JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
27 October 1994 *

In Case T-32/93,

Ladbroke Racing Limited, a company incorporated under the law of England and Wales whose registered office is in London, represented by Jeremy Lever QC and Christopher Vajda, members of the Bar of England and Wales, and Stephen Kon, Solicitor, 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 Francisco Enrique González-Díaz and Richard Lyal, of the Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, of the Legal Service, Wagner Building, Kirchberg,

defendant,

supported by

French Republic, represented by Catherine de Salins and, at the hearing, Jean-Marc Belorgey, acting as Agents, with an address for service in Luxembourg at the

* Language of the case: English.

French Embassy, 9 Boulevard du Prince Henri,

intervener,

IN THE MATTER, at this stage in the proceedings, of the admissibility of an action brought under the third paragraph of Article 175 of the EEC Treaty for a declaration that the Commission failed, in breach of the Treaty, to take a decision under Article 90(3) of the Treaty against the French Republic,

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

composed of: J. L. Cruz Vilaça, President, C. P. Briët, A. Kalogeropoulos, D. P. M. Barrington and J. Biancarelli, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 13 April 1994,

gives the following

Judgment

Facts and procedure

1 The applicant, Ladbroke Racing Limited (hereinafter 'Ladbroke'), is a company incorporated under the law of England and Wales, controlled by Ladbroke Group

plc, one of whose activities is the provision and organization of betting services on horse-races, which it operates through its branches and subsidiaries in the United Kingdom and in other countries of the European Community.

2 On 24 November 1989 Ladbroke, acting in its own name and in the name of its subsidiaries and associated companies involved in taking bets on horse-races, lodged a complaint with the Commission against: (a) the French Republic; (b) the ten principal racecourse companies (*'sociétés de course'*) in France, which are the only bodies permitted under the French legislation in force to organize off-course totalizator betting, the other racecourse companies being authorized to accept only on-course bets on horse-races organized by them (Article 4 of the Law of 2 June 1891 governing the authorization and operation of horse-races); (c) the Pari Mutuel Urbain (hereinafter 'PMU'), an economic interest grouping comprising the ten principal racecourse companies in France (Article 21 of Decree No 83-878 of 4 October 1983 on racecourse companies and totalizator betting), created to manage, as a joint venture, the rights of those companies to organize off-course totalizator betting and exclusively responsible for managing the rights of the principal racecourse companies, under the system established in 1974 by French legislation (Article 13 of Decree No 74-954 of 14 November 1974 on racecourse companies). That exclusivity is protected by the prohibition of the placing or accepting of bets by any person other than the PMU (Article 8 of the Interministerial Decree of 13 September 1985 governing the Pari Mutuel Urbain) and extends to bets accepted outside France on races organized in France and to bets accepted in France on races organized abroad, which may also be placed only by the authorized companies and/or the PMU (Article 15(III) of Law No 64-1279 of 23 December 1964 on finances for 1965 and Article 21 of Decree No 83-874 of 4 October 1983, cited above).

3 In so far as its complaint was directed against the PMU and its member companies, Ladbroke requested the Commission, on the basis of Article 3 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'), to declare that certain agreements between the abovementioned companies *inter se* and with the PMU, whose objective was first to grant the PMU, even before 1974, exclusive rights over off-course betting on races organized or controlled by those companies, secondly to support a request for State aid to the PMU, and thirdly to authorize the PMU to extend its activities to Member States other than France, were prohibited by Article 85(1) of the Treaty and to order that that infringement be brought to an end.

4 Ladbroke also requested the Commission first to declare that the conduct of the PMU and of the principal racecourse companies in France, in so far as it concerned the grant to the former of exclusive rights to take off-course bets as well as the securing by it of illegal State aid and the use of advantages procured by that aid to meet competition, was, because of a collective dominant position on the relevant market, prohibited by Article 86 of the Treaty, and secondly to order that that infringement be brought to an end and that the PMU repay the illegal State aid which it had received, together with interest at the market rate.

5 Finally, Ladbroke requested the Commission, pursuant to Article 90 of the Treaty, to take a decision under Article 90(3) with a view to bringing to an end the infringement by the French Republic of (a) Articles 3(f), 5, 52, 53, 85, 86 and 90(1) of the EEC Treaty arising from the enactment and maintenance of the abovementioned legislation (see paragraph 2 above), in so far as that legislation gives statutory backing to the agreements between the racecourse companies *inter se* and with the PMU granting the latter exclusive rights in accepting off-course bets and prohibits anybody from placing or accepting off-course bets on races organized in France otherwise than through the PMU; (b) Articles 3(f), 52, 53, 56, 62, 85, 86 and 90(1) of the EEC Treaty arising from the enactment and maintenance of the abovementioned legislation (see paragraph 2 above) prohibiting the placing in France of bets on races organized outside France save through authorized companies and/or

the PMU; and (c) Articles 90(1), 92 and 93 of the EEC Treaty arising from the grant to the PMU of illegal aid repayment of which should be ordered by a decision of the Commission under Article 90(1) and 90(3).

6 As regards, however, the aid which France is alleged to have unlawfully granted to the PMU, Ladbroke had already lodged another complaint on 7 April 1989 which is the subject of separate proceedings before the Commission under Articles 92 and 94 of the EEC Treaty and which led the Commission to adopt Decision 93/625/EEC of 22 September 1993 concerning aid granted by the French Government to the Pari mutuel urbain (PMU) and to the racecourse undertakings (OJ 1993 L 300, p. 15).

7 By letter of 11 August 1992, Ladbroke formally requested the Commission, pursuant to Article 175 of the EEC Treaty, to define its position within two months with regard to Ladbroke's complaint of 24 November 1989. In particular, it requested the Commission to send it a letter under 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') if the Commission considered that there were insufficient grounds for allowing the complaint lodged with it under Articles 85 and 86 of the Treaty, or alternatively a letter similar in format to one under Article 6 of Regulation No 99/63 if the Commission considered that there were insufficient grounds for allowing the complaint in so far as it was based on Article 90(3) of the Treaty. Finally, in the event that the Commission wished to avoid following the procedure under Article 6 of Regulation No 99/63, Ladbroke invited it to define its position on the complaint under Articles 85, 86 and 90(3) by a reasoned decision which could be challenged under Article 173 of the EEC Treaty.

8 By letter of 12 October 1992 the Deputy Director-General for competition informed Ladbroke that his department was still actively considering the com-

plaint, but that because of the complexity and the specific characteristics of the sector in question that consideration required considerable time. He added that the complainant would be informed of the results as soon as possible.

9 Those are the circumstances in which, by application lodged at the Registry of the Court of Justice on 21 December 1992, Ladbroke brought an action under Article 175 of the Treaty for a declaration that the Commission had failed to act, after bringing an identical action on 18 December 1992 before the Court of First Instance. Those actions were registered under numbers C-424/92 and T-110/92 respectively.

10 By letter of 9 February 1993 the Commission informed the applicant, in accordance with Article 6 of Regulation No 99/63, that it did not envisage treating its complaint favourably to the extent that it was based on Articles 85 and 86 of the Treaty and on Regulation No 17. Subsequently, the Commission adopted a decision definitively rejecting Ladbroke's complaint under those provisions. By application lodged at the Registry of the Court of First Instance on 19 October 1993, Ladbroke brought an action under Article 173 of the Treaty for the annulment of that decision, of which it had been notified by letter dated 29 July 1993; that application was registered under number T-548/93.

11 By document lodged at the Registry of the Court of Justice on 10 February 1993, the Commission raised an objection of inadmissibility, in which it requested the Court of Justice first to decline jurisdiction in favour of the Court of First Instance to the extent that the action sought a declaration that it had failed to act under Regulations No 17 and No 99/63 and secondly to dismiss the action as inadmissible to the extent that it sought a declaration that it had failed to act under Article 90 of the Treaty.

12 By order of 3 May 1993 the Court of Justice referred Case C-424/92 to the Court of First Instance on the ground that the action fell within the jurisdiction of that court. Following that reference and registration of the case at the Registry of the

Court of First Instance under number T-32/93, Ladbroke, by letter lodged at the Registry of the Court of First Instance on 14 May 1993, stated that it was discontinuing its action in Case T-110/92, which was removed from the register of the Court of First Instance by order of the President of 1 July 1993.

13 By order of 14 June 1993 the President of the Second Chamber of the Court of First Instance granted the French Government's application to the Court of Justice, lodged on 19 April 1993, to intervene in support of the form of order sought by the Commission.

14 By document lodged at the Registry of the Court of First Instance on 6 September 1993 the French Government submitted its statement in intervention in support of the form of order sought by the Commission, relating to the admissibility of the action. On 7 October 1993 Ladbroke submitted its observations on the statement in intervention.

15 Requested by the Court of First Instance to submit observations as to the future of the proceedings, the parties accepted first that the application had become devoid of purpose in so far as it sought a declaration of failure to act by the Commission under Articles 85 and 86 of the Treaty, after the Commission had sent the applicant on 9 February 1993 a letter under Article 6 of Regulation No 99/63 and the applicant had been notified by letter dated 29 July 1993 of a decision rejecting its complaint to the extent that it was based on those provisions, and secondly that the application remains to be decided in so far as it seeks a declaration of failure to act by the Commission under Article 90 of the Treaty.

16 The Court of First Instance (Second Chamber), upon hearing the report of the Judge-Rapporteur, decided in accordance with Article 114(3) of the Rules of Procedure to open the oral procedure on the admissibility of the application in so far as it is based on Article 90 of the Treaty, without any preparatory inquiry.

17 At the hearing on 13 April 1994 the parties presented oral argument and answered oral questions put to them by the Court.

Forms of order sought on the admissibility of the application

18 The Commission claims that the Court should:

(i) dismiss that part of the application concerning Article 90 of the Treaty as inadmissible;

(ii) order the applicant to pay the costs of the proceedings.

19 The applicant contends that the Court should:

(i) declare that part of the application concerning Article 90 of the Treaty admissible;

(ii) order the Commission to pay the costs occasioned by the objection of inadmissibility.

20 The intervener submits that the Court should allow the objection of inadmissibility raised by the Commission.

The subject-matter of the application in so far as it seeks a declaration of failure to act based on Articles 85 and 86 of the Treaty

21 The Court notes that, after the action had been commenced on 21 December 1992, the Commission sent the applicant a letter on 9 February 1993 under Article 6 of Regulation No 99/63 informing it of the Commission's intention to reject its complaint to the extent that it was based on Articles 85 and 86 of the Treaty and that on 29 July 1993 the Commission notified the applicant of a definitive decision to that effect. The Commission, which thus definitively rejected that part of the applicant's complaint, after sending the notification required by Article 6 of Regulation No 99/63, cannot therefore in any event be regarded as having failed to reach a decision on that issue.

22 In those circumstances, and as is moreover common ground between the parties, the Commission must be considered to have defined its position within the meaning of Article 175 of the Treaty after this action was commenced (see the judgment of the Court of Justice in Case 125/78 *GEMA* v *Commission* [1979] ECR 3173), in accordance with the request and the letter before action which the applicant had sent it on 24 December 1989 and 11 August 1992. It follows that, as from 9 February 1993 and in any event after the decision of 29 July 1993, the application became devoid of purpose in so far as it concerned Articles 85 and 86 of the Treaty in conjunction with Regulations No 17 and No 99/63. There is accordingly no need for the Court to rule on that aspect (see the judgment of the Court of First Instance in Case T-28/90 *Asia Motor France and Others* v *Commission* [1992] ECR II-2285).

The admissibility of the application in so far as it seeks a declaration of failure to act under Article 90 of the Treaty

Summary of the pleas in law and main arguments of the parties

23 The Commission submits that, since individuals have no right to bring an action for failure to act when it refrains from bringing proceedings against Member States

under Article 169 of the EEC Treaty (judgments of the Court of Justice in Case 247/87 *Star Fruit* v *Commission* [1989] ECR 291 and Case C-87/89 *Sonito and Others* v *Commission* [1990] ECR I-1981 and order of the Court of Justice in Case C-72/90 *Asia Motor France* v *Commission* [1990] ECR I-2181), they must also be held to have no right to bring such an action when it fails to act vis-à-vis Member States under Article 90(3) of the Treaty. Moreover, according to the Commission, a measure adopted under that provision of the Treaty is addressed to a Member State and furthermore cannot directly and individually concern individuals, so that the latter should, for that reason also, be held to have no right to bring an action against it for failure to act.

24 The Commission considers that the effect of that interpretation is not to deprive individuals of any judicial remedy since they are still able to invoke Article 90 of the Treaty before the national courts (judgment of the Court of Justice in Case C-179/90 *Merci Convenzionali Porto di Genova* v *Siderurgica Gabrielli* [1991] ECR I-5889, paragraph 23).

25 The intervener emphasizes that Regulations No 17 and No 99/63, adopted on the basis of Article 87 of the EEC Treaty, solely concern decisions adopted pursuant to Articles 85 and 86 and not measures adopted on the basis of Article 90(3) of the Treaty. Although entitled to expect some reply to its request, the applicant is therefore has no grounds for requiring a letter under Article 6 of Regulation No 99/63 or a letter similar in format to such a letter.

26 Furthermore, the intervener stresses that in fact the applicant is not complaining that the Commission did not send it a letter similar in format to that provided for in Article 6 of Regulation No 99/63 but rather that the Commission failed to adopt a decision as against a Member State pursuant to Article 90 of the Treaty, for which purpose it has moreover a discretion similar to that which it has under Article

169 of the Treaty. Accordingly, given that decisions adopted under Article 90(3) are addressed solely to Member States and that an action for failure to act may be brought only by the potential addressee of a legal act (order of the Court of First Instance in Case T-3/90 *Prodifarma* v *Commission* [1991] ECR II-1), the applicant, which is not such a potential addressee, does not in any event have the right to bring an action under the third paragraph of Article 175 of the Treaty.

27 The applicant submits that the Commission's failure to exercise its powers under Article 90(3) of the Treaty must be amenable to judicial review by way of an action for failure to act open to individuals.

28 It emphasizes that Article 90(3) of the Treaty forms part of the rules on competition that apply to undertakings, as is clear from the judgment of the Court of Justice in Joined Cases C-48/90 and C-66/90 (*Netherlands and Others* v *Commission* [1992] ECR I-565, paragraph 22) in which it was held that Article 90(3) must be seen in the context of Article 90 as a whole and of the task imposed upon the Commission by virtue of Articles 85 to 93 of the Treaty. Although decisions adopted under Article 90 are formally addressed to a Member State, their purpose is thus to ensure that there is some equivalence, from the point of view of the conditions of competition, between the legal regime governing the undertakings referred to in that article and the regime applicable to other undertakings. Accordingly, a request to the Commission that an infringement of Article 90(1) of the Treaty be brought to an end should be treated in the same way as a request that an infringement of the rules of competition that apply to undertakings be brought to an end, so that the way in which the Commission deals with it should be amenable to the same judicial review as that provided for in the context of decisions under Articles 85 and 86 of the Treaty.

29 Furthermore, the applicant stresses that the Commission's prerogatives under Article 90(3) of the Treaty are different from its prerogatives under Article 169. Article

90(3), as is apparent from the remainder of its wording, gives the Commission power to adopt binding measures (judgment in *Netherlands and Others* v *Commission*, cited above, paragraph 25), as in competition matters, while Article 169 confers on it the power only to deliver reasoned opinions and to bring proceedings against the Member States (judgment of the Court of Justice in Case 48/65 *Lütticke* v *Commission* [1966] ECR 19, at p. 27). The fact that the Commission has such a decision-making power under Article 90 of the Treaty means that it must be liable to judicial review if it fails to take action, given that it is susceptible to such review under Article 173 of the Treaty when it adopts a decision which does not fully meet the points made in a complaint lodged with it (judgment of the Court of Justice in Case 169/84 *Cofaz* v *Commission* [1986] ECR 391) or which constitutes a refusal to act (judgments of the Court of Justice in Case 191/82 *Fediol* v *Commission* [1983] ECR 2913 and Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487).

30 Finally, the applicant observes that the fact that Article 90 may be invoked before national courts does not mean that the Commission has no obligation to deal with a complaint based on that provision, since the competition rules applicable to undertakings are also of direct effect and that does not exclude the Commission's obligation to deal with complaints that they have been breached where those complaints are made by persons with a legitimate interest (judgment in T-24/90 *Automec* v *Commission* [1992] ECR II-2223).

31 On the question of its legal interest in bringing proceedings, the applicant, while recognizing that it cannot be the formal addressee of a measure adopted on the basis of Article 90(3) of the Treaty, states that the Commission is none the less susceptible to judicial review in dealing with complaints made by parties whose competitive position is affected by an infringement of the Treaty rules on competition.

32 Furthermore, the applicant submits that it is directly and individually concerned by a decision addressed to the French Republic under Article 90(3) of the Treaty given

first that it is a direct competitor of the PMU in a number of areas outside France and secondly the fact that it wishes to compete in France as well. It states that it would in any event have been entitled to bring proceedings under Article 173 of the Treaty had the Commission adopted an inadequate or invalid decision, on the basis that its competitive position was substantially affected by the conduct of the government concerned (judgment in *Cofaz* v *Commission*, cited above) or had the Commission notified it of its decision not to take action (judgments in *Fediol* v *Commission* and *BAT and Reynolds* v *Commission*, cited above).

33 Finally, the applicant emphasizes that in this case it, among other things, formally requested the Commission either to adopt a decision rejecting its complaint or to send it a letter similar in format to that provided for in Article 6 of Regulation No 99/63. It follows that it must be regarded as a potential addressee of a legal measure and that it was entitled to expect a reply to its complaint from the Commission.

Findings of the Court

34 Based on the third paragraph of Article 175 of the Treaty, this application seeks a declaration that the Commission failed, in breach of the Treaty, to define its position, either by a reasoned decision open to challenge under Article 173 of the Treaty or by a letter similar in format to that provided for by Article 6 of Regulation No 99/63, on the applicant's complaint of 24 November 1989 requesting it to adopt a decision as against the French Republic based on Article 90(3) of the Treaty.

35 The Court notes at the outset that it is a condition of an action for declaration of failure to act as instituted by Article 175 of the Treaty that the institution concerned should be under an obligation to act, so that the alleged failure to act is contrary to the Treaty. The Commission's obligations under Article 90 of the Treaty, as inter-

preted by the Court of Justice (see the judgment in *Netherlands and Others* v *Commission*, cited above), and in particular under paragraph (3), must accordingly be considered.

36 Article 90(3) of the Treaty confers on the Commission the task of ensuring compliance by the Member States with their obligations concerning the undertakings referred to in Article 90(1), and expressly invests it with the power to take action where necessary for that purpose under the conditions and by the legal measures which are there laid down.

37 As may be seen from Article 90(3) and the general scheme of that article, the Commission's power to supervise the Member States responsible for an infringement of the Treaty rules, in particular those relating to competition (judgment in *Netherlands and Others* v *Commission*, cited above, paragraph 32), necessarily implies that that institution has a wide power of assessment. That power of assessment is even wider in relation in particular to Member States' compliance with the rules of competition since, first, Article 90(2) invites the Commission to take account in exercising that discretion of the demands inherent in the particular tasks of the undertakings concerned and, secondly, the authorities of the Member States may in certain cases have a sufficient degree of latitude in regulating certain matters, such as the gambling market on which the applicant operates, to determine what is required to protect the players and maintain order in society in the light of the specific social and cultural features of each Member State, as the Court of Justice has recently recognized in its judgment in Case C-275/92 *Her Majesty's Customs and Excise* v *Schindler* [1994] ECR I-1039, paragraph 61.

38 Consequently, the exercise of the power to assess the compatibility of State measures with the Treaty rules, conferred by Article 90(3) of the Treaty, is not coupled

with an obligation on the part of the Commission to take action which may be relied on in seeking a declaration that the Commission has failed to act.

39 It is accordingly not open to the applicant to argue that, by failing to adopt as against the French Republic a decision under Article 90(3) of the Treaty, as it was invited to do by the applicant's request of 24 November 1989 and its letter before action of 11 August 1992, the Commission failed to define its position, thereby infringing the Treaty, and that that failure thus constitutes a failure to act within the meaning of Article 175.

40 Moreover, and even on the assumption that the Commission was obliged to adopt as against the French Republic a measure under Article 90(3) of the Treaty, that measure would be addressed only to that Member State. The applicant cannot therefore claim to be in the precise position of the potential addressee of a legal measure which the Commission has a duty to adopt with regard to him, as required by Article 175(3) of the Treaty (see the judgment of the Court of Justice in Case 246/81 *Lord Bethell* v *Commission* [1982] ECR 2277, paragraph 16, and the order of the Court of Justice in Case C-371/89 *Emrich* v *Commission* [1990] ECR I-1555, paragraphs 5 and 6, and also the orders in *Asia Motor France* v *Commission*, cited above, paragraphs 10 to 12, and *Prodifarma* v *Commission*, cited above, paragraphs 35 to 37).

41 Nor can the applicant claim that it is directly and individually concerned by the measure which the Commission allegedly failed to adopt. It should be noted, first, that third parties who, *ex hypothesi*, are not addressees of a decision, can be considered to be individually concerned by that decision only if it affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of those factors distinguishes them individually just as in the case of the person addressed (see,

in particular, the judgments of the Court of Justice in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, Case 231/82 *Spijker* v *Commission* [1983] ECR 2559, and Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219). It should be noted, next, that the mere fact that a measure may exercise an influence on the competitive relationships existing on a market cannot suffice to allow any operator on that market to be regarded as directly and individually concerned by that measure in the absence of specific circumstances enabling him to claim that it affects his position as an economic operator (judgment of the Court of Justice in Joined Cases 10/68 and 18/68 *Eridania* v *Commission* [1969] ECR 459; judgments of the Court of First Instance in Case T-83/92 *Zunis Holding and Others* v *Commission* [1993] ECR II-1169, paragraph 34, and Case T-3/93 *Air France* v *Commission* [1994] ECR II-121, paragraph 82).

42 In order to demonstrate that it was individually concerned by the measure which the Commission allegedly failed to adopt, the applicant relies solely on its capacity as an economic operator which is in direct competition with the PMU in a number of areas outside France and which wishes to compete with it in France as well. Consequently, the measure which the Commission allegedly failed to adopt pursuant to Article 90(3) of the Treaty could concern the applicant solely in its capacity as an operator on the market in taking bets on horse-races, in the same way as any other operator in the same situation, which, in the light of the case-law cited above, is not such as to enable it to claim that that measure, once adopted, would be of individual concern to it.

43 Nor, finally, can the applicant validly claim to be sufficiently distinguished individually compared with other operators on the relevant market on the grounds that, first, it requested the Commission to adopt the measure which it allegedly failed to adopt and, secondly, it was able to participate in the investigation procedure conducted in this case by the Commission in accordance with Article 90 of the Treaty and, thirdly, it was able to require the Commission to define its position on its request, if not by a decision open to legal challenge, at least by a letter similar in format to that referred to in Article 6 of Regulation No 99/63. Firstly, given that neither Regulations No 17 and No 99/63 nor any other similar provision apply in

the context of the exercise of the Commission's powers under Article 90, an economic operator cannot claim the benefit of procedural rights granted to interested parties by those regulations. Secondly, it is clear from the case-law of the Court of Justice that mere participation in an investigation conducted by the Commission is not necessarily such as to enable an interested party to challenge the decision adopted after that investigation, since that decision itself, by its nature and effects, does not concern him individually (see the orders of the Court of Justice in Case 279/86 *Sermes* v *Commission* [1987] ECR 3109, paragraph 19, and Case 301/86 *Frimodt Pedersen* v *Commission* [1987] ECR 3123).

44 Finally, and in any event, the applicant cannot require the Commission to take action under Article 90(3) of the Treaty, since it is for the Commission to assess, in the light of the various types of public undertaking in the different Member States and the diversity and complexity of their relations with the public authorities (judgment of the Court of Justice in Joined Cases 188/80 to 190/80 *France, Italy and United Kingdom* v *Commission* [1982] ECR 2545), whether it is appropriate to take action not by way of decisions addressed to one or more Member States but by way of directives. By the latter the Commission can enact general rules in order to specify the obligations arising for Member States under the Treaty with regard to the undertakings referred to in paragraph (1) of that article (see the judgments of the Court of Justice in Case C-202/88 *France* v *Commission*, the *'Telecom'* judgment, [1991] ECR I-1223 and *Netherlands and Others* v *Commission*, cited above, paragraph 26) and to determine criteria which are common to all the Member States and all the undertakings in question (*Telecom* judgment, cited above). Such rules can be laid down on the basis of the information available to the Commission from, among others, studies of the markets concerned, as in this case where it is common ground that in 1990-1992 the Commission conducted a study of the national laws governing the gambling market.

45 Consequently, individuals may not put the Commission on notice to act under Article 90(3) of the Treaty, since such action may be taken, depending on the

circumstances, by adopting a decision or a directive, a legislative measure of general scope addressed to the Member States the adoption of which cannot be required by individuals (judgments of the Court of Justice in Case 134/73 *Holtz* v *Council* [1974] ECR 1, Case 90/78 *Granaria* v *Council and Commission* [1974] ECR 1081 and Joined Cases 97/86, 193/86, 99/86 and 215/86 *Asteris* v *Commission* [1988] ECR 2181; order of the Court of Justice in Case 60/79 *Producteurs de Vins de Tables et Vins de Pays* v *Commission* [1979] ECR 2425).

46 It follows from all the above considerations that the application must be dismissed as inadmissible to the extent that it is based on Article 90 of the Treaty.

Costs

47 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. Under Article 87(6), where a case does not proceed to judgment, the costs are in the discretion of the Court.

48 Since the applicant has been unsuccessful in its claims and pleas in law concerning the admissibility of the application in so far as it seeks a declaration of failure to act under Article 90 of the Treaty, and since the Commission has asked for the applicant to be ordered to pay the costs, the latter must be ordered to pay the costs.

49 However, in so far as the application seeks a declaration of failure to act under Articles 85 and 86 of the Treaty in conjunction with the provisions of Regulations No 17 and No 99/63, a claim in respect of which the Court has held that the case should not proceed to judgment, it must be noted that the dispute became devoid

of purpose only by reason of the Commission's belated defining of its position on the applicant's complaint, after commencement of the action.

50 Accordingly, in this case the Court considers that a decision that each party should bear its own costs would represent a fair assessment of the circumstances of the case.

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

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Rules that it is not necessary to give judgment on the application to the extent that it seeks a declaration of failure to act by the Commission in that it failed to define its position on the complaint which the applicant had lodged with it for infringement of the provisions of Articles 85 and 86 of the EEC Treaty in conjunction with those of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty and 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;

2. Dismisses the application as inadmissible for the remainder;

3. Orders the parties to bear their own costs;

4. Orders the intervener to bear its own costs.

Cruz Vilaça Briët Kalogeropoulos

Barrington Biancarelli

Delivered in open court in Luxembourg on 27 October 1994.

H. Jung J. L. Cruz Vilaça

Registrar President