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

In Case T-548/93,

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

applicant,

v

Commission of the European Communities, represented by 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 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 of the Legal Affairs Directorate of the Ministry for Foreign Affairs, Catherine de Salins, Head of Section in that 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 for annulment of the Commission's Decision of 29 July 1993 rejecting a complaint relating to a proceeding under Articles 85 and 86 of the EEC Treaty and for immediate re-examination of the complaint (IV/33.374),

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

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

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 11 May 1995,

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 organization and provision of betting services for horse-races, which it carries on 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, lodged a complaint (IV/33.374) with the Commission against: (a) the French Republic; (b) the ten main racing companies (*'sociétés de courses'*) in France, which are the only bodies permitted under French legislation to organize totalizator betting on horse-races, initially on their race-courses (Article 5 of the French Law of 2 June 1891 governing the authorization and operation of horse-races) and subsequently off-course (Article 186 of the French Finance Law of 16 April 1930), the other *sociétés de courses* being authorized to accept only on-course bets on races organized by them and (c) the Pari Mutuel Urbain (hereinafter 'PMU').

3 The PMU is an economic interest grouping comprising the main *sociétés de courses* in France (Article 21 of Decree No 83-878 of 4 October 1983 on *sociétés de courses* and totalizator betting), created to manage the rights of those *sociétés* to organize off-course totalizator betting. The PMU initially managed the rights of the *sociétés de courses* to organize such betting as a 'joint service' operating by virtue of a decree of 11 July 1930 on the extension of off-course totalizator betting which, made pursuant to Article 186 of the abovementioned Finance Law of 16 April 1930, provided in Article 1: 'With the authorization of the Minister for Agriculture, totalizator betting may be organized and operated outside racecourses by the Parisian *sociétés de courses* acting jointly with the aid of the provincial *sociétés de courses*'. Under Article 13 of Decree No 74-954 of 14 November 1974 on the *sociétés de courses*, the PMU thereafter had exclusive responsibility for managing the rights of

the *sociétés de courses* in relation to off-course totalizator betting; that article provides that 'the *sociétés de courses* authorized to organize off-course totalizator betting ... shall entrust its management to a joint service to be called Pari Mutuel Urbain'. The exclusivity thereby conferred on the PMU is moreover protected by the prohibition of the placing or accepting of bets on horse-races by any person other than the PMU (Article 8 of the Interministerial Decree of 13 September 1985 governing the Pari Mutuel Urbain). It extends to bets taken abroad on races organized in France and bets taken in France on races organized abroad, which likewise may be entered into only by the authorized *sociétés* and/or the PMU (Article 15(3) of Law No 64-1279 of 23 December 1964 on finances for 1965 and Article 21 of Decree No 83-878 of 4 October 1983, cited above).

4 The essential feature of totalizator betting, the only system of betting authorized in France, is that the stakes constitute a common pool which, after various levies, is distributed to the winners. The betters bet against each other, the return by way of winnings depends on the total stakes and the number of winners, and the operator of the betting is not remunerated out of the gamblers' lost stakes but by levies imposed on the pool of stakes.

5 In so far as its complaint was directed against the PMU and its member *sociétés*, 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), first to find and order the termination of infringements of Article 85(1) of the EEC Treaty arising from agreements or concerted practices on the part of the *sociétés de courses* authorized in France *inter se* and with the PMU. The alleged objective of those agreements or concerted practices was first to grant the PMU exclusive rights in the management and organization of off-course totalizator betting on races organized or controlled by those *sociétés*, 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 the French Republic.

6 Secondly, in its complaint Ladbroke requested the Commission to find and order the termination of infringements of Article 86 of the EEC Treaty arising from, first, the grant to the PMU of the exclusive rights to manage and organize off-course betting and, secondly, the securing by the PMU of illegal State aid and the use of advantages procured by that aid to meet competition. The applicant also requested the Commission to order the PMU to repay the illegal State aid which it had thus received together with interest at the market rate. Furthermore, Ladbroke notified the Commission of other abuses of dominant position by the PMU, consisting in the exploitation of betters, the users of its services, owing to the lack of organized betting on races run on courses not belonging to the main *sociétés de courses* and from the restricted availability of betting on races run on courses belonging to them, because the number of races on which bets are taken are fewer than in other Member States, there is restricted cover of foreign races by the PMU and its agencies and the quality of the services offered by the PMU and its agencies is poor. Finally, Ladbroke alleges that competition is prevented, restricted or distorted by reason of the close links between the PMU and its principal suppliers.

7 In so far as its complaint was directed against the French Republic, Ladbroke requested the Commission, pursuant to Article 90 of the EEC 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 due to the enactment and maintenance of the abovementioned legislation (see paragraphs 2 and 3 above) giving statutory backing to the agreements between the *sociétés de courses inter se* and with the PMU granting the latter exclusive rights to take off-course bets and prohibiting anybody from placing or accepting off-course bets on horse-races organized in France otherwise than through the PMU; (b) Articles 3(f), 52, 53, 59, 62, 85, 86 and 90(1) of the EEC Treaty due to the enactment and maintenance of the abovementioned legislation prohibiting the placing in France of bets on races organized abroad save through authorized companies and/or the PMU; and (c) Articles 90(1), 92 and 93 of the EEC Treaty due to 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).

8 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) 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.

9 By letter of 12 October 1992, the Deputy Director-General for Competition informed Ladbroke that his department was still actively considering the complaint but that because of the complexity and the specific characteristics of the sector in question that examination required considerable time. He added that the complainant would be informed of the results as soon as possible.

10 On 21 December 1992 Ladbroke brought an action before the Court of Justice under Article 175 of the Treaty for failure to act seeking a declaration that the Commission had failed, in breach of the Treaty, to take a decision on the aspects of its complaint concerning Article 90. That case was subsequently referred to the Court of First Instance where it was registered under No T-32/93. Ruling on the objection of inadmissibility raised by the Commission in that action, the Court of First Instance held that the Commission was not obliged, following a letter before action under Article 175, to address a decision to a Member State and that, accordingly, it was not open to the applicant to bring an action for failure to act against the Commission on the ground that it had failed to make use of its powers under Article 90(3) of the Treaty (Case T-32/93 *Ladbroke Racing* v *Commission* [1994] ECR II-1015, paragraph 37).

11 With regard to the aspects of Ladbroke's complaint concerning the alleged infringements of Articles 85 and 86 of the Treaty by the French *sociétés de courses* and the PMU, the Commission by letter of 9 February 1993 informed Ladbroke in accordance with Article 6 of Regulation No 99/63 that it did not envisage granting it a favourable outcome.

12 By letter of 5 May 1993, Ladbroke submitted its observations on the Commission's letter of 9 February 1993.

13 By decision contained in a letter of 29 July 1993 (hereinafter 'the Decision'), the Commission rejected Ladbroke's complaint for reasons set out both in that letter and in the letter of 9 February 1993 sent to the complainant under Article 6 of Regulation No 99/63.

14 With regard to the alleged infringements of Article 85(1) of the Treaty due to the exclusivity granted to the PMU in the management of totalizator betting in France, which, according to Ladbroke, was the result of the agreements or concerted practices between the main *sociétés de courses*, the Commission considered that that article was inapplicable. Since 2 July 1891 French legislation had abolished all competition in taking bets on horse-races except between the *sociétés de courses*. However, the legislation adopted in 1930, in particular the decree of 11 July 1930, which required the *sociétés de courses* to act jointly in organizing totalizator betting, also required them jointly to designate an operator for pooling their bets. Consequently, Decree No 74-954 of 14 November 1974, which granted the PMU exclusive rights in that field, cannot, in the Commission's view, be regarded as having legitimized agreements or concerted practices on the part of the *sociétés de courses*.

15 Furthermore, in the Commission's view, Article 85(1) of the Treaty is inapplicable to the agreements referred to by Ladbroke, the object of which is allegedly to extend the PMU's activities outside France. First, the isolation of the French

market by the national legislation makes it impossible for inter-State trade to be affected. Secondly, by extending their actions outside France through a company called 'Pari Mutuel International', responsible for marketing their services abroad, the authorized *sociétés de courses* in reality did nothing more than exercise abroad their intellectual property rights in the same way as they exercise them in France, so that not only is Article 85(1) inapplicable but competition is even enhanced in that there is a greater choice of bets available to betters. Although certain of the PMU's activities examined in the context of other complaints by Ladbroke (IV/33.375, IV/33.699) may, according to the Commission, affect trade between Member States, such effects could not be the direct consequence of the joint designation by the *sociétés de courses* of the PMU as common operator, which is the only issue in this case.

16 The Commission considers that Article 85(1) of the Treaty is also inapplicable to the steps allegedly taken vis-à-vis the public authorities to secure the grant of State aid to the PMU because Article 85(1) applies only to actions by companies affecting market conditions and not to mere requests to public authorities. It considers, moreover, that Ladbroke has adduced no evidence of such steps.

17 With regard to the infringements of Article 86 of the Treaty alleged by Ladbroke, the Commission accepted that the *sociétés de courses* had a monopoly in France in taking bets off course and that the PMU, as sole operator of those *sociétés*, had a dominant position in the French betting market. None the less, the Commission considered, with regard to the abuses imputed to the main *sociétés de courses*, that Article 86 of the Treaty did not apply to the circumstance that those *sociétés* entrusted to the PMU the coordination and the pooling of their bets, which was simply a rationalization of their services which better served their interests and those of betters. Furthermore, the isolation of the French market by the French legislation meant that trade between Member States could not be affected by the granting of exclusive rights to the PMU. As for the abuses of dominant position due to the PMU's exploitation of betters, they were not the subject of a formal request for a finding of infringement.

18 According to the Commission, Article 86 of the Treaty is, like Article 85, inapplicable in any event to the requests for State aid for the PMU.

19 Finally, the Commission considered that, even on the assumption that the relationships between the *sociétés de courses* themselves and between those bodies and the PMU are within the scope of Articles 85 and 86, a finding that they restricted competition could be made only in so far as the restrictions occurred in the period between 1962 — when Regulation No 17 was adopted — and 1974 — when the designation of the PMU as sole operator ceased to be a contractual matter and became a legal obligation on the *sociétés de courses* by virtue of the abovementioned decree of 14 November 1974. In those circumstances, there is no Community interest in finding any infringement since such a finding could serve only to facilitate a claim for damages by Ladbroke for possible harm suffered during the period between 1962 and 1974.

20 Those are the circumstances in which, by application lodged on 19 October 1993, Ladbroke brought this action.

21 By a document lodged at the Registry of the Court of First Instance on 18 February 1994, the French Republic sought leave to intervene pursuant to Article 115 of the Rules of Procedure in support of the Commission.

22 By order of the President of the Second Chamber of the Court of First Instance of 25 April 1994, the French Republic was granted leave to intervene in the case.

23 On 20 June 1994 the French Government submitted its statement in intervention. The applicant submitted its observations on the statement in intervention on 17 October 1994. The Commission did not submit observations.

24 The written procedure followed the normal course. By decision of the Court of First Instance of 2 June 1994, the Judge-Rapporteur was assigned to the First Chamber (Extended Composition), to which the matter was consequently allocated. Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber, Extended Composition) decided to open the oral procedure and requested the parties to reply to certain written questions. The parties responded to the Court's request within the prescribed time-limits.

25 At the hearing on 11 May 1995 the parties presented oral argument and answered oral questions put to them by the Court.

Forms of order sought

26 The applicant claims that the Court should:

— annul the Decision pursuant to Articles 173 and 174 of the EEC Treaty;

— order the Commission to re-examine forthwith the French Monopolies Complaint (IV/33.374) pursuant to Article 176 of the EEC Treaty;

— order the Commission to pay the costs.

27 The Commission contends that the Court should:

— dismiss the application under Article 173 as unfounded;

— order the applicant to pay the costs.

28 The intervener submits that the Court should:

— dismiss the application.

Substance

The claim for annulment

29 In support of the forms of order sought in its application, the applicant relies essentially on five pleas in law. The first plea alleges breach by the Commission of its duty to investigate a complaint with the requisite care, application and diligence. The second plea alleges misapplication of Article 85 of the Treaty and the third plea misapplication of Article 86 of the Treaty. The fourth plea alleges that rejection of the complaint for lack of Community interest was unlawful. Finally, the fifth plea alleges that the reasons given in the Decision are unsound, contradictory and incomplete.

First plea: breach by the Commission of its duty to investigate the complaint with the requisite care, application and diligence

— Summary of the parties' arguments

30 The applicant submits that the Commission failed to fulfil its obligation to investigate the facts and arguments set out in its complaint with the requisite care, application and diligence (Case T-7/92 *Asia Motor France and Others* v *Commission* [1993] ECR II-669, paragraphs 34 to 36); in its view, this is demonstrated by the fact that the Commission, blaming the complexity and difficulty of the case, took more than three and a half years to reach a conclusion on the complaint, rejecting it, finally, on the basis of very simple factors.

31 Moreover, the Commission's inadequate investigation of the complaint is shown by the fact that a number of facts on which the Decision is based are inaccurate or not mentioned at all in the Decision.

32 First, the Commission committed errors of fact concerning the very existence of the express or tacit agreements made by the *sociétés de courses inter se* and with the PMU before Decree No 74-954 of 14 November 1974 came into force and concerning the connection between those agreements and the national legislation. According to Ladbroke, the Commission did not understand that the above-mentioned decree of 11 July 1930 at most required the *sociétés de courses* to act jointly, without however laying down detailed arrangements for such cooperation or obliging them to entrust all their off-course bets exclusively to a single third-party undertaking. Furthermore, the Commission took no account of Decree No 48-891 of 12 May 1948 which, amending and supplementing Article 1 of the Decree of 11 July 1930, authorized the Parisian *sociétés de courses* to organize, apparently individually, off-course totalizator betting. When the Treaty and Regulation No 17 entered into force, the main *sociétés de courses* were thus free to organize their bets off-course, which they did by entrusting to the PMU, by mutual agreement, the organization of those bets. Consequently, if the Commission had

properly assessed the facts it would have concluded, according to the applicant, that Decree No 74-954, as a public-law measure obliging the authorized *sociétés de courses* to entrust their off-course bets to the PMU, legalized pre-existing consensual arrangements.

33 The applicant submits that giving such legal sanction to existing agreements which were contrary to Article 85 of the Treaty did not however take those agreements outside the scope of that article (Case 123/83 *BNIC* [1985] ECR 391, paragraphs 23 to 25; Case 311/85 *VVR* v *Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* [1987] ECR 3801, paragraphs 21 to 23; Case 136/86 *BNIC* v *Aubert* [1987] ECR 4789 and in particular the Opinion of Advocate General Sir Gordon Slynn, p. 4805; and Case 267/86 *Van Eycke* v *ASPA* [1988] ECR 4769, paragraph 16). At most, it demonstrated the necessity for the Commission to examine the compatibility of the French legislation with the Treaty in order to ascertain whether Decree No 74-954 had unlawfully sanctioned pre-existing restrictive agreements and whether it was a mere legal cloak for concerted action between the *sociétés* PMU members and the PMU itself. The applicant stresses that its complaint was also brought against the French Republic under Article 90 of the Treaty and that it had requested appropriate declarations from the Commission in accordance with Regulation No 17 and Article 90(3) of the Treaty and decisions enjoining the French Republic to put an end to the alleged infringements.

34 Secondly, according to the applicant, the Commission's inadequate examination of the complaint led to an error as to the facts to be taken into consideration in examining the effects on trade between Member States. That error consists in disregarding the facts that, first, pursuant to an agreement between the French PMU and the Belgian PMU, French betters may bet on Belgian races, secondly the French legislation does not prohibit bets on French races from being accepted outside France and, finally, in an interim decision adopted on 11 June 1991 following another complaint by the applicant, the Commission accepted that the State aid granted to the PMU was liable to affect trade between Member States.

35 Thirdly, according to the applicant, the Decision disregarded important points, raised in its complaint, concerning the dominant position of the main *sociétés de courses* on the French horse-racing market and the abusive expansion of that dominant position towards the ancillary activity of taking off-course bets. It also disregarded most of the PMU's abuses impugned in the complaint, concerning the exploitation of betters (see paragraph 6 above).

36 The Commission submits that the applicant's complaint was treated with diligence and emphasizes the complexity of the matter and the scale of the problems raised in the case, regarding the interpretation of Articles 52, 53, 59, 62, 85, 86 and 90(1) of the Treaty, in a sector in which it had never previously taken action, involving moral, cultural, social and fiscal considerations.

37 With regard to the priority to be given to the different aspects of the complaint, the Commission explains that its choice was dictated by the consideration that, even on the assumption that the agreements and conduct of the *sociétés de courses* and the PMU constituted, as alleged by Ladbroke, infringements of Articles 85 and 86 of the Treaty, a finding of those infringements would concern only the period between 1962 and 1974 and would serve only to facilitate a possible claim by the applicant for damages. Consequently, the most appropriate method of resolving the problem of competition raised by the complaint is not, according to the Commission, finding such infringements, committed before 1974, which would not eliminate obstacles to access to the market at issue put in place by the French legislation adopted in 1974, but the assessment of the compatibility of the PMU's statutory monopoly with the competition rules of the Treaty, which would have held, *mutatis mutandis*, for any agreement, past or future, between the *sociétés de courses* on the market in providing off-course totalizator betting services in France.

38 The Commission thus considers that, faced with the applicant's request concerning the current situation of the French market and calling for it to intervene if need be against the French State, and with the applicant's request essentially concerning past conduct of the *sociétés de courses* and the PMU in the light of Articles 85 and

86 of the EEC Treaty, it was entitled, in accordance with Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, to devote most of its time and resources to the first rather than the second of those requests. It was thus only after receiving the applicant's letter of 11 August 1992, in which the applicant insisted that the Commission formally define its position with regard to that part of the complaint relating to Articles 85 and 86, and in the light of threatened action under Article 175 of the Treaty, that the Commission decided to concentrate its efforts on that part of the complaint concerning State measures and moreover to reject that complaint on the ground of lack of Community interest.

39 With regard to the facts which, according to the applicant, are inaccurate or not mentioned in the Decision owing to an inadequate investigation of the complaint on the matter of, first, the existence of express or tacit agreements and their connection with the national legislation, the Commission submits that the existence of such agreements, dubious even before 1974, must be ruled out in view of the national legislation in force after that date, since Decree No 74-954 leaves no scope for agreements or concerted practices, the *sociétés de courses* thereafter merely conforming to obligations imposed by the national legislation.

40 With regard to the facts which, according to the applicant, should have been taken into consideration in examining the effects on trade between Member States of the conduct referred to in the complaint, the Commission considers, first, that that conduct, directly due to the law, cannot have effects on trade between Member States within the meaning of Article 85 of the Treaty and that an agreement between the *sociétés de courses* which entrusted to a sole operator the taking of bets on horse-races in the national context has by itself no effects on inter-State trade. Furthermore, according to the Commission, although trade between Member States may, at most, be affected by the grant to the PMU by the French State of exclusive rights concerning the taking of bets on foreign races, the applicant has not given any specific information as to the volume of those bets. Finally, the position taken in its decision of 11 June 1991 concerning another complaint by the applicant relating to State aid reflects the need to assess the effects on trade case by case and does not contradict its conclusions on that point in this case.

41 Finally, the Commission stresses that it was unnecessary to examine the dominant position on the French market of the main *sociétés de courses* with a view to finding any abuse because the *sociétés de courses* were under a legal obligation to grant the exclusive rights to the PMU. Moreover, even if it were the case that such a legal obligation did not exist, the applicant's failure before 1974 to ask to be granted the right to provide the same services as the PMU is, according to the Commission, an additional reason for not considering the question of the dominant position of the *sociétés de courses*. Furthermore, by entrusting the management of their bets exclusively to the PMU, the *sociétés de courses* did not abuse a dominant position but simply chose a system of managing bets which better served their interests and those of the public and saved them from setting up individual management systems. As for the alleged failure to find other abuses of a dominant position by the PMU (see paragraph 35 above), the Commission stresses, first, that there was no formal request for a finding that the alleged abuses constituted an infringement and, secondly, that the applicant has no legal interest in bringing proceedings since it has neither been caused any damage by the alleged abuses nor adduced any evidence thereof.

42 The French Government, intervener, emphasizes that both it and the French racing body were frequently approached by the Commission in 1990, 1991 and 1992 during the investigation of the complaint and that they provided the Commission with numerous documents. Furthermore, the French Government stresses that the order of priority to be given in dealing with complaints is not only a right but also an obligation on the Commission. It refers to Case T-16/91 *Rendo* v *Commission* [1992] ECR II-2417, in which the Court of First Instance held that the Commission could not oblige undertakings, in order to put an end to an infringement of Article 85 of the Treaty, to adopt conduct contrary to a national law without assessing that law from the point of view of Community law.

— Findings of the Court

43 It is appropriate first to examine the objection to the treatment of the two aspects of the complaint concerning the alleged infringements of Articles 85 and 86 and of

Article 90 of the Treaty, since that issue calls in question the general way in which the Commission dealt with the complaint. In particular, the question whether the Commission was bound to assess the compatibility of the French legislation with the Treaty before adopting the contested decision under Articles 85 and 86 of the Treaty must be considered.

44 When the Commission receives a complaint lodged under Article 3 of Regulation No 17, it is at liberty to determine the priority to be given to that complaint in the light of the Community interest (see *Automec* v *Commission*, cited above, paragraph 85 and Case T-74/92 *Ladbroke Racing* v *Commission* [1995] ECR II-115, paragraph 58) and to decide to initiate and pursue the investigation of the case on the basis of the various provisions of the Treaty invoked in a complaint if that appears to be in the Community interest (judgment of 24 January 1995 in Case T-74/92 *Ladbroke Racing* v *Commission*, cited above, paragraph 60).

45 Secondly, with regard to the Commission's obligation to act under Article 90(3) of the Treaty, the Commission, while bound to exercise its power to monitor compliance by the Member States with the rules of competition in accordance with Article 90(1) of the Treaty, cannot be obliged to take action, at an individual's request, on the basis of Article 90(3) of the Treaty (see Case T-32/93 *Ladbroke* v *Commission*, cited above) and, more particularly, with regard to undertakings entrusted with the operation of services in the general economic interest, particularly where such action entails assessing the compatibility of national legislation with Community law.

46 In this case, the Commission initiated the procedure for examining the applicant's complaint under Article 90 of the Treaty in order to assess the compatibility of the French legislation with the other Treaty provisions; that procedure is still in progress. Consequently, the question to be considered is whether the Commission

could definitively reject the applicant's complaint under Articles 85 and 86 of the Treaty and Regulation No 17 without having previously completed its examination of the complaint under Article 90 of the Treaty.

47 The Commission has submitted, both in its pleadings and at the hearing, that the competition issue raised by the applicant's complaint could be resolved only by examining the compatibility of the French legislation concerning the PMU's statutory monopoly with the Treaty rules and by taking action, if appropriate, under Article 90 of the Treaty and that, accordingly, that examination was a priority, since the result of it would hold good for any prior or future agreements between the *sociétés de courses* (defence, point 46). Consequently, the Court considers that the conduct of the *sociétés de courses* and the PMU, impugned by Ladbroke in its complaint, could not have been fully assessed under Articles 85 and 86 of the Treaty without a prior evaluation of the national legislation in the light of the provisions of the Treaty.

48 If the Commission were to find that the relevant national legislation was consistent with the provisions of the Treaty, then the fact of the conduct of the *sociétés de courses* and the PMU being in compliance with that national legislation would mean that their conduct would also have to be regarded as not falling foul of Articles 85 and 86 of the Treaty, whereas if their conduct was not in compliance with the national legislation, this could lead to a finding that the conduct itself infringed those provisions of the Treaty.

49 If, however, the Commission were to find that the national legislation was not consistent with the provisions of the Treaty, it would then have to consider whether or not compliance by the *sociétés* and the PMU with national legislation which was contrary to the Treaty could lead to the adoption of measures against them in order to bring infringements of Articles 85 and 86 of the Treaty to an end.

50 Consequently, by deciding to definitively reject the applicant's complaint under Articles 85 and 86 of the Treaty without first completing its examination of the compatibility of the French legislation with the provisions of the Treaty, the Commission cannot be regarded as having carried out its duty to examine carefully the factual and legal issues brought to its attention by the complainants (see *Automec* v *Commission*, paragraph 79), so as to satisfy the requirement of certainty which a final decision determining whether or not an infringement exists must have (see Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1, paragraph 61). It was not therefore entitled to conclude at that stage that the abovementioned provisions of the Treaty were inapplicable to the conduct of the main *sociétés de courses* and the PMU to which the applicant had objected and then that there was no Community interest in finding that the matters alleged by the applicant were infringements on the ground that they involved past infringements of the competition rules.

51 It follows from the foregoing that by definitively rejecting the applicant's complaint, on the grounds that Articles 85 and 86 of the Treaty were inapplicable and there was no Community interest, before completing its investigation into the compatibility of the French legislation in question with the competition rules of the Treaty, the Commission in its reasoning erred in law in interpreting the conditions under which the question whether alleged infringements exist may be definitively determined.

52 The contested decision must therefore be annulled, without its being necessary for the Court to consider the applicant's other objections to the contested decision.

The claim for an order requiring the Commission to re-examine the complaint

53 The applicant requests the Court to order the Commission forthwith to re-examine the complaint pursuant to Article 176 of the Treaty.

54 It is settled law that it is not for the Community judicature to address instructions to institutions or to substitute itself for them when exercising its power of judicial review (Case T-19/90 *Von Hoessle* v *Court of Auditors* [1991] ECR II-615, paragraph 30) and that, according to Article 176 of the Treaty, it is for the institution concerned to take the necessary measures to comply with a judgment given in an action for annulment (see Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965, Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 18, and Joined Cases T-432/93 to 434/93 *Socurte and Others* v *Commission* [1995] ECR II-503, paragraph 54).

55 It follows that the applicant's claim for an order requiring the Commission to re-examine the complaint is inadmissible and must be dismissed.

Costs

56 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be order to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful in all essential respects, it must be ordered to pay the costs.

57 Under Article 87(4), Member States and institutions which intervene are to bear their own costs.

On those grounds,

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

hereby:

1. **Annuls the Commission's decision contained in the letter dated 29 July 1993 rejecting the applicant's complaint of 24 November 1989 (IV/33.374);**

2. **Dismisses the remainder of the application;**

3. **Orders the Commission to pay the costs of the proceedings with the exception of those of the intervener, which are to be borne by the intervener.**

Cruz Vilaça Saggio Kirschner

Kalogeropoulos Tiili

Delivered in open court in Luxembourg on 18 September 1995.

H. Jung J. L. Cruz Vilaça

Registrar President