

JUDGMENT OF THE COURT OF FIRST INSTANCE  
(Second Chamber, Extended Composition)  
12 June 1997 \*

In Case T-504/93,

**Tiercé Ladbroke SA**, a company incorporated under the laws of Belgium, established in Brussels, represented by Jeremy Lever QC, Christopher Vajda, of the Bar of England and Wales, and Stephen Kon, Solicitor, London, with an address for service in Luxembourg at the Chambers of Winandy and Err, 60 Avenue Gaston Diderich,

applicant,

v

**Commission of the European Communities**, represented by Julian Currall and Francisco Enrique González Díaz, 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

**Société d'encouragement et des steeple-chases de France**, an association governed by French law, established in Boulogne-Billancourt (France),

\* Language of the case: English.

**Société d'encouragement à l'élevage du cheval français**, an association governed by French law, established in Paris,

**Société sportive d'encouragement**, an association governed by French law, established in Paris,

**Société de sport de France**, an association governed by French law, established in Boulogne-Billancourt,

**Société des courses de la Côte d'Azur**, an association governed by French law, established in Cagnes-sur-Mer (France),

**Société des courses du Pays d'Auge**, an association governed by French law, established in Deauville (France),

**Société des courses de Compiègne**, an association governed by French law, established in Compiègne (France),

**Société des courses de Dieppe**, an association governed by French law, established in Rouxmesnil-Bouteilles (France),

**Société des courses de Fontainebleau**, an association governed by French law, established in Fontainebleau (France),

**Groupement d'intérêt économique Pari Mutuel Urbain**, an economic interest grouping governed by French law, established in Paris,

**Pari Mutuel International SA**, a company incorporated under the laws of France, established in Paris,

represented by Bruno Chain and Jérôme Depondt, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Victor Gillen, 13 Rue Aldringen,

interveners,

APPLICATION for annulment of the Commission Decision of 24 June 1993 rejecting a complaint lodged by Tiercé Ladbroke SA on 9 October 1990 (IV/33.699) against the principal French *sociétés de courses* (horse-racing associations), Pari Mutuel Urbain and Pari Mutuel International, alleging infringement of Articles 85 and 86 of the EEC Treaty, and for an order requiring the Commission to re-examine that complaint forthwith,

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

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

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 8 May 1996,

gives the following

## Judgment

### Facts and procedure

- 1 Tiercé Ladbroke SA ('Ladbroke') is a subsidiary company governed by Belgian law, set up in 1982 by Ladbroke Group Plc, whose business consists in making a book in Belgium on horse races run abroad.
- 2 Pari Mutuel Urbain Français ('PMU') is a *groupement d'intérêt économique* (economic interest grouping) set up by the principal *sociétés de courses* in France (hereinafter 'the *sociétés de courses*'). PMU has exclusive responsibility for organizing off-course betting in France, under the *pari mutuel* (totalizator) system, on horse races organized by authorized *sociétés de courses*. PMU also has exclusive rights to take bets abroad on races organized in France and bets in France on races organized abroad.
- 3 Pari Mutuel International ('PMI') is a public limited company governed by French law in which PMU is the majority shareholder. Its objects are to exploit outside France televised pictures of and information on horse races organized in France. Pursuant to a contract concluded on 9 January 1990, which took effect on

1 August 1989, PMU, to which the *sociétés de courses* had granted the right to market television pictures and sound commentaries on horse races organized by them, assigned that right to PMI for the Federal Republic of Germany and Austria.

4 On 25 August 1989, PMI concluded an agreement with Deutscher Sportverlag Kurt Stoof GmbH&Co. ('DSV'), a company governed by German law specializing in publishing horse-racing newspapers covering, among other things, French races. Under that agreement, PMI granted DSV the exclusive right to exploit televised pictures and sound commentaries of French races (hereinafter referred to as 'French sound and pictures') in the Federal Republic of Germany, within the pre-reunification frontiers and including the former zone of West Berlin, and in Austria (hereinafter 'the licensed territory').

5 In September 1989, Ladbroke asked DSV to grant it the right to retransmit the French sound and pictures in Belgium. DSV refused that request in October 1989 on the ground that its contract with PMI debarred it from retransmitting the French sound and pictures outside the licensed territory.

6 Following an amendment to the Belgian legislation governing off-course betting which enabled betting outlets to remain open in the afternoons while horse races were taking place, Ladbroke, by letter dated 18 June 1990, asked PMI for details of the financial and technical conditions for subscribing to the service operated by PMI known as '*Courses en direct*' which enables horse races run in France to be viewed live by satellite.

7 By letter dated 13 July 1990, PMI replied that it was unable to accede to that request on the ground that it did not enjoy 'free disposal of rights in respect of pictures of French races and associated information, since these were the property of the *sociétés de courses* and GIE-PMU'.

8 On 27 July 1990, Ladbroke wrote to PMU and each of the *sociétés de courses* requesting details of the financial and technical conditions for subscribing to the ‘*Courses en direct*’ service.

9 By letter of 8 August 1990, PMU replied to Ladbroke as follows:

‘We would inform you that, under its contract with the *sociétés de courses*, GIE-PMU has at its disposal pictures belonging to the *sociétés de courses* only for the purposes of broadcasting them in real time over its bet-taking network in France and, as far as other countries are concerned, only for the purposes of retransmission in the Federal Republic of Germany and Austria. Accordingly, we do not have the powers over those rights presumed by your request. Moreover, the *sociétés de courses* which are members of the Groupement d’intérêt économique have informed us that, by a letter of the same date and with the same content, you asked them individually to notify you of their conditions for supplying their service. Those companies have instructed us, as the Groupement d’intérêt économique, to notify you, in their name and on their behalf, that they have no intention to grant rights for the commercial exploitation of their copyrights in Belgium.’

10 On 9 October 1990, Ladbroke lodged a complaint with the Commission under Article 3(2)(b) of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87; hereinafter ‘Regulation No 17’), in which it asked the Commission to bring to an end an infringement of Article 85 and/or Article 86 of the EEC Treaty by the principal French *sociétés de courses*, PMU, PMI and DSV. It also asked the Commission to adopt interim measures.

11 In its complaint, Ladbroke took issue both with the direct refusal of the *sociétés de courses*, PMU and PMI, and with the indirect refusal of DSV, to provide it with the French sound and pictures for its betting outlets in Belgium, although it pointed

out that, in so far as DSV's conduct consisted solely in giving effect to the contractual restrictions imposed on it by the other parties to which the complaint related, its complaint did not seek to impute any liability to DSV under Articles 85 and 86 of the Treaty or Regulation No 17.

12 According to Ladbroke, the relevant product market, in relation to which the alleged infringements should be examined, was the market in the transmission of French sound and pictures. As for the relevant geographical market, Ladbroke maintained that it was the Community market or a market comprising at least France, Germany and Belgium.

13 As regards the alleged infringement of Article 86, Ladbroke asserted that the principal *sociétés de courses*, alone or together with PMU/PMI, enjoyed a joint dominant position with regard to the transmission of the French sound and pictures in the common market and in each Member State. Their direct refusal to provide Ladbroke with the French sound and pictures constituted an abuse of a joint dominant position for which there was no objective justification, since (i) it was technically possible for PMU and PMI to supply it with the French sound and pictures against payment of a reasonable fee; (ii) PMU and PMI were prepared to supply the French sound and pictures to competitors of Ladbroke in Belgium, namely Pari Mutuel Unifié Belge, Tiercé Franco-Belge and the Dumoulin company; (iii) the principal *sociétés de courses* had already authorized transmission of the French sound and pictures in France and Germany; (iv) the refusal to supply Ladbroke with the French sound and pictures prevented the introduction of a new product, to the detriment of Belgian betting outlets and their customers, and (v) in so far as the principal *sociétés de courses* had rights over the French sound and pictures, they were not entitled to use those rights in a manner constituting an abuse. With regard to points (iv) and (v), the applicant supported its arguments by referring to Commission Decision 89/205/EEC of 21 December 1988 relating to a proceeding under Article 86 of the Treaty (IV/31.851 — Magill TV Guide/ITP, BBC and RTE) (OJ 1989 L 78, p. 43; hereinafter 'Decision 89/205' or 'the Magill decision').

14 It also maintained that DSV's indirect refusal to supply it with the French sound and pictures by reason of the restrictions contractually imposed on it by PMU and/or PMI and/or the *sociétés de courses* also constituted an abuse of a dominant position for which there was no objective justification.

- 15 As regards, secondly, the alleged infringement of Article 85(1) of the Treaty, Ladbroke maintained in its complaint that the obligation imposed by PMU/PMI on DSV to incorporate a clause in its contracts with German bookmakers prohibiting the retransmission of French sound and pictures outside the licensed territory constituted an infringement of Article 85(1) of the Treaty.
- 16 After Ladbroke's complaint was lodged, the Commission sent PMU and PMI a request for information pursuant to Article 11 of Regulation No 17. A version of the answers given by PMU and PMI, from which information of a confidential nature had been removed, was subsequently made available to the complainant.
- 17 By letter dated 19 March 1991, Ladbroke pointed out to the Commission that it was clear from PMU's reply to the request for information that it intended to commercialize the French sound and pictures in Belgium in collaboration with third parties, not including Ladbroke. Ladbroke therefore called on the Commission to proceed with its investigation into the abusive practices criticized in its complaint or, failing this, to inform it pursuant to Article 6 of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47; hereinafter 'Regulation No 99/63') of the reasons for which it considered that it was not appropriate to uphold its complaint.
- 18 By letter dated 26 June 1992, Ladbroke formally called on the Commission, pursuant to the second paragraph of Article 175 of the Treaty, to adopt a decision on its complaint.
- 19 By application lodged on 12 October 1992, Ladbroke brought an action for failure to act before the Court of First Instance under the third paragraph of Article 175 of the Treaty in which it sought a declaration that the Commission had, in breach of the Treaty, failed to take a final decision following the submission of its complaint. The case was registered as Case T-86/92.



20 By letter dated 11 November 1992, sent pursuant to Article 6 of Regulation No 99/63, the Commission informed Ladbroke that it was not minded to uphold its complaint.

21 According to the letter, in this case the relevant product market for the purposes of Article 85 and 86 of the Treaty was the market for the retransmission of sound and pictures for horse races in general. As for the relevant geographical market, the Commission considered that it was confined to Belgium.

22 As far as concerns the application of Article 86 of the Treaty, the Commission took the view that Ladbroke had not shown that the *sociétés de courses* occupied a joint dominant position within the meaning of the judgment in Joined Cases T-68/89, T-77/89 and T-78/89 *SIV and Others v Commission* [1992] ECR II-1403 (the '*Flat Glass*' case). It also stated that there was no analogy between the present case and the judgment in Case T-69/89 *RTE v Commission* [1991] ECR II-485 (hereinafter '*the Magill judgment*') given on an application for the annulment of Decision 89/205 (hereinafter '*the Magill case*'). According to the Commission, Ladbroke already occupied a dominant position in the market on which the French sound and pictures are offered to consumers, namely the horse-race betting market, whereas the *sociétés de courses* were not even present in that market. Moreover, what was the decisive factor in the *Magill* case was that the abusive conduct of the television channels concerned consisted in preventing the marketing of a new product to the detriment of consumers' interests, whereas in this case the relaying of sound and pictures for horse races did not constitute a service which genuinely differed from that already provided to bettors, namely the taking of bets.

23 As far as the application of Article 85(1) of the Treaty was concerned, the Commission took the view that, as Community law stands, the prohibition imposed by the principal *sociétés de courses* on DSV's retransmitting the French sound and pictures outside the licensed territory fell within the scope of the licensor's rights and therefore was not caught by Article 85(1) of the Treaty.

- 24 By letter dated 13 January 1993, Ladbroke submitted its observations in reply to the Commission's letter of 11 November 1992. It claimed that the direct refusal of the *sociétés de courses* to grant it a transmission licence for sound and pictures of their races and their indirect refusal through DSV were the subject of an agreement and/or concerted practice between the *sociétés de courses* and/or a decision of an association of undertakings, contrary to Article 85(1) of the Treaty.
- 25 By order of 19 March 1993, the President of the Second Chamber, on application by Ladbroke, ordered the removal from the register of the action for failure to act (Case T-86/92) in view of the Commission's letter of 11 November 1992 (see paragraphs 19 and 20 of this judgment).
- 26 By a decision contained in a letter dated 24 June 1993, the Commission, dealing only with the main arguments put forward by Ladbroke in its observations of 13 January 1993, definitively rejected Ladbroke's complaint on the grounds contained both in that decision and in the letter sent pursuant to Article 6 of Regulation No 99/63 ('for the reasons set out in its letter of 11 November 1992, [...] there are insufficient grounds for granting your application for a finding of infringement. The comments you submitted on 13 January 1993 do not contain any new points of fact or law which could alter the views taken and conclusions reached by the Commission in its letter of 11 November 1992. This letter therefore does not repeat what was said in that letter but deals only with the main arguments contained in your comments.').
- 27 As regards the definition of the relevant product market, described as the market in sound and pictures in general and not that in French sound and pictures, the Commission took the view in its decision that the latter were substitutable for the sound and pictures of other races since, as shown by an analysis of the principal betting market in Germany, although 40% of the bets taken by bookmakers were on German races, 40% on French races and 20% on British races, 67% of bookmakers had chosen to receive French sound and pictures, 23% British sound and pictures and 10% both French and British sound and pictures. It also rejected

Ladbroke's argument that the Commission itself had conceded that the relevant product market was the market for French sound and pictures when, in an earlier decision adopting interim measures, namely Commission Decision 92/35/EEC of 11 June 1991 requiring France to suspend the implementation of aid in favour of PMU introduced in breach of Article 93(3) of the Treaty (OJ 1992 L 14, p. 35; hereinafter 'the PMU decision'), it referred to a judgment delivered on 21 December 1990 by the Landgericht Saarbrücken in the case of *Buchmacher Herbert Hellmund v Deutscher Sportverlag Kurt Stoof GmbH & Co. KG* (annex 9 to the application) (hereinafter '*Hellmund v Deutscher Sportverlag*').

28 The Commission emphasized that the definition of the relevant geographical market depended not on the technical feasibility of retransmitting French sound and pictures throughout the Community, but on a number of other factors, such as the habits of bettors, the type of betting offered (totalizator or bookmaking) and the countries in which races were organized, in other words the structure of supply and demand, which was determined by the betting markets themselves and by the differences between the various national laws.

29 With regard in particular to the habits of Belgian and German consumers, the Commission found that, although the sound and pictures for British races were relayed on the German and Belgian markets, those races accounted for less than 10% of bets in Germany, whereas German races, for which only the commentary was transmitted, without pictures, accounted for 90% of total betting. In contrast, in the Belgian market, Belgian races accounted for only 31.5% of bets, the rest being taken on foreign races, namely 63% on French races and 5% on British races.

30 On the basis of those differences in the behaviour of Belgian and German bettors — the economic operators to whom the supply side of the market for taking bets and the supply side of the market for the retransmission of sound and pictures of races are aimed — the Commission concluded that the market in sound and pictures of horse races was divided into national markets.

- 31 As regards the infringement of Article 86 of the Treaty and the alleged joint dominant position, the Commission rejected Ladbroke's argument that the *sociétés de courses* and PMU occupied a joint dominant position within the meaning of the judgment in the *Flat Glass* case because they were united by economic links by virtue of the contract of 9 January 1990 concluded between them (see paragraph 3 of this judgment). First, PMU's right to manage the rights of the *sociétés de courses* relating to races organized by them did not stem from that contract, which moreover did not grant exclusivity to PMU, but from the French legislation on the organization of off-course totalizator betting. Secondly, although the legislation in question entrusted PMU with the exclusive management of off-course betting, it appeared from a number of clauses of the abovementioned contract, in particular Article 2 and the first and second indents of Article 4, that the *sociétés de courses* still retained their intellectual property rights in respect of the races they organized. Finally, the fact that the *sociétés de courses* had all responded to a request for information from the Commission by means of a single letter, sent on their behalf by PMU, was not proof that the *sociétés de courses* had waived their right to independent behaviour in the relevant market.
- 32 As to the existence of abuse, the Commission took the view that, given that this case was concerned with national geographical markets, the conduct of which the *sociétés de courses* stood accused could not be assessed in the light of their policy of granting licences in the various geographical markets and that, by refusing to grant Ladbroke the licences requested for the Belgian market, the *sociétés* had not discriminated against it as compared with other operators.
- 33 It also considered that, in its observations on the letter sent pursuant to Article 6 of Regulation No 99/63, Ladbroke was not entitled to rely on Commission Decision 88/589/EEC of 4 November 1988 relating to a proceeding under Article 86 of the EEC Treaty (IV/32.318 London European — Sabena OJ 1988 L 317, p. 47; hereinafter 'the *London European v Sabena* case'), according to which Sabena had infringed Article 86 of the Treaty by pursuing a course of conduct intended to deter London European from operating on the Brussels-Luton route by refusing to grant it access to a computerized reservation system for aircraft seats in Belgium. According to the Commission, in this case, by contrast with the *London European v Sabena* case, neither the *sociétés de courses* nor PMU operated on the relevant market, that is to say the Belgian market in the transmission of

horse racing in general. This observation also applied to the judgments of the Court of Justice in Joined Cases 6/73 and 7/73 *ICI and Commercial Solvents v Commission* [1974] ECR 223 and Case 311/84 *CBEM v CLT and IPB* [1985] ECR 3261, also relied on by the applicant in its observations.

- 34 As regards the infringement of Article 85(1) of the Treaty, the Commission emphasized that both the prohibition imposed by the *sociétés de courses* on DSV's retransmitting the French sound and pictures outside the licensed territory and their refusal to grant Ladbroke a licence for the French sound and pictures formed part of their intellectual property rights, guaranteed by Community law, and did not therefore constitute an infringement of that article of the Treaty.
- 35 Ladbroke brought the present action by application lodged at the Registry of the Court of First Instance on 31 August 1993.
- 36 On 11 January 1994, Société d'encouragement et des steeple-chases de France, Société d'encouragement à l'élevage du cheval français, Société sportive d'encouragement, Société de sport de France, Société des courses de la Côte d'Azur, Société des courses du Pays d'Auge, Société des courses de Compiègne, Société des courses de Dieppe, Société des courses de Fontainebleau, PMU and PMI (hereinafter 'the interveners') sought leave to intervene in support of the form of order sought by the Commission.
- 37 Leave to intervene was granted by order of the Court of First Instance (Second Chamber) of 8 June 1994. On 19 July 1994, the interveners lodged their statement in intervention, on which the Commission submitted its observations on 13 September 1994 and the applicant on 14 October 1994.

- 38 By decision of the Court of First Instance of 19 September 1995, the Judge-Rapporteur was assigned to the new Second Chamber, Extended Composition, to which the case was consequently assigned. Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber, Extended Composition) decided to open the oral procedure and asked the parties to answer a number of written questions. The parties did so within the appointed period.
- 39 At the hearing on 8 May 1996, the parties presented oral argument and answered questions put to them orally by the Court, composed of H. Kirschner, President, B. Vesterdorf, C. W. Bellamy, A. Kalogeropoulos and A. Potocki.
- 40 Following the death of Judge H. Kirschner on 6 February 1997, the present judgment was drawn up after deliberation by the three judges whose signature it bears, in accordance with Article 32(1) of the Rules of Procedure.

### Forms of order sought

41 The applicant claims that the Court of First Instance should:

- annul the Commission Decision of 24 June 1993;
- order the Commission to re-examine forthwith the Belgian complaint (IV/33.699) pursuant to Article 176 of the Treaty;
- order the Commission to pay the costs.

42 The defendant contends that the Court of First Instance should:

- dismiss the action as unfounded;
- order the applicant to pay the costs.

43 The interveners contend that the Court of First Instance should:

- declare the applicant's action unfounded and dismiss it;
- order the applicant to pay the costs of their intervention.

#### **The claim for a direction to be issued to the Commission**

44 The applicant asks the Court of First Instance to order the Commission to re-examine its complaint forthwith pursuant to Article 176 of the EC Treaty.

45 However, according to settled case-law, 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 (see Case T-19/90 *Von Hoessle v Court of Auditors* [1991] ECR II-615, paragraph 30). It is for the administration concerned to adopt the necessary measures to implement a judgment given in proceedings for

annulment (Case 53/85 *AKZO Chemie v Commission* [1986] ECR 1965, paragraph 23, and Case T-109/94 *Windpark Groothusen v Commission* [1995] ECR II-3007, paragraph 61).

- 46 Consequently, the applicant's claim for a direction to be issued to the Commission must be rejected as inadmissible.

### **The claim for annulment**

- 47 The applicant maintains first that the Commission is not entitled to rely on the arguments contained in its letter sent pursuant to Article 6 of Regulation No 99/63 since it did not repeat them in the contested decision. It then puts forward two pleas in law alleging, respectively, misapplication of Articles 86 and 85 of the Treaty.

1. *Whether the Commission is entitled to state the grounds for the decision rejecting the complaint by reference to the letter sent pursuant to Article 6 of Regulation No 99/63*

### *Summary of the parties' arguments*

- 48 The applicant maintains that, in the contested decision, the Commission could not validly rely on a reference to, but not express repetition of, the arguments contained in its letter sent pursuant to Article 6 of Regulation No 99/63. It submits that the approach to be taken should be the same as that for decisions finding an infringement of Article 85(1) which are adopted following a statement of objections and replies thereto and contain all the objections and observations of the undertakings concerned. By virtue of the fundamental principles of administrative law, the Commission is debarred from simply referring in its decisions to reasons set out in a preparatory act such as a statement of objections or a letter sent



pursuant to Article 6 of Regulation No 99/63. The fact that the Commission is so debarred makes it possible to verify that the addressee of the decision has been 'heard' within the meaning of Regulations Nos 17 and 99/63, that is to say, that its arguments have been properly taken into account by the Commission.

49 The applicant maintains that it cannot be concluded from a reading of its observations on the letter sent pursuant to Article 6 of Regulation No 99/63 that they added nothing to what had already been stated in its complaint.

50 The Commission considers that the possibility of giving reasons for a decision rejecting a complaint by reference to a letter sent pursuant to Article 6 of Regulation No 99/63 has to do with the role of such letters in the procedure for the treatment of complaints. After the complainant has submitted further observations on the letter sent pursuant to Article 6 of Regulation No 99/63, the Commission may reject the complaint, mentioning the reasons set out in that letter, or indicate those reasons and also deal with the complainant's new arguments or simply reproduce word for word the reasoning set out in the letter sent pursuant to Article 6, with or without discussion of the complainant's new arguments. It considers that, whichever course it takes, the complainant cannot pretend to be unaware of the reasons for which his complaint was rejected, and ask that judicial review be confined to the reasons set out in the final decision.

51 It adds that, in any event, Ladbroke did not raise any new factual or legal matters in its observations on the letter sent pursuant to Article 6 of Regulation No 99/63.

*Findings of the Court*

- 52 The answer to the question whether a Community measure fulfils the obligation laid down in Article 190 of the Treaty to state the reasons on which it is based depends on the nature of the act in question and on the context in which it was adopted (Case 13/72 *Netherlands v Commission* [1973] ECR 27, paragraph 11). Thus, where the party concerned was closely involved in the process by which the contested decision came about and is therefore aware of the reasons for which the administration considered that the request should not be upheld, the scope of the obligation to state reasons will be defined by the context thus created by the party's involvement in that process (Case 819/79 *Germany v Commission* [1981] ECR 21, paragraphs 19, 20 and 21, and Case 14/88 *Italy v Commission* [1989] ECR 3677, paragraph 11). In such circumstances, the requirements of the applicable case-law are considerably relaxed (Case 1252/79 *Lucchini v Commission* [1980] ECR 3753, paragraph 14, and Joined Cases 275/80 and 24/81 *Krupp v Commission* [1981] ECR 2489, paragraphs 10 to 13).
- 53 With regard more particularly to competition law, an area in which the involvement of the persons concerned by the procedures leading to the adoption of decisions under Regulation No 17 is of decisive importance, the Community judicature must consider itself to be seised of all such matters of fact and law contained in the application or in the complainant's observations as were taken into account by the Commission in reaching the decision to close the file on a complaint (Case 298/83 *CICCE v Commission* [1985] ECR 1105, paragraph 19). Consequently, in the event of proceedings against such a decision, the Community judicature must be regarded also as being seised of all the matters of fact or of law brought to the complainant's notice by the Commission in response to its complaint (see, in this regard, Case T-114/92 *BEMIM v Commission* [1995] ECR II-147, paragraph 45).
- 54 In this case, therefore, the Commission was entitled to reject the applicant's complaint both on the grounds contained in the letter sent pursuant to Article 6 of Regulation No 99/63 and on those set out in the contested decision, while intimating that its decision would deal only with such of the applicant's arguments as called for an additional response on its part (see paragraph 26 of this judgment).

55 In so far as it referred to the letter sent pursuant to Article 6, the contested decision disclosed with sufficient clarity the reasons for which the complaint was rejected, thus enabling the applicant to defend its rights before the Community judicature and the latter to review the legality of the decision (Case C-360/92 P *Publishers Association v Commission* [1995] ECR I-23, paragraph 39, Case T-85/94 *Branco v Commission* [1995] ECR II-45, paragraph 32, and *BEMIM v Commission*, cited above, paragraph 41).

56 It follows from the foregoing that the plea is unfounded and must therefore be rejected.

## *2. Misapplication of Article 86 of the Treaty*

57 This plea has four limbs. In the first two, the applicant claims that the Commission wrongly defined the product market and the geographical market in question. In the third limb, it maintains that, contrary to what is indicated in the contested decision, the *sociétés de courses* do occupy a joint dominant position. In the fourth limb, it claims that the direct refusal of the *sociétés de courses* and the indirect refusal of their 'associés' (associates) constitute an abuse of a joint dominant position within the meaning of Article 86 of the Treaty.

### *First limb: definition of the relevant product market*

#### Summary of the parties' arguments

58 The applicant maintains that the decision is flawed on the ground that the Commission does not explain what is the relevant product market and gives no

indication of the reasons for which it rejected the market definition suggested in the complaint, namely the market in French sound and pictures.

- 59 First, it considers that it is impossible to understand the meaning of the second subparagraph of paragraph 8 of the contested decision, in which, in support of the view that the relevant product market is that in sound and pictures in general, the Commission states that French and British races are competitors, from the point of view of the bettors, because although 40% of the bets taken on the German market by German bookmakers are on German races, 40% on French races and 20% on British races, 67% of bookmakers have chosen to receive the French sound and pictures, 23% the British and 10% both.
- 60 Moreover, the fact that in France, Germany and Belgium there are different betting markets should not affect the definition of the market in sound and pictures, which is an entirely different market. Any substitutability between the various races on the betting market does not mean that broadcasts of the various races are also substitutable on the market in sound and pictures. Neither bookmakers, who wish to increase their turnover from French races, nor bettors betting on those races, have any interest in receiving the sound and pictures of other races. Thus, by referring in the contested decision to the specific characteristics of the betting market in the various countries, the Commission introduced an irrelevancy which served only to obscure the definition of the relevant product market.
- 61 The defects and inadequacies of the contested decision with regard to the definition of the relevant product market are particularly incomprehensible given that, in the PMU decision (see paragraph 27 of this judgment), the Commission referred to the judgment of the Landgericht Saarbrücken in *Hellmund v Deutscher Sportverlag*, which concluded that in Germany there was a separate market in French sound and pictures. Thus, if in this case the Commission proposed departing from its own findings concerning that judgment, it should have given a detailed and

complete statement of reasons in the contested decision. According to the applicant, to maintain that the Commission was not bound by the abovementioned findings of the German court concerning the relevant product market is difficult to reconcile not only with the contrary findings contained in the PMU decision but also with the principle of 'constant and sincere cooperation' which binds both the Commission and the national courts.

62 The Commission contends that the contested decision contains an adequate statement of reasons because it defines the relevant product market as set out in the letter sent pursuant to Article 6 of Regulation No 99/63, of which the applicant cannot be unaware, for the reasons given above (see paragraphs 50 and 51 of this judgment).

63 It also contends that the applicant's arguments challenging the very definition of the product market are unfounded.

64 In that connection, it states that it defined the relevant market as being not bets on racing but the retransmission of sound and pictures of horse races in general because the buyers of sound and pictures on the race 'retransmission' market are bookmakers, whereas the customers in the 'betting' market are the final consumers, that is to say, the bettors.

65 It then submits that it is impossible to give an answer in the abstract, without taking account of factual differences from one country to another, to the question whether the market in the retransmission of sound and pictures of French horse races must be defined as a market distinct from the market in the retransmission of sound and pictures of other races, in particular, British races. In order to consider the degree of substitutability between the retransmission of sound and pictures of French races and the retransmission of sound and pictures of other races, it would have had to undertake a detailed statistical analysis of the way in which bettors' choices might be affected by differences in the hourly and daily coverage of horse races. Since at the material time there was no retransmission of French sound and

pictures in Belgium, such a study would have been impossible, so that, in the Commission's submission, the relevant market had to be defined as that of retransmission of sound and pictures of horse races in general.

- 66 The Commission contests the applicant's proposition that the French sound and pictures and the sound and pictures of other races are not substitutable on the ground that the bettor needs to see pictures of the races on which he is betting. Whilst it is true that the choice between betting on the various races, for example British or French, is to some extent related to the preferences and racing knowledge of the bettors, the fact remains that, in their eyes, those races compete with each other for bets. The same applies to the bookmakers' choice as to sound and pictures of the various races transmitted, which must be regarded as competing products, in so far as the bookmakers' choice depends not only on the amount of betting on the various races, but also on other factors such as the terms of the licensing agreements and/or whether there are other betting outlets offering other sound and pictures. The correctness of that analysis is apparent from the information obtained in the investigation of another complaint by the applicant concerning the German betting market (complaint IV/33.375, annex 8 to the application; hereinafter 'the German complaint'), on which a number of races are retransmitted. Although 40% of the bets placed on the latter market with German bookmakers are on French races, 40% on German races and 20% on British races, 67% of bookmakers chose to receive the French sound and pictures, 23% opted for British race retransmissions and 10% chose both networks.
- 67 Finally, with regard to the reference made in the PMU decision to the judgment of the Landgericht Saarbrücken of 21 December 1990, the Commission states that that reference did not in any way adopt the German court's assertion as to the existence of a separate market in French sound and pictures, but merely sought to show, first, that Ladbroke had business activities in Germany and, second, that the retransmission of sound and pictures of horse racing in a country considerably influences betting on races.

- 68 In its reply, the applicant contends that the fact that a product has never been sold on a given market and that there are no statistics concerning the product in question must not prevent consideration of whether or not there is an abuse of a dominant position. It states that both the Commission and the Court of Justice have in the past defined the relevant product market without the need for a detailed statistical study [Commission Decision 92/521/EEC of 27 October 1992 relating to a proceeding under Article 85 of the EEC Treaty (IV/33.384 and IV/33.378 — Distribution of package tours during the 1990 World Cup, OJ 1992 L 326, p. 31); the *Magill* decision, and the judgments of the Court of Justice in Case 26/75 *General Motors v Commission* [1975] ECR 1367 and Case 226/84 *British Leyland v Commission* [1986] ECR 3263].
- 69 The interveners endorse the Commission's arguments. They maintain that the Commission's analysis concerning the definition of the relevant product market is also borne out by the following considerations. First, the possibility or otherwise of following the television broadcast of a race has no connection with the possibility of betting before the beginning of the race. Second, the bettors' interest in pictures broadcast in the outlets where they place their bets depends on their knowledge and experience. In that connection, the interveners, drawing a distinction between occasional bettors and regular bettors, observe that the former, who visit betting outlets from time to time, place bets on the races which are offered and have no particular preference for any particular category of race or, therefore, for pictures of any particular race. On the other hand, regular bettors place their bets in the light of their detailed knowledge of horse-racing, in particular of the capabilities and form of the jockeys and horses, and not of the place where the race is run or whether or not it is retransmitted.
- 70 As to whether there is substitutability between the transmission of the various horse-races, linked with the substitutability of the bets taken on such races, the interveners observe that, in its application of 28 August 1993, the applicant indicated that German races accounted for 40% of the bets placed in Germany, French races for 30% and British races for 30%, whereas in its German complaint of November 1989, in which it accused PMU of refusing to provide it with French sound and pictures for its outlets in Germany, it stated that French races accounted

for approximately 40% of bets on races. That shows that, despite the re-transmission of French races in Germany, the market share of bets on French races has fallen by about 25% in three years. The interveners add that, according to the contested decision, the market share of British races in Germany was 20%, whereas, according to the figures given by the applicant in its application, that share has now increased to 30%. They conclude from this that those figures also show the continual variations in the market for sound and pictures and the substitutability of the various race transmissions.

- 71 Finally, according to the interveners, the lack of any link between the retransmission of sound and pictures of races and the taking of bets on those same races is proved by the following facts: (i) the availability of pictures does not govern access to taking bets; (ii) the persons involved in the betting market (betting outlets and bettors) and those in the market for the retransmission of pictures (betting outlets, producers of the pictures) are different; (iii) it is not the availability of sound and pictures which guides the choice of bettors but the amount of the stakes on a race; (iv) the retransmission of a race is so independent from the taking of bets that at no time are either of them associated with one another, and (v) an undertaking may hold a dominant position in the market for sound and pictures without being present in the bet-taking market itself, as is apparent from the factual part of the contested decision.

## Findings of the Court

— The absence or inadequacy of the statement of reasons

- 72 In the first place, the Court observes that, as appears from the letter sent pursuant to Article 6 of Regulation No 99/63 (see paragraph 21 of this judgment), the Commission clearly defined the relevant product market as the transmission of sound and pictures of horse races in general rather than the taking of bets on races (see point II 1 a of the letter, p. 11).



73 Furthermore, it justified the definition first by the fact that the economic operators on the market for the taking of bets are different from those operating on the market for the retransmission of sound and pictures of horse races, with the result that the definition of the relevant product market can comprise only the services of broadcasting sound and television pictures of races (see point II 1 a, second paragraph, of the abovementioned letter, p. 12). Secondly, the Commission took the view that it was impossible to answer in the abstract the question whether that market was confined solely to French races, as asserted by the applicant, or whether on the contrary it included other races, since the answer to the question depended on factual information which varied from one Member State to another. The Commission declared that it was impossible for it to undertake a detailed analysis of the impact of the differences in hourly and daily coverage of the various horse races on betting choices in Belgium, because there was no retransmission of French sound and pictures in Belgium during the period when the complaint was examined. However, referring to the conditions of competition prevailing on the betting market in Germany as between the various races, it concluded that the relevant market was the retransmission of sound and pictures of horse races in general (see point II 1 a, fifth paragraph, of the letter sent pursuant to Article 6 of Regulation No 99/63, p. 12, and paragraph 8 of the letter of 24 June 1993).

74 Accordingly, the contested decision states with sufficient clarity the essential reasons for the definition of the relevant product market adopted by the Commission. Consequently, the applicant's allegation that there is no, or no adequate, statement of reasons cannot be upheld.

75 That conclusion is not affected by the applicant's argument that the Commission should have explained its definition of the product market in a 'particularly full and reasoned' manner on the ground that that definition contradicted the earlier reference made by the Commission, in the PMU decision, to the judgment of the Landgericht Saarbrücken in *Hellmund v Deutscher Sportverlag* (see paragraph 27 of this judgment), which purportedly defined the product market as that in French sound and pictures only.

- 76 First, the PMU decision was a decision adopting interim measures. By contrast with a final decision, such a decision cannot bind the Commission, which may always, following a thorough investigation of the complaint, maintain or alter its initial position.
- 77 Second, contrary to the applicant's assertion, it does not appear from the PMU decision that the Commission adopted the German court's findings with regard to the relevant product market.
- 78 In point 8 of the decision, under the heading the 'Community market for horse-race betting and related services', the Commission states that the information available to it is sufficient 'to demonstrate that there is trade and competition in horse-race betting and related services [and] that the PMU and a limited number of competitors take part in this trade', and concludes under the heading 'PMU' that 'the PMU participates either directly or indirectly in intra-Community trade, that the PMU is pursuing an active policy of export expansion and that it is one of the major market players' and 'that there is trade and competition in the provision of betting services in the Community'.
- 79 It is clear from those extracts, and from the PMU decision as a whole, that the Commission referred to the Landgericht Saarbrücken's judgment in order to substantiate the existence of trade between France and Germany in betting and related services such as to justify, together with the other considerations set out in the PMU decision (see in particular pp. 36, 37 and 38 thereof), the application of Articles 92 and 93 of the Treaty to the aid granted by the French State to PMU, and not in order to define the relevant product market.

80 Consequently, the applicant cannot maintain that the definition of the relevant product market conflicted with the Commission's previous decision-making practice and therefore called for a more detailed statement of reasons.

— The correctness of the definition of the product market

81 According to settled case-law, for the purposes of applying Article 86 of the Treaty, the relevant product or service market includes products or services which are substitutable or sufficiently interchangeable with the product or service in question, not only in terms of their objective characteristics, by virtue of which they are particularly suitable for satisfying the constant needs of consumers, but also in terms of the conditions of competition and/or the structure of supply and demand on the market in question (Case 31/80 *L'Oréal* [1980] ECR 3775, paragraph 25; Case 322/81 *Michelin v Commission* [1983] ECR 3461, paragraph 37; Case C-62/86 *AKZO Chemie v Commission* [1991] ECR I-3359, paragraph 51; Case T-30/89 *Hilti v Commission* [1991] ECR II-1439, paragraph 64, and Case T-83/91 *Tetra Pak v Commission* [1994] ECR II-755, paragraph 63).

82 As regards the applicant's argument that the Commission could not justify its assertion that there is competition between the sound and pictures of the various races by referring to the German betting market because the latter is a distinct market, the Court considers that, in the absence of any televised transmission of French sound and pictures on the Belgian market, where only sound and pictures of British races were broadcast, the Commission was right, when considering whether or not a competitive relationship existed between the French sound and pictures and the sound and pictures of other horse races, to refer to the German market, where French races are transmitted in parallel with other races. Moreover, the applicant cannot criticize the Commission for taking account of the conditions of competition on the German betting market. By maintaining in its complaint that the market in the sound and pictures of French races was Community-wide or included, at the very least, Germany, France and Belgium, the applicant invited the Commission to examine the substitutability of the sound and pictures of French

races and the sound and pictures of other races, specifically taking account of the conditions of competition on several Community markets, including the German market.

- 83 The Commission was also entitled to refer to the conditions of competition existing on the principal betting market in order to examine the conditions of competition existing downstream in the sound and pictures market. By comparing the market shares of betting on the various horse races and the market shares of the sound and pictures of such races, it was able to take a view on the question whether the choice made by bookmakers as to the races transmitted in their betting outlets derived solely, as the applicant maintains, from the supposed wish of bettors to see only the races on which they bet retransmitted.
- 84 It is clear from paragraph 8 of the contested decision that demand on the German market in sound and pictures is subject to some variability as compared with demand on the betting market. This shows, contrary to the applicant's assertion, that the choice made by German bookmakers as between sound and pictures of different origins is not based solely on the desire of bettors to see only the races on which they have bet, but also on other factors, such as the conditions on which the transmission of races is offered to them and/or the pursuit of a policy whereby some races are promoted more than others, which, as the Commission has correctly emphasized, are factors in the competitive relationship between the sound and pictures of different origins on offer. According to figures not challenged by the applicant, although 40% of bets placed with German bookmakers are on French races, 40% on German races and 20% on British races, 67% of bookmakers have chosen to receive and retransmit the sound and pictures of French races, whereas 23% have opted for the transmission of British races and 10% have chosen both networks.
- 85 Moreover, it is to be noted that, in Belgium, betting outlets may make a book only on horse races run abroad and that, at the material time, the sound and pictures of British races were the only ones being retransmitted in Belgian betting outlets. It

follows that, in Belgium, there was at least one product other than the transmission of the sound and pictures of French races which was comparable in terms of its technical characteristics and use.

86 In those circumstances, the applicant's assertion that bettors on French races are not content with pictures of other races is likewise insufficient to establish that, in this case, the definition of the product market must be limited to the sound and pictures of French races, to the exclusion, in particular, of the sound and pictures of British races, which are at present available in Belgium. As has just been stated (see paragraph 84 of this judgment), it cannot be presumed, in the absence of actual evidence, that the decision to buy transmissions of the sound and pictures of races, taken by the betting outlet and not by the bettor, is taken solely by reference to the existing habits of bettors, without having regard to other factors, such as the terms of the licence contracts offered by the various licensors.

87 It appears from the documents before the Court, in particular from the information provided by the applicant itself (see points 6.14 and 6.15 of the application and paragraph 94 of this judgment), that 100% of the bets taken by the applicant's outlets in Belgium, before the amendment to Belgian legislation which enabled pictures of British horse races to be retransmitted, were on French races as against 0% on British races and that, since the amendment in question, bets taken on French races, which are still not retransmitted in Belgium, account for 60%, as against 40% for British races, for which pictures are now retransmitted. In view of that information provided by the applicant itself, it must be concluded that the non-transmission of sound and pictures of French races and the transmission of the sound and pictures of British races have not prevented and still do not prevent Belgian bettors from continuing to bet on French races. Consequently, the applicant cannot claim that demand on the market in sound and pictures and the consequent choice by bookmakers between sound and pictures of different origins are based solely on bettors' wish to see only races on which they have bet and that, therefore, the sound and pictures of the various races are not mutually substitutable.

- 88 It follows that the applicant has not established that the Commission made a manifest error of assessment with regard to the definition of the product market.
- 89 It follows from the whole of the foregoing that the applicant's arguments that there was no, or no adequate, statement of reasons and that the relevant product market was incorrectly defined must be rejected in their entirety.

*Second limb: definition of the relevant geographical market*

Summary of the parties' arguments

- 90 The applicant maintains that the identification of a number of separate national geographical markets is the result of confusion between the market in sound and pictures and the betting market: they are different product markets, which may also be delimited differently in geographical terms. It must be borne in mind in that connection that in Belgium, as in France and in Germany, there is substantial demand for the French sound and pictures, as evidenced by the fact that 95% of the applicant's turnover comes from bets on French races, and that that demand cannot be satisfied in any other way. Moreover, Belgian bettors can place bets with French outlets by telephone or Minitel or even cross the Franco-Belgian border to place a bet in France. Finally, there is no technical obstacle to the transmission of the sound and pictures of French races in Belgium.
- 91 The applicant also maintains that the figures given in the contested decision for demand for betting in Germany and Belgium on German, French, Belgian and British races did not appear in the letter sent pursuant to Article 6 of Regulation No 99/63 and that the contested decision makes no reference to their source.

- 92 Moreover, the figures cited by the Commission for the structure of demand in Germany and Belgium are inaccurate, misleading and irrelevant, in so far as they are based on on-course betting and bets taken by bookmakers rather than confined to the latter bets, which would show that the structure of demand on the Belgian and German markets is strongly influenced by the possibility of transmitting sound and pictures.
- 93 The applicant submits that the figures for the German market cited by the Commission (paragraph 10 of the contested decision) show that 90% of bets are taken on German races (without pictures) and 10% on British races (with pictures), whereas the various market shares in bets taken by German bookmakers only amount to 40% of the bets taken on German races, 30% on French races and 30% on British races, as appears from information obtained from bookmakers in Germany. Information from the applicant's only outlet in Berlin, which has not been allowed to receive French pictures, shows that the market shares for races are as follows: German races 35%, French races 2%, British races 63%.
- 94 As for the figures for the Belgian market (see paragraph 29 of this judgment), according to which the market share for bets on French races (without pictures) is 63%, the share for bets on Belgian races (also without pictures) is 31.5% and the share for bets on British races (with pictures) is 5%, the applicant maintains that, on the basis of the information available to it, the split of bets for its betting outlets in Belgium is as follows: French races (without pictures) 60%, British races (with pictures) 40%. It adds that, before the Belgian law on betting on horse races was amended when it was not possible to transmit pictures of British races, the bets were split as follows: French races 100%, British races 0%, showing that demand for British races increased as a result of their transmission live.

- 95 The applicant also maintains that the contested decision is defective because the Commission, failing to observe the rule in Case 27/76 *United Brands v Commission* [1978] ECR 207, excluded the supply side, which is characterized by the lack of any obstacle of a technical nature to the transmission of sound and pictures in Belgium.
- 96 Finally, the definition of the geographical market is defective because the contested decision explains neither the nature nor the relevance of the differences between the various national legal requirements or the extent of intellectual property rights in respect of horse races within the Community.
- 97 The Commission considers that in so far as differing consumer preferences create different conditions of competition in the various geographical areas concerned, they justify delimiting the relevant market on a national basis. The existence of some demand for the same product in all those areas does not mean that they form part of a single territory, since such demand is insignificant [(Commission Decision 92/553/EEC of 22 July 1992 relating to a proceeding under Council Regulation (EEC) No 4064/89 (Case IV/M.190 — *Nestlé/Perrier*) OJ 1992 L 356, p. 1], since telephone bets and bets made in neighbouring countries represent only a small part of overall demand.
- 98 The close links between those who take bets and those who place them, owing to bettors' limited mobility, mean that competition between betting outlets is of limited scope, being confined to local or regional level, with the result that the ancillary market in sound and pictures is also limited to the national territory. The technical feasibility of transmitting sound and pictures in Belgium or in any other Member State cannot call in question that division of the relevant market on a national basis because its scope depends only on the conditions of competition resulting from the structure of demand and differences between legal requirements in the Member States. On the latter point, the Belgian legislation has created a regulatory framework bringing about conditions of competition which differ from those existing in the other Member States, as demonstrated by the fact that before



the amendment of the law on the opening hours of betting outlets, the technical availability of British sound and pictures had no influence on the interest of Belgian outlets in broadcasting them.

99 The Commission explains that the figures for demand on the German market come from the applicant's 'German complaint' (points 2.5.2(c) and (d) of Annex 8 to the application). The differences between those figures and those now put forward by the applicant are probably due to the fact that the data given to the latter by German bookmakers are only for bets taken by them, which account for 20% of all bets, the remaining 80% being taken by German horse-racing associations on races organized by them.

100 As for the figures for demand on the Belgian market, the Commission considers that the applicant's information on bets taken on French and British races in betting outlets, which was given for the first time in the application, does not call in question the overall picture of the Belgian market as described in the letter sent pursuant to Article 6 of Regulation No 99/63 and in the contested decision.

101 The interveners state that telephone betting or bets placed by Minitel between Belgium and France are negligible: to date only 22 people living in Belgium hold either a telephone account with PMU or a Minitel account. They add that, in 1993, the amount of stakes wagered on all those accounts amounted to FF 33 576, or 0.0001% of the total stakes collected in France in that year by PMU. Finally, the volume of stakes wagered by the 22 Belgian residents holding an account with PMU represented only 0.0013% of the total stakes wagered in Belgium on horse races run in Belgium and abroad.

## Findings of the Court

- 102 Under the scheme of Article 86 of the Treaty, definition of the geographical market, like that of the product market, calls for an economic assessment. The geographical market can be defined as the territory in which all the traders concerned are exposed to objective conditions of competition which are similar or sufficiently homogeneous (*United Brands v Commission*, cited above, paragraph 44; *Michelin v Commission*, cited above, paragraph 26; Case 247/86 *Alsatel v Novasam* [1988] ECR 5987, paragraph 15, and *Tetra Pak v Commission*, cited above, paragraph 91).
- 103 The Court considers that in this case the conditions of competition existing on the market in sound and pictures must be considered in relation to betting outlets. This is because the latter constitute the demand-side for sound and pictures for retransmission to final consumers, that is to say the bettors, with the result that the conditions in which the downstream market in sound and pictures operates are determined by the conditions in which the main betting market operates.
- 104 Contrary to what the applicant claims, the market in sound and pictures does not constitute an independent market, but instead an ancillary market created as a result of the main betting market, whose operation tends to influence and direct bettors' choices towards betting on the races transmitted, the bettors being the ultimate consumers both on the main betting market and on the ancillary market in sound and pictures.
- 105 In any event, the applicant cannot claim that the Commission has confused the betting market with the market in sound and pictures. It was the applicant itself which, in support of its argument that televised transmission influences bettors' choices, referred to the structure of demand on the betting market and, in particular, to the structure of demand for bets taken by betting outlets and the way in

which such demand varies according to whether or not the sound and pictures of horse races are transmitted (see paragraphs 93 and 94 of this judgment).

106 Accordingly, the conditions in which the main betting market operates are characterized by close geographical links between bettors and betting outlets, in so far as the mobility of bettors is necessarily limited and marginal, as is evidenced by the information produced by the interveners and not challenged by the applicant, relating to the cross-frontier betting market between Belgium and France (see paragraph 101 of this judgment). The effect of the necessary geographical proximity between betting outlets and bettors is that competition between the various betting outlets develops essentially within geographical areas which, considered as a whole, cannot in any event extend beyond national boundaries.

107 Since the geographical scope of the main betting market remains national, this must also be true of the geographical scope of the ancillary market in sound and pictures. It follows that the applicant's arguments based on the alleged inaccuracy and irrelevance of the figures for the structure of demand in Belgium and Germany must be rejected as having no bearing. Even assuming that the relevant figures given by the Commission do not correctly reflect the structure of demand in those two countries — which is not the case, as witness the detailed analysis of all the figures produced by the parties in their written submissions and in reply to the written questions put by the Court — such a finding would not in any event be sufficient to call in question the national nature of the market having regard to the considerations set out above (see paragraphs 103 to 106 of this judgment).

108 It follows from the whole of the foregoing that the applicant's arguments to the effect that the relevant geographical market was wrongly defined must be rejected.

*Third limb: the dominant position*

- 109 The applicant maintains that the contested decision should have treated the *sociétés de courses* as occupying a joint dominant position on the Belgian market in the sound and pictures of French races.
- 110 It must be pointed out, however, that, even if the *sociétés de courses* had to be regarded as occupying a joint dominant position, such a finding could not justify the annulment of the contested decision, unless the refusal of the *sociétés de courses* to grant the applicant a transmission licence actually satisfied the requirements for conduct constituting an abuse within the meaning of Article 86 of the Treaty.
- 111 It is therefore appropriate to move directly to the fourth limb of the applicant's plea, in which it alleges that the contested refusal constitutes an abuse.

*Fourth limb: the alleged abuse*

Summary of the parties' arguments

- 112 The applicant, starting from the premiss that the geographical market is Community-wide and not, as the Commission contends, of a national scale, maintains that the alleged abuse arises because the refusal of the *sociétés de courses* to grant it a licence to transmit the sound and pictures of French races discriminates against it and partitions the market, since the *sociétés de courses* have granted transmission licences to other parties, namely PMU, PMI, DSV, and betting outlets in France and Germany. Moreover, that refusal is arbitrary, since the applicant was

prepared to pay the *sociétés de courses* an appropriate fee for a licence in respect of the French sound and pictures. The intention is to limit the growth of the Ladbroke Group in the horse-race betting sector.

- 113 The applicant considers that, even if the geographical market is Belgium, the refusal of the *sociétés de courses* to grant it a licence for French sound and pictures is in itself arbitrary and without objective justification, because the *sociétés de courses* have granted such licences to third parties in neighbouring territories in the common market. The arbitrariness of the refusal is also evidenced first by the fact that there is no technical barrier to the grant of such licences in Belgium and secondly by the fact that the applicant is at least a potential competitor of the *sociétés de courses*, PMU and the Belgian PMU, a close 'ally' of PMU. In that regard, the Commission is not entitled to rely on the judgments in Case 62/79 *Coditel* [1980] ECR 881 ('*Coditel I*') and Case 262/81 *Coditel* [1982] ECR 3381 ('*Coditel II*') in support of its contention that the Treaty rules cannot in principle preclude the setting of geographical limits in contracts granting licences, since those judgments are not concerned with the abuse of a dominant position but with freedom to provide services and cartels.
- 114 By granting licences to undertakings in France and Germany, the *sociétés de courses* exhausted their right of exclusivity over the sound and pictures of French races, which means that the steps taken by the applicant in order to obtain a retransmission licence are to be seen, not as an attempt to obtain a compulsory licence, but rather as an attempt to bring to an end an arbitrary and discriminatory licensing policy.
- 115 The applicant considers that the classification of the conduct imputed to the *sociétés de courses* as an abuse cannot be evaded by reliance on the judgments in Case 238/87 *Volvo* [1988] ECR 6211 and in *Magill*. It follows from those judgments that the refusal of an undertaking in a dominant position to grant a licence in respect of its intellectual property rights does not escape the prohibition contained in Article 86 of the Treaty where such a refusal constitutes an abuse. Thus, the Commission's view that the contested conduct of the *sociétés de courses* does not

come within the list of examples of abusive exercise of intellectual property rights given by the Court of Justice and the Court of First Instance in the judgments in *Volvo* and *Magill* is misconceived, since the list in question is not exhaustive. On the contrary, *Magill* shows that the mere fact that a particular course of conduct does not correspond exactly to the examples of abuse of a dominant position mentioned in the judgment in *Volvo* does not prevent the possible application of Article 86 to other cases.

- 116 Similarly, the applicant considers that there is no basis for the distinction drawn by the Commission in the contested decision between the *London European v Sabena* decision and the *ICI and Commercial Solvents v Commission* and *CBEM* judgments, cited above, on the one hand, and the present case, on the other, by reason of the fact that, in contrast to the position in those three cases, the *sociétés de courses* are not present in the relevant market. It submits that, contrary to what is stated in the contested decision, the *sociétés de courses* are present in Belgium through PMU and its Belgian subsidiary, PMB, and have even offered, through PMU and PMI, to supply Belgian outlets with French sound and pictures.
- 117 The Commission states that, according to the abovementioned judgments of the Court of Justice and the Court of First Instance, the exercise of a copyright constitutes an abuse only if the ways and circumstances in which that right is exercised pursue an aim which is manifestly contrary to the objectives of Article 86, as in the *Magill* case, in which the refusal to grant a licence prevented the entry on to the market of a new product. Those conditions are not met in this case, in that the applicant is active and even in a dominant position on the betting market on which the sound and pictures are offered to bettors, whereas the owners of the copyright in question, the *sociétés de courses*, are not currently present in that market. Moreover, in contrast to *Magill*, the refusal of the *sociétés de courses* to grant Ladbroke a licence to broadcast French sound and pictures does not have the effect of

depriving bettors of a service — that is to say the service consisting of sound and pictures — which is fundamentally different from the existing service, that is the taking of bets.

118 According to the Commission, the refusal of the *sociétés de courses* to grant licences to the applicant is commercially justified. Since licences in respect of sound and pictures constitute promotional back-up for bet-taking by PMU in France and Switzerland, it is natural that the *sociétés de courses* should refuse to grant licences to competitors operating in the same markets as their joint commercial agent, PMU. On the other hand, where PMU does not operate, the *sociétés de courses* are free to grant licences to third parties, provided that they are not granted on a discriminatory basis, and such a situation cannot obtain on the Belgian market, where, in contrast to the German market, the *sociétés de courses* have not so far granted any licence. The Commission challenges the applicant's assertion that, first, the *sociétés de courses* are present in Belgium through PMU and its subsidiary, PMB, and, secondly, that their sound and pictures have been offered, through PMU/PMI, to betting outlets in Belgium. As indicated in the letter sent pursuant to Article 6 of Regulation No 99/63, PMB has never operated in Belgium, and the situation of an undertaking that contemplates entering a market, whether directly or indirectly through licensing, cannot be equated with the situation of a company already present in that market.

119 As to the applicant's allegation that the common market has been partitioned as a result of the fact that the *sociétés de courses* have granted licences in France and Germany, the Commission states that, according to the case-law (*Coditel I* and *Coditel II*), the rules of the Treaty cannot in principle preclude the setting of geographical limits in a contract assigning intellectual property rights. The mere fact that those limits coincide in this case with national frontiers does not mean that a different view should be taken, since the exploitation of those rights is organized on a national basis as a result of its links with the main betting market. In the light of the *Volvo* judgment, cited above, the position adopted by the Court of Justice in the *Coditel I* and *Coditel II* judgments also applies in the context of Article 86 of

the Treaty. Those judgments expressly rejected the proposition that the grant of a licence for a particular territory exhausted the right of exclusivity in relation to other territories and prohibited an undertaking in a dominant position from refusing to grant a licence when it has already granted licences in other Member States.

- 120 The Commission states that, in the event that the Court should hold that the relevant geographical market extends to the Community as a whole, the refusal of the *sociétés de courses* to grant a licence to the applicant would constitute an abuse only if it were actually established that certain betting outlets would suffer a disadvantage *vis-à-vis* others if they were debarred from access to sound and pictures. Ladbroke, however, has not produced evidence to that effect either in the administrative procedure or before the Court.
- 121 The interveners contend that, by virtue of the *Magill* judgment, in order for the refusal of the holder of an intellectual property right to grant a licence to be regarded as an abuse of a dominant position, it is necessary that (i) the refusal should impede the appearance of a far more suitable product for consumers, constituting an ancillary market; (ii) the holder of the right in question should be present in both the main market and the ancillary market and (iii) the holder of the right in question must prevent the entry of competitors into the market in order to uphold its monopoly through its refusal to grant a licence. In the present case, none of those conditions is fulfilled since, first, the sound and pictures are not a new product for bettors which is liable to influence their betting choices and, second, neither the *sociétés de courses* nor PMU or PMI are present in the Belgian betting market (main market) or in the market for the exploitation of their copyright (ancillary market) and, finally, the refusal of the *sociétés de courses* to grant licences in no way impedes the entry of the applicant into the betting market.
- 122 As regards the applicant's assertion that the *sociétés de courses* are already present in Belgium through PMB, the interveners state that, although in February 1981 PMI did in fact set up a Belgian company named PMB with a view to benefiting from the envisaged legislative changes which would have made it possible to



exploit betting on foreign races in Belgium, the law was not changed and therefore PMB never carried on business in Belgium.

### Findings of the Court

- 123 The applicant's argument that the *sociétés de courses* abused their joint dominant position is based on a definition of the geographical market which includes at least Belgium, France and Germany. However, for the reasons already given (see paragraphs 103 to 106 of this judgment), the relevant market, namely the Belgian market in sound and pictures, is a national one.
- 124 It is common ground that the *sociétés de courses* have not granted any licence for the territory of Belgium to date. Accordingly, their refusal to grant a licence to Ladbroke does not constitute discrimination as between operators on the Belgian market. The mere fact that, according to the applicant, the *sociétés de courses* have offered to supply French sound and pictures to Belgian outlets does not suffice, for the purposes of Article 86 of the Treaty, for them to be treated as having already exploited their intellectual property rights, in respect of races organized by them, in a discriminatory manner in Belgium. Finally, the *sociétés de courses* likewise cannot be regarded as being present in the Belgian market through their subsidiary PMB, given that the applicant does not deny that the latter company, although actually set up under Belgian law by PMI, has never engaged in any commercial activity in Belgium (see paragraph 122 of this judgment).
- 125 Furthermore, since, on the basis of its structure, which is determined according to criteria relating to the conditions of competition and, in particular, the pattern of demand on the market in the sound and pictures of races in general, the geographical market is divided into distinct national markets, there is no basis for the applicant's allegation that there is a partitioning of the common market resulting from the licensing policy of the *sociétés de courses*.

- 126 As regards, finally, the allegedly arbitrary nature of the refusal of the *sociétés de courses* to supply French sound and pictures to the applicant, the Court considers that, since the markets are on a national scale, the arbitrariness or otherwise of the refusal by the *sociétés de courses* to exploit their intellectual property rights in Belgium cannot be assessed in the light of the policy followed by the *sociétés de courses* on other, geographically distinct markets. The fact that the applicant is prepared, as it states, to pay an appropriate fee for a licence to transmit French races does not constitute sufficient evidence of an abuse in the absence of discrimination against it by the *sociétés de courses* in the relevant geographical market.
- 127 The applicant maintains that, even assuming that the relevant geographical market is Belgium, the refusal by the *sociétés de courses* to grant it a transmission licence is arbitrary because they have granted licences to economic operators established in neighbouring countries.
- 128 It must be pointed out, however, that, if the refusal to supply the applicant with French sound and pictures in Belgium does not constitute an abuse because, as the Court has just found, it involves no discrimination as between operators on the Belgian market, that refusal likewise cannot be held to be an abuse merely because outlets operating on the German market have French sound and pictures available to them. There is no competition between betting outlets operating in Belgium and those operating in Germany.
- 129 Moreover, neither the absence of technical barriers to the transmission of French sound and pictures in Belgium nor the fact that the applicant might be regarded, from an overall perspective, as a potential competitor of the *sociétés de courses* is sufficient for the refusal to supply sound and pictures to be regarded as constituting an abuse of a dominant position since the *sociétés de courses* themselves are not present in the separate geographical market on which the applicant operates and, secondly, they have not granted any licence to other operators on that market.

130 The applicant cannot rely on the *Magill* judgment to demonstrate the existence of the alleged abuse, since that decision is not in point. In contrast to the position in *Magill*, where the refusal to grant a licence to the applicant prevented it from entering the market in comprehensive television guides, in this case the applicant is not only present in, but has the largest share of, the main betting market on which the product in question, namely sound and pictures, is offered to consumers whilst the *sociétés de courses*, the owners of the intellectual property rights, are not present on that market. Accordingly, in the absence of direct or indirect exploitation by the *sociétés de courses* of their intellectual property rights on the Belgian market, their refusal to supply cannot be regarded as involving any restriction of competition on the Belgian market.

131 Even if it were assumed that the presence of the *sociétés de courses* on the Belgian market in sound and pictures were not, in this case, a decisive factor for the purposes of applying Article 86 of the Treaty, that provision would not be applicable in this case. The refusal to supply the applicant could not fall within the prohibition laid down by Article 86 unless it concerned a product or service which was either essential for the exercise of the activity in question, in that there was no real or potential substitute, or was a new product whose introduction might be prevented, despite specific, constant and regular potential demand on the part of consumers (see in that connection Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission* [1995] ECR I-743, paragraphs 52, 53 and 54).

132 In this case, as moreover the Commission and the interveners have pointed out, the televised broadcasting of horse races, although constituting an additional, and indeed suitable, service for bettors, it is not in itself indispensable for the exercise of bookmakers' main activity, namely the taking of bets, as is evidenced by the fact that the applicant is present on the Belgian betting market and occupies a significant position as regards bets on French races. Moreover, transmission is not indispensable, since it takes place after bets are placed, with the result that its absence does not in itself affect the choices made by bettors and, accordingly, cannot prevent bookmakers from pursuing their business.

- 133 For the same reasons, the applicant likewise cannot rely on the *London European v Sabena* decision and the *ICI and Commercial Solvents v Commission* and *CBEM* judgments, cited above. In the *London European v Sabena* decision, the action taken to exclude a competitor related to a market in which both Sabena and that competitor, London European, were operating, whereas in this case the *sociétés de courses* are not present on the Belgian market. The same applies to the two judgments relied upon. In *ICI and Commercial Solvents v Commission*, the abuse consisted in the refusal by a company occupying a dominant position on the market in raw materials to provide those materials to a customer producing derivatives in order to keep those raw materials for its own production of derivatives, and so the company in a dominant position, like its customers, was present on the downstream market, namely the market in derivatives. In contrast, in this case the *sociétés de courses* are not present on the Belgian market in French sound and pictures. In the *CBEM* judgment, the Court of Justice held that an undertaking abuses a dominant position where, without any objective necessity, it reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market. However, in this case the *sociétés de courses* have not reserved the Belgian market in French sound and pictures to themselves and have not granted access to that market to a third-party undertaking or to an undertaking belonging to them.
- 134 It follows from the whole of the foregoing that the applicant's plea alleging abuse of a dominant position by the *sociétés de courses* must be rejected.

### 3. Misapplication of Article 85(1) of the Treaty

#### *Summary of the parties' arguments*

- 135 The applicant maintains that both the indirect refusal of DSV and the direct refusal of the *sociétés de courses* to grant it a transmission licence for French races in Belgium are caught by the prohibition set out in Article 85(1) of the Treaty.

- 136 DSV's indirect refusal to grant it such a licence derives, according to the applicant, from the prohibition imposed by the *sociétés de courses* on DSV in respect of the retransmission of French sound and pictures outside the licensed territory. It is therefore tantamount to a prohibition of exports and results in a partitioning of national markets in breach of Article 85(1) since that prohibition serves to give effect to an agreement, decision or concerted practice which has as its object or effect the restriction of competition between PMU, PMI and their 'allies', on the one hand, and Ladbroke Group, on the other.
- 137 The applicant regards the arguments to the contrary put forward by the Commission on this point in the contested decision as a departure from its earlier practice, according to which copyright protection cannot be used to justify contractual export bans (the *Stempa* case, *Eleventh Report on Competition Policy*, 1982, paragraph 98). The applicant maintains that, in *Coditel I*, the Court of Justice did not rule out the possibility that certain aspects of the exercise of copyright may prove to be incompatible with Article 85 where they serve to give effect to an agreement, decision or concerted practice which may have as its object or effect the prevention, restriction or distortion of competition within the common market.
- 138 In that regard, the contested decision is in its view vitiated by an inadequate statement of reasons in so far as the Commission failed to consider whether the prohibition imposed on DSV in respect of the retransmission of French sound and pictures outside the licensed territory was the consequence of the lawful exercise of intellectual property rights by the *sociétés de courses* or, on the contrary, as it argued in its complaint, was the result of an agreement whose object or effect was to restrict competition within the common market.
- 139 The applicant maintains that the direct refusal of the *sociétés de courses* to grant it a transmission licence, which was notified by PMU by letter of 8 August 1990, is the subject of an agreement between the *sociétés de courses* and/or a decision of an association of undertakings and/or a concerted practice contrary to Article 85(1) of the Treaty. Such a refusal cannot be regarded as the 'normal consequence' of the fact that neither PMU nor the *sociétés de courses* take bets in Belgium on French

racas, because in Germany, where, similarly, neither PMU nor the *sociétés de courses* take bets, the latter have transmitted French sound and pictures to DSV and allowed it to relay them to outlets established in the licensed territory.

140 Finally, the applicant claims that there is no basis for the Commission's statement that, since no licence has been granted on the Belgian market, the refusal by each of the *sociétés de courses* to grant the applicant a licence for that market does not restrict competition in a discriminatory manner. First, the Commission incorrectly defined the relevant geographical market and, secondly, the contested refusal to grant a licence prevents the applicant from competing with other betting outlets in Belgium. The applicant considers that if the *sociétés de courses* had granted licences in a discriminatory manner to some Belgian outlets and not to others, that would in fact have further distorted competition. However, the absence of such additional discrimination does not mean that the contested refusal does not in itself constitute a restriction of competition within the meaning of Article 85(1) of the Treaty.

141 The Commission states that, under Community law as it now stands, the clause prohibiting DSV from retransmitting French sound and pictures outside the licensed territory falls within the scope of the intellectual property rights of the *sociétés de courses* and therefore does not constitute an infringement of Article 85(1) of the Treaty.

142 It considers that the direct refusal of the *sociétés de courses* to grant a licence to the applicant is the normal consequence of the fact that neither the *sociétés de courses* nor PMU at present take bets in Belgium on French races or exploit intellectual property rights in Belgium. In the absence of any proof to the contrary, that behaviour cannot be said to be the result of an agreement or concerted practice between the *sociétés de courses*.

- 143 The Commission points out that the position that it took in the *Stempa* case, cited above (see paragraph 137 of this judgment), was subsequently rejected by the Court of Justice in *Coditel II*.
- 144 Finally, it contests the applicant's view that since the refusal on the part of the *sociétés de courses* was not objectively justified, it involves in itself — even in the absence of discrimination — a distortion of competition because it prevents the applicant from receiving the French sound and pictures and thereby competing with other betting outlets in Belgium. The Commission considers that, since there is no competitive relationship between Ladbroke and the *sociétés de courses* on the Belgian market, the application of Article 85(1) of the Treaty is by definition excluded.
- 145 The interveners endorse the arguments put forward by the Commission and stress that when the Commission notice pursuant to Article 19(3) of Regulation No 17 concerning the contract between PMI and DSV was published in the *Official Journal of the European Communities*, the Commission did not express any reservation concerning the clause prohibiting DSV from retransmitting French sound and pictures outside the licensed territory.

### *Findings of the Court*

- 146 First, it is conceivable that some aspects of the manner in which an intellectual property right is exercised may prove to be incompatible with Article 85 of the Treaty where they serve to give effect to an agreement which may have as its object or effect the prevention, restriction or distortion of competition within the common market (see *Coditel II*, paragraph 14). However, the mere fact that the owner of the copyright has granted to a sole licensee an exclusive right over the territory of a Member State, while prohibiting the grant of sub-licences for a specified period, is not sufficient to justify a finding that such a contract must be regarded as the purpose, the means or the result of an agreement prohibited by the Treaty (paragraph 15 of that judgment).

- 147 However, although the characteristics of the industry and of the markets in question show that an exclusive licence is not, in itself, such as to prevent, restrict or distort competition, the fact nevertheless remains that the exercise of copyright and of an assigned right deriving from it may be caught by the prohibition contained in Article 85(1) of the Treaty, where there are economic or legal circumstances the effect of which is to restrict the activity in question to an appreciable degree or to distort competition on the market, regard being had to the specific characteristics of that market (paragraphs 16 and 17 of the same judgment).
- 148 It is in the light of this guidance from the case-law that it is necessary to examine the applicant's arguments alleging that the contested decision has an inadequate statement of reasons and, as regards the indirect and direct refusals to grant a transmission licence for the French races in Belgium, that Article 85(1) of the Treaty has been misapplied.

The complaint alleging an inadequate statement of reasons for the measure

- 149 According to settled case-law, the purpose of the statement of the reasons on which an individual decision is based is to enable the Community judicature to carry out its review of legality of the decision and to give the person concerned sufficient information to make it possible to ascertain whether the decision is well founded or whether it is vitiated by a defect which may permit its legality to be contested. The extent of that obligation depends on the nature of the measure in question and on the context in which it was adopted (Joined Cases C-121/91 and C-122/91 *CT Control (Rotterdam) and JCT Benelux v Commission* [1993] ECR I-3873, paragraph 31; Case C-56/93 *Belgium v Commission* [1996] ECR I-723, paragraph 86; Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others v Commission* [1996] ECR I-5151, paragraph 31, and *Branco v Commission*, cited above, paragraph 32). Thus, in the case of Commission decisions finding infringements of the competition rules, the Commission cannot be required to discuss all the issues of fact and law raised during the administrative procedure (*RTE and ITP v Commission*, cited above, paragraph 99, and Case T-149/89 *Sotralentz v Commission* [1995] ECR II-1127, paragraph 73).



150 In this case, by taking the view in the contested decision that the prohibition of retransmission imposed on DSV by the *sociétés de courses* does not, under Community law as it now stands, fall within the scope of Article 85(1) of the Treaty, but forms part of the rights vested in the licensor, the Commission gave the applicant sufficient information in order to enable it to ascertain the principal matters of fact and of law on which the reasoning of the contested decision was based. The question whether the contested refusal might possibly be the outcome of an agreement prohibited by Article 85(1) of the Treaty falls to be considered in relation to the substance of that decision and not to the obligation to state reasons. Consequently, the plea alleging an inadequate statement of reasons must be rejected.

#### The indirect refusal to grant a transmission licence

151 As regards the merits of the Commission's position that the requirement imposed on DSV to refrain from granting sub-licences outside the licensed territory falls within the scope of intellectual property rights as Community law stands at present, the Court points out that the mere fact that the owner of a copyright has decided to grant a single exclusive licence in the territory of a Member State and therefore to prohibit the grant of sub-licences outside the licensed territory is not sufficient to justify a finding that such a contract constitutes the purpose, the means or the result of an agreement intended to restrict competition on the market in question (see *Coditel II*, paragraph 15).

152 In this case, the applicant has produced no evidence to show that the contract concluded between PMU/PMI and DSV in fact served to give effect to an agreement prohibited by Article 85(1) of the Treaty. In those circumstances, it cannot be concluded that the Commission erred in considering that Article 85(1) was inapplicable.

153 Consequently, the applicant's plea alleging misapplication of Article 85(1) to the contract concluded between the *sociétés de courses* and DSV and to the latter's refusal to grant it a licence must be rejected.

## The direct refusal to grant a transmission licence

- 154 As emerges from the documents before the Court, during the administrative procedure before the Commission, the applicant claimed that the direct refusal of each of the *sociétés de courses* to grant it a licence was the subject of an agreement concluded between the *sociétés de courses* and that that agreement was caught by the prohibition set out in Article 85(1) of the Treaty. In support of that assertion, it referred to the abovementioned letter of 8 August 1990 in which PMU had informed it of the contested refusal on behalf of the *sociétés de courses*, and to the exclusive nature of the contract of 9 January 1990 concluded between the *sociétés de courses* and PMU regarding the latter's exploitation, outside France, of their intellectual property rights in respect of races organized by them (see Ladbroke's letter of 13 January 1993, points 2.7.1 to 2.7.3, Annex 5.16 to the application, and paragraph 24 of this judgment).
- 155 In the contested decision, the Commission considered that refusal to be the normal consequence of the fact that neither PMU nor the *sociétés de courses* were currently present on the betting market in Belgium and that consequently that conduct did not restrict competition on that market in a discriminatory manner. Moreover, it claimed before the Court that the applicant had not established the existence of an agreement between the *sociétés de courses* contrary to Article 85(1) of the Treaty. Finally, in its answer to a written question from the Court, it explained that the reason for which it had not examined the question whether the refusal of a licence was the subject of an agreement between the *sociétés de courses* intended to restrict competition between them within the meaning of Article 85(1) of the Treaty, was that in any event the applicant had no legitimate interest within the meaning of Article 3 of Regulation No 17 in making a complaint on that aspect.
- 156 It must be borne in mind that the prohibition set out in Article 85(1) of the Treaty covers all agreements, decisions by associations of undertakings or concerted practices whose object or effect is to restrict not only actual or possible competition between the parties concerned but also any possible competition between them or one of them and third parties (Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299, at 339, and Case 32/65 *Italy v Council and Commission* [1966] ECR 389, at 407).

- 157 It follows that an agreement between two or more undertakings whose object is to prohibit the grant to a third party of a licence to exploit intellectual property rights does not, as the Commission contends, fall outside the scope of Article 85(1) of the Treaty merely because no contracting party has granted such a licence to a third party on the relevant market and there is no resultant restriction of the present competitive position of third parties.
- 158 Whilst it is true that, in the absence of present competition on the relevant market, such a refusal cannot be regarded as discriminatory and therefore as liable to be caught by Article 85(1)(d) of the Treaty, the fact nevertheless remains that an agreement of the sort complained of by the applicant may have the effect of restricting potential competition on the relevant market, since it deprives each of the contracting parties of his freedom to contract directly with a third party by granting him a licence to exploit his intellectual property rights and thus to enter into competition with the other contracting parties on the relevant market.
- 159 It follows that a horizontal agreement between *sociétés de courses* which prevented each of them from granting a licence to transmit the sound and pictures of the races which it organized to a third party such as the applicant would be liable to impede the entry of each of them on to the Belgian market in sound and pictures in general and thereby restrict such potential competition as might exist on that market, to the detriment of the interests of bookmakers and ultimate consumers. Moreover, the effect of such an agreement might be to 'limit or control ... markets' and/or to 'share markets' within the meaning of Article 85(1)(b) and (c) of the Treaty. The Commission is therefore not entitled to plead that the applicant has no legitimate interest within the meaning of Article 3 of Regulation No 17 in order to justify its failure to examine that part of the complaint, as supplemented by the applicant's observations in its letter of 13 January 1993.

160 Accordingly, by considering that the refusal to grant a licence, notified to the applicant by letter of 8 August 1990, did not constitute an agreement whose object was to restrict competition between the *sociétés de courses* on the Belgian market in the exploitation of intellectual property rights in respect of races organized by them, on the grounds that such refusal was the normal consequence of the absence of present competition on that market and that, in any event, the applicant had not shown, in that respect, a legitimate interest within the meaning of Article 3 of Regulation No 17, the Commission did not examine with the required diligence all the matters of fact and of law brought to its attention by Ladbroke.

161 In so far as it failed to examine that aspect of the application of Article 85(1) of the Treaty with the required diligence, the Commission was not entitled to dismiss as irrelevant either the abovementioned letter of 8 August 1990 or the contract of 9 January 1990 concluded between the *sociétés de courses* and PMU (see the abovementioned letter of 13 January 1993 to the Commission), which were relied on by the applicant as evidence in support of its claim that the contested refusal was the subject of an agreement between the *sociétés de courses* which, even in the absence of any discriminatory treatment on the Belgian market, was caught by Article 85(1) of the Treaty.

162 It follows from the whole of the foregoing that the contested decision must be annulled in so far as, by failing to consider whether the contested refusal might possibly be the subject of an agreement between the *sociétés de courses* preventing each of them from granting Ladbroke a transmission licence for the races organized by them and by consequently dismissing as irrelevant the letter of 8 August 1990 relied on as evidence of the existence of an agreement prohibited by Article 85(1) of the Treaty on the ground that the refusal at issue was the normal consequence of the fact that neither PMU nor any of the *sociétés de courses* were present on the betting market in Belgium, the Commission did not examine that part of the applicant's complaint with the required diligence.

## Costs

- 163 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 or that the parties bear their own costs 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 against the other, the parties should be ordered to bear their own costs.
- 164 Pursuant to Article 87(4) of the Rules of Procedure, the interveners should be ordered to bear their own costs.

On those grounds,

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

hereby:

1. Annuls the Commission decision contained in its letter of 24 June 1993 rejecting the applicant's complaint of 9 October 1990 (IV/33.699) in so far as

it considers that the refusal of the *sociétés de courses* to grant the applicant a licence for the transmission of French races in Belgium, as notified to the applicant by a letter from Pari Mutuel Urbain dated 8 August 1990, was the normal consequence of the fact that neither Pari Mutuel Urbain nor the *sociétés de courses* take bets on the betting market in Belgium, and therefore could not be the subject of an agreement between the *sociétés de courses* within the meaning of Article 85(1) of the Treaty;

2. Dismisses the remainder of the application;
3. Orders the parties, including the interveners, to bear their own costs.

Vesterdorf

Bellamy

Kalogeropoulos

Delivered in open court in Luxembourg on 12 June 1997.

H. Jung

B. Vesterdorf

Registrar

President

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