ORDER OF THE PRESIDENT OF THE SECOND CHAMBER (EXTENDED COMPOSITION) OF THE COURT OF FIRST INSTANCE

16 October 1995 *

In Case T-561/93,

Tiercé Ladbroke SA, a company incorporated under Belgian law, whose registered office is in Brussels, represented by Jeremy Lever QC and Christopher Vajda, of the Bar of England and Wales, and by 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 its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

* Language of the case: English.

Pari Mutuel Unifié Belge, an association formed under Belgian law, whose registered office is in Brussels, and

Société Coopérative Auxiliaire PMU Belge, a company incorporated under Belgian law, whose registered office is in Brussels,

together represented by Thomas Delahaye, Member of the Bar of the Belgian Cour de Cassation, with an address for service in Luxembourg at the Chambers of Charles Turk, 13B Avenue Guillaume,

interveners,

APPLICATION for the annulment of the Commission's decision of 3 September 1993 rejecting a complaint lodged by Tiercé Ladbroke SA on 18 May 1992 under 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) and for an order pursuant to Article 176 of the EC Treaty that the Commission re-examine forthwith that complaint,

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makes the following

Order

Facts, procedure and the parties' pleas in law

1 By application lodged at the Registry of the Court of First Instance on 5 November 1993, Tiercé Ladbroke SA (hereinafter 'Ladbroke') brought an action under Article 173 of the EC Treaty for the annulment of the Commission's decision of 3 September 1993 rejecting the complaint (IV/34.318) that it had lodged on 18 May 1992 under 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). In that complaint, Ladbroke alleged that the Société Coopérative Auxiliaire PMU Belge and the Pari Mutuel Unifié Belge (hereinafter 'PMUB'), which organize off-course betting on horse-races run in Belgium, were infringing Article 86 of the Treaty by refusing to appoint Ladbroke as their agent for taking totalizator bets on Belgian races.

2 By order of the President of the Second Chamber of the Court of First Instance of 8 August 1994, the Société Coopérative Auxiliaire PMU Belge and the PMUB were granted leave to intervene in support of the Commission.

3 By letter lodged at the Registry of the Court of First Instance on 27 July 1995, the applicant requested that the case be removed from the register on the ground that, since it had come to an agreement with the PMUB under which it was appointed as the PMUB's agent for taking totalizator bets on horse-races organized in Belgium, the infringement impugned in its complaint, which was the subject-matter of the contested decision, had come to an end and that accordingly it was abandoning the case.

4 By the same letter, the applicant requested that the Commission be ordered to pay the costs in accordance with the second sentence of the first subparagraph of Article 87(5) of the Rules of Procedure.

5 In support of that request the applicant submits that bringing the action was justified by the conduct of the Commission, which did not examine in the contested decision the substance of the questions raised in the complaint but simply dealt with the questions raised in the applicant's reply to the letter (hereinafter 'the Article 6 letter') which the Commission had sent to it earlier, on 23 February 1993, 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).

6 The applicant submits that the Commission's conduct left it with no option, in order to ascertain the precise grounds of the decision rejecting its complaint, but to challenge that decision by way of an action for annulment under Article 173 of the Treaty.

7 By letter from the Registrar of 28 July 1995, the Court of First Instance invited the defendant and the interveners to submit observations on the request for removal from the register.

8 In the observations which it lodged at the Registry of the Court of First Instance on 4 August 1995, the Commission requested that the costs be borne by the applicant in accordance with the first sentence of the first subparagraph of Article 87(5) of the Rules of Procedure. It submits that its conduct did not justify bringing the

action, that it is consequently not appropriate in this case to apply the second sentence of the first subparagraph of Article 87(5) of the Rules of Procedure and that on the contrary the applicant should be ordered to pay the costs.

9 The Commission states that, contrary to the applicant's submissions, it cannot be considered that the proceedings were brought to enable the applicant to ascertain the reasons for the rejection of its complaint. It indicates that after its Article 6 letter, in which it had set out the reasons for its proposed rejection of the complaint, the applicant submitted observations on various points in that letter and that, in its turn, the Commission itself responded to those observations in its letter of 3 September 1993 finally rejecting the complaint. It follows that the grounds for the rejection of the complaint are perfectly clear both to Ladbroke and to the Court, that the proceedings were brought by the applicant in order to obtain the annulment of the decision rejecting its complaint and, by those means, to obtain a commercial benefit from the PMUB and that, since that benefit has been obtained by negotiation between the parties concerned, Ladbroke no longer has any interest in challenging the rejection of its complaint.

10 The interveners state in their observations dated 6 September 1995 that the statement in the request for removal from the register of 27 July 1995 that the infringement impugned in the complaint had by then ceased since an agreement had been concluded between the applicant and the PMUB suggests that there had in fact been such an infringement. They deny that such was the case and argue that the abovementioned agreement between the applicant and the PMUB does not imply acknowledgement by them that their initial refusal to appoint Ladbroke as their agent was an infringement.

11 The interveners, considering that the applicant has not adduced evidence of its assertions that bringing the action was justified by the defendant's conduct,

contend that Ladbroke should be ordered to pay the costs of their intervention in accordance with Article 87(5) of the Rules of Procedure.

Findings of the Court

12 In accordance with Article 99 of the Rules of Procedure, the case must be ordered to be removed from the register and a decision must be given as to costs.

13 In accordance with the first subparagraph of Article 87(5) of the Rules of Procedure, a party who discontinues or withdraws from proceedings is to be ordered to pay the costs if they have been applied for in the other party's pleadings. However, upon application by the party who discontinues or withdraws from proceedings, the costs are to be borne by the other party if this appears justified by the conduct of that party.

14 In this case, it must be noted first that by its Article 6 letter the Commission informed the applicant that the information in its possession did not justify granting a favourable outcome to the complaint seeking a finding of infringement of Article 86 of the Treaty. According to the Commission, the PMUB and the Tiercé Franco-Belge, a competitor of Ladbroke acquired by the PMUB, were not in a dominant position on the relevant market, defined as the Belgian market for taking totalizator or fixed-odds bets on Belgian and foreign horse-races, and moreover had a smaller market share than the applicant. Furthermore, the Commission stated that, even if it were assumed that the PMUB could be regarded as being in a dominant position on the relevant market and that its refusal to accredit Ladbroke to take bets as its agent constituted an abuse, that abuse was linked to the Belgian national legislation and was not liable to affect trade between Member States and thus be caught by Article 86 of the Treaty.

15 Secondly, Ladbroke argued in its reply dated 12 May 1993 to the Article 6 letter that the Commission's conclusions were based on misunderstandings of fact and law concerning the relevant market, whether the PMUB was in a dominant position on that market, the PMUB's conduct and whether trade between Member States was affected by such conduct.

16 In its letter of 12 May 1993, Ladbroke, without claiming that it had not understood the grounds which, according to the Article 6 letter, justified the rejection of its complaint, disputed the substance of those grounds. It argued that contrary to the Commission's conclusions there were two distinct markets in the sector of the market in horse-race bets taken in Belgium. The first was the market in bets taken on Belgian races and the second that in bets taken on foreign races. Consequently, both the existence of a dominant position and the existence of an abuse should be considered by reference to each of those markets and their interdependence.

17 Similarly, in the abovementioned letter the applicant disputed the Commission's conclusion that, even if the abuse complained of had actually been committed, it was linked to the application of the Belgian national legislation and was not liable to affect trade between Member States: the applicant argued that to the extent that bets on foreign races are taken in Belgium by it and by undertakings connected with the PMUB there is clearly trade between Member States in the sector concerned, so that the refusal to accredit it to take bets on Belgian races as agent of the PMUB was liable, by affecting its legal and commercial situation, also to affect trade between Member States.

18 Finally, the disputed decision of 3 September 1993 rejecting the applicant's complaint first states that the applicant's reply to the Article 6 letter did not contain any new points of fact or of law such as to alter the Commission's position and

secondly restates the analysis set out by the Commission in the Article 6 letter with regard to the abovementioned points, namely the relevant market, whether the PMUB was in a dominant position on that market, whether there was abuse and the possibility that trade between the Member States might be affected thereby.

19 It follows from the foregoing that in this case the applicant was aware of the reasons for which the Commission rejected its complaint since it was notified of those reasons both by the Article 6 letter, with regard to which it had the opportunity to make observations on the substance, and by the contested decision itself.

20 It follows that in those circumstances and given that the Commission is not required to discuss in its decisions all the issues of fact and law which have been raised by every party during the administrative proceedings (Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck* v *Commission* [1980] ECR 3125, paragraph 66 of the judgment) the Court of First Instance cannot find that bringing this action was justified by the Commission's conduct.

21 Consequently, the first sentence of the first subparagraph of Article 87(5) of the Rules of Procedure must be applied and the applicant must be ordered to pay the costs. With regard to the interveners' costs, it does not appear to be appropriate to apply the third subparagraph of Article 87(4) of the Rules of Procedure as amended on 28 February 1995.

On those grounds,

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hereby orders:

1. Case T-561/93 shall be removed from the register.

2. The applicant is to pay the costs, including those incurred by the interveners.

Luxembourg, 16 October 1995.

H. Jung — Registrar

H. Kirschner — President