JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)
27 January 1998 *

In Case T-67/94,

Ladbroke Racing Ltd, a company incorporated under English law established in London, represented by Jeremy Lever QC, Christopher Vajda, of the Bar of England and Wales, and Stephen Kon, Solicitor, with an address for service in Luxembourg at the Chambers of Winandy & Err, 60 Avenue Gaston Diderich,

applicant,

v

Commission of the European Communities, represented by Michel Nolin and Richard Lyal, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

French Republic, represented by Catherine de Salins, Deputy Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Jean-Marc Belorgey, *chargé de mission* in the same Directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

intervener,

* Language of the case: English.

APPLICATION principally for annulment of Commission Decision 93/625/EEC of 22 September 1993 concerning aid granted by the French authorities to the Pari Mutuel Urbain (PMU) and to the racecourse undertakings (OJ 1993 L 300, p. 15),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Second Chamber, Extended Composition),

composed of: C. W. Bellamy, President, B. Vesterdorf, C. P. Briët, A. Kalogeropoulos and A. Potocki, Judges,

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the hearing on 11 March 1997,

gives the following

Judgment

Facts and procedure

1 The applicant, Ladbroke Racing Ltd (hereinafter 'Ladbroke'), is a company incorporated under English law and controlled by Ladbroke Group plc whose activities include organising and providing betting services in connection with horse-races in the United Kingdom and other countries in the European Community.

2 The Pari Mutuel Urbain ('the PMU') is an economic interest group (*groupement d'intérêt économique*) consisting of the principal racecourse undertakings (*sociétés de courses*) in France (Article 21 of Decree 83-878 of 4 October 1983 concerning racecourse undertakings and totalisator betting), which was set up to manage the organisation of off-course totalisator betting on behalf of its members. In discharging that responsibility, the PMU's status was initially that of a 'joint administrative department' (decree of 11 July 1930 extending totalisator betting to off-course operations). Article 13 of Decree 74-954 of 14 November 1974 concerning the racecourse undertakings provides that as from that date the PMU alone may manage the organisation of off-course totalisator betting by the racecourse undertakings. The PMU's exclusive position is further safeguarded by the preclusion of persons other than the PMU from offering to receive or receiving bets on horse-races (Article 8 of the Interministerial Order of 13 September 1985 laying down rules for the PMU). It covers the taking of bets on races in France and bets in France on races abroad, services which likewise can be offered only by the racecourse undertakings which are authorised to do so and/or the PMU (Article 15(3) of Law 64-1279 of 23 December 1964 laying down the Finance Law for 1965, and Article 21 of Decree 83-878, cited above).

3 On 7 April 1989 seven companies belonging to the Ladbroke Group, including the applicant, submitted a complaint to the Commission in respect of several forms of aid which the French authorities had granted to the PMU and which those companies maintained were incompatible with the common market.

4 The complaint criticised the following aid measures:

1. cash-flow benefits granted to the PMU in the form of authorisation to defer the payment to the French State of certain charges levied on horse-race betting;

2. the waiver in 1986 of FF 180 million in betting levies in order to assist the PMU in tackling its deficit, subject to its adoption of a recovery plan;

3. exemption from the one-month delay rule for the deduction of VAT;

4. use by the PMU of unclaimed winnings to finance redundancy payments;

5. exemption of the PMU from the employers' contribution to social housing (hereinafter 'the housing levy');

6. the waiver between 1982 and 1985 of amounts deriving from the practice of rounding bettors' winnings down to the nearest 10 centimes;

7. exemption of the racecourse undertakings from corporation tax, representing in 1989 aid worth approximately FF 546 million;

8. exemption of the racecourse undertakings from income tax, normally payable by associations not subject to corporation tax.

5 By letter of 11 January 1991, the Commission informed the French authorities of its decision to initiate the procedure laid down in Article 93(2) of the EEC Treaty in respect of the following seven categories of aid granted to the PMU (OJ 1991 C 38, p. 3):

'1. cash-flow benefits represented by the deferring of the periods for the payment of the Treasury levy, as from 1980 and 1981;

2. waiving of FF 180 million of the levies for 1986;

3. exemption from the one-month delay rule for the deduction of VAT;

4. use of unclaimed winnings to pay an additional redundancy allowance in 1985;

5. exemption from the housing levy;

6. waiving from 1982 to 1985 of amounts deriving from the practice of rounding bettors' winnings down to the nearest ten centimes;

7. exemption from corporation tax.'

6 By letter of 19 March 1991, Ladbroke asked the Commission to adopt interim measures suspending four of the seven measures favouring the PMU, namely (a) the cash-flow benefits; (b) exemption from the one-month delay rule for the deduction of VAT; (c) exemption from the housing levy; and (d) exemption from corporation tax.

7 By Decision 92/35/EEC of 11 June 1991, the Commission asked the French Government to suspend three of those four measures in favour of the PMU which had been introduced in infringement of Article 93(3) of the Treaty and were 'of an ongoing character' (OJ 1992 L 14, p. 35; hereinafter 'the interim decision'), namely (a) the cash-flow benefits; (b) exemption from the one-month delay rule for the deduction of VAT; and (c) exemption from the housing levy.

8 By letter of 24 June 1992, Ladbroke asked the Commission to confirm whether or not the French Government had suspended the aids that were the subject of the interim decision.

9 Since the Commission did not answer that letter, Ladbroke wrote to the Commission on 11 August 1992, calling on it pursuant to Article 175 of the Treaty to define its position in respect of (a) the aids referred to in the complaint but not dealt with in the interim decision; (b) the measures taken by the Commission to enforce the interim decision; and (c) the substantive procedure in respect of the aid concerned in the interim decision.

10 By letter of 12 October 1992, the Commission replied to the letter of formal notice of 11 August 1992 mentioned above. The Commission referred to the measures taken by the French authorities to comply with the interim decision and indicated that the compatibility with the common market of the other aid measures referred to in its decision opening the procedure would be assessed in its final decision pursuant to Article 93(2) of the Treaty.

11 Ladbroke replied to the Commission's letter of 12 October 1992 by letter of 5 November 1992, pointing out that, as the Commission's letter reveals, 15 months after the adoption of the interim decision, not only was the Commission still uncertain whether the French Government had in fact suspended the cash-flow benefits or the exemption from the one-month delay rule for the deduction of

VAT, but the exemption from the housing levy was still in force, in blatant disregard of the interim decision. Accordingly, Ladbroke called upon the Commission once more under Article 175 of the EC Treaty (a) to confirm that the first two categories of aid — the cash-flow benefits and exemption from the one-month delay rule for the deduction of VAT — had been suspended; (b) to ensure suspension of the third category (exemption from the housing levy); (c) to terminate the Article 93(2) procedure within two months of the date of receipt of that letter; (d) to declare the seven aid measures to the PMU to be incompatible with the common market; (e) to order repayment of that aid together with interest at the commercial rate.

12 In the absence of any response to that letter of formal notice, on 5 March 1993 Ladbroke brought an action against the Commission under Article 175 of the Treaty for failure to act, registered as Case T-467/93.

13 On 22 September 1993 the Commission adopted Decision 93/625/EEC concerning aid granted by the French authorities to the PMU and to racecourse undertakings (OJ 1993 L 300, p. 15; 'the contested decision'), terminating the procedure initiated against France.

14 By letters of 13 and 20 December 1993, Ladbroke informed the Court of First Instance that, following the Commission's adoption of Decision 93/625, its action had become devoid of purpose and that it withdrew its application.

15 By order of the President of the Second Chamber of the Court of First Instance of 2 May 1994, Case T-467/93 was removed from the register.

The contested decision

16 In the contested decision, the Commission drew a distinction between two types of sums collected on horse-race betting, namely 'levies' or 'public levies' (*'prélèvements publics'*), which go to the Treasury, and 'non-public levies', which are distributed between bettors. According to the contested decision, for every FF 100 in registered bets, the PMU levies about FF 30 and pays back about FF 70 to the bettors. Of the FF 30 withheld, the PMU uses about FF 5.5 to cover its expenses, the national authorities and the City of Paris retain about FF 18, and the rest is allocated to the racecourse undertakings.

17 The Commission went on to point out that whereas the markets in games of chance have traditionally been partitioned along national lines, betting on horse-races on national courses is organised internationally, and it was not until January 1989, when the Pari Mutuel International ('the PMI') was set up, that the PMU expressly made clear its desire to extend its activities beyond France by concluding agreements in Germany and Belgium, and by thereby entering into competition with other betting organisations and particularly with Ladbroke (part III of the contested decision).

18 Of the seven measures adopted by the French Government in favour of the PMU with regard to which the procedure under Article 93(2) of the Treaty was initiated, three were identified by the Commission as State aid within the meaning of Article 92(1) of the Treaty.

19 The Commission considered that the waiver between 1982 and 1985 of part of the levy (FF 315 million) on the amount deriving from the practice of rounding down bettors' winnings to the nearest ten centimes — allocated to the Treasury since 1967, pursuant to the Finance Law of 17 December 1966 — constituted aid since it was a 'measure limited in time and intended to solve a specific problem', namely

computerisation of the PMU's operations in order to assist it in strengthening its market position (parts IV and V, point 2).

20 It also regarded the exemption from the one-month delay rule for the deduction of VAT as a cash-flow benefit equivalent to State aid; however, the Commission found that this had been offset between 1989 and its abolition on 1 July 1993 by a permanent deposit lodged with the French Treasury (parts IV and V, point 6).

21 Lastly, as regards the PMU's exemption from the social housing levy, the Commission considered that, even though the Conseil d'État held in a 1962 judgment that horse-racing was an agricultural activity and therefore exempt from such contributions, the PMU's activity — organising and processing bets — fell manifestly outside the scope of agricultural activities. Accordingly, since the exemption at issue was not justified under the PMU's articles of association, it constituted State aid (parts IV and V, point 7).

22 However, the Commission considered that the three forms of aid in question qualified for exemption under Article 92(3)(c) of the Treaty.

23 As regards the aid resulting from the waiver of the amounts deriving from the practice of rounding down winnings to the nearest ten centimes, the Commission took the view that, although the intensity of that aid was high (almost 29% of the total cost of computerisation), 'given the state of development of competition and trade before the setting-up of the PMI in January 1989, the aid granted between 1982 and 1985 for the computerisation of the PMU did not produce any disruptive effects on the market contrary to the common interest, bearing in mind the direct and indirect effects of the aid in developing all the economic factors making up the sector, including the improvement of bloodstock' (part VII, point 1).

24 In the case of the exemption from the one-month delay rule for the deduction of VAT, the Commission took the view that — for the same reasons as were cited in connection with the aid just referred to — it had likewise to be regarded as compatible with the common market up to January 1989. Thereafter, any adverse effects of that aid on competition were offset in full by a permanent deposit lodged with the Treasury (part VII, point 2).

25 As for the aid attributable to the exemption from the housing levy, the Commission considered that, like the aid resulting from the exemption from the one-month delay rule for deduction of VAT, it qualified up to 1989 for the derogation provided for in Article 92(3)(c); thereafter, however, it had to be declared incompatible (part VII, point 3).

26 However, with regard to the obligation to repay the aid obtained in that form as of 1989, the Commission stated that '... repayment as from that date should not be required in view of the French authorities' argument that the contribution could not be levied because of the 1962 decision of the Conseil d'État referred to in part IV, point 7' (see above, paragraph 21); none the less, '[that] argument cannot be accepted as from the time when the initiation of proceedings was notified to the French authorities, namely on 11 January 1991'. The Commission also stated that it had not been given the means to quantify for itself the amount of aid to be recovered and requested the French authorities to determine themselves and communicate to the Commission such amount (part VIII).

27 In the case of the other four measures, the Commission decided that the conditions laid down for the application of Article 92(1) of the Treaty were not satisfied.

28 As regards the amounts resulting from unclaimed winnings, the Commission considered that, in so far as those amounts have always been regarded as normal

resources, they form part of the non-public levies. Their use to finance in particular 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 therefore be regarded as State aid, since the State resources criterion is not met (parts IV and V, point 1).

29 As regards the change in the allocation of the public levies (see above, paragraph 16), the Commission stated that the tax arrangements applicable to horse-races are the responsibility of the Member States and increases or reductions in the rate of tax do not constitute State aid provided that they apply uniformly to all the undertakings concerned. The question of State aid arises only where a significant reduction in the rate of taxation strengthens the financial situation of an undertaking in a monopoly position. That was not the case here, however, in so far as the 1984 reduction in the public levy on bets was limited (some 1.6%) and subsequently maintained, and was thus not designed to finance a specific *ad hoc* operation. The French authorities acted with the aim of increasing the resources of the recipients of the non-public levies on a permanent basis. 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 is justified by the nature and economy [sic] of the system in question' (parts IV and V, point 3).

30 As regards the PMU's exemption from corporation tax, the Commission took the view that, in so far as corporation tax 'cannot apply to the [economic interest group] PMU since its legal form is that of an economic interest grouping', the exemption must 'be considered to stem from the normal application of the general tax system' (part V, point 4).

31 Regarding the cash-flow benefit — amounting to nearly two months' additional resources — deriving from the deferral allowed in the payment of the public levies, which was granted to the PMU by decisions of the Minister for the Budget of

24 April 1980 and 19 February 1982, the Commission considered that in so far as that advantage had had the effect of increasing the share of the non-public levies continuously since 1981, it did not involve 'a temporary waiving of resources by the public authorities or a specific *ad hoc* measure', and accordingly fell to be assessed in the same way as the change in the allocation of the levies (see above, paragraph 29) (parts IV and V, point 5).

32 In those circumstances, Ladbroke brought the present action by application lodged at the Registry of the Court of First Instance on 4 February 1994.

33 By application lodged at the Registry of the Court of First Instance on 22 June 1994, the Government of the French Republic sought leave to intervene in support of the Commission.

34 By order of the President of the Second Chamber of the Court of First Instance (hereinafter 'the Court') of 30 August 1994, leave to intervene was granted and on 21 December 1994 the intervener lodged its statement in intervention, on which the Commission submitted its observations on 31 March 1995.

35 After hearing the report of the Judge-Rapporteur, the Court (Second Chamber, Extended Composition) decided to open the oral procedure and, by way of measures of organisation of procedure, asked the parties to produce certain documents and papers relating to the correspondence exchanged with the French authorities on the subject of the aid granted to the PMU.

36 The parties presented oral argument and answered questions put by the Court at the hearing on 11 March 1997.

Forms of order sought

37 The applicant claims that the Court should:

— annul Decision 93/625 in so far as the Commission decides therein that:

(1) the following measures fall outside the scope of Article 92(1) of the Treaty:

(a) cash-flow benefits allowing the PMU to defer the payment of certain betting levies to the State;

(b) exemption from corporation tax;

(c) exemption from income tax;

(d) waiver of FF 180 million of betting levies in 1986;

(e) PMU's entitlement to retain unclaimed winnings;

(f) exemption from the one-month delay rule for the deduction of VAT from 1 January 1989 onwards;

(2) the following measures were compatible with the common market pursuant to Article 92 of the Treaty:

(a) the rounding down of bettors' winnings to the nearest ten centimes between 1982 and 1985, representing FF 315 million;

(b) the exemption from the one-month delay rule for the deduction of VAT prior to 1 January 1989;

(c) the exemption from the housing levy prior to 1 January 1989;

(3) (a) there should be no repayment of aid granted to the PMU in the form of exemption from the housing levy in respect of the period prior to 11 January 1991;

(b) the Commission has no obligation to determine itself the amount of the aid in respect of the exemption from the housing levy that the Commission ordered to be repaid from 11 January 1991;

— direct the Commission to:

(1) calculate within one month of the Court's judgment:

(a) the amount of aid granted to the PMU in the form of exemption from the housing levy in respect of the period after 11 January 1991, such aid being the amount of revenue waived in respect of that levy by the French State during that period;

(b) the amount of interest thereon, such interest to be calculated in accordance with Article 3 of Decision 93/625;

(2) seek within a further month repayment of any sums due under paragraph (1)(a) and (b) above that have not already been repaid by the PMU to the French State (together with any interest thereon);

(3) seek forthwith repayment of all revenues waived by the French State in respect of the PMU's exemption from the housing levy in the period between 1 January 1989 and 11 January 1991, together with interest thereon calculated in accordance with Article 3 of Decision 93/625;

(4) without prejudice to (3) above, re-examine forthwith the complaint lodged on 7 April 1989 in the light of the judgment of the Court and conclude such re-examination within six months of the date of that judgment;

— order the Commission to pay the costs.

38 The Commission claims that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

39 The intervener claims that the Court should:

— dismiss the application.

Substance

40 The applicant relies on four pleas in law in support of its application: (i) misapplication of Article 92(1) of the Treaty; (ii) misapplication of Article 92(3)(c) of the Treaty; (iii) failure to fulfil the obligations incumbent on the Commission when it requires repayment of State aid; (iv) infringement of Article 190 of the Treaty.

Misapplication of Article 92(1) of the Treaty

41 The applicant maintains that the Commission misapplied Article 92(1) of the Treaty in so far as it decided that four of the seven State measures impugned did not constitute State aid and that as of 1989 the exemption from the one-month delay rule for deduction of VAT did not constitute State aid since it was offset by a permanent deposit lodged with the French Treasury.

The change in the allocation of the levies and the subsequent waiver of FF 180 million in betting levies as from 1985

— Summary of the parties' arguments

42 The applicant maintains that it is clear from the evidence put forward in the complaint that the reduction in the State share of the levy by decrees of 23 January 1985 and 12 March 1986 — estimated at FF 180 million — was directly linked to the PMU recovery plan and that a significant part of that money went to finance the large-scale redundancies imposed on PMU staff. The applicant refers to a news release from the AFP press agency, reporting that the then French Secretary of State for the Budget approved the PMU recovery plan, stating that 'the State, for its part, is contributing aid worth FF 180 million, thanks to its waiver in favour of the racecourse undertakings of part of its share of the levy on stakes'.

43 The fact that the legislative amendment to the allocation of the levies was subsequently maintained in force in no way alters the fact that the amendment was inextricably linked to the PMU's recovery plan. According to the applicant, a Member State cannot evade the State aid rules by making what had originally been regarded

as temporary assistance into a permanent arrangement. In any event, the levy system as a whole constitutes a State aid arrangement and, accordingly, any change in the levy system which favours the PMU itself constitutes State aid.

44 As regards the Commission's argument that it is legitimate for a Member State to assist in the restructuring of undertakings subject to special high taxation, the applicant refers to the judgment in Case 173/73 *Italy* v *Commission* [1974] ECR 709, in which the Court of Justice rejected the argument that a reduction in the burden of taxation for such a purpose could escape the prohibition laid down by Article 92 of the Treaty. Furthermore, the applicant does not accept that the PMU is subject to heavy taxation which goes beyond the taxation of other economic activities, and emphasises that the contested decision does not mention that argument, which was put forward by the Commission in its defence.

45 The Commission maintains that the reduction in the share of betting revenue accruing to the French State from 1985 onwards was a permanent change in the taxation scheme and therefore cannot be regarded as a State aid.

46 While the Commission does not accept that there is a direct link between the change in the levy system and the PMU recovery plan, it maintains that, even if such a link existed, the measure in question would not necessarily constitute State aid, since it is legitimate for the Member State, in the context of special high taxation such as that to which the PMU is subject, to assist in the restructuring of the undertakings concerned with a view to securing its own future revenue, and the French Treasury would have much to gain from any improvement in the PMU's efficiency.

47 Lastly, the Commission argues that it is clear from the statement made by the French Secretary of State for the Budget and quoted by the applicant (see above, paragraph 42) that the measure in question was adopted 'in favour of the

racecourse undertakings', not of the PMU. Since the procedure initiated under Article 92(3) of the Treaty concerned the PMU alone, and not the racecourse undertakings, the Commission could not adopt a position on aid granted to the latter.

48 Furthermore and in any event, the essential conditions to be met for a measure to be classed as State aid incompatible with the common market and unlawful under the Treaty are lacking in the case of the racecourse undertakings, since they are not in competition with the applicant.

49 Lastly, at the hearing, the Commission — relying on the judgment in Case T-106/95 *FFSA and Others* v *Commission* [1997] ECR II-229 — argued that it must be acknowledged as enjoying a measure of discretion when deciding the most appropriate way to ensure that activities exposed to free competition are not subsidised, and its conclusions can be vitiated solely by a manifest error of assessment.

50 The intervener supports the Commission's submissions and, for the rest, refers to its own arguments in relation to the cash-flow benefits granted (see below, paragraphs 72 and 73).

— Findings of the Court

51 The Court notes that, according to the contested decision, the change in the allocation of levies in 1985 and 1986 did not constitute State aid but a 'reform in the form of a "tax" adjustment that is justified by the nature and economy [sic] of the system in question', in so far as the three criteria used by the Commission in order to assess its compatibility with Article 92(1) of the Treaty were not satisfied. According to the contested decision, the measure in question was (a) merely a limited reduction in the rate of taxation (approximately 1.6%) and did not strengthen

the financial situation of an undertaking in a monopoly position, (b) ongoing in character and (c) not aimed at financing an *ad hoc* operation but at 'increasing the resources of the recipients of the non-public levies' (part V, point 3, of the contested decision).

52 The first point to note, since the present case turns on the extent to which the Community judicature may review the criteria chosen by the Commission for assessing whether a particular fiscal measure is caught by Article 92(1) of the Treaty, is that the latter provision — which provides that State intervention in any form whatsoever which confers on certain undertakings advantages which distort or threaten to distort competition on the common market — does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects (see Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraphs 19 and 20). It follows that the concept of aid is objective, the test being whether a State measure confers an advantage on one or more particular undertakings. The characterisation of a measure as State aid, which, according to the Treaty, is the responsibility of both the Commission and the national courts, cannot in principle justify the attribution of a broad discretion to the Commission, save for particular circumstances owing to the complex nature of the State intervention in question (Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraphs 10 and 11, and Case T-358/94 *Air France* v *Commission* [1996] ECR II-2109, paragraph 71). The relevance of the causes or aims of State measures falls to be appraised only in the context of determining — pursuant to Article 92(3) of the Treaty — whether such measures are compatible with the common market. It is only in cases where Article 92(3) falls to be applied and where, accordingly, the Commission must rely on complex economic, social, regional and sectoral assessments, that a broad discretion is conferred on that institution (Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 18, and Case C-355/95 P *TWD* v *Commission* [1997] ECR I-2549, paragraph 26).

53 That conclusion is not affected by the judgment in *FFSA* (cited above) on which the Commission relies, in which this Court — addressing the question whether a

State measure meeting the conditions for the application of Article 92(1) of the Treaty (paragraphs 167 and 168 of the judgment) may nevertheless qualify for the derogation provided for in Article 90(2) of the Treaty — acknowledged that the Commission had a broad discretion (paragraphs 170 to 187 of the judgment) since, in contrast to that judgment, the State measure at issue here does not fall to be assessed in the light of Article 90(2) of the Treaty.

54 Secondly, although, as the Commission pointed out in the contested decision, both tax legislation and the implementation of tax arrangements are matters for the national authorities, the fact remains that the exercise of that competence may, in certain cases, prove incompatible with Article 92(1) of the Treaty (Case 47/69 *France* v *Commission* [1970] ECR 487).

55 Accordingly, the foregoing considerations must be borne in mind when determining whether, in the present case, the Commission was entitled to employ the three criteria mentioned above (see paragraph 51) as a basis for finding that the tax measure in question did not constitute State aid for the purposes of Article 92(1) of the Treaty but was a 'reform in the form of a "tax" adjustment that is justified by the nature and economy [sic] of the system in question'.

56 As regards, first, the criterion of the ongoing nature of the measure in question, Article 92(1) of the Treaty, as explained above, does not distinguish between permanent and provisional measures. Furthermore, it would be difficult to apply such a criterion in this area since, as the intervener rightly emphasised at the hearing, it is no easy matter in view of the frequency with which tax rates are adjusted by national authorities to determine whether a measure which was initially regarded as permanent must subsequently be classed as provisional because of a fresh adjustment of the rates and therefore regarded, according to the Commission's line of reasoning, as State aid by reason of its limited duration. Conversely, a measure

initially regarded as temporary — so that, according to the Commission, Article 92(1) of the Treaty applies — may subsequently be transformed into a permanent measure with the result (still according to the Commission) that it is no longer State aid. In those circumstances, application of the criterion of the permanent nature of a State measure, such as the Commission has proposed, would make application of Article 92 of the Treaty so unpredictable as to make that criterion incompatible with the principle of legal certainty.

57 As regards the second criterion, according to which the measure in question was not intended to finance a specific operation, the Court notes that, as pointed out above, Article 92(1) does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects (Case C-241/94 *France* v *Commission*, cited above, paragraph 20). However, as was stated in the contested decision itself, the measure was in fact aimed at 'increasing the resources of the recipients of the non-public levies on a permanent basis'.

58 In any event, even if such a criterion could legitimately be relied on in order to distinguish between tax measures which fall within the scope of Article 92(1) of the Treaty and those which do not, the Commission's finding that the change in the levy rates was not intended to finance a specific operation is contradicted in this case by another finding in the contested decision to the effect that 'as from 1984, the racecourse undertakings were showing a deficit' and that 'as a result, in addition to the introduction of a recovery plan, the French authorities decided to change the allocation of the levies' (see part IV, point 3, of the contested decision). Moreover, that finding in the contested decision must be read in the light of the

letter opening the procedure, according to which all the financial advantages accorded to the PMU enabled it to deal with the costs of computerisation and restructuring necessary for the organisation of its management responsibilities.

59 Lastly, as regards the Commission's third criterion, the limited nature of the reduction applied by the French authorities to the rate of the public levy, the Court observes, first of all, that it is settled law that the fact that the level of aid is relatively low does not as such rule out the application of Article 92(1) of the Treaty (Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 43, and Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 42). Nevertheless, even if the limited nature of the reduction may in certain cases make it appropriate not to apply Article 92(1) of the Treaty, in the present case it is common ground that, according to the contested decision, the adjustment of the rates of levy had the effect of 'increasing the resources of the recipients of the non-public levies'. Furthermore, although the reduction in the public levy may be regarded as 'limited' in terms of the rate (approximately 1.6%), that does not mean that levels are also low in terms of net figures. As is apparent from the letter opening the procedure and from the case-file (see above, paragraph 5), the benefit to the PMU for the year 1986 amounted to FF 180 million. Since the measure in question was permanent, the annual benefit to the PMU of such magnitude could not justify the finding that the advantage derived by the PMU from the 'limited' rate of levy was minimal. In that connection it should also be noted that, in the context of the Commission's policy on State aid, as set out in its communication of 20 May 1992 concerning the Community guidelines on State aid for small and medium-sized enterprises (OJ 1992 C 213, p. 2), the sum of FF 180 million by which the PMU benefited for the year 1986 alone cannot be classed as minimal aid. According to that communication, which was applicable at the time the contested decision was adopted, the level of aid below which Article 92(1) could be regarded as inapplicable was fixed at ECU 50 000 paid over a period of three years. However, an amount in the order of FF 180 million — roughly ECU 27 137 000 — paid over a single year manifestly exceeds that threshold.

60 As for the Commission's argument that according to the statement made by the Secretary of State for the Budget and quoted by the applicant (see above, paragraph 42) to the effect that, in any event, the measure in question concerned only the racecourse undertakings and not the PMU, it is contradicted by the contested decision itself, which is confined to the measures taken by the French authorities for the benefit of the PMU alone (see the letter opening the procedure under Article 93(3) of the Treaty, and part V of the contested decision). Nowhere in the contested decision is it stated that Article 92(1) of the Treaty does not apply in the present case because the measure in question did not concern the PMU — the undertaking actually referred to in the opening of the procedure — but, rather, the racecourse undertakings.

61 Furthermore, the same argument of the Commission is contradicted by its reasoning as a whole, particularly as set out in its defence where it argues that the assessment of the measure in the contested decision was justified on the ground that 'the activities of the PMU were being strangled *inter alia* by the level of taxation, and that it was necessary to rectify the situation' and that since that measure led to the 'improvement in the efficiency of the PMU' it permitted 'the French Treasury to benefit substantially'. Lastly, although, according to the abovementioned statement (see above, paragraph 42), the French State contributed aid worth FF 180 million 'to the racecourse undertakings', it is also apparent that that 'aid' was the subject of an agreement between the French State, the racecourse undertakings and the PMU and that it was intended, *inter alia*, to assist the racecourse undertakings which were members of the PMU to undertake 'some thousand dismissals essentially from the PMU'. The Commission's argument cannot therefore be accepted.

62 It follows from the foregoing that the three criteria mentioned above, as applied in the present case, were not such as to justify the finding that the reduction in the levy rate was not State aid for the purposes of Article 92(1) of the Treaty, but should be classed as a reform in the form of a tax adjustment that is justified by the nature and organisation of the system in question. That part of the contested decision must therefore be annulled.

The cash-flow facilities enabling the PMU to defer payment of certain betting levies

— Summary of the parties' arguments

63 The applicant argues that the levies subject to deferred payment are public levies, as the Commission acknowledged, moreover, in part IV, point 5, of the contested decision. According to established case-law, the imposition of such public levies by the State and the disbursement of all, or part, of the proceeds thereof by the State constitutes State aid within the meaning of Article 92(1) of the Treaty. Accordingly, the French State's decision allowing the PMU to defer payment of the share of the levy due to the State is caught by the prohibition in Article 92(1) (Case 78/76 *Steinike und Weinlig* v *Germany* [1977] ECR 595, Case 222/82 *Apple and Pear Development Council* v *Lewis* [1983] ECR 4083 and Case 290/83 *Commission* v *France* [1985] ECR 439).

64 According to the applicant, the change in the rules on the payment of the public levies cannot be equated — contrary to the Commission's contention — with a general change in the rate of taxation for horse-races, since it was not for the general benefit of the horse-racing industry but for the benefit of the PMU. The fact that the cash-flow benefits also benefit the racecourse undertakings which are members of the PMU does not alter the fact that aid was granted in favour of the PMU or the fact that the aid in question is not a general measure, since the racecourse undertakings belonging to the PMU represent only 10 out of some 275 racecourse undertakings in France and the PMU only accepts bets on less than 1% of races organised on racecourses not owned by its members. This is confirmed, first, by the 1987 Report of the French Cour des Comptes (Court of Auditors), which states that the change in the rules on the payment of levies to the State was prompted by a desire to assist the PMU in meeting the increase in commission costs payable to its point-of-sale outlets and, secondly, by the reply to that Report given by the French Ministère de l'Économie, des Finances et de la Privatisation (Ministry of the Economy, Finance and Privatisation), to the effect that the fiscal regime governing the PMU 'derogates from the ordinary rules of law'.

65 The applicant concludes that the change in the levy arrangements was an *ad hoc* and *temporary* measure for the benefit of a specific undertaking, which means that, in view of the settled case-law to the effect that a fiscal regime, even of a permanent nature, which favours a specific industry constitutes State aid (Case 70/72 *Commission* v *Germany* [1973] ECR 813 and Case 310/85 *Deufil* v *Commission* [1987] ECR 901), the same must be all the more true of measures for the benefit of a single undertaking.

66 As for the Commission's argument that the change in the rules on the payment of levies to the State was justified by the French authorities' concern to bring the arrangements for paying the PMU levies into line with those for the lotto levies (part IV, point 5, of the contested decision), the applicant maintains that it must be disregarded in so far as it forms no part of the Commission's legal reasoning in the contested decision and because the Commission failed to adduce any reason why, in its view, the Cour des Comptes erred in finding the contrary.

67 In the alternative, the applicant asks the Court to annul that part of the contested decision for lack of reasoning.

68 The Commission argues that the case-law cited by the applicant to the effect that special fiscal measures for the benefit of a single economic sector constitute State aid does not apply since the present case does not concern the normal system of taxation applicable to all undertakings but an exceptional system for the taxation of a single operator. Changes to such a system cannot be assessed on the same basis as derogations from the general system. According to the Commission, if the applicant's view were correct, the French authorities would be prevented from making any changes in the taxation of horse-race betting, which cannot be the purpose of Article 92 of the Treaty.

69 On that point, the Commission adds that although Advocate General Darmon referred in his Opinion in Joined Cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR I-887, at 903, to the concept of 'derogation', meaning that a measure which does not apply to all undertakings or all industrial sectors which could benefit from it constitutes aid, that criterion must be applied in a different manner in respect of the horse-race betting sector. In the Commission's view, since that sector bears a heavier tax burden than that applicable under the normal system of taxation, the sole test for determining whether a change in that special tax scheme constitutes State aid is one which enables it to be established whether the change was permanent or temporary, and only if it is temporary is it capable of constituting State aid.

70 The Commission also challenges the assertion that the measure at issue was solely for the benefit of the PMU. Since the income of the PMU flows through it to its members, the racecourse undertakings, the measure was for the benefit of each of them. The fact that the racecourse undertakings which are members of the PMU do not represent the whole of the French horse-racing industry is irrelevant, since those companies are the only ones to which that tax scheme applies.

71 Lastly, the Commission argues that the numerous references made by the applicant in its pleadings to the 1987 Report of the French Cour des Comptes are irrelevant, since that institution is not competent to determine whether fiscal or quasi-fiscal measures constitute State aid within the meaning of Article 92(1) of the Treaty.

72 The intervener endorses the Commission's arguments, adding that the applicant's argument that the aid granted to the PMU benefits only a limited number of those engaged in horse-breeding in France is without substance, because all racecourse undertakings may benefit indirectly from the services of that body.

73 As for the funds derived from the PMU, the intervener emphasises that they are used for French horse-breeding as a whole since the *primes* and incentives are given to breeders, owners and other professionals in the whole equestrian sector, and thus go in large part to racecourse undertakings which are not members of the PMU.

— Findings of the Court

74 The Commission's refusal to class the measure in question as State aid for the purposes of Article 92(1) of the Treaty is based on the view that the tax arrangements applicable to the PMU, and the horse-racing sector in general, do not derogate from the general fiscal regime but constitute a 'special' scheme, justified by the particular features of the sector concerned, and that, considered in the light of the criteria applied by the Commission to the aid in the form of adjustments to the rate of levy paid by the PMU (see above, paragraphs 68 and 69), that measure does not constitute State aid since it is not *ad hoc* and has 'had the effect of increasing the share of the non-public levy continuously since 1981' and does not involve 'a temporary waiving of resources by the public authorities' (part V, point 5, of the contested decision).

75 Consequently, it should first be determined whether the Commission was correct in maintaining that the tax regime applicable to the horse-racing sector does not constitute in itself a derogation from the general tax system, but a special system intended to apply solely to that sector.

76 In so far as the PMU's activities are subject to special rules which guarantee it exclusive rights over the organisation of totalisator betting in France (see above, paragraph 2), and the tax arrangements applicable to it take into account not only that fact but all the characteristic features of French horse-racing, 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.

77 However, the mere fact that that measure belongs to a separate system, and does not fall within the derogations from the general fiscal arrangements, does not remove it from the ambit of Article 92(1) of the Treaty. Accordingly, the effects of that measure must be examined in order to determine whether the finding that Article 92(1) of the Treaty did not apply in this case was correct.

78 The Court notes that the Commission acknowledged in the contested decision that the measure amounted in effect to a waiver of revenue by the public authorities, which 'had the effect of increasing the share of the non-public levy continuously since 1981'. However, as has just been recalled, any State measure, whether permanent or temporary, which has the effect of granting financial advantages to an undertaking and improving its financial position falls within the definition of State aid for the purposes of Article 92(1) of the Treaty (see above, paragraph 52) and, accordingly, the question whether a change in the rules for allocation of the levies is temporary or permanent is not an adequate test for determining whether Article 92(1) of the Treaty applies in a particular case (see above, paragraph 56).

79 As for the fact 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, the Court observes that, contrary to the Commission's assertion, the contested decision contains no statement to that effect and, according to part IV, point 5, thereof, the Minister for the Budget allowed the payments due to the Treasury to be deferred solely in the case of the PMU. The fact that, as a general rule, the operation of the *pari mutuel* in

France can benefit not only members of the PMU, but also, indirectly, non-member companies, cannot be regarded as decisive evidence. Although, certainly, aid granted to a particular economic operator may also, indirectly, benefit a number of others whose affairs depend on that operator's principal activities, it does not follow that the measure in question is a general measure outside the ambit of Article 92(1) of the Treaty; at the very most it may qualify for the sectoral derogation provided for in Article 92(3)(c) of the Treaty.

80 Furthermore, as the Commission emphasises in the contested decision (see part V, point 7), for the purposes of applying Article 92(1) of the Treaty a distinction should be drawn between the PMU's main business (the organisation and processing of bets) and that of its members (the organisation of horse-races). Consequently, even if the horse-racing sector as a whole benefits in one way or another from the cash-flow benefits granted to the PMU, those financial advantages permit the PMU to improve its position on the market in bet-taking — both at home and abroad — through the PMI, in direct competition with the applicant (part III of the contested decision). In any event, it is evident that the arguments put forward in this connection by the Commission and the intervener did not form part of the legal assessment set out in the contested decision and, accordingly, that in this respect, too, the decision must be regarded as vitiated by the fact that no, or no sufficient, reasons are given.

81 Lastly, with respect to the Commission's argument that the State intervention in question was made in the context of the exceptionally heavy taxation of the horse-racing sector, which is considerably higher than in other sectors, put forward for the first time before the Court, unsupported by adequate evidence, that argument is not sufficient in itself to show that the Commission's argument is well founded.

82 In those circumstances, the applicant's allegation that Article 92(1) was misapplied in respect of the cash-flow benefits granted to the PMU is well founded and that part of the contested decision must be annulled.

The exemption from corporation tax

— Summary of the parties' arguments

83 The applicant maintains that the decision is vitiated by an error of law, in so far as the Commission considered that the PMU's exemption from corporation tax stems from the normal application of the general tax system, which does not cover *groupements d'intérêt économique*.

84 The applicant explains that the issue in the present case is the exemption from corporation tax not for the benefit of the PMU, but for the benefit of its members, which the applicant criticised in its complaint of 7 April 1989 and in its letter of formal notice of 5 November 1992. Moreover, according to the French Cour des Comptes, an exemption of that nature for the racecourse undertakings was unlawful even under French law. Furthermore, no equivalent exemption is granted to other racecourse undertakings or to other members of a *groupement d'intérêt économique*.

85 Lastly, the applicant challenges the implied rejection of its argument in the complaint that the PMU's exemption from income tax also constitutes State aid, and claims that in that respect the contested decision is devoid of reasoning.

86 The Commission explains that although the PMU is not subject to corporation tax, it is because as a *groupement d'intérêt économique* it does not have any capital of its own, and its financial results may be integrated directly in the results of its members so that it is fiscally transparent, that is to say, the tax is payable not by the group as such but by its members. As for the applicant's argument that the tax should have been paid by the racecourse undertakings, the Commission contends that its decision to open the Article 93(2) procedure related solely to the aid for the PMU, not that for racecourse undertakings.

87 As regards the applicant's allegation that its complaint concerning the PMU's exemption from income tax was implicitly rejected, the Commission points out that that measure was not addressed in the decision to open the Article 93(2) procedure and therefore could not be dealt with in the contested decision.

88 The intervener emphasises the fact that if, on the assumption that their betting business is separate from the rest of their operations and the share reserved for bettors remains constant, the racecourse undertakings were subject to corporation tax and tax under the general law, they would pay much less than they do now. Thus, if VAT at the normal rate (18.6%) applied to the share not accruing to the bettors (28% of the stakes), the gross income of the racecourse undertakings would be 22.8% of the stakes (28%-(28 x 18.6%) = 28% -5.2%). The 'profit' before tax of the PMU would thus be equal to that result minus the PMU's operating costs, that is to say, 17.3% (22.8% -5.5%). Corporation tax, calculated at the current rate of 33% on profits, would amount to 5.7% of stakes (17.3% x 33%). The final share of the racecourse undertakings would thus be, after deduction of the PMU's operating costs, 11.6% of stakes (17.3% -5.7%), whereas it is today between 4.5% and 5%. This makes it clear, according to the French Government, that the current system for taxing the PMU, involving exemption from corporation tax, does not constitute State aid to the racecourse undertakings.

— Findings of the Court

89 The Court points out that, according to the contested decision, the exemption of the PMU from corporation tax is a consequence of the normal application of the general fiscal regime in so far as no such tax applies to *groupements d'intérêt économique*. However, although the applicant does not challenge that finding, it argues that, as stated in the complaint, the issue in the present proceedings is not the PMU's exemption from corporation tax, but the exemption of the racecourse undertakings from such a tax.

90 Accordingly, it should be determined whether the fact that the Commission — contrary to the assertion made in the applicant's complaint — found it necessary to bring proceedings solely against the PMU and not against the racecourse undertakings is capable of affecting the lawfulness of the contested decision.

91 In that respect it should be noted that the right of third parties to lodge a complaint with the Commission for infringement of Article 92 of the Treaty and thereby to induce it to open the procedure under Article 93(2) of the Treaty in respect of the Member State concerned, which may culminate in its adoption of a final decision, is not governed by any provisions of secondary legislation analogous to Regulation No 17 of the Council of 6 February 1962, the First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-62, p. 87).

92 However, if the Commission decides to reject a complaint by adopting a decision to that effect, that decision must, pursuant to Article 190 of the Treaty, contain a statement of reasons which enables the person concerned to ascertain the reasons for the measure and, where appropriate, assert his rights before the Community judicature. In the present case, however, there was no decision expressly rejecting the applicant's complaint: on the contrary, a decision was adopted to open the procedure under Article 93(2) of the Treaty, by letter addressed to the French Government and published in the *Official Journal of the European Communities*

(see above, paragraph 5). In those circumstances, if the applicant considered that by so doing the Commission had failed to adopt a position on all the State measures which were the subject of the complaint, it ought to have called upon the Commission to do so in accordance with Article 175 of the Treaty.

93 According to the case-file, Ladbroke did indeed request the Commission, in its letter of 11 August 1992, to adopt a position, in accordance with Article 175 of the Treaty, regarding the aid challenged in the complaint but not dealt with in the interim decision (see above, paragraph 9), and by letter of 12 October 1992 the Commission replied (see above, paragraph 10). After receiving that reply, however, Ladbroke again sent a letter of formal notice to the Commission, requesting it this time to adopt a position only with regard to the measures referred to in the decision opening the procedure (see above, paragraph 11). Since the Commission failed to respond to the second letter, Ladbroke brought an action for failure to act before the Court of First Instance, which it abandoned, however, following the adoption of the contested decision (see above, paragraphs 12 to 14). If, however, Ladbroke considered that the Commission's reply to its first formal notice did not amount to a definition of the Commission's position on all the measures criticised in the complaint, it should have issued a fresh formal notice requesting the Commission to adopt a position on all the measures criticised, rather than merely requesting it to adopt a position solely on the measures referred to when the procedure was initiated. If, by contrast, Ladbroke considered that the Commission's reply to the first formal notice constituted a definition of its position, impliedly rejecting the part of the complaint in which the relevant measure was criticised, it ought to have brought an action for annulment under Article 173(5) of the Treaty.

94 The applicant failed to initiate and follow the procedure laid down in Article 175 of the Treaty or to bring in due time an action for annulment. Consequently, its claim that in the contested decision the Commission failed to address a measure which was not the subject of the procedure which had been initiated is inadmissible.

95 The position is the same, and for the same reasons, with regard to the applicant's argument based on the implied rejection of the complaint as regards the PMU's exemption from income tax.

Retention of unclaimed winnings by the PMU

— Summary of the parties' arguments

96 The applicant argues, first of all, that the contested decision is vitiated by an error of law in so far as the Commission considered that the PMU's entitlement under Decree 83-878 to retain unclaimed winnings in order to finance social security expenditure did not constitute State aid because such winnings are considered to be 'normal resources', forming part of the non-public levies, and not 'State resources' within the meaning of Article 92(1) of the Treaty.

97 According to the applicant, since the imposition of levies and their allocation are matters decided by the French State, it is incorrect to regard such resources as non-public levies, since any transfer of resources to the PMU pursuant to measures of public law constitutes State aid. In any event, even if unclaimed winnings are to be regarded as normal resources of the racecourse undertakings, the amendment introduced by Article 27 of Decree 83-878 constituted State aid inasmuch as the decision to allow the PMU access to the money was instigated and approved by the State (see Case 290/83 *Commission* v *France*, cited above, paragraphs 14 and 15, and Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, paragraphs 32 to 38).

98 The applicant argues next that resources derived from unclaimed winnings and made available to the PMU were in fact to be used to finance the PMU's operating costs incurred by the computerisation of its betting operations. The applicant explains that, before the adoption of Decree 83-878, a decree of 18 July 1941 provided that the racecourse undertakings could retain unclaimed winnings on condition that such monies were used exclusively for a specified class of employee working in the horse-racing sector and that any surplus had to be handed over to the State. However, the change introduced by Decree 83-878 consisted in permitting the PMU to use such winnings for its own purposes. In support of this view, the applicant refers to the Report of the French Cour des Comptes, according to which the resources handed over to the PMU, which are 'not subject to VAT and generate considerable financial income (FF 24.6 million in 1985)', were used 'to finance, to the tune of 105 million, the corporate strategy of the racing sector', three-quarters of which was reserved 'to the PMU for the payment of a supplementary redundancy payment for employees whom it will have to dismiss in view of the computerisation of its betting operations (some FF 75 million in respect of 750 employees)'.

99 Lastly, the applicant maintains that in so far as Article 281 *bis* of the French *Code Général des Impôts* provides that VAT is payable on the remuneration received by organisers of totalisator betting, the fact that the PMU is not obliged to pay VAT on unclaimed winnings also constitutes State aid within the meaning of Article 92(1) of the Treaty and, accordingly, the contested decision is vitiated by an error of law in this respect also.

100 The Commission points out that in France the sums in question can only be used for defined categories of social spending. Following the adoption of Decree 74-954, any sums not so used accrue to the State, and Decree 83-878 simply altered the categories of social spending for which unclaimed winnings may be used. The fact that that amendment led to a reduction in the portion of unclaimed winnings accruing to the State does not mean therefore that it amounted to State aid.

101 In the Commission's view, the applicant has been led to challenge the description of the sums in question as 'non-public levies' (*'prélèvements non-publics'*) by a misunderstanding brought about by the use of the English term 'levy', which in English indicates a tax. The applicant thus arrived at the false conclusion that the FF 30 withheld by the PMU for every FF 100 in bets (see above, paragraph 16) constituted a State tax and that any distribution of part of that sum constituted State aid. In fact, only part of those FF 30, the FF 18 taken by the French authorities, can be regarded as a 'tax' in the true sense. Since the sums concerned constitute a non-public levy which does not accrue to the State and cannot therefore be regarded as a tax, the criterion of State resources is, in this context, not satisfied.

102 The Commission argues that, even if it refrained in its defence from specifically rebutting the applicant's assertion that the measure in question was directed towards assisting in the computerisation of the PMU, allowing unclaimed winnings to be used to provide surplus employees with a supplementary redundancy payment amounted to a social measure benefiting the ex-employees rather than the PMU itself.

103 As for the applicant's argument that the fact that unclaimed winnings are not subject to VAT also constitutes State aid, the Commission contends that this is a new argument which did not appear in the complaint and, consequently, could not be addressed in the contested decision.

104 The intervener explains that prior to the adoption of Decree 74-954 unclaimed winnings were wholly retained by the racecourse undertakings and that the decree simply restricted the use to which those winnings could be put to certain categories of social security spending on the part of the racecourse undertakings, the winnings not used for that purpose reverting to the State (Article 20(4) of the decree). Decree 83-878 merely extended the possible uses to which unclaimed winnings could be put to other activities directly linked to the operations of the racecourse undertakings, such as monitoring and operating costs, breeding incentives and investments connected with the organisation of races and betting (Article 27 of the decree). At all times — before 1974, from 1974 to 1983, and after 1983 —

unclaimed winnings remained wholly at the disposal of the racecourse undertakings: changes affected solely the range of uses to which those winnings could be put, so that it was reasonable to regard such funds as part of the normal resources of the racecourse undertakings.

— Findings of the Court

105 By way of a preliminary point, the Court notes that it is indicated in the parties' arguments that the measure enabled the racecourse undertakings to cover, *inter alia*, the social security costs incurred by the PMU in connection with redundancy for some of its surplus staff. The Court considers it necessary to determine, first, whether the funds derived from unclaimed winnings constitute 'normal resources' within the meaning advocated by the Commission, which thus claims that one of the conditions for applying Article 92(1) of the Treaty — the transfer of State resources to the aid recipient — is lacking in the present case.

106 It is apparent from the case-file that although before 1974 unclaimed winnings were wholly retained by the racecourse undertakings, Decree 74-954 restricted for the first time the use to which those winnings could be put to certain categories of social security expenditure, the winnings not used for that purpose having to be paid to the State. Article 20(4) of that decree provided that 'each year the racecourse undertakings may be authorised by the authorities responsible for approving their budget to allocate the winnings on uncashed tickets to relief, social assistance, welfare or additional retirement benefits for their staff, excluding all other benefits. Such sums are to be paid to one of the bodies provided for in Article 25 hereunder or to a vocational training centre. The fraction of the winnings on uncashed tickets which is not allocated to funding the activities defined in the preceding subparagraph shall be paid to the Treasury'.

107 It is clear from that provision of French legislation that the use which racecourse undertakings could make of unclaimed winnings was not only restricted (to social

expenditure) but also depended on prior authorisation from 'the authorities responsible for approving their budget'. Those authorities are defined in the above decree as the Minister for Agriculture and the Minister for the Economy and Finance (see Articles 22 and 23 of the decree) and, in Decree 83-878 which replaced Decree 74-954, as the Minister for Agriculture and the Minister responsible for the Budget (Articles 29 and 30 of Decree 83-878). However, if use of unclaimed winnings is to be regarded — as stressed in the contested decision — as 'normal resources', there would be no need for the French legislature to adopt regulations restricting their use to strictly defined expenditure, failing which those resources would automatically revert to the Treasury.

108 In those circumstances, the resources in question cannot be regarded as 'normal resources' belonging to the racecourse undertakings and the PMU, but constitute 'State resources' the allocation of which to the Treasury depends on whether certain statutory conditions are met.

109 That conclusion can also be inferred from Decree 83-878, whereby, as the French Government and the Commission have emphasised, the French legislature extended the range of uses to which unclaimed winnings may be put to other activities of the racecourse undertakings, such as the allocation 'of vocational training credits, or welfare or additional retirement benefits for staff of racecourse undertakings or racing stables, as well as for jockeys' (Article 27(5) of Decree 83-878). In so doing, all the French legislature did 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.

110 However, according to established case-law, in so far as those resources have been used 'to finance social expenditure, in particular', as stated in the contested decision, they constitute a reduction in the social security commitments which an

undertaking must normally discharge, and hence a grant of aid (Case 173/73 *Italy* v *Commission* and *Steinike und Weinlig*, both cited above).

111 Consequently, the Commission's finding that although the measure in question is designed to finance social expenditure of the racecourse undertakings linked to the organisation of totalisator betting it does not constitute State aid because no transfer of State resources is involved is based on false premisses and must therefore be annulled.

112 Lastly, as regards the applicant's argument that the fact that the PMU is not required to pay VAT on unclaimed winnings also constitutes State aid, it should be stated that this point was not mentioned in the complaint or raised when the procedure under Article 92 was opened, which means that the applicant cannot reproach the Commission for not addressing that point in the contested decision.

The exemption from the one-month delay rule for VAT deductions as from 1 January 1989

— Summary of the parties' arguments

113 The applicant argues that, while the Commission states in the contested decision that the exemption from the one-month rule for VAT deductions has been offset, as of 1989, by a permanent deposit lodged by the racecourse undertakings with the French Treasury, it is silent both as to the size of that deposit and the basis on which it is re-assessed from time to time. The failure to provide that information is all the more improper in view of the fact that, owing to the existence of that

deposit, the Commission reached a conclusion different from its initial finding in the interim decision.

114 The applicant asks the Court to request, by way of measures of inquiry, first, that the Commission indicate the size of the permanent deposit lodged with the French Treasury in 1989, the criteria by which it is re-assessed and on what occasions a re-assessment has been carried out and, secondly, that the French Government state the annual cost of the VAT derogation to the French State and the annual interest earned by the French State as a result of that deposit between 1 July 1989 and 1 July 1993, when the measure at issue was finally abolished.

115 The Commission maintains that the fact that as regards the exemption from the one-month delay rule for VAT deductions the provisional conclusion reached in its interim decision was different from that in the contested decision does not affect the validity of the latter.

116 As to the amount of the deposit, the Commission points out that until 1988 it was a fixed amount of FF 14 million, which was increased to FF 16 million in 1989 and to FF 20 million in 1993.

117 The intervener points out that the case-file shows that the deposit lodged with the French Treasury has existed since 1969, and not since 1989 as indicated by the contested decision, from which it follows that the State measure at issue never constituted State aid. Furthermore, if the French authorities did not point this out to the Commission during the administrative procedure, it was because the mistake had no practical consequence for the assessment of the measure at issue.

— Findings of the Court

118 According to the correspondence exchanged by the Commission and the intervener on this point since the opening of the procedure and produced at the Court's request, the French authorities had clearly stated to the Commission during the administrative procedure that, in return for the exemption from the one-month rule for VAT deductions granted to the racecourse undertakings on 1 August 1969, the latter were required from that date to lodge a permanent deposit with the French Treasury (letter of 7 February 1992 to the Commission from France's Permanent Representative to the European Communities).

119 Furthermore, at the hearing the Commission conceded that the permanent deposit had, indeed, existed not since 1989 but since 1969, and that the contested decision was vitiated on this point by a manifest error.

120 It follows that the Commission's consideration of the question whether the permanent deposit with the French Treasury offset the cash-flow benefits resulting from the exemption from the normal VAT rules should have applied to the period from 1969 or, at the least, from 1985 (when the PMU acquired legal personality), not from 1989. Consequently, in the absence of a detailed examination by the Commission going back to 1969 or to 1985, the Court cannot rule on the question whether the permanent deposit has since 1969 offset the cash-flow benefits with the result that the measure in question never constituted State aid, and whether, if that is not the case, from which date the alleged aid in fact existed because the benefits complained of were not offset.

121 That conclusion is not affected by the figures produced by the Commission in reply to the Court's questions, figures which were contained in a letter it received from France's Permanent Representative to the European Communities (see

above, paragraph 118). According to those figures, although as regards 1985, 1986 and 1990 the amount of the permanent deposit appears to offset the 'average monthly worth' of the benefit derived by the PMU from its exemption from the one-month delay rule for VAT deduction, as regards 1987, 1988 and 1989 the PMU benefited by some FF 7 968 000. However, in so far as the Commission did not, for the reasons explained above (see paragraph 119), consider those figures when it adopted its decision, the Court cannot, on the basis of the parties' written replies to its questions, rule on the existence or otherwise of State aid, since in doing so it would encroach on the powers which Article 92(1) confers exclusively on the Commission and the national courts.

122 Furthermore, since the Commission's assessment of the measure in question was in any event vitiated by error the applicant's claims must be upheld and that part of the contested decision must be annulled.

Misapplication of Article 92(3)(c) of the Treaty

The applicant's pleas in law and arguments

123 The applicant argues that none of the State measures classed as State aid in the contested decision — namely (1) the French State's waiver, in favour of the PMU, of the amounts derived from rounding down bettors' winnings to the nearest ten-centimes from 1982 to 1985; (2) the exemption prior to 1989 from the one-month delay rule for the deduction of VAT; and (3) until 1989, the PMU's exemption from the housing levy — can be held to be compatible with the common market under Article 92(3)(c) of the Treaty.

(1) The waiver from 1982 to 1985 of the sums deriving from the practice of rounding down bettors' winnings to the nearest ten centimes

124 The applicant makes the preliminary point that since Article 92(3)(c) of the Treaty is an exception to the general rule prohibiting State aid, it is to be strictly construed, and that for aid to fall within its scope it must satisfy two conditions, the first of which is positive — namely, the aid must facilitate the development of certain economic activities or of certain economic areas — and the second of which is negative — namely, the aid must not adversely affect trading conditions to an extent contrary to the common interest. In the present case, neither of those conditions is satisfied.

125 First, the reference in the contested decision to the 'direct and indirect effects of the aid in developing all the economic activities in the sector, including the improvement of bloodstock', which was intended to demonstrate that the aid in question facilitated the development of certain activities (the positive condition), cannot satisfy that condition since the aid in question was not directed either to the improvement of bloodstock or to horse-racing, but rather to one particular form of betting, namely off-course betting. The PMU's activities have very little direct relation to horse-breeding and the percentage of the turnover generated by the PMU that goes to horse-breeding is less than the share received by the State.

126 The Commission's finding is also contrary not only to the Court's case-law in this area (see Case 730/79 *Philip Morris Holland* v *Commission* [1980] ECR 2671) but also to the rules which the Commission laid down for its own guidance in its *Tenth* and *Twelfth Reports on Competition Policy*. According to the Tenth Report, aid is not compatible with the common market unless it contributes 'to the achievement of the Community objectives and interests set out in Article 92(3) of the Treaty'. In its Twelfth Report, the Commission stated that, in order to make sure that aid does not distort competition to a degree contrary to the common interest, the measure in question (1) must contribute to the development of the

sector concerned in the interest of the Community as a whole (2) must be necessary to bring about the development concerned, and (3) its modalities (its intensity, its duration, the degree of distortion of competition, and so on) must be commensurate with the objectives sought.

127 The contested decision completely ignores the first of the above tests. The assertion in the Commission's defence that the objective of the aid was to improve the efficiency of totalisator betting and 'above all the improvement in horse-breeding, a legitimate objective consistent with the Community interest' constitutes a new argument and, accordingly, cannot be taken into account by the Court.

128 As regards the second test — whether the aid is necessary to bring about the development sought — the applicant points out that the Commission did not address that question until it lodged its defence, in which it is stated that without the aid at issue the computerisation of the PMU could not have been achieved. Since that claim is unsupported by argument, it is possible that the racecourse undertakings could have financed the computerisation of their operations either by reducing the levels of prize money offered or by obtaining bank loans.

129 In the case of the third test, namely whether the impact of the aid is commensurate with the objective sought, the applicant maintains that, if the other State measures adopted in favour of the PMU and impugned in the complaint constitute State aid, the contested decision is vitiated by the Commission's failure to estimate the cumulative impact of the various forms of aid granted to the PMU, rather than the impact of each measure viewed in isolation. In any event, even if those measures are not to be regarded as State aid, the fact remains that the effect of that aid — worth FF 315 million — should have been assessed in the light of all the financial advantages which had accrued to the PMU and which, according to the Report of the French Cour des Comptes mentioned above, amounted to FF 1.3 billion for the period from 1982 to 1985 alone.

130 Secondly, as regards the question whether the aid adversely affects trade between Member States to an extent contrary to the common interest (the negative condition), the applicant maintains that the answer given by the Commission in the contested decision to the effect that computerisation of the PMU's operations had taken place at a time when the PMU had no foreign operations, or indeed plans to establish foreign operations, is based on false premisses. According to the summary of a presentation given by the Director-General of the PMU in London at the Sixth Conference of the European Associations of PMUs, as early as May 1987, that is to say, before the creation of the PMI, the PMU already planned to extend its operations abroad. This conclusion is also supported by the reply given, at about the same time as the above statement, by the Chairman of the PMU to the *Premier Président* of the French Cour des Comptes on the subject of the 'proposed inclusion in the public report [of the Cour des Comptes] of a study of the racing sector and the *modus operandi* of the PMU', in which the Chairman regretted the effects of the publication of that report at a 'time when [the PMU is pursuing] negotiations with foreign countries who wish to benefit from [its] experience in the field of the taking of bets on races and at a time when [the PMU is going] to face, in 1992, competition from [the 12 Member States of the European Communities].'

131 Lastly, the applicant maintains that where the undertaking benefiting from the aid (a) receives aid of a high intensity, (b) faces no competition by reason of its monopoly, and (c) uses the aid in order to start competing with other undertakings in markets outside its home base, the negative condition laid down by Article 92(3)(c) of the Treaty cannot be regarded as satisfied, since a situation of that nature is contrary to the fundamental principle of a single market characterised by free competition.

(2) The exemption prior to 1989 from the one-month delay rule for the deduction of VAT

132 The applicant argues that in so far as the contested decision stated that the aid resulting from the exemption from the one-month delay rule for the deduction of VAT was compatible with the common market prior to 1989, on the same grounds

as aid in the form of the waiver from 1982 to 1985 of the sums deriving from rounding down bettors' winnings to the nearest ten centimes, it follows for the reasons set out above (see paragraphs 124 to 131) that the exemption has no better claim to be regarded as satisfying the conditions for the application of Article 92(3)(c) of the Treaty.

133 Furthermore, the argument put forward by the Commission in its defence that the positive condition to be met if aid is to be declared compatible with the common market under Article 92(3)(c) is satisfied in this case because the aid in question had '[as] its ultimate objective ... the improvement of horse-breeding rather than the simple continued operation of the PMU or the [racecourse undertakings] as such' is at variance with the reasoning set out in the contested decision, according to which the disruptive effects of the aid in question were not liable to outweigh any beneficial effects 'on the development of the sector', which includes the improvement of breeding as well as the taking of off-course bets.

134 Lastly, the applicant argues that, since the measure in question is an operating aid, it cannot be declared compatible with the common market save in exceptional circumstances (see *Twelfth Report on Competition Policy*, paragraph 160, and *Deufil*, cited above), which do not exist in the present case.

(3) The exemption from the housing levy up to 1989

135 The applicant maintains that, in so far as the Commission considered that the aid granted to the PMU in the form of exemption from the housing levy could, 'like the VAT derogation', benefit until 1989 from the derogation provided for by Article 92(3)(c) of the Treaty, the contested decision is vitiated by an error in law for the same reasons as those set out above in connection with the aid deriving

from rounding down bettors' winnings and the exemption from the VAT rules (paragraphs 124 to 133).

136 Furthermore, an ongoing operating aid of some FF 5 million per annum, such as the aid in question, can never satisfy the positive condition laid down by Article 92(3)(c) of the Treaty.

The Commission's pleas in law and arguments

137 The Commission relies on the considerations set out in the contested decision concerning the compatibility of the aid derived from rounding down bettors' winnings to the nearest ten centimes, on the basis of which the other two State aid measures were also declared compatible with the common market, to reject the applicant's arguments in their entirety. Apart from that the Commission addresses only the essential aspects of the application of Article 92(3)(c), namely, the lawfulness of the objectives pursued by the aid (the positive condition) and, secondly, the absence of disruptive effects on the market which are contrary to the Community interest (the negative condition). Lastly, it rejects the applicant's assertion that in adopting the decision the Commission failed to comply with its own guidelines as set out in the reports on competition policy referred to above.

(1) The lawfulness of the objectives pursued by the State aid measures in favour of the PMU, namely computerisation of the PMU and bloodstock improvement

138 The Commission relates that, from 1930 until the beginning of the 1980s, the PMU processed bets manually, creating difficulties for its operations and entailing costs representing some 60% of the PMU's total operating expenses. In order to overcome these difficulties the PMU decided in 1972 to computerise all its operations,

a decision which, according to the Commission, was not in any way intended to enable it to expand its operations outside France, but was necessary in order to adjust to the economic and technical trends on the national market. Those measures enabled a more reliable system to be set up, making it possible to provide a service better suited to the requirements of bettors, described in the contested decision as 'the direct and indirect effects of the aid in developing all the economic [activities in] the sector' and, secondly, an increase in the revenue of the French State, which is in the Community interest since it is always preferable for any economic activity to have an efficient organisation.

139 According to the Commission, the PMU's management costs decreased constantly after 1986 because of the computerisation of the PMU's collection and processing operations: from 5.95% in 1986 they declined to 5.45% in 1990, representing a reduction in expenses of some FF 170 million, enabling the racecourse undertakings to devote additional resources to their function of encouraging the improvement of bloodstock.

(2) Lack of disruptive effect on the market

140 The Commission submits that, in so far as the PMU's operations were confined before 1989 to France and there was no competition between the PMU and other operators in France or elsewhere, the Commission was entitled to conclude that the measures had no significant effect on trade between Member States, and it was merely the absence of a *de minimis* rule as regards State aid that led the Commission to regard the measures in question as State aid, and ultimately to declare them compatible with the common market.

141 As regards the applicant's assertion that, according to statements made in May 1987 by representatives of the PMU (see above, paragraph 130), the assistance with regard to the PMU's computerisation had disruptive effects on the market since it enabled the PMU to expand abroad, the Commission argues that the process of

computerising PMU's operations was planned and put into practice well before those statements were made. In any event, it has not been established that there was a direct connection between the PMU's decision to computerise its operations and its subsequent decision to offer a service abroad to other racing associations.

142 Lastly, the Commission argues that the PMI's foreign operations are different from the French operations of the PMU, a view which is confirmed by the remarks of the Director General of the PMU quoted by the applicant (see above, paragraph 130).

(3) The Commission's compliance with the requirements laid down by the case-law and with its own guidelines

143 The Commission argues that, although aid must be assessed in a Community context, that does not mean that aid must benefit the Community as a whole. In the present case, the contribution to the development and greater efficiency of the totalisator betting sector and above all to the improvement of bloodstock constitute legitimate objectives consistent with the Community interest. The Commission emphasises that although the decision does not expressly state that ground, any decision authorising aid under Article 92(3)(c) of the Treaty implicitly relies on it.

144 As for the requirement that the aid must be necessary in order to achieve the stated objective, the Commission points out that, contrary to the applicant's argument, the contested decision is not silent on this issue since it clearly states that 'the [racecourse undertakings] were not able to finance all the necessary investment themselves' (see part IV, point 2, of the contested decision).

145 As regards the intensity of aid derived from rounding down winnings to the nearest ten centimes, the Commission points out that, although according to the contested decision this amounts to 29%, it is difficult to assess the intensity of aid in relation to an organisation such as the PMU, which has no resources of its own. Lastly, the Commission rejects the applicant's argument that it assessed the aid in question in isolation without taking into account other State measures alleged in the complaint to be State aid.

146 The intervener endorses the Commission's reasoning and argues that the latter correctly applied Article 92(3)(c) of the Treaty with regard to the aid at issue.

— Findings of the Court

147 It should be recalled at the outset that, according to established case-law, Article 92(3) of the Treaty confers on the Commission a broad discretion to allow aid by way of derogation from the general prohibition laid down in Article 92(1). The question in this case whether a particular form of State aid is compatible with the common market raises problems which entail examination and appraisal of economic facts and circumstances which are complex and liable to change rapidly (Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 15; Case C-39/94 *SFEI and Others* v *La Poste and Others* [1996] ECR I-3547, paragraph 36; and Case C-169/95 *Spain* v *Commission*, cited above, paragraph 18). Furthermore, it is settled law that in actions for annulment, the function of the Community judicature is solely to determine whether the contested decision is vitiated by one of the grounds of illegality set out in Article 173 of the Treaty; it cannot substitute its own assessment of the facts for that of the deciding authority, especially in the economic sphere (Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 23, Case C-56/93 *Belgium* v *Commission*, cited above, and Case T-106/95 *FFSA*, cited above, paragraph 101).

148 It follows that the review which this Court is called upon to carry out in the present case must be confined to verifying compliance with the rules governing procedure and the statement of reasons, the accuracy of the facts on which the decision was based, and the absence of manifest error of assessment and of misuse of powers (*Matra* v *Commission*, cited above, paragraph 25; Case C-56/93 *Belgium* v *Commission*, cited above, paragraph 11; and Case T-106/95 *FFSA*, cited above, paragraph 101).

149 Those are the principles which must govern the examination of the applicant's complaint that, by declaring the three forms of State aid at issue to be compatible with the common market, the Commission contravened both the requirements for the application of Article 92(3)(c) of the Treaty and its own guidelines, as set out *inter alia* in its *Twelfth Report on Competition Policy*.

— The waiver from 1982 to 1985 of the sums deriving from the practice of rounding down bettors' winnings to the nearest ten centimes

150 According to the contested decision, given the state of development of competition and trade before the PMI was set up in January 1989, the aid granted between 1982 and 1985 for the PMU's computerisation and which derived from the rounding down of winnings 'did not produce any disruptive effects on the market contrary to the common interest, bearing in mind the direct and indirect effects of the aid in developing all the economic factors making up the sector, including the improvement of bloodstock' (part VII, eighth paragraph, point 1, of the contested decision).

151 That passage shows that the applicant cannot criticise the Commission for not having determined whether the positive condition for the application of Article 92(3)(c) of the Treaty was satisfied in the present case.

152 As for the question whether such an assessment by the Commission is nevertheless based on false premisses, since the aid in question was of benefit solely to the taking of bets, not to improvement of bloodstock, the Court points out that it appears from the case-file that the computerisation of the PMU resulted not only in more efficient taking of bets, but also in reduced operating charges and costs as from 1986, enabling the racecourse undertakings to release and thus to allocate more funds for encouraging the improvement of bloodstock. In so far as the organisation of totalisator betting in France is non-profit-making and its sole purpose is to enable the racecourse undertakings to pursue their principal business of improving bloodstock, the Commission cannot be regarded as having committed a manifest error of assessment in considering the aid in question to be compatible with the common market because of its effects on the development of all the economic factors making up the bet-taking sector, 'including the improvement of bloodstock'.

153 Nor can the applicant argue that it was not until the written procedure that the Commission placed emphasis on the effects of the aid in question, and in particular on bloodstock improvement. That consideration is clearly mentioned in the decision itself. Furthermore, it should be noted that the contested decision does not refer only to the effects of the aid concerned on the improvement of bloodstock, but also emphasises its effects, direct and indirect, in developing 'all the economic factors making up the [racing] sector, including the improvement of bloodstock'.

154 So far as concerns the question whether the aid at issue also satisfied the negative condition under Article 92(3)(c) of the Treaty that its effects on the market not affect intra-Community trade to an extent contrary to the common interest, 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. In those circumstances, the Commission was entitled to conclude that the aid granted to the PMU between 1982 and 1985 for computerisation of its activities could not have had disruptive effects on the market, contrary to the Community interest.

155 That conclusion is not affected by the summary of the presentation given by the Director-General of the PMU in May 1987 at a conference of the European Associations of PMUs in London (see above, paragraph 130) which was generally concerned only with the PMU's long-term policy and which took place two years after the aid in question had been abolished, so that it cannot cast doubt on the Commission's finding that there was no disruptive effect on the market before 1989.

156 The same is true of the PMU Chairman's reply in 1987 to the *Premier Président* of the French Cour des Comptes (see above, paragraph 130), which occurred two years after the aid in question had been abolished and two years before the PMI was set up, in a period during which the PMU's expansion abroad was only one of its long-term policy aims. Lastly, as the Commission rightly emphasised, the decision to assist the racecourse undertakings in computerising their organisation of totalisator betting was taken well before the PMU acquired legal personality in 1985 and the latter's decision to extend its operations abroad by the creation of the PMI in 1989.

157 It is clear from the foregoing that the Commission was entitled to conclude that the aid in question was compatible with the common market.

158 The Court likewise considers that the Commission's finding cannot be called in question by the applicant's allegation that the Commission completely ignored the first of the three criteria which it had adopted in its *Twelfth Report on Competition Policy*, namely, assessment of sectoral aid in a Community context. According to part VII, third paragraph, of the contested decision, the aid in question was appraised 'in the context of the Community as a whole and not that of a single Member State'. Accordingly, the applicant cannot maintain that it was not until the written procedure that the Commission raised for the first time the argument — which is in any case inherent in any examination of the compatibility of sectoral aid with the common market — that the contribution of the aid in question to the development of totalisator betting and to improvement of bloodstock constituted a

legitimate objective consonant with the Community interest. Lastly, and contrary to what the applicant appears to argue, assessment of aid in a Community context does not mean that aid with positive effects on the development of a sector in only one Member State — such as bet-taking in France — cannot qualify for derogation under Article 92(3)(c) of the Treaty in so far as, as the Commission emphasised, it is in the Community interest for a particular economic sector to have an efficient organisation and infrastructure in a Member State.

159 The criticism that the Commission failed to address the question whether the aid at issue was necessary in order to attain the intended objective is also unfounded. It is clearly stated in the contested decision that 'the derogations are applicable only if the Commission is able to establish that, if the aid were not granted, market forces alone would not induce the potential recipient to behave in a way that would help to achieve one of the abovementioned objectives' (part VII, fourth paragraph, of the contested decision) and that, so far as concerns aid for the PMU's computerisation, 'the racecourse undertakings were not able to finance all the necessary investment themselves'. Furthermore, it is common ground that, since the early 1980s, the racecourse undertakings were showing a serious deficit, which explains why only the public authorities, and not private credit institutions, were capable of improving matters (see part IV, points 2 and 3, of the contested decision).

160 As for the question whether the intensity of the aid in question was commensurate with its objective, the aid was admittedly described by the Commission in the contested decision as considerable. However, the fact remains that, according to the contested decision, the aid had been granted well before the PMI was set up in January 1989, a time at which, owing to the state of development of competition and trade between Member States, it was not liable to produce effects contrary to the Community interest.

161 Lastly, the Court also rejects the applicant's argument that the Commission did not correctly apply the same criterion, since it assessed the intensity of the aid in question separately. Although it is true that, since the Commission did not correctly apply Article 92(1) to the four other State measures contested by the applicant (see above, paragraphs 62, 82, 111 and 122), it could not assess their cumulative effects together with those of the aid in question, those cumulative advantages relate to a period during which there was no intra-Community competition or trade. Consequently, the existence of other aid granted to the PMU before 1989 has no bearing on the question whether the aid in question is compatible with the common market, the effects of that aid being, moreover, of limited duration (from 1982 to 1985).

162 It follows that the Commission was entitled to take the view that, given the state of intra-Community trade at the material time, the aid in question, albeit of high intensity, was compatible with the common market.

— The exemption prior to 1989 from the one-month delay rule for the deduction of VAT

163 According to the contested decision, this form of aid was considered to be compatible with the common market prior to 1989, the date from which the racecourse undertakings had to lodge a permanent deposit with the French Treasury in order to offset the advantage it conferred. However, as has just been stated, the Commission's assessment is based on an error regarding the relevant period (see above, paragraphs 118 to 122), which prevents the Court from ruling on whether it was a case of State aid at all. However, the Court takes the view that, in so far as the Commission bases the compatibility of the aid with the common market until 1989 on the same grounds as those concerning aid derived from rounding down winnings to the next ten centimes, that finding cannot be challenged since those grounds, as just stated, are not vitiated by a manifest error of assessment

(see above, paragraphs 150 to 159). It follows that, although the Commission erred in that respect, it was entitled to conclude that prior to 1989 the aid in question was compatible with the common market.

— The exemption from the housing levy up to 1989

164 The applicant maintains that, in this respect also, the decision is vitiated for the same reasons as the two other forms of aid found to be compatible with the common market. However, in so far as the applicant's arguments regarding those other measures are unfounded (see above, paragraphs 150 to 163), the same is true of the arguments contesting this type of aid.

165 It follows from all the foregoing that the applicant's plea to the effect that Article 92(3)(c) of the Treaty was misapplied is unfounded and must therefore be rejected.

The obligation to recover aid incompatible with the common market

Summary of the parties' arguments

166 In support of this plea, the applicant maintains that the contested decision should be annulled because, first, rather than stipulating that the aid received in the form of the exemption from the housing levy be repaid as from 1989, when the PMU began operating in other Community countries, it limits that obligation to the period after 11 January 1991, when the procedure was initiated, in view of a

judgment given in 1962 by the French Conseil d'État confirming that operations of the racecourse undertakings were agricultural and therefore exempt from the housing levy, and secondly because it entrusts the French authorities with the task of calculating the amount of aid to be repaid.

167 As regards, first, the obligation to repay the aid in question, the applicant argues that the reliance placed on the judgment of the Conseil d'État to justify the restriction in time of that obligation is irreconcilable with part V, point 7, of the contested decision, in which the Commission specifically stated that that judgment concerning two racecourse undertakings which are not PMU members in no way relates to their activities in bet-taking on horse-races or, consequently, to the PMU's activity, namely the organisation and processing of bets, which is quite clearly not an agricultural activity.

168 As regards the Commission's argument in its defence that the abovementioned judgment could have given rise to a 'legitimate assumption' on the part of the French authorities that the measure in question was lawful, preventing them from requiring the aid to be repaid in respect of the period prior to 11 January 1991 (the date of the opening of the procedure), the applicant maintains that this argument does not appear in the contested decision. Furthermore, the Commission confused the 'legitimate assumption' of the recipient of aid with the impossibility for a Member State to recover unlawful aid. In any event, the Commission's argument is at variance with the relevant case-law, according to which a Member State which has granted aid in contravention of the procedural rules laid down by Article 93 of the Treaty cannot rely on the legitimate expectations of the recipients as a reason for not seeking repayment of aid which was unlawful (see Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437). Furthermore, in so far as the judgment of the Conseil d'État did not concern either the taking of bets on horse-races or the compatibility of the measure in question with the rules laid down by Article 92 et seq. of the Treaty, it is impossible in this particular instance to attribute any kind of legitimate expectation to the PMU.

169 As regards, secondly, the complaint that the Commission should not have entrusted the French Government with the task of calculating the amount of aid to

be recovered, the applicant argues that since the levy from which the PMU is exempted is determined on the basis of the employer's payroll, in order to calculate the amount in question it is simply necessary to know the rate of the levy and the payroll details of the PMU for the relevant period of time. Furthermore, inasmuch as it appears from the contested decision that the Commission was in possession of the figures for the amount of the levy waived by the French State in 1986 and in 1990, there should not have been any difficulty in obtaining the figures for the other years. Lastly, the Commission cannot cite insufficient information as justification for the decision to entrust the French State with the task of determining the amount of aid to be repaid, since it has had over four years to obtain the relevant figures from the French State.

170 The applicant adds that according to a fundamental principle of Community law the Commission is not entitled, in any event, to delegate discretionary powers which have been conferred upon it by the EC Treaty (see Case 9/56 *Meroni* v *High Authority* [1957 and 1958] ECR 133), and that it failed to define the scope of the powers delegated in this instance and to lay down detailed rules for their exercise. Furthermore, such a delegation of powers would deprive individuals of the judicial protection guaranteed by Article 173 of the Treaty.

171 Lastly, the applicant argues that full repayment of the aid in question has not been sought by the French authorities. It appears from correspondence between the Commission and the French authorities and, in particular, from the letter of 10 January 1994 from France's Permanent Representative, that the exemption from the housing levy was abolished with effect from 1 January 1994, which means that the repayment in question should cover a period of almost three years, from 1991 to 1993 inclusive. However, it would appear from the same letter that the French authorities have sought repayment solely in respect of 1992 and 1993 and not for 1991.

172 The Commission contends that, although recipients of aid may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in

compliance with the proper procedure, they are not precluded from relying on exceptional circumstances on the basis of which they could legitimately have assumed the aid to be lawful and thus declined to refund that aid (see Case C-5/89 *Commission* v *Germany*, cited above).

173 As for the possibility that a Member State may rely on the legitimate expectations of the aid recipients in order to justify a failure to seek repayment of that aid, the Commission points out that, according to the judgment in Case C-5/89 *Commission* v *Germany*, cited above, a Member State '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 do so', which is not the situation in this case (paragraph 17 of the judgment).

174 The Commission takes the view that the judgment of the French Conseil d'État in 1962 classifying the activities of the racecourse undertakings as agricultural, and hence justifying their exemption from the housing levy, could give rise to a legitimate assumption on their part that the measure in question was lawful until the initiation of the procedure, when it was expressly described as a State aid within the meaning of Article 92(1) of the Treaty.

175 The Commission adds that although the judgment of the Conseil d'État in 1962 did not concern either the members of the PMU or the taking of bets on horses, and did not address the question of the compatibility of the measure at issue with the Treaty rules on State aid, it nevertheless has the effect that the racecourse undertakings must be regarded as agricultural undertakings which are not subject to the housing levy.

176 As regards the fact that the French authorities were entrusted with the task of determining the amount of aid to be recovered, the Commission refutes the applicant's argument that this is a delegation of powers: it is rather a case of cooperation between the Commission and the Member State concerned in accordance with Article 5 of the Treaty. It emphasises that this has been the practice in other cases (Commission Decision 88/468/EEC of 29 March 1988 on aid granted by the

French Government to a farm machinery manufacturer at St Dizier, Angers and Croix (*International Harvester/Tenneco*), OJ 1988 L 229, p. 37) and that the French authorities do not have any discretionary power in this case and are required to justify their calculation of the amount due.

177 As for the criticisms made by the applicant concerning the supervision of the procedure for recovery of the aid, the Commission contends that they concern the proper implementation of the decision, not its legality, which is the sole subject of this action.

178 The intervener endorses the Commission's arguments and emphasises that the Commission is not under a duty to require repayment of aid but has a broad discretion in that respect which is subject to review by the Community judicature solely where there has been a manifest error of assessment (see Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires et Syndicat National des Négociants et Transformateurs de Saumons* [1991] ECR I-5505).

Findings of the Court

179 As a preliminary point, it should be noted that when the Commission finds that State aid is incompatible with the common market, it may instruct the Member State concerned to recover the aid from the recipient undertaking (*Deufil*, cited above, paragraph 24), since abolishing unlawful aid by means of recovery is the logical consequence of such a finding inasmuch as it enables the *status quo ante* to be restored (Case C-142/87 *Belgium* v *Commission*, cited above, paragraph 66, and Case C-169/95 *Spain* v *Commission*, cited above, paragraph 47). In so doing the Commission enjoys a power of appraisal, which is necessary for the implementation of decisions adopted under Article 93(2) of the Treaty given that the adoption

of such decisions entails the exercise of such a power of appraisal (Case 301/87 *France* v *Commission*, paragraph 15).

180 It is therefore necessary to consider whether the Commission in exercising its power of appraisal as to whether to instruct the Member State concerned to recover aid declared incompatible with the common market may restrict the effects in time of such a decision on the ground that the Member State concerned considers that a judgment of a national court was liable to give rise to a legitimate expectation on the part of the recipient of the aid that the latter was lawful.

181 According to established case-law, a Member State whose authorities have granted aid contrary to the procedural rules laid down in Article 93 of the Treaty may not rely on the legitimate expectations of the recipient undertaking 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 of their effectiveness decisions taken by the Commission under provisions of the Treaty (see, most recently, Case C-169/95 *Spain* v *Commission*, cited above, paragraph 48).

182 However, recipients of unlawful aid are not to be precluded from relying on exceptional circumstances on the basis of which they had legitimately assumed the aid to be lawful. In such cases, legitimate expectations on the part of the recipient will be recognised only if the aid has been granted in compliance with the procedure laid down in Article 93 of the Treaty (see Case C-183/91 *Commission* v *Greece* [1993] ECR I-3131, paragraph 18, and Case C-169/95 *Spain* v *Commission*, cited above, paragraph 51).

183 It follows that it is not for the Member State concerned, but for the recipient undertaking, in the context of proceedings before the public 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 (Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraph 104).

184 Consequently, 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.

185 Accordingly, in so far as the contested decision limits the temporal scope of the French authorities' obligation to require repayment of the aid derived from the PMU's exemption from the housing levy not to the period commencing in 1989 (the date on which it was declared incompatible), but to the period commencing with the opening of the procedure on 11 January 1991, it is vitiated by infringement of Article 93(2) of the Treaty and must therefore be annulled.

186 As for the applicant's second complaint, that the Commission erred in law by entrusting the French Government with the task of calculating the exact amount of aid to be recovered, according to the relevant case-law the intention underlying the obligation for a Member State to abolish, in accordance with Article 93(2) of the Treaty, aid regarded as incompatible with the common market is to restore the position to the *status quo ante*, an objective which is attained where the aid at issue, together with any default interest, is repaid to the State by the recipient (see Case C-350/93 *Commission* v *Italy* [1995] ECR I-699, paragraphs 20 to 22).

187 However, neither the case-law nor any provision of Community law requires the Commission to determine the sum to be reimbursed when it demands repayment

of aid declared incompatible with the common market. The case-law in this area requires merely that recovery of aid granted unlawfully restore the position to the *status quo ante* and that repayment be made in accordance with the rules of national law, subject to the requirement that they do not restrict the scope and effectiveness of Community law (Joined Cases 205/82 to 215/82 *Deutsche Milchkontor and Others* [1983] ECR 2633, paragraphs 18 to 25; Case 94/87 *Commission* v *Germany* [1989] ECR 175, paragraph 12; and *Siemens* v *Commission*, cited above, paragraph 82).

188 It should be added that, in so far as the calculation of the amount of aid to be recovered may, as in the present case, call for consideration of tax regimes where the basis of assessment, the rates and the rules governing recovery are fixed directly by the relevant domestic legislation, the Commission is entitled merely to make a general statement that the recipient is obliged to repay the aid in question and to leave to the national authorities the task of calculating the exact amount of aid to be recovered (see, by way of analogy, *Air France* v *Commission*, cited above, paragraph 165).

189 The Court takes the view that, contrary to the applicant's assertion, far from constituting a delegation of unlawful powers, the Commission's decision to entrust the French Government with the task of calculating the amount of aid to be recovered should be viewed as part of the wider obligation of cooperation in good faith between the Commission and the Member States in the implementation of Article 93 of the Treaty. (As regards implementation of Article 93(1), which provides that the Commission is to keep under constant review all existing aid, see Case C-135/93 *Spain* v *Commission* [1995] ECR I-1651, paragraph 24, and Case C-311/94 *Ijssel-Vliet Combinatie* [1996] ECR I-5023, paragraph 36; as regards the difficulties encountered by Member States in giving effect to a Commission decision that aid should be repaid, see Case 94/87 *Commission* v *Germany*, cited above, paragraph 9, Case C-5/89 *Commission* v *Germany*, cited above, paragraphs 13 to 16, and Case C-183/91 *Commission* v *Greece*, cited above, paragraph 19).

190 As for the applicant's argument that the aid in question has not yet been fully repaid, the case-law states that the lawfulness of a decision on aid must be assessed by reference to the information available to the Commission at the time of its adoption (Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraphs 12 and 13, and Case C-241/94 *France* v *Commission*, cited above, paragraph 33). However, the applicant's arguments do not relate to the lawfulness of the adoption of the contested decision, but to the detailed rules for its implementation, which means that they are irrelevant in the present context.

191 It follows that the applicant's complaint that, in entrusting to the French authorities the task of calculating the amount of aid to be repaid, the contested decision is vitiated by an error of law, is unfounded, and must therefore be rejected.

Infringement of Article 190 of the Treaty

Summary of the parties' arguments

192 The applicant maintains that it is clear from the arguments relating to the preceding pleas that the contested decision is vitiated by lack of reasoning and must therefore be annulled.

193 The applicant adds that examination of the statement of reasons for a decision must be based on the grounds put forward in the decision itself and not additional grounds mentioned for the first time during the contentious procedure. Consequently, in exercising its power of review, the Court should disregard the following arguments which the Commission raised for the first time in its defence: (a) the

PMU 'is subject to heavy taxation which goes far beyond the taxation of other activities and undertakings'; (b) 'it is legitimate for the State, in the context of an exceptional scheme of heavy taxation such as that in issue here, to assist in the restructuring of the undertaking concerned by that scheme with a view to securing its own future revenue'; (c) the objective of the aid for computerisation is 'above all the improvement of bloodstock, a legitimate objective consistent with the Community interest'; (d) the ultimate objective of the exemption from the one-month delay rule in deducting VAT was the improvement of bloodstock; and (e) the time restriction on the obligation to repay aid resulting from the exemption of the PMU from the housing levy was justified by the PMU's legitimate expectations based on the judgment of the French Conseil d'État, mentioned above.

194 Lastly, the applicant maintains that the contested decision should also be annulled for infringement of Article 190 of the Treaty because the Commission did not adopt a position with regard to the complaint concerning the PMU's exemption from all forms of income tax.

195 The Commission contends that this plea in law is not an independent plea, and refers to its submissions on the substantive aspects of the case. However, although it did not refer to the aid granted to the PMU for restructuring being designed to protect the State's own revenue until the written procedure (see above, paragraph 46), that was because that consideration is inherent in any decision regarding State aid. Furthermore, that consideration was stated only in order to reply to the applicant's argument, raised for the first time in its application, that the reduction in the State's share of the betting levy in 1985 was an *ad hoc* measure specifically intended to finance the PMU's recovery plan.

196 The Commission argues that the argument put forward in its defence based on the legitimate expectations of the PMU was intended simply to amplify the explanation given in the decision to the effect that the French authorities could not have levied the tax in question in view of the 1962 judgment of the Conseil d'État.

— Findings of the Court

197 Since all the applicant's arguments in support of this plea alleging infringement of Article 190 of the Treaty have already been considered in the context of the previous pleas, the Court considers it unnecessary to address them here.

198 It follows from all the foregoing considerations that the contested decision must be annulled in so far as it found that various advantages granted to the PMU through (a) cash-flow benefits whereby the PMU was able to defer payment of certain charges levied on horse-race betting; (b) the amendment in 1985 and 1986 of the allocation of the levies; (c) the access by the PMU to unclaimed winnings; and (d) exemption from the one-month delay rule for the deduction of VAT after 1 January 1989 do not constitute State aid for the purposes of Article 92(1) of the Treaty. Secondly, the contested decision must be annulled in so far as it limits the temporal scope of the obligation on the French State to reclaim the aid deriving from the PMU's exemption from the housing levy, not as from 1989, but as from 11 January 1991.

The claim that the Court should issue a direction to the Commission

199 The applicant claims that the Court should instruct the Commission to re-examine its complaint forthwith and take the measures required pursuant to Article 176 of the Treaty.

200 It is settled case-law that the Community judicature is not entitled, when exercising judicial review of legality, to issue directions to the institutions or to assume the role assigned to them; rather, it is for the administration concerned to adopt the necessary measures to implement a judgment given in proceedings for annulment. Accordingly, the form of order sought by the applicant must be rejected as inadmissible (Case T-504/93 *Tiercé Ladbroke* v *Commission* [1997] ECR II-923, paragraph 45).

Costs

201 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, Article 87(3) provides that the Court may order that the costs be shared if each party succeeds on some and fails on other heads. Since the application has been partially successful and since each of the parties has applied for costs, the parties should be ordered to bear their own costs.

202 In accordance with Article 87(4) of the Rules of Procedure, the intervener shall bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)

hereby:

1. **Annuls Commission Decision 93/625/EEC of 22 September 1993 concerning aid granted by the French authorities to the Pari Mutuel Urbain (PMU) and to the racecourse undertakings 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;

2. Dismisses the remainder of the action;

3. Orders each party to bear its own costs.

Bellamy Vesterdorf Briët

Kalogeropoulos Potocki

Delivered in open court in Luxembourg on 27 January 1998.

H. Jung A. Kalogeropoulos

Registrar President