JUDGMENT OF THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)
18 September 1995 *

In Case T-471/93,

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

applicant,

v

Commission of the European Communities, represented by Eric White, of the Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

* Language of the case: English.

French Republic, represented by Edwige Belliard, Deputy Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Catherine de Salins, Head of Section in the same directorate, and Jean-Marc Belorgey, Special Adviser to that directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 9 Boulevard Prince-Henri,

intervener,

APPLICATION pursuant to Article 173 of the EEC Treaty for a declaration that the Commission's decision of 18 January 1993 rejecting the applicant's complaint (IV/34.013) under Articles 92 and 93 of the EEC Treaty is void,

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

composed of: J. L. Cruz Vilaça, President, B. Vesterdorf, A. Saggio, H. Kirschner and A. Kalogeropoulos, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 24 January 1995,

gives the following

Judgment

Facts and procedure

1 The French Pari Mutuel Urbain (hereinafter 'the PMU') is an economic interest grouping set up by the main *sociétés de courses* (racecourse undertakings) in France. It has exclusive responsibility for organizing off-course totalizator betting in France on horse-races run by the *sociétés de courses* authorized for that purpose. The PMU also has exclusive rights to take bets abroad on races run in France and bets in France on horse-races run abroad. The PMU's statutes must be approved by the French authorities who also appoint the persons constituting its Assemblée Générale.

2 The Pari Mutuel Unifié Belge, a non-profit-making association, and the SC Auxiliaire PMU Belge, a cooperative company associated with it (hereinafter together referred to as 'the Belgian PMU'), were set up in Belgium in 1974 and 1984 respectively by the 11 Belgian racecourse operators. Under the relevant Belgian legislation, only the organizers of horse-races may take bets on the races which they organize, either on-course, at fixed odds or under the totalizator system, or off-course, under the totalizator system. The other authorized betting agencies in Belgium may take bets only on horse-races run abroad, in practice at fixed odds. On Belgian races, those agencies may take bets only as agents of the *sociétés de courses* where the bets are placed under the totalizator system or on authorization of the *sociétés de courses* and against payment of a fee where bets are at fixed odds. The Belgian PMU was therefore set up by the racecourse operators with the object of jointly organizing the taking of bets on the races which they organize and was given the exclusive mandate to organize off-course totalizator betting on those races.

3 On 18 March 1991, the PMU and the Belgian PMU entered into an agreement under which the PMU is authorized to take, on the Belgian PMU's behalf, bets in France, more specifically in 17 French *départements*, on Belgian horse-races.

4 That agreement was made against the background of the French legislation including Finance Law No 64-1279 of 23 December 1964 for 1965, Article 15(3) of which provides that the *sociétés de courses* authorized to organize off-course totalizator betting may be empowered to collect bets placed in France on foreign races provided that the bets taken are centralized and incorporated in the pool to be distributed in direct liaison with the body or bodies responsible for operating totalizator betting in the country concerned. That article further provides that the bets thus collected are to be subject to the statutory and fiscal levies in force in the country in which the race is organized and that the proceeds of those levies are to be apportioned between the country in which the bets are collected and the country in which the race takes place. Such apportionment may include a special portion to cover administrative costs, to be levied prior to payment to the statutory recipients in each country.

5 Furthermore, Decree No 91-118 of 31 January 1991, on the collection of bets by the PMU on horse-races organized in Belgium, provides that on the first FF 50 million of stakes collected annually on races organized in Belgium the PMU is to pay each month the stamp duty proceeds to the general budget and 0.876% of the total stakes to the Fonds National des Haras et des Activités Hippiques (National Fund for Stud-farms and Equestrian Activities). On the tranche between FF 50 million and FF 75 million of stakes collected annually, the payments referred to above and one third of the proceeds of the progressive additional levy on winnings (hereinafter 'the PAL') are to be paid to the general budget and 0.181% of the total stakes to the Fonds National des Haras et des Activités Hippiques. On the tranche between FF 75 million and FF 100 million of stakes collected annually, the first-mentioned payments and two thirds of the proceeds of the PAL are to be paid to the general budget and 0.362% of the total stakes to the Fonds National des Haras et des Activités Hippiques. Finally, on amounts over FF 100 million collected annually, those payments and the total proceeds of the PAL are to be paid to the general budget and 0.543% of the total stakes to the Fonds National des Haras et des Activités Hippiques.

6 In France, the aggregate rates of the various statutory and fiscal levies which may be imposed on amounts staked on horse-races may not exceed 30% by virtue of Article 18 of the 1967 Finance Law.

7 In Belgium, such levies on the proceeds of bets placed on horse-races may in contrast be up to a maximum of 35% according to Article 44(2)(d) of the Royal Decree of 8 July 1970 laying down general rules for charges treated as taxes on income, which provides that the amount of the stakes reserved to winners may not be less than 65%.

8 Against the background of those legislative provisions, the abovementioned agreement between the PMU and the Belgian PMU provided that the levy on the proceeds of bets taken in France on Belgian horse-races, at the rate of 35% as a result of the combined provisions of the abovementioned French and Belgian legislation, was to be apportioned according to a system which takes account of turnover. For that purpose, the agreement provides for four tranches. The first tranche comprises turnover under FF 50 million, in respect of which the French public recipients receive 6.386% of the levy and the Belgian party 23.114%. The second tranche comprises turnover between FF 50 and 75 million, in respect of which the French share rises to 10.817% and the Belgian share falls to 16.183%. The third tranche comprises turnover between FF 75 and 100 million, in respect of which the French share reaches 15.238% and the Belgian share 9.762%. Finally, for turnover above FF 100 million the Belgian share falls to 5.602% and that of the French authorities rises to 19.169%.

9 On 12 July 1991, Tiercé Ladbroke SA (hereinafter 'Ladbroke'), a company incorporated under Belgian law in 1982 as a subsidiary of Ladbroke Group plc and which carries on business as a bookmaker, taking bets at fixed odds in Belgium on horse-races run abroad, lodged a complaint against the PMU, the Belgian PMU and the French Republic (IV/34.013) with the Commission pursuant to Articles 85 and 86 and Articles 92 and 93 of the EEC Treaty. With regard to the latter Treaty provisions, Ladbroke's complaint, repeated and clarified on that point by letter of

5 February 1992 (NN 16/92), requested the Commission to find that the agreement made on 18 March 1991 between the PMU and the Belgian PMU entailed the provision by France of unlawful and unnotified State aid to the Belgian PMU.

10 Ladbroke stated in its complaint that bets taken in France, in accordance with the agreement between the two PMUs which is said to have given rise to a turnover of BFR 67 million since 20 March 1991 and BFR 300 million annually, are collected and administered in the same way as bets on French races, being part of the French system and being centralized in the PMU's totalizator system using the PMU's resources and technology. Subsequently transferred from the French to the Belgian totalizator system, the total staked on Belgian races in bets taken in France is subject to a 35% levy pursuant to the Belgian legislation. Of that 35% levy, an amount equivalent to 26% goes to the Belgian PMU and the remaining 9% is returned to the French system, with approximately 4% going to the French State and 5% to the French *sociétés de courses*. In contrast, as regards amounts staked in bets on French races taken in France, the levy of approximately 30% is allocated as to 18% to the French State and as to 10% to the *sociétés de courses*.

11 Ladbroke therefore argued in its complaint that the fact that the French State, the PMU and the *sociétés de courses* retain only 9% of the levy on amounts staked on Belgian races and not 28%, as is the case for the levy on amounts staked on French races, entails fiscal treatment which, since it involves a charge on the French State and a profit for its recipient, the Belgian PMU, constitutes unlawful State aid for the Belgian PMU. That State aid distorts competition since the Belgian PMU receives returns on bets taken in France on Belgian races which are not received by its competitors in Belgium who are unable to take bets in France. Furthermore, the unlawful aid in question affects trade between Member States since the system which gives rise to it entails the taking of bets in France on Belgian races and the return by the French State from France to Belgium of sums stemming from those bets. Finally, Ladbroke maintains that the alleged State aid is new, unnotified aid, granted in breach of Article 93(3) of the Treaty.

12 Besides requesting the Commission to find that the agreement between the two PMUs infringed Articles 85 and 86 of the Treaty and to require the two PMUs to put an end to that agreement, Ladbroke therefore requested it to:

— order France by way of interim decision to suspend the unnotified State aid granted to the Belgian PMU;

— after a full examination of the unlawful aid granted to the Belgian PMU, order it to put an end to that aid; and

— order the Belgian PMU to return the unlawful aid with interest at the full commercial rate.

13 The part of Ladbroke's complaint concerning the alleged grant of unlawful State aid was rejected by letter dated 18 January 1993 signed by the Commissioner for Competition (hereinafter 'the decision' or 'the contested decision') on the ground that the abovementioned agreement between the two PMUs contained no aid within the meaning of Article 92(1) of the EEC Treaty for the following reasons.

14 According to the decision, the levy on the proceeds of betting on horse-races cannot be termed a tax because it is itself subject to public deductions of a fiscal nature and in France, as in Belgium, it varies depending on a number of factors, including the place where the race is organized and its allocation to different funds, such as the fund for horse-breeding establishments or the national fund for the development of water supply and the general budget.

15 According to the decision it would also be inappropriate to subject the 35% levy on bets taken in France on Belgian races to the public retention which applies to the 30% levy on bets on French races because that French public retention of 18%

includes 'exclusively French' contributions, in particular contributions to the French horse-breeding fund (from 1.86% to 3.36%) and VAT of 22% calculated on the proportion of the levy going to the French *sociétés de courses*. Consequently, the French public retention of 18% could not be applied in its entirety to the 35% levy on bets on Belgian races, but only to the portion remaining after deduction of the exclusively French contributions, which come to some 5%. The French public retention therefore falls to less than 13% of bets taken on Belgian races so that it is close to the French public retention of 6.4% currently imposed on the 35% levy applied to the proceeds of bets taken in France on Belgian races.

16 Furthermore, according to the decision, the share of the levy which accrues to the Belgian PMU is almost the same whether the bet is collected in France or in Belgium. The Commission explains in the decision that if the bets on Belgian races were taken in Belgium, the Belgian PMU's share would amount, depending on the region, to between 25% and 28%, less 5.5% operating costs, which would give a share of between 19.5% and 22.5% as against 23.114% when the bets are taken in France. Deducting from that 23.114% the Belgian PMU's additional expenses (advertising, prizes and information costs) attributable to taking bets outside the national Belgian territory demonstrates that for bets taken in France on Belgian races the Belgian PMU receives a share which is broadly equivalent to the share it would receive if it collected the bets on Belgian races itself.

17 Finally, according to the decision, the agreement between the two PMUs considered as a whole appears to be advantageous to the Belgian PMU only during its initial phase, concerning turnover of less than FF 50 million, when the Belgian PMU's share is relatively high. For the later phases, however, the agreement must be regarded as distinctly less advantageous to the Belgian PMU because of the decrease in its share of the levy on higher tranches of turnover.

18 However, so as to take account of any new facts that might emerge and the possibility that in the years ahead the agreement might not be implemented beyond its initial phase, the Commission in its decision reserves the right to review the agreement after a period of four years and requests the French authorities to submit an annual report on how the terms of the agreement are being implemented in practice.

19 Those are the circumstances in which, by application lodged on 22 March 1993, Ladbroke brought this action under Article 173 of the EEC Treaty, registered at the Registry of the Court of Justice under number C-80/93.

20 On 7 July 1993, the Government of the French Republic sought leave to intervene in support of the Commission. By order of 6 August 1993 of the President of the Court of Justice, leave to intervene was granted and, on 20 October 1993, the intervening party lodged its statement in intervention, on which the Commission submitted its observations on 23 November 1993 and the applicant on 10 December 1993.

21 By order of 27 September 1993 made pursuant to Article 4 of Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 amending Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1993 L 144, p. 21), the Court of Justice transferred the case to the Court of First Instance, where it was registered under number T-471/93.

22 The written procedure followed the normal course. Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber, Extended Composition) decided to open the oral procedure without any preparatory inquiry. The Court however requested the Commission and the French Government to reply to certain written questions and produce certain information concerning the implementation of the agreement between the two PMUs and the system of public retentions and levies applied in France to amounts staked on French and Belgian horse-races. The parties responded to the Court's request within the prescribed periods.

23 At the hearing on 24 January 1995 the parties presented oral argument and answered oral questions put to them by the Court.

Forms of order sought

24 The applicant claims that the Court should:

— annul the decision contained in the letter of 18 January 1993;

— order the Commission to re-examine forthwith the complaint against the two PMUs (No NN 16/92) pursuant to Article 176 of the EEC Treaty;

— order the Commission to pay the costs of the application.

25 The defendant contends that the Court should:

— declare the application unfounded;

— order the applicant to pay the costs of the action.

26 The intervener claims that the Court should:

— dismiss the application;

— order the applicant to pay the costs, including the costs incurred by the intervener.

Substance

27 In support of its claims for annulment, the applicant submits that the contested decision is vitiated by lack of reasoning in breach of Article 190 of the EEC Treaty and/or by incorrect reasoning or unlawfulness.

The first plea: failure to state reasons

28 Although the applicant has submitted that the contested decision lacks reasoning, it has put forward only one argument calling in question the substantive legality of the decision. However, the Court, which is entitled to review, even of its own motion, the reasoning of Community acts challenged before it, considers it appropriate to examine the plea of failure to state reasons.

29 The Court notes as a preliminary point that by virtue of Article 190 of the Treaty decisions adopted by Community institutions must state the reasons on which they are based and that the statement of reasons must be such as to enable the Community judicature to exercise its power of review of the legality of the decision and to enable the person concerned to ascertain the matters justifying the measure

adopted, so that he can defend his rights and verify whether the decision is well founded (judgments of the Court of Justice in Joined Cases 43 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19 and of the Court of First Instance in Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1, paragraph 42, and Case T-7/92 *Asia Motor France and Others* v *Commission* [1993] ECR II-669, paragraph 30).

30 In the contested decision the Commission set out the reasons for its view that the agreement between the two PMUs, impugned by the applicant in its complaint of 12 July 1991 confirmed by its letter of 5 February 1992, cannot be considered to entail the grant of aid, within the meaning of Article 92(1) of the Treaty, to the Belgian PMU and for which it consequently rejected the applicant's complaint.

31 The contested decision contains a series of observations of fact and of law concerning the nature of the levy on amounts staked on horse-races and the retentions on that levy, the justification of the treatment in France of that levy and, in particular, the fact that the Belgian PMU does not in fact gain any advantage from the application of the agreement between the two PMUs and that, even if there were such an advantage during the first phase of the agreement, it would be cancelled out during the later phases.

32 That summary of the reasons constitutes a statement of reasons which must as a whole be considered sufficient, for the purposes of Article 190 of the Treaty, to support the Commission's conclusions since it contains a summary of the facts and the legal considerations essential to the decision and indicates that the Commission's refusal to accept the existence of aid within the meaning of Article 92(1) of the Treaty follows in substance from the finding that no advantage accrues to the Belgian PMU from the application of the agreement.

33 Although the reasons given in the contested decision do not always reveal all the Commission's reasoning, they may be considered as sufficient, given that the person adopting a decision is not required to give all the relevant factual and legal

details and that the question whether the statement of the reasons on which a decision is based is sufficient may be assessed with regard not only to its wording but also to the context in which it was adopted and to all the legal rules governing the matter in question (Case 185/83 *University of Groningen* v *Inspecteur der Invoerrechten en Accijnzen, Groningen* [1984] ECR 3623, paragraph 38; Case 203/85 *Nicolet Instrument* v *Hauptzollamt Frankfurt an Main-Flughafen* [1986] ECR 2049, paragraph 10; Case 167/88 *Association Générale des Producteurs de Blé et Autres Céréales* v *ONIC* [1989] ECR 1653, paragraph 34 and Joined Cases C-121/91 and C-122/91 *CT Control (Rotterdam) and JCT Benelux* v *Commission* [1993] ECR I-3873, paragraph 31).

34 It follows that the applicant's first plea of failure to state reasons must be rejected.

The second plea: incorrect reasons or unlawfulness of the contested decision

Summary of the arguments of the parties

35 The applicant states that, from the agreement between the two PMUs and the way in which the levy on stakes on Belgian races is treated in France, it can be seen that on every FF 100 bet on those races the French State levies FF 35 of which it retains only FF 6.39 and pays the remainder, namely FF 28.61, to the French PMU which itself retains FF 5.5 and transfers the remaining FF 23.19 to the Belgian PMU. In contrast, on every FF 100 bet on a French race the French State levies FF 30 of which it retains FF 18 and pays the remaining FF 12 to the PMU. Consequently, not only is the rate of the levy of 35% on the proceeds of bets placed in France on Belgian horse-races which is to go to the Belgian PMU higher than the levy of 30% imposed on bets taken in France on French races but also the share of the levy ultimately transferred to the Belgian PMU, namely 23.114%, is therefore higher than the share of the levy transferred to the PMU, namely 12%. The Belgian PMU thus receives revenue which it would not have received if there had been no agreement with the French PMU permitting bets to be taken in France on Belgian races. That revenue constitutes unlawful State aid the exact amount of which is the amount by which the sum received by the Belgian PMU pursuant to the agreement exceeds the sums necessary to cover the expenses of taking bets in France on

Belgian races. According to the applicant, that mechanism, which in 1991 gave the Belgian PMU revenue of the order of FF 8.1 million, distorted competition, causing it considerable harm. It submits that, without that unlawful aid, the Belgian PMU would have collapsed, enabling Ladbroke to organize totalizator betting on Belgian races itself. Moreover, without that aid, the Belgian PMU would not have been able to acquire, as it did in December 1991, the Paris agency 'Tiercé Franco-belge', Ladbroke's competitor in Belgium in the market in bets on horse-races run abroad.

36 In support of its argument that the financial advantage thereby conferred on the Belgian PMU constitutes State aid, the applicant emphasizes that the payment of the part of the levy accruing to the Belgian PMU is made on the instructions of the French State and through an organization which, as can be seen from its statutes, is controlled by the French State, namely the French PMU. The levy accruing to the Belgian PMU thus constitutes a compulsory contribution prescribed by rules of public law, so that whether it is formally termed a tax or other retention is irrelevant since by its nature it is a compulsory contribution imposed by the State, and it is irrelevant to the classification as State aid of the share of the levy going to the Belgian PMU whether all or part of it accrues to the State exchequer (judgments of the Court of Justice in Case 78/76 *Steinike und Weinlig* v *Germany* [1977] ECR 595, 611 and Case 290/83 *Commission* v *France* [1985] ECR 439, 449).

37 The applicant further submits that neither the fact that the share of the levy going to the State may vary from one race to another, as the Commission emphasizes in the contested decision, nor the fact that the levy is itself subject to fiscal retentions, affects its character of compulsory contribution imposed by the State, since both the application of VAT at the rate of 22% on the portion of the levy going to the *sociétés de courses* and the application of another tax, the PAL (see above, paragraph 5), calculated on the basis of the odds and the type of bet placed, concern only the internal structure of the levy and are irrelevant in classifying it as a tax.

38 The fact that the taxes and retentions imposed in France on the levy on bets placed on French races differ from those imposed on the levy on bets placed on Belgian races means that the Belgian PMU receives more of the levy than it would have received if that levy, when concerning Belgian races, were subject to the same fiscal contribution as when it concerns amounts staked on French races, given that the bets on Belgian races and on French races are placed in France. The very terms of the agreement between the two PMUs, which provides for an increased retention for the French public recipients during the third and fourth phases of its application, show that it is feasible to make the two levies subject to the same fiscal treatment.

39 In response to the Commission's argument in the contested decision that the share of the levy at issue does not entail aid to the Belgian PMU because the revenue it obtains under the agreement in question is substantially the same as the revenue it would have by directly taking bets on Belgian races, the applicant refers to the case-law of the Court of Justice to the effect that a contribution does not lose its character of State aid merely because its object or effect is to put the beneficiary into the same position as if it had carried on the same economic activity in another Member State (Case 173/73 *Italy* v *Commission* [1974] ECR 709). Even if the revenue in question proved to be substantially the same in both cases, this would still be the result of discrimination, created by the agreement at issue, in applying to bets on Belgian races a rate of levy higher than that applied to bets on French races, the whole system leading in any event to a much higher transfer of revenue to the Belgian PMU than would have been the case if the two bets had been treated in France in the same way.

40 The applicant thus submits that any speculation as to the revenue which the Belgian PMU could have realized if, in the absence of the agreement, it had itself taken the bets on Belgian races is purely theoretical since nothing indicates that without the agreement the bets concerned would in fact have been placed.

41 Finally, the applicant rejects the Commission's argument that the agreement between the two PMUs, considered as a whole and taking account of all the phases of its application, does not involve State aid to the Belgian PMU. The fact that under the agreement the share of the levy going to the Belgian PMU decreases as turnover in bets on Belgian races taken in France increases is irrelevant because that decrease occurs only as a percentage and not in actual revenue, which in any event increases concurrently with the turnover in bets taken on Belgian races.

42 The Commission considers that the levy at issue cannot be regarded as a tax or a 'State resource' since it is never levied or received by the State. It is merely the residue of the amount which the totalizator operator must redistribute to the winning betters and which is itself subject to certain taxes or public retentions, so that the most fundamental criterion for classifying the levy as a tax, namely imposition by the State, is not fulfilled.

43 With regard to the difference between the rates of the levy depending on whether it applies to amounts staked on Belgian races or amounts staked on French races, the Commission stresses that the difference is the effect of the combination of French and Belgian laws. It refers to Article 15(3) of the French Finance Law for 1965, cited above, which provides that bets placed in France on foreign races are to be subject to the statutory and fiscal levies in force in the country in which the race is organized, whereas Article 44(2)(d) of the Belgian Royal Decree of 8 July 1970 sets at 35% the levy to be applied on races organized in Belgium. In those circumstances, the Commission considers that, given that the levy is deducted in Belgium when the Belgian PMU pools the bets collected in France, the deduction of 5.5% from the levy by way of commissions for the French PMU may even be considered to be a payment by the Belgian PMU to the French PMU and not the other way round.

44 With regard to the difference in fiscal treatment and the various retentions on the levy, depending on whether bets placed in France are taken on French races or on Belgian races, the Commission considers that the composition of the levy on bets placed in France on French races makes it impossible to transpose to bets placed on foreign races and, consequently, to Belgian races because that levy comprises certain 'exclusively French' taxes which would make applying it to foreign races unsuitable or inappropriate.

45 The Commission considers that from the quantitative point of view the existence of those 'exclusively French' contributions brings the difference in taxation down to a level lower than that advanced by the applicant. The Commission restates the analysis in the contested decision according to which the French public retention of 18% which is imposed on the 30% levy applied to bets placed in France on French races includes a tax for the Fonds National des Haras et des Activités Hippiques, which varies between 1.86% and 3.36%, and VAT of 22% on the share of the levy going to the French *sociétés de courses* (namely on the 6.5%). Those two elements, which constitute some 5% of the overall French public retention of 18%, when deducted from it, thus bring the French public levy down to 13%. The difference between it and the tax of 6.4% on the 35% levy on bets taken in France on Belgian races is therefore lower than the applicant claims.

46 The Commission also repeats its argument that, even in terms of the revenue realized by the Belgian PMU, there can be no question of aid within the meaning of Article 92(1) of the Treaty because, as the terms of the agreement between the two PMUs show, the revenue of the Belgian PMU arising from bets taken in France on Belgian races is at approximately the same level as if the bets on Belgian races were taken by the Belgian PMU, in both cases amounting to some 20% of the sums staked in the bets concerned.

47 The Commission explains that when a bet is placed in France on Belgian races the Belgian PMU's share of the stake comes to 35%, from which must be deducted 6.386% by way of French taxes levied by France and 5.5% by way of the

commission paid to the French PMU, which gives a percentage of 23.114% from which must be deducted a further 1 to 2% of additional expenses for publicity, prizes and information borne by the Belgian PMU in order to make Belgian races attractive to the French public. When a bet is placed in Belgium on Belgian races, the Belgian PMU's share of the levy is determined by deducting from the 35% levy first 7 to 10% of public retentions, varying from region to region, and then 5.5% by way of the Belgian PMU's operating costs, which gives in total a levy percentage broadly equivalent to the previous one and barely enough, according to the Commission, to cover the costs of the *sociétés* members of the Belgian PMU. Thus, the only effect of the two PMUs' agreement is simply to increase the Belgian PMU's turnover so that the resulting benefit for that body cannot be treated as aid within the meaning of Article 92 of the Treaty.

48 The Commission stresses that an analysis of the agreement at issue as a whole, in all its phases, indicates that the benefit gained by the Belgian PMU is even slighter during the later stages of implementation of the agreement because of the increase in the French State's retentions applying to the levy in the later stages.

49 Finally, while affirming its intention to review the two PMUs' agreement after a period of four years, the Commission emphasizes that the argument that the agreement between the two PMUs is contrary to Article 92 of the EEC Treaty raises many other complex legal issues which it was not necessary to address in the decision because its conclusion that the agreement did not constitute State aid can be based on the simpler ground that the Belgian PMU was in any case not receiving any benefit. Thus it was not necessary for the Commission to examine, for example, the complex question of what measures a Member State is entitled or bound to take to ensure complete fiscal neutrality in intra-Community trade where certain specific tax regimes differ between Member States or the nature of the alleged distortion of competition or its effect on trade between Member States.

50 The intervener accepts that the Belgian PMU realizes more revenue on bets taken in France on Belgian races than the French PMU on bets of the same amount taken on French races. However, even if that revenue were to be categorized as State aid in accordance with the applicant's view, such categorization could not apply to the entire sum of FF 8.1 million received in 1991 by the Belgian PMU under the agreement at issue but solely to the difference between that sum and the amount which that body would have received had the system for dealing with stakes on French races been applied to it. Given that on that latter assumption the proceeds of the bets would have been subject to retentions and taxes of some 17.85% while the Belgian PMU would have received 10.3% instead of the 23.114% currently received, the difference between those receipts — and hence the actual amount of the alleged aid — would have been some FF 4.5 million and not FF 8.1 million as claimed by the applicant.

51 As regards the explanation for the difference between the revenue of the PMU and that of the Belgian PMU from the proceeds of bets of an identical amount, the intervener attributes that difference to objective factors with no relation to economic and commercial considerations which relate exclusively to the very nature of totalizator betting and the resultant structure of the levies on amounts so staked. The intervener states that totalizator betting is characterized by the pooling of the stakes and, after deduction of the various levies and the expenses of operating the system, their repayment in total to the winners, which precludes any quest for profit. That non-profit making objective is reflected in the legal form of the PMU, which is an economic interest grouping of *sociétés de courses* in the form of a non-profit making association whose object is the improvement of horse-breeding in France. The legal nature of totalizator betting and of the body which operates it, the PMU, requires that the management of the stakes be strictly regulated. Thus, French legislation has fixed at 70% the share of the stakes to be returned to betters and allocated the remaining 30% between various public levies, including a share allocated to the *sociétés de courses* to make it possible both to cover the costs of operating the system and to attain the PMU's object, namely the improvement of horse-breeding in France, in various forms. It follows that the system as a whole is, by its nature and its objectives, not transposable to bets taken on foreign races, even if the bets on those races are taken in France.

52 The intervener also states that the system of imposing a levy on amounts staked in France on Belgian races is an inevitable consequence of the combination of French and Belgian laws, application of the latter being required by Article 15 of the French Finance Law for 1965, and is furthermore required for the following reasons. First, the whole idea of totalizator betting requires that there be only one pool of stakes for bets of the same type and that those betting on the same race be treated in the same way. Second, applying only the French law, which requires certain levies to be used for the improvement of French horse-breeding, would have dissuaded the organizers of Belgian races from accepting the principle of taking bets from France. Third, applying the levies of the country in which the race is organized is indispensable if taking bets from another country is to be of commercial interest for all the operators and for the public-interest objectives of the two States concerned.

53 The intervener notes, finally, that in the present state of Community law there is nothing to require it to amend its domestic legislation governing the allocation of the various portions of the levy.

Findings of the Court

54 It is necessary first to examine the validity of the ground advanced by the Commission that there is no financial advantage for the Belgian PMU arising from the application of the agreement between the two PMUs. In the absence of any advantage for the alleged recipient of a measure prohibited by Article 92(1) of the Treaty, that provision of the Treaty must be inapplicable and the contested decision could not be vitiated by incorrect reasons or unlawfulness in so far as it refused to accept in this case that aid, within the meaning of the abovementioned provision of the Treaty, was being provided.

55 According to the case-law of the Court of Justice (see Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 34; Joined Cases 142 and 156/84

BAT and Reynolds v *Commission* [1987] ECR 4487, paragraph 62; Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraphs 23 and 25) and of the Court of First Instance (see Case T-44/90 *La Cinq* v *Commission*, cited above, paragraphs 85 and 86 and Case T-7/92 *Asia Motor France and Others* v *Commission* [1993] ECR II-669, paragraph 33), in situations involving complex economic appraisals, judicial review must be limited to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers.

56 After examining the information provided by the applicant in its complaint, the Commission concluded that the effect of the agreement at issue was merely to increase the Belgian PMU's turnover without conferring on it any advantage constituting State aid, given that a comparison of the share of the levy accruing to the Belgian PMU in France and the share of the levy which would accrue to it if the bets on Belgian races were taken by it without the intervention of the French PMU shows that the revenue is equivalent, being in both cases some 20% of the stakes placed (see above, paragraphs 16, 46 and 47).

57 In order to rebut that argument by the Commission, the applicant submits that any speculation as to the revenue which the Belgian PMU would have realized if, in the absence of the agreement at issue, it had itself taken the bets on Belgian races is theoretical because nothing indicates that without that agreement the bets concerned would in fact have been placed. Furthermore, even if the Belgian PMU's revenue proved to be substantially the same in both cases, this would in any event be the result of discrimination, created by the agreement at issue, in applying to bets on Belgian races a rate of levy higher than that applied to bets on French races, the whole system leading in any event to a much higher transfer of revenue to the Belgian PMU than would have been the case if the two bets had been treated in France in the same way.

58 The Court considers that that argument of the applicant is not by itself such as to put in question the Commission's assessment. With regard, first, to the revenue realized in France by the Belgian PMU, even if, as the applicant claims, without the agreement at issue between the two PMUs the bets concerned would not have been placed, the revenue deriving therefrom for the Belgian PMU could still not be regarded as aid within the meaning of Article 92(1) of the Treaty. The opening of the French market in taking bets on horse-races, enabling the Belgian PMU to gain access, through the French PMU, to French betters and to increase its revenue by the amounts they stake, is a choice made by the French legislature concerning the organization of the national market in taking bets on horse-races and the arrangements for the exercise by the French PMU of its exclusive rights under the national legislation on taking bets on foreign horse-races (see above, paragraph 1). Consequently, the choice made by the French legislature which permitted the agreement at issue between the two PMUs to be made cannot in itself be impugned as contrary to Article 92(1) of the Treaty solely because application of the agreement at issue may have the effect of increasing the revenue not only of the French PMU on foreign races but also of the Belgian PMU on bets on horse-races run in Belgium which are normally taken by it directly.

59 With regard, secondly, to the applicant's argument criticizing the fact that the two bets are not treated in France in the same way, even if it is accepted that the applicant, which does not operate on the French market in taking bets on horse-races, can complain about the grant to a third party of an advantage due to a difference in fiscal treatment which could in fact affect only those authorized to operate on that market and hence in this case the French PMU, the Court considers that that argument likewise cannot put in question the validity of the Commission's assessment that the revenue ultimately received by the Belgian PMU on the levy concerned under the agreement at issue is equal to the revenue which it would receive on that levy if the bets on Belgian races were taken directly by it. In the absence of any evidence adduced by the applicant in its complaint or in the proceedings before the Court demonstrating that in comparing the rates of revenue realized by the Belgian PMU in France and in Belgium the Commission committed a manifest error in its findings of fact or in its assessment of the data relating to the rates of the various retentions and taxes on the levies which are imposed in Belgium and in

France on amounts staked on horse-races run in Belgium, the Court considers that the contested decision, by assuming that the Belgian PMU draws no real advantage from the application of the agreement at issue, is not the result of an erroneous assessment justifying its annulment (see the judgments of the Court of Justice in Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraphs 12 and 13; Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 45; Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 40 and Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 29).

60 It must also be added that in comparing, for the purposes of examining whether there is any real advantage to the Belgian PMU, the revenue realized by the PMU in France with that which it would realize in itself taking bets on Belgian races, the Commission cannot be regarded as committing an error of law with regard to Article 92(1) of the Treaty. According to Article 15(3) of the French Finance Law for 1965, cited above (see above, paragraph 4), allowing bets to be placed in France on races run abroad, the bets so collected are subject to the statutory and fiscal levies in force in the country in which the races are organized. The Commission was accordingly entitled to consider that the existence of any advantage, as alleged by Ladbroke in its complaint, should be examined by taking into account the fact that the treatment of the levy accruing in France to the Belgian PMU would normally be subject to statutory and fiscal retentions, which would have meant that the Belgian PMU would receive a share of that levy equivalent to the share which would in principle accrue to it in the country in which the horse races concerned are run, namely Belgium.

61 The applicant cannot be justified in maintaining that the mechanism for determining the amount and the treatment of the levy on amounts staked on foreign races, laid down by Article 15(3) of the French Finance Law for 1965, constitutes a State aid mechanism and that, to prevent such aid from being granted, the levy on Belgian races would have to be treated in the same way as the levy on amounts staked on French races accruing to the French PMU.

62 The way in which the levy on bets on Belgian races is treated in France, whereby, the Belgian PMU receives a share of that levy comparable to the share which would accrue to it upon application of the Belgian statutory and fiscal retentions, in accordance with the abovementioned provisions of Article 15 of the French Finance Law for 1965, cannot constitute a State aid mechanism, since such treatment does not constitute a measure which derogates from the scheme of the general system but on the contrary accords with the general system, the main feature of which is, precisely, that amounts staked on races run abroad are subject to the statutory and fiscal retentions of each country in which the horse races concerned are run.

63 It follows that the applicant's argument that the way in which stakes on Belgian races are treated in France, which allegedly produces the advantage to the Belgian PMU it complains of, should be the same as the way in which the levy accruing to the French PMU is treated, cannot be accepted either.

64 It follows from all the foregoing that the applicant has not established that the contested decision is vitiated by incorrect reasoning or unlawfulness and that the second plea must also be rejected.

65 The application must accordingly be dismissed as unfounded in its entirety without its being necessary to rule on the applicant's alternative claims for an order requiring the Commission to re-examine its complaint.

Costs

66 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.

67 However, Article 87(3) of the Rules of Procedure 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 or where the circumstances are exceptional.

68 The Court considers that, in the present case, the reasons stated in the contested decision could not dispel all the doubts which the applicant might have had as to the justification for the Commission's refusal to accept that the Belgian PMU gains an advantage and for the rejection of its complaint, so that the Commission must be regarded as having partly contributed to the bringing of this action.

69 It is therefore appropriate to apply the abovementioned provisions of Article 87(3) of the Rules of Procedure and order the parties to bear their own costs.

70 Under Article 87(4) of the Rules of Procedure, Member States which have intervened in proceedings are to bear their own costs. The French Republic must accordingly be ordered to bear its own costs.

On those grounds,

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

hereby:

1. Dismisses the application;

2. Orders the parties, including the intervener, to bear their own costs.

Cruz Vilaça Vesterdorf Saggio

Kirschner Kalogeropoulos

Delivered in open court in Luxembourg on 18 September 1995.

H. Jung J. L. Cruz Vilaça

Registrar President