on the substance and are therefore inadmissible. In any event, however, the French Government's criticisms are based on a misunderstanding of the contested judgment. The Court of First Instance did not find that after 1989 the exemption from the one-month delay rule for the deduction of VAT in fact constituted State aid; it merely stated that, by reason of the manifest errors of fact upon which the Commission's reasoning as a whole was based, it was impossible to assess whether those particular arguments were correct in law since they were based on a mistaken factual position. In other words, the Court of First Instance considered that the errors of fact in the Commission decision contested before it made it impossible to examine whether that decision was correct in law. The Court of Justice cannot interfere with that substantive finding by the Court of First Instance, which falls outside the scope of appellate review. Consequently, the final part of the first ground of appeal should be dismissed as inadmissible.

B — *Second ground of appeal*

(a) Arguments of the parties

50. The appellant challenges paragraphs 179 to 185 of the contested judgment, in particular the finding of the Court of First Instance that, 'in giving reasons for its decision to limit the temporal scope of the French authorities' obligation to recover the aid unlawfully granted to the PMU, it was not sufficient for the Commission merely to rely on the position adopted by the French authorities regarding the legitimate expectations purportedly entertained by the PMU'.[21] More specifically, the Commission had found in its decision that the aid consisting of PMU's exemption from the housing levy as from 1 January 1989 had to be recovered not from that date but from 1 November 1991, the date upon which the procedure under Article 93(2) of the EC Treaty was initiated. It based that finding on the legitimate expectation which the PMU had entertained by reason of a judgment of the French Conseil d'État (Council of State) in accordance with which the activities of the racecourse undertakings appeared to be agricultural in nature, thus justifying their exemption from the housing levy. The Commission considered that that judgment could give rise to legitimate expectations on the part of the racecourse undertakings that the exemption was lawful. The Court of First Instance did not follow the above reasoning of the Commission, finding that 'it is not for the Member State concerned, but for the recipient undertaking, in the context of proceedings before the public

21 — Paragraph 184 of the contested judgment.

authorities or before the national courts to invoke the existence of exceptional circumstances on the basis of which it had entertained legitimate expectations, leading it to decline to repay the unlawful aid'. [22]

51. The French Government submits that the view of the Court of First Instance that legitimate expectations cannot be invoked when the Commission exercises its supervisory functions under Article 92 et seq. of the EC Treaty is not consistent with Community law. It relies, first of all, on the wide discretion accorded to the Commission when it assesses national measures from the standpoint of Community law on State aid. It also disputes the correctness of paragraph 182 of the contested judgment in so far as, contrary to the case-law of the Court of Justice, its effect is that observance of the procedure laid down in Article 93 of the Treaty is an absolute requirement in order for legitimate expectations to be invoked. The French Government meets the settled case-law of the Court of Justice that a Member State cannot invoke the expectations of a recipient of aid in order to escape its duty to take the necessary measures to enforce a Commission decision requiring it to recover aid, by relying on Case C-169/95 *Spain* v *Commission*, [23] whose effect, in its view, is that a Member State may raise the legitimate expectations of the recipient undertaking in order to challenge the legality of such a Commission decision in judicial proceedings. It seeks to reconcile its interpretation of the judgment in *Spain* v *Commission* with the previous case-law in the following way: while the classic prohibition is preserved, preventing a Member State from resorting to the argument as to legitimate expectations in order to refuse to enforce a Commission decision requiring it to recover aid which has been paid unlawfully, that State may nevertheless raise the issue before the Commission; if the latter is not persuaded and adopts a decision requiring repayment of the aid, the Member State must then seek its recovery but at the same time retains the possibility of taking legal proceedings against the Commission decision. Thus — still following the French Government's reasoning — the Court of First Instance wrongly denied the Commission the possibility of examining the submission of a Member State that a recipient of aid entertained a legitimate expectation that the aid was lawful. The French Government adds that the Court of First Instance's position is over-formalistic since it does not allow a timely argument directly related to the question of the recovery of the aid to be examined at the stage when the Commission exercises its supervisory functions.

52. Ladbroke agrees with the reasoning of the Court of First Instance, considering that it alone is compatible with Community law on State aid and the objectives of that law. Ladbroke observes that *Spain* v *Commission*, upon which the appellant's line of argument is founded, is fundamentally different from the present case. In that case, the Court of Justice had been called on to decide whether the conduct of Community institutions, in particular the Commission, could be considered to create legitimate expectations on the part of the recipient of unlawfully granted aid; here, however, the conduct which may have given rise to the expectation took place

22 — Paragraph 183 of the contested judgment.

23 — Case C-169/95 *Spain* v *Commission* [1997] ECR I-135.

purely at national level. It would thus be wrong to allow the Commission to intervene in a national matter of that kind and to regard such a matter as capable of hindering the application of Community rules on State aid. That would render the procedure under Article 93 of the EC Treaty redundant, in particular the obligation to notify aid. Finally, Ladbroke states that paragraph 182 of the contested judgment is legally correct.

(b) Consideration of the ground of appeal

53. In my view, the question under consideration may be dealt with from two different angles which do not necessarily lead to the same result. The focal point of the analysis which follows is the defining of the (national and/or Community) factors used to determine the scope, and the conditions for application, of the principle of the protection of legitimate expectations.

(i) Legitimate expectations, a dual-natured concept

54. The concept of legitimate expectations in the particular context of the refund of aid which has been paid unlawfully appears to be dual-natured: first, its scope and application are laid down by national law subject to the conditions, and within the framework, specified by Community law; second, the recipient's belief as to the legality of the unlawful aid may be created both by conduct of the national authorities and by that of the Commission.

55. The duality of legitimate expectations is shown by the Court's judgment in *Deutsche Milchkontor*,[24] which concerned the repayment of unlawful Community aid. In that judgment it is stated:

'The first point to be made... is that the principles of the protection of legitimate expectation and assurance of legal certainty are part of the legal order of the Community. The fact that national legislation provides for the same principles to be observed in a matter such as the recovery of unduly paid Community aids cannot, therefore, be considered contrary to that same legal order. Moreover, it is clear from a study of the national laws of the Member States regarding the revocation of administrative decisions and the recovery of financial benefits which have been unduly paid by public authorities that the concern to strike a balance, albeit in different ways, between the principle of legality on the one hand and the principles of legal certainty and the protection of legitimate expectation on the other is common [to] the laws of the Member States.'[25]

24 — Joined Cases 205/82 to 215/82 *Deutsche Milchkontor* v *Germany* [1983] ECR 2633.

25 — *Deutsche Milchkontor*, paragraph 30.

56. That judgment goes on to state that the legitimate expectations recognised by national law may be relied upon only to the extent that such reliance is consistent with the like-named principle forming part of the Community legal order, account having to be taken of the interests of the Community and the need not to affect the scope and effectiveness of Community law. [26] The above reasoning has also been employed by the Court in relation to the question of the repayment of State aid which is unlawful because it contravenes Articles 92 and 93 of the EC Treaty. [27]

57. There is, however, a fundamental difference between the repayment of Community aid and the recovery of unlawful State aid. State aid is adjudged contrary to Community law because it confers a competitive advantage on the undertaking receiving it and distorts the conditions of free trade. For that reason, its recovery constitutes an imperative need in order to repair the damage to Community law. Community aid, on the other hand, has different objectives (support of a particular economic activity, in the interests of the Community). A finding that aid of that kind is unlawful merely means that the aid did not meet the preconditions for its grant, without the infringement also prejudicing the provisions governing competition. Significant conclusions with direct consequences for the scope of the protection afforded to legitimate expectations may be drawn from the difference set out above. For example, a claim by a recipient of State aid that he is no longer enriched because the benefit has been passed on to the consumer is not a sufficient basis for setting aside the obligation to repay the aid; the same submission may, on the other hand, meet with a favourable response in the case of unlawful Community aid. [28]

58. It follows, therefore, that the Community interest requiring State aid to be recovered is clearly greater than the interest in the repayment of Community aid — indeed it appears to be difficult to set the former aside in favour of the protection of legitimate expectations. It may be observed in summary that, even where the refund of State aid is at issue, the Court follows, in

26 — *Deutsche Milchkontor*, paragraphs 22 and 32.

27 — See Case 94/87 *Commission* v *Germany* [1989] ECR 175 (known as *Alcan I*), paragraph 12, and Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437 (known as *BUG-Alutechnik*), paragraphs 13 to 16.

28 — With regard to the difference in the treatment of legitimate expectations according to whether State or Community aid is at issue, see the judgments in, respectively, Case C-24/95 *Land Rheinland-Pfalz* v *Alcan Deutschland* [1997] ECR I-1591 (known as *Alcan II*) and Case C-298/96 *Oelmühle and Schmidt Söhne* v *Bundesanstalt für Landwirtschaft und Ernährung* [1998] ECR I-4767.
As Advocate General Jacobs stated in point 40 of his Opinion in *Alcan II*, '... [in *Deutsche Milchkontor*] the Court properly left the matter to be decided in accordance with national law since there was no overriding Community interest justifying encroachment upon the procedural autonomy of the Member State concerned. By contrast, if a similar situation arose in relation to State aid, it would jeopardise attainment of the aims of the Treaty provisions to allow the recipient of aid to resist recovery because he had passed on the benefit of the aid to his customers by lowering his prices. In such circumstances he would with impunity receive a significant competitive advantage.'
In this connection, Advocate General Léger observed in his Opinion in *Oelmühle* (points 47, 48 and 49): 'The Court has consistently held that a State's obligation to repeal an aid which the Commission finds incompatible with the common market is designed to bring about the restoration of the previous situation. Just as for the recovery of Community aid, the recovery of a State aid must in principle be effected in accordance with the relevant provisions of national law, provided that they are applied in a way which does not make it impossible in practice to effect the recovery required by Community law. In particular, the interests of the Community must be taken fully into consideration when applying a provision which makes the revocation of an unlawful administrative act subject to an assessment of the different interests arising. On the other hand, the Court's case-law relating to these two areas differs considerably. The specific nature of State aid justifies the Court's very rigorous approach to pleas based on principles of national law such as that of the protection of legitimate expectations or that of legal certainty in order to resist the repayment of aid.'

principle, the reasoning adopted in *Deutsche Milchkontor*, namely: (i) the principle of the protection of legitimate expectations constitutes a general principle of Community law which is derived from the legal traditions common to the Member States; (ii) the scope of legitimate expectations and the conditions under which they apply are determined by the domestic law of the Member States; and (iii) the body applying the principle at national level must observe the principles of equal treatment and of effectiveness of Community law and respect the Community interest. However, precisely because of the particular nature of State aid and the need to safeguard the imperative Community interest in rectifying the conditions of competition, the Court has the tendency to restrict the legal autonomy of the national legal orders, by laying down itself the substantive requirements for recognising that legitimate expectations are entertained or even by directly prohibiting the application of national provisions.

59. More specifically, the Court has preferred to define the concept of a diligent businessman itself, restricting the opportunities for recipients of aid to invoke legitimate expectations. [29] In addition, it has completely taken away the ability of the Member States to resort to the principle of the protection of legitimate expectations in order to avoid recovering unlawful aid. [30] It has indeed gone as far as to reshape, if not overturn, national law on legitimate expectations with regard to the specific instances where it is applied in the context of the recovery of unlawful State aid. It is, I believe, essential to dwell on that last issue.

60. A characteristic example of the tendency to reduce the autonomy of the Member States is provided by the judgment in *Land Rheinland-Pfalz* v *Alcan Deutschland* (cited in footnote 28 above; hereinafter '*Alcan II*'), where the Court overrode Paragraph 48 of the German Verwaltungsverfahrensgesetz (Law on Administrative Procedure). More specifically, it ruled:

'Community law requires the competent authority to revoke a decision granting unlawful aid, in accordance with a final decision of the Commission declaring the aid incompatible with the common market and ordering recovery, [(i)] even if the authority has allowed the time-limit laid down for that purpose under national law in the interest of legal certainty to elapse ..., [(ii)] even if the competent authority is responsible for the illegality of the aid decision to such a degree that revocation

29 — 'In view of the mandatory nature of the supervision of State aid by the Commission under Article 93 of the Treaty, undertakings to which an aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article. A diligent businessman should normally be able to determine whether that procedure has been followed' (Case C-5/89, cited in footnote 27 above, paragraph 14).

30 — 'A Member State whose authorities have granted aid contrary to the procedural rules laid down in Article 93 may not rely on the legitimate expectations of recipients in order to justify a failure to comply with the obligation to take the steps necessary to implement a Commission decision instructing it to recover the aid' (Case C-5/89, cited in footnote 27 above, paragraph 17).

appears to be a breach of good faith towards the recipient, where the latter could not have had a legitimate expectation that the aid was lawful because the procedure laid down in Article 93 of the Treaty had not been followed ... [and (iii)] even where such recovery is excluded by national law because the gain no longer exists, in the absence of bad faith on the part of the recipient of the aid.' [31]

61. It is to be noted that in that case the Court followed the Opinion of the Advocate General and found that the national authorities 'do not ... have any discretion as regards revocation of a decision granting aid', [32] overturning in that way the fundamental rule of German administrative law that it is in principle for the administration, acting in its discretion, to decide on the revocation of an advantageous administrative measure which is contrary to the law.

62. There is a further interesting aspect of the Community case-law on the repayment of unlawful State aid, from which it appears that the Court of Justice prefers to entrust the national courts with the issue of assessing the legitimate expectations of recipients of aid, the latter being expected to take action before those courts if they are to avoid returning the benefit which they have reaped. [33]

63. It is not by accident that the possibility of relying on legitimate expectations is tied to the jurisdiction of the national courts. The latter are the national authorities before which legal disputes concerned with the enforcement of Commission decisions requiring unlawfully paid aid to be refunded are considered likely to end up. Furthermore, they provide greater guarantees of independence and neutrality than the national administrative departments which might also have played a part in the grant of the unlawful aid; it is therefore to be anticipated that national courts will weigh up the Community interest better than some other State authority. They are also the most suited to taking account of the parameter of the effectiveness of Community law. Finally, if a problem of interpretation arises with regard to the above issues and the way in which they affect the application of national rules concerning legitimate expectations, the national courts are in the privileged position of being able to refer a question to the Court of Justice for a preliminary ruling.

31 — *Alcan II*, operative part of the judgment.

32 — *Alcan II*, paragraph 34. See also point 27 of the Opinion of Advocate General Jacobs in the same case.

33 — The Court's preference in favour of the national court as the 'natural adjudicator of the legitimate expectations of recipients of unlawful State aid' is apparent in paragraph 16 of the judgment in Case C-5/89, cited in footnote 27 above, which followed the Opinion of Advocate General Darmon (points 17 to 26). The judgment states: 'It is true that a recipient of illegally granted aid is not precluded from relying on exceptional circumstances on the basis of which it had legitimately assumed the aid to be lawful and thus declining to refund that aid. If such a case is brought before a national court, it is for that court to assess the material circumstances, if necessary after obtaining a preliminary ruling on interpretation from the Court of Justice'. See also Case C-39/94 *SFEI and Others* v *La Poste and Others* [1996] ECR I-3547.

64. The national administrative authorities are of course allowed to reject submissions as to legitimate expectations, whereupon the recipient of the aid will in all probability bring proceedings in the national courts. By contrast, it is not open to those authorities not to seek recovery of the unlawful aid by accepting (whether acting of their own accord or following the submission of a request) that legitimate expectations are entertained. In that case they would be acting contrary to the direction of the Court of Justice as set out in Case C-5/89, cited in footnote 27 above. Moreover, that decision by the authorities would probably never be brought before the national courts for review, resulting in a risk that the Community interest would remain unprotected. [34]

65. Consequently, always assuming that the above indications in the case-law are borne out by future judgments, it appears that the Court has laid down a further procedural and formal rule concerning the application of the principle of the protection of legitimate expectations where the recovery of unlawful State aid is at issue. Under the above rule, that general principle is not protected by the national administrative bodies, acting of their own accord or following a request, but by the courts. In other words, the national courts are converted into special authorities for assessing an issue which in principle falls within the competence of the administrative authorities, while the latter are relegated to bodies which merely implement Commission decisions.

66. In short, certain fundamental rules of national administrative law relating to the application of the principle of legality and to the division of powers between judicial and administrative authorities are undermined, if not entirely set aside, by the above case-law. Not only is the autonomy of national law shrunk to almost nothing when it is applied to cases with Community interest; more significantly, rather, through the safeguarding of the Community interest the constituent elements of the national legal order are prejudiced, possibly resulting in inexpert or even arbitrary legal structures.

67. The chief reason for the creation of the above — in my view regrettable — situation must be sought in the starting point from which the logic of the present case-law proceeds, that is to say in the acceptance of the duality of legitimate expectations. It is not clear that the endeavour to combine Community and national elements in order to fashion a dual-based concept of legitimate expectations results in conclusions which are acceptable for the legal system or in a satisfactory reconciliation of the need to protect the trader acting in good faith and the need to safeguard the conditions of competition.

68. Nor is it obvious that, by entrusting this issue to the national courts for decision by them, their role is enhanced, preserving the balance between the national and

34 — The above explanation is necessary in order to understand the final words of paragraph 183 of the contested judgment, according to which the recipient of the aid may plead legitimate expectations '... in the context of proceedings before the public authorities or before the national courts'.

Community legal orders at the present stage of European integration. The national courts are in a difficult position. First, they do not feel secure when they rely on the specific provisions of national law, in particular following the stringent position adopted by the Court in *Alcan II*.[35] Second, the Court of Justice, by its abovementioned case-law, is giving them strong encouragement to refer questions to it for a preliminary ruling on a systematic basis, especially when they are called on to weigh up the Community interest in that particular category of disputes. From the moment, however, that definition of the Community interest determines entirely whether, and in what manner, the national provisions will be applied, the whole legal problem passes in reality to the 'high inspectorate' of the Court. Finally, it is not clear that legal certainty is served by the fact that the national rules regarding legitimate expectations remain in force but may be overturned at any moment if they are considered to be incompatible with the objectives of Community law.

69. Following the above general observations, I will now consider the ground of appeal before the Court in the light of its case-law referred to above. On the basis of that case-law, I consider that the Court of First Instance was correct in finding that it was not open to the French Government to submit that the racecourse undertakings entertained legitimate expectations as a result of the abovementioned judgment of the Conseil d'État as regards the lawfulness of the national measure at issue and, consequently, that the Commission should not have relied on that submission to restrict the temporal scope of the obligation to recover the unlawfully granted aid.

70. The principal argument in favour of the position adopted by the Court of First Instance must, prima facie, be sought in the settled case-law of the Court, according to which 'a Member State whose authorities have granted aid contrary to the procedural rules laid down in Article 93 may not rely on the legitimate expectations of recipients in order to justify a failure to comply with the obligation to take the steps necessary to implement a Commission decision instructing it to recover the aid. If it could do so, Articles 92 and 93 of the Treaty would be set at naught, since national authorities would thus be able to rely on their own unlawful conduct in order to deprive decisions taken by the Commission under provisions of the Treaty of their effectiveness'.[36] Moreover, the Court of First Instance expressly refers to that case-law in paragraph 181 of the contested judgment.

71. That prohibition laid down by the Court of Justice appears to be founded, first of all, on the general principle under

35 — Cited in footnote 28 above.

36 — Case C-5/89, cited in footnote 27 above, paragraph 17. See also *Spain* v *Commission*, cited in footnote 23 above, paragraph 48.

which nobody may obtain benefit from his own violation of the law (nemo potens propriam turpitudinem allegans). In other words, it has been adjudged unacceptable for the effectiveness of the Community rule — which is safeguarded by the imposition of a strict obligation to notify proposed aid and by the systematic repayment of aid which has been given unlawfully — to be undermined by the very transgressor, namely the Member State, relying on conduct contrary to the Community interest. To allow such reliance could give rise to the absurd result that a Member State is vindicated where, apart from infringing the express obligation to inform the Commission laid down by Article 93(3) of the EC Treaty, it has succeeded in shaping the legal and factual context within which a sum of aid is granted in such a way as to mislead even the diligent businessman, thereby rendering practically inapplicable the decision declaring the aid contrary to Community competition law.

72. In addition, a second argument can be advanced in favour of preventing the Member States from resorting to the principle of the protection of legitimate expectations in order to avoid the recovery of unlawful aid; the concept of legitimate expectations is subjective in nature [37] and must therefore be assessed *in concreto*, taking account not only of the conduct of the public (Community and national) authorities which is the underlying reason for the expectations but also of the features particular to the person who entertains them. [38] Thus, when the question is raised as to whether the recipient of the aid entertained legitimate expectations that the aid was lawful (in which case it might not have to be recovered) it is preferable for the authority which will decide that question to have a direct connection with the trader allegedly persuaded that the conduct at national level was lawful; it is then possible to carry out the fullest assessment of those aspects of the concept of legitimate expectations which relate to the subjective situation and to the conduct of the person holding the expectations, for example the diligence which he displayed and/or his good faith. This point also appears to be implicit in the Court's preference in favour of entrusting the issue to the national courts and *in principle* not examining it within the framework of disputes between Member States and the Community, when the recipient of the aid is not present. [39]

73. As Advocate General Tesauro observes in his Opinion in *Spain* v *Com-*

37 — See J.-P. Puissochet, '"Vous avez dit confiance légitime?" (le principe de confiance légitime en droit communautaire', *Mélanges en l'honneur de Guy Brabant*, Dalloz 1996, p. 584.

38 — This is also understood by Advocate General Darmon in his Opinion in Case C-5/89 (cited in footnote 27 above), when he observes that 'the national court must be able to *assess* the conduct of the recipient undertaking *in concreto* ... The doubts with which some undertakings may be assailed, when faced with "atypical" forms of aid, as to whether notification is necessary should not be made light of. But the concrete nature of the assessment to be carried out by the national court must be contrasted with the abstract concept of legitimate expectations on which Germany relies in support of its refusal to implement the Community decision ordering the recovery of aid in question. The existence of legitimate expectations is not presumed, it must be proved' (point 26 of the Opinion).

39 — See above, point 62 et seq.

mission,[40] when the Member State which is the applicant in the case refers to the expectations of the undertaking in receipt of the aid, in actual fact 'it is contesting the obligation imposed on it by the decision to recover the aids at issue, by invoking a legal situation which is not its own, but that of another, the beneficiary undertaking, which is not a party to [those] proceedings, even as an intervener; it is doing that at best in the absence of any specific provision of law conferring on it any such rights of subrogation'.[41]

74. The weight of the above arguments is undermined, however, by the solution reached by the Court in the same case.[42] In its judgment, the Court did not adopt the absolute position proposed by the Advocate General but examined the merits of the submission which had been advanced by Spain relating to the expectations of the recipient undertaking. The Court did not rule fully on the question as to whether or not the undertaking which had benefited from the aid entertained legitimate expectations when it received it, but restricted itself to one aspect of the issue, stating that 'the fact that the Commission initially decided not to raise any objections to the aid in issue *cannot be regarded as capable*[43] of having caused the recipient undertaking to entertain any legitimate expectation since that decision was challenged in due time before the Court ...'.[44]

75. Even after that explanation, however, it is clear that this development in the case-law calls into question, if not conclusions, at least the reasoning of the case-law cited above. From the moment that the Court considered the merits of the submission put forward by Spain, that is to say by a State which had not notified proposed aid, it set aside the argument that national authorities are unable to invoke legitimate expectations in order that they do not benefit from their own unlawful conduct. Similarly, the argument that, when the person entertaining the legitimate expectations is absent from the Community proceedings, the legal issue relating thereto cannot be fully dealt with loses much of its value; in *Spain* v *Commission* the undertakings which had received the aid did not appear before the Court.

76. In my view, the judgment in *Spain* v *Commission* reveals the basic criterion for deciding whether or not the issue of legitimate expectations must be considered by the Court when it is put forward by a Member State. The criterion is none other than the duality of legitimate expectations which is acknowledged by the case-law in the context of the repayment of unlawful State aid. When the underlying reason for the creation of expectations that the

40 — Cited in footnote 23 above.

41 — Point 17 of the Opinion.

42 — *Spain* v *Commission*, cited in footnote 23 above.

43 — Emphasis added.

44 — Paragraph 53 of the judgment.

national measure is lawful 'is attributed' to the conduct of national authorities, the Court refuses to intervene; only as an exception does it agree to rule on whether legitimate expectations formed at national level should be protected or are contrary to the Community interest. [45] By contrast, in cases where it is contended that the mistaken belief as to the legality of the State measure was created by conduct of the Community authorities, usually the Commission, the Court appears to cast its qualms aside and examines that particular dimension of the issue of legitimate expectations.

77. *Spain* v *Commission* was such an instance. In its judgment in that case, the Court exceptionally agreed to examine whether particular conduct on the part of the Commission — its adoption of a decision stating that it wished 'to raise no objections' to the grant of the aid at issue — could be regarded as the underlying reason for a legitimate belief on the part of the recipient of the aid that the latter was consistent with Community law. [46] The choice made by the Court to go into the substance of the issue was directly connected with the 'Community' nature of the conduct at issue, that is to say with the fact that the conduct was attributable to a Community institution. [47]

45 — See *Alcan II* (cited in footnote 28 above). In those instances, the Court answers questions referred to it for a preliminary ruling by national courts, having substantive jurisdiction in respect of the assessment of the legitimate expectations which have arisen at national level.

46 — Nor is it an accident that, on the only occasion when Court has accepted that aid should not be repaid because of legitimate expectations entertained by the recipient, those expectations had been created by acts and omissions of the Commission whose effect was that the decision by it had to be annulled (Case 223/85 *RSV* v *Commission* [1987] ECR 4617). See also *SFEI and Others*, cited in footnote 33 above, in particular points 75 and 76 of the Opinion of Advocate General Jacobs.

47 — At this point, however, two questions arise.
First, may the national courts examine submissions as to legitimate expectations which have been created by conduct at Community level?
At first sight, this venture presents difficulties inasmuch as the ultimate judge of whether acts of the Community institutions are lawful is the Court of Justice. If the Court of Justice has not looked into the issue, the national court seised with the case regarding repayment of aid is in all probability required to refer a question to the Court of Justice for a preliminary ruling on the legal interpretation of the Commission's acts or omissions, in order to be able to rule on whether or not prior expectations have been aroused.
See, however, the Opinion of Advocate General Jacobs in *SFEI and Others*, cited in footnote 33 above, from which it appears to follow indirectly that national courts may take conduct on the part of the Commission into account when establishing whether a recipient of aid entertains legitimate expectations, without it being necessary to refer a question to the Court of Justice for a preliminary ruling. I consider that view to be correct where the assessment does not call into question the compatibility of a decision of a Community institution with Community law.
The relevant passages of the Opinion of Advocate General Jacobs (points 75 and 76) are as follows: '... It is for national courts to assess whether a diligent businessman ought to have realised that the measures in question constituted aid which could be granted only in accordance with the procedure laid down by Article 93(3). In the present case it seems doubtful whether that is so. First, the measures in question are not ones which self-evidently constitute aid; whether they do depends on whether the Post Office received adequate remuneration for its services, a matter which SFMI may have found it difficult, if not impossible, to verify. Secondly, the Commission, after conducting its preliminary inquiry, decided not to proceed with the matter; moreover, since re-opening its inquiry, it has failed for a period of more than three years to reach a decision. In such circumstances the national court, if it were to find that the measures constitute aid, may in my view be justified in considering it inappropriate to order repayment of the aid.'
The second question concerns the applicable law in instances where the Court examines the issue of legitimate expectations created by conduct at Community level. What legal criteria are used to establish whether legitimate expectations are entertained in those specific instances? In all probability criteria of Community law. It follows, therefore, that the Community principle of the protection of legitimate expectations also has a special regulatory content, that is to say its application is not always dependent on the special provisions of national law.

78. Transposing the above reasoning to the present case, I note that there is no mention in Decision 93/625 of the extent to which the Commission itself or another Community institution had, by its conduct, caused the PMU to believe that there were no problems as regards the compatibility of the State aid with Community law; [48] nevertheless, the Commission agrees to examine whether a national judicial decision created, on the basis of national legal rules, expectations on the part of the recipients of the aid which deserved protection. In that way, the Commission involves itself with the assessment of conduct to be attributed to a national authority, an assessment which is carried out in accordance with the national provisions governing the protection of legitimate expectations and the revocation of unlawful administrative measures. In accordance with the case-law as analysed above, the option taken by the Commission of examining the issue in question is therefore not justified. It constitutes an intervention into the purely national dimension of a legal problem which not only exceeds its institutional competence but also offends against the duality of prior expectations in the particular context of the repayment of State aid contrary to Article 92 et seq. of the EC Treaty. [49]

79. In view of the above reasoning, no error of law is apparent in the position of the Court of First Instance that the Commission was wrong to restrict in time the recovery of the unlawful State aid in question on the basis of the French Government's submissions as to legitimate expectations entertained by the PMU.

(ii) Legitimate expectations as a purely Community concept

80. The starting point for the following analysis is a different definition of legiti-

48 — If the Commission's finding had related to conduct to be 'attributed' to a Community institution, I do not consider that problems would have arisen regarding the legality of its decision to look into the question of legitimate expectations. The principle of the protection of legitimate expectations, as a component of the Community legal order, requires the Community institutions to examine whether their conduct has caused persons subject to their administration to entertain beliefs of such a kind as to deserve protection. The ultimate decision on that issue rests, of course, with the Community judicature.

49 — This is a particularly delicate issue. I am not, of course, implying that the question of the legitimate expectations of recipients of aid is one for the national authorities. That submission was, for that matter, made by the German Government in Case C-5/89 and, correctly, not accepted by Advocate General Darmon (points 14, 15 and 16 of the Opinion). In reality, this issue has many aspects, some of which are for the Member States and others for the Community. For example, the question as to whether national requirements for establishing legitimate expectations arising from conduct at national level are satisfied has a purely Member State character and is a matter for decision by the competent national authorities. By contrast, the Community interest or the effectiveness of a Community provision, as parameters to be assessed when determining whether and how the expectation which has been created might be protected, are issues for Community law. The error of the Commission in the present case lies in the fact that it accepted the legal weight of a decision of a French court from the standpoint of French law regarding the revocation of administrative measures, when the issue had not already been dealt with by the national courts and the undertaking alleged to have been misled by that decision was not present before it. Thus, either the Commission determined a Member State issue purely by itself, or it contented itself with submissions of the national authorities regarding how the question of the legitimate expectations of the recipient of the aid was to be considered. On either interpretation, its decision is defective.

mate expectations, for instances where that concept arises in the particular context of the recovery of unlawful State aid. This definition deviates from the *Deutsche Milchkontor* case-law inasmuch as it gives the concept of legitimate expectations a purely Community content, that is to say its application is not, under this definition, a matter for the rules of national law. The definition is founded on the idea that, in the legal context at issue, the protection of legitimate expectations is a concern of the Community legal order, being a parameter connected with the exercise of an exclusively Community competence; that competence consists in remedying the severe damage caused to the conditions of competition in inter-State trade by the payment of unlawful State aid. The administrative measure which gives rise to an issue of protection of legitimate expectations is the Commission decision requiring the aid granted contrary to the Community interests to be recovered. The national measures giving effect to that decision are in reality implementing measures which the national administration is under a mandatory duty to take. [50]

81. The transfer of such a matter to the exclusive regulatory power of Community law is, of course, a further blow to the autonomy of national law, inasmuch as it takes away a particular area of jurisdiction. However, that need not appear strange from a legal point of view or be considered to constitute an impermissible intervention by the Community legal order in the national legal orders which is contrary to the current status quo and not justified at the present stage of European integration.

82. The need to safeguard the effectiveness of Community law when it is implemented at national level has led not only, from the negative point of view, to the shrinking of national legal autonomy — a characteristic example being *Alcan II* — but also, positively, to the restriction of the scope of national law by express formulation of the rules to be applied. Examples are Directives 89/665/EEC and 92/13/EC which contain the procedural rules for ensuring that Community law on public works is duly observed.

83. It is also important to refer to a less well-known passage from the judgment in

50 — See the observations of Advocate General Jacobs in *Alcan II*, cited in footnote 28 above. It is to be noted that it is more correct from a methodological point of view to agree to the issue of legitimate expectations being examined during the Community stage of the procedure, that is to say when the decision-making body (the Commission) has a discretion as to the decisions which it will adopt, than during the national stage of the procedure, when the national bodies will be obliged to give effect to the order issued by the Commission.

Deutsche Milchkontor, where it is held that the need of Community law to intervene in relation to the rules governing the repayment of unlawful aid, that is to say an area of law still open to the Member States, cannot be ruled out. More specifically, while the Court stated that 'in the absence of provisions of Community law disputes concerning the recovery of amounts unduly paid under Community law must be decided by national courts pursuant to their own national law subject to the limits imposed by Community law', [51] it then observed that 'if disparities in the legislation of Member States proved to be such as to compromise ... equal treatment ... or distort or impair the functioning of the common market, it would be for the competent Community institutions to adopt the provisions needed to remedy such disparities'. [52] It is therefore expressly foreseen that Community measures might be adopted on issues relating to the repayment of unlawful aid and the safeguarding of the conditions of competition even though they currently fall within national competence. Such measures would consist in the harmonisation of national provisions or assimilation of the way in which a particular legal issue is dealt with by the national authorities.

84. That pronouncement by the Court is entirely correct and reinforces the comments made above regarding the Community character of the issue of repayment of aid. In particular, the fact that national rules governing the recovery of unlawful aid, which include the parameter of the protection of legitimate expectations, are applied does not mean that that issue is brought within the scope of the national legal order; their application is justified, however, by the fact that, as Community law currently stands, detailed Community provisions have not yet been enacted. The Community institutions therefore retain the power of regulatory intervention if they judge that the Community interest is not met by application of the national rules.

85. The very same reasoning provides the context for the proposition under consideration, whereby legitimate expectations become a Community concept; however, the need for Community law to intervene with regard to the meaning and practical application of the principle of the protection of legitimate expectations as entertained by recipients of State aid is not justified solely in order to protect the Community interest more fully but also in order to avoid the adverse effects on national administrative law which result from the prevailing case-law, as set out above.

86. The intervention by Community law could be achieved by drafting Community legislation which would include the basic procedural and substantive rules governing the recovery of unlawful aid and, of course, also broach the issue of safeguards for traders who have in good faith received

51 — *Deutsche Milchkontor*, cited in footnote 24 above, paragraph 19.

52 — *Deutsche Milchkontor*, paragraph 24.

such State assistance. Furthermore, I am of the view that the absence, until now at least, of Community legislation governing the repayment of aid may be made good, in particular so far as concerns the protection of legitimate expectations, by the work of the Court in shaping the law. It is feasible for the Community judicature to engage in a venture of that kind for two reasons. First, in accordance with the theoretical traditions common to national administrative law, the protection of legitimate expectations constitutes a general principle of law and there is thus scope for filling the gaps in the legislation by means of case-law. Second, the concept at issue already exists as a general principle with a purely Community content, applying principally to the revocation of unlawful administrative measures which create rights. [53]

87. I can therefore see no practical obstacle to accepting that the question of the protection of a trader acting in good faith who has benefited from a national measure contrary to Articles 92 and 93 of the EC Treaty be judged on the basis of the Community principle of legitimate expectations, as applied in the particular context of the recovery of unlawful State aid. In other words, the body applying Community law — and ultimately the Court — will seek to ascertain whether certainty was created in the trader's mind that the aid was compatible with Community law, before balancing the private interest in not repaying the aid against the Community interest. [54]

88. Two observations are called for at this point. First, the national provisions which operate to protect legitimate expectations under domestic law are not immaterial when assessing whether recipients of aid have expectations which are protected at Community level. It is logical for the particular circumstances under which that issue is judged in national law to influence a trader acting in good faith, and they may be sufficient to persuade him that the State aid from which he has benefited is not only lawful but also irreversible. In that case, it is necessary to determine — of course from the standpoint of Community law — the extent to which the national provisions contribute to the creation of legitimate expectations under Community law. Both the conduct of the national authorities which is presented as the underlying reason for the belief that the aid is lawful and the particular provisions concerning legitimate expectations are substantive issues for

53 — See, for example, Case 14/61 *Hoogovens* v *High Authority* [1962] ECR 253 and Joined Cases 42/59 and 49/59 *Snupat* v *High Authority* [1961] ECR 53. It is settled case-law that 'while it must be acknowledged that any Community institution which establishes that a measure which it has just adopted is tainted with illegality has the right to withdraw it within a reasonable period, with retroactive effect, that right may be restricted by the need to fulfil the legitimate expectations of a beneficiary of the measure, who has been led to rely on the lawfulness thereof'. See, for example, Case C-248/89 *Cargill* v *Commission* [1991] ECR I-2987, paragraph 20.

54 — The Court traditionally follows the above judicial reasoning when it examines the issue of prior expectations. See Case 15/85 *Consorzo Cooperativo d'Abruzzo* v *Commission* [1987] ECR 1005, Case C-50/95 P *De Compte* v *Parliament* [1997] ECR I-1999 and Case 84/78 *Tomadini* v *Amministrazione delle Finanze dello Stato* [1979] ECR 1801.

Community law and as such are taken into account by the body implementing it.

89. Second, when the private interest of a trader acting in good faith is balanced against the general Community interest in rectifying the conditions of competition and ensuring that the Community rules are observed, it is expected that the outcome will be unfavourable to the trader. [55] Moreover, we are not faced with a classic relationship between a benefits authority and an individual, as is usually the case in national law. [56] In the category of disputes under consideration, the unlawful act of the national authorities does not prove detrimental solely to their own interests, when it could be maintained that they themselves are to blame for the financial loss which they will suffer if aid is not repaid; that unlawful act adversely affects both a superior legal order, that of the Community, and a category of persons, namely competitors and all those who suffer the adverse consequences of the distortion of competition and the prejudice to inter-State trade. I therefore believe that, in practice, the cases where the protection of the legitimate expectations of a recipient of aid prevails over the abovementioned interests will prove to be entirely exceptional. In order for there to be such an exception, the particular position in which the trader acting in good faith has been placed must be deserving of special protection, a situation which in principle arises only when he is 'misled' into believing that the aid is lawful not only by the conduct or measures of the national authorities but also by inappropriate or misleading acts on the part of the Community institutions. Only then is the need to safeguard the Community interest weakened and the need to protect the trader acting in good faith correspondingly strengthened.

90. Having regard to the foregoing, I will now examine the question which occupied the Court of First Instance in the present case. If the above analysis is accepted, the Commission was correct to consider the issue of the legitimate expectations entertained by the PMU, and the Court of First Instance was wrong to find that it was not open to the Commission to assess the ground put forward by the French Government. That view is imposed precisely by the Community character of the protection of legitimate expectations entertained by recipients of aid acting in good faith. Since the investigation as to whether those expectations exist flows from the general principles of Community law, the Commission, when adopting the relevant measures regarding repayment of the unlawful aid, is not merely entitled, but obliged, to consider that parameter.

91. A number of objections contesting the above view may be put forward. First of all, acceptance that the Commission is able, or even required, to consider the issue in

55 — See above, point 57 et seq.

56 — For example, it is common to recognise legitimate expectations entertained by persons who in good faith receive a social security or pension benefit on the basis of an unlawful administrative measure. In that case, the legal situation of other persons is unaffected by the unduly paid sums not being refunded because of the legitimate expectation.

question in the course of the Community procedure at issue means that the Member States are indirectly given the opportunity to derive benefit from their own unlawful acts and that the legitimate expectations end up being assessed in the absence of the person alleged to hold them, without his even having made a request in that regard. I have already explained that the value of those arguments is only relative and that the Court puts them to one side when faced with a case where it is contended that a measure or conduct of a Community institution has given rise to the trader's belief that the aid is lawful. I consider that the same arguments lose force if it is accepted that the issue of legitimate expectations of a recipient of aid falls in the domain of Community law. In accordance with a commonly held view in administrative law, the protection of legitimate expectations, as a fundamental principle which governs the action of administrative bodies under every legal system, must be taken into account by those bodies of their own accord. Since the Commission must therefore examine that parameter in any event, it is entirely within the Commission's power to rely on it in its decisions even if they are adopted in the absence of the person immediately concerned — that is to say the person entertaining the expectations — or even without a request by him in that regard. [57] It is immaterial that the Member States may benefit if the aid is not repaid. The decision that it need not be repaid will have been adopted irrespective of the appraisal of their interests, and that decision does not remove their liability arising from the unlawful acts which have been committed, a liability which may have various unfavourable legal consequences for them. [58]

92. Nor would there be any foundation to the argument that acknowledgment of that competence to the Commission prejudices the national courts, which are the 'natural adjudicators' of the legitimate expectations of recipients of State aid. Irrespective of the Commission's assessment, the national courts, as the 'ordinary courts of Community law', may examine the issue in question if an application is made to them. Indeed, if they consider that the Commission has misinterpreted and misapplied the Community principle of the protection of legitimate expectations, they can refer a question to the Court for a preliminary ruling.

93. I consider that greater attention should be paid to another criticism which may be made of the view which I am now putting forward, a criticism which relates to the limits of the Community legal order. Does the suggested transfer to Community law alone of jurisdiction to apply legitimate expectations constitute an excessive and impermissible challenge to the Community legal order? As I have explained above, the solution of making the protection of legitimate expectations a Community matter, even solely in relation to the particular issue of the repayment of unlawful State aid, is at first sight a significant blow to the autonomy of national law, in that it takes

57 — I nevertheless cannot fail to spot the fundamental weakness of the Community procedure for monitoring State aid, which makes no provision for the participation of the undertaking granted the aid.

58 — For example, the consequences laid down by the Treaty for failure to comply with the requirements of Community law or those provided for by national law where the persons affected by the aid have a claim for compensation.

away a portion of national jurisdiction. Nevertheless, I take the view that that blow is preferable to the blow inflicted by the case-law of the Court of Justice to date, on the grounds that the Community interest is better protected, legal clarity and certainty are enhanced and the specific elements which make up the national legal order are safeguarded. As I have stated at a previous point in my analysis, it proves more prejudicial to national law, and is uncertain from a systemic and theoretical viewpoint, for national law to be legally autonomous in circumstances where fundamental rules of the national legal order might be overturned or even distorted when they are applied in cases of interest to the Community.

94. The answer to this ground of appeal remains to be given. Having regard to the above analysis, must the solution adopted by the Court of First Instance be set aside? I think not. Despite the mistaken reasoning adopted by it when assessing the relevant part of the Commission decision, the conclusion which it reached is correct, irrespective of its grounds. As is clear from the contested judgment, the Commission decided to restrict recovery of the unlawful aid, finding that a judgment of the French Conseil d'État gave rise to legitimate expectations on the part of the racecourse undertakings. However, it failed to explain the specific reasons why the protection of those expectations — assuming that they were in fact legitimate — prevailed over the mandatory Community interest in restoring free competition and inter-State trade following the very heavy damage caused by unlawful State aid, especially when, as stated above, the need to protect the interests of the person who has received the aid in good faith may prevail only in wholly exceptional cases over the need to safeguard the Community interest at issue. Accordingly, Commission Decision 93/625 manifestly suffered from a defective statement of grounds and was correctly annulled by the Court of First Instance.

(iii) Failure to notify State aid as a ground which precludes legitimate expectations

95. A final point requires explanation. The appellant criticises in particular paragraph 182 of the contested judgment, where it is, in its view, held that an undertaking in receipt of aid may rely on exceptional circumstances establishing that the aid is lawful only where the procedure under Article 93 of the Treaty has been observed. It is not in fact clear that such an absolute position, under which the formal requirements of Article 93 of the EC Treaty must always be satisfied in order for prior expectations to be recognised, is in line with the conclusions of the case-law to date.

96. It follows from a review of the case-law that the reasoning of the Court may be condensed into the following two propositions. On the one hand, the Court observes

that, 'in view of the mandatory nature of the supervision of State aid by the Commission under Article 93 of the Treaty, undertakings to which an aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article. A diligent businessman should normally be able to determine whether that procedure has been followed'.[59] On the other hand, the Court nevertheless finds that 'it is true that a recipient of illegally granted aid is not precluded from relying on exceptional circumstances on the basis of which it had legitimately assumed the aid to be lawful and thus declining to refund that aid. If such a case is brought before a national court, it is for that court to assess the material circumstances, if necessary after obtaining a preliminary ruling on interpretation from the Court of Justice'.[60] Thus, while *in principle* a failure to comply with the obligation of notification laid down by Article 93 of the Treaty prevents legitimate expectations from being created, a recipient of aid nevertheless has a narrow leeway for proving that there may be exceptional circumstances which enable the presumption against him that there are no legitimate expectations to be rebutted.[61]

97. There is, of course, also the precedent of *Alcan II*, where the Court refers to the general position set out above,[62] but appears in the end to consider that legitimate expectations were not entertained in the case before it solely because the State aid at issue had not been notified.[63] However, I do not consider that that judgment is sufficient to overturn the previous case-law and to establish an irrebuttable presumption that failure to notify national measures is sufficient to preclude the creation of legitimation expectations on the part of the recipient of the aid.

98. In any event, however, the error detected in paragraph 182 of the contested judgment is not sufficient to undermine its correctness, since the position of the Court of First Instance with regard to the relevant point of the disputed Commission decision is entirely correct for the reasons previously set out.

59 — Case C-5/89, cited in footnote 27 above, paragraph 14.

60 — Case C-5/89, paragraph 16.

61 — 'Traders in receipt of State aids are professionals who have a duty to take care ... The obligation under which they are placed to verify that prior notification of the aid granted to them has been given to the Commission does not appear to me to be either excessive or particularly difficult to fulfil. However, both the principle of the protection of legitimate expectations itself and the jurisdiction of the national courts to determine such matters must be preserved, and allowance must therefore be made for cases in which the fundamental rights of an undertaking, although it has not verified whether the aid had been notified, are such that it should none the less be accorded the benefit of the protection of legitimate expectations ...' (Opinion of Advocate General Darmon in Case C-5/89, points 25 and 26). The Opinion of Advocate General Jacobs in *SFEI and Others*, cited in footnote 33 above, is to similar effect.

62 — *Alcan II*, cited in footnote 28 above, paragraph 25.

63 — 'It appears from the file on the case that the aid was paid without prior notification to the Commission, so that it was unlawful under Article 93(3) of the Treaty. The first tranche was paid on 9 June 1983, without prior advice to the Commission, and the second on 30 November 1983, after the Commission's letter of 25 November 1983 informing the Federal Government that the grant of the first tranche had been unlawful and that the second tranche should not be paid. In accordance with the principle set out in paragraph 25 of this judgment, the recipient of aid could not, therefore, have had at that time a legitimate expectation that its grant was lawful' (*Alcan II*, paragraphs 30 and 31).

IV — Conclusion

99. In view of the foregoing, I propose that the Court should:

— dismiss the appeal in its entirety;

— order the appellant to pay the costs.