JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
24 January 1995 *

In Case T-74/92,

Ladbroke Racing (Deutschland) GmbH, a company incorporated under German law having its registered office in Mainz (Germany), represented by Jeremy Lever-QC and Christopher Vajda, Barrister, members of the Bar of England and Wales, and by Stephen Kon, Solicitor, with an address for service in Luxembourg at the Chambers of Winandy and Err, 60 Avenue Gaston Diderich,

applicant,

v

Commission of the European Communities, represented by Julian Currall and Francisco Enrique González-Díaz, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

* Language of the case: English.

Deutscher Sportverlag Kurt Stoof GmbH & Co., represented by Klaus-Jürgen Michaeli and Ute Zinsmeister, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Bonn and Schmitt, 62 Avenue Guillaume,

intervener,

APPLICATION under the third paragraph of Article 175 of the EEC Treaty for a declaration that the Commission has failed to define its position on the applicant's complaint based on Articles 85 and 86 of the EEC Treaty (IV/33.375 — Ladbroke GmbH/PMU-PMI-DSV), and alternatively under Article 173 of the EEC Treaty for the annulment of the Commission's implicit decision to reject the complaint,

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

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

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 9 June 1994,

gives the following

Judgment

Facts giving rise to the action

The complaint and the procedure before the Commission

1 The applicant, Ladbroke Racing (Deutschland) GmbH (hereinafter 'Ladbroke'), a company incorporated under German law having its registered office in Mainz (Germany), belongs to Ladbroke Group plc which, outside the United Kingdom where it has its registered office, operates betting services on horse-races through subsidiaries in other Community countries. The Ladbroke Group owns for that purpose Ladbroke Racing International BV, a company incorporated under Netherlands law, which itself has two subsidiaries in Germany to develop the activities of the group in that country. The subsidiaries are the applicant, which was granted a betting licence in the Rhineland-Palatinate on 26 October 1989, valid until 31 December 1993, and Ladbroke Racing Deutschland Ost GmbH, which has had a betting licence in what was formerly East Berlin since 24 September 1990.

2 In September 1989 Ladbroke requested broadcasting rights for television pictures and commentary on French horse-races from Deutscher Sportverlag Kurt Stoof GmbH and Co. ('DSV'), a company incorporated under German law which holds such broadcasting rights for the territory of the German Länder (including West Berlin) of the Federal Republic of Germany within the frontiers existing prior to reunification and for Austria.

3 DSV acquired those rights by an agreement dated 25 August 1989 with Pari Mutuel International ('PMI'), a *société anonyme* incorporated under French law whose object is to market outside France television pictures and news on horse-races in France. PMI acquired the rights under an agreement made on 12 January 1990, with

effect from 1 August 1989, with Pari Mutuel Urbain ('PMU'), an economic interest group set up by the ten principal French racing associations which alone are authorized to take off-track bets on French races. Finally PMU, which is responsible for drawing up the programme of races organized by those associations, totalizing bets on them and calculating winnings, was granted the right to market abroad the televised pictures and news relating to those races by the associations, which hold the intellectual property rights relating to such pictures and news, by an agreement dated 9 January 1990, with effect from 1 August 1989.

4 DSV refused Ladbroke's request, however, in October 1989 on the ground that under its agreement with PMI it was not permitted to supply televised pictures and commentary on French races other than to 100 betting shops in Germany and Austria without renegotiating the agreement which, moreover, permitted it to supply only betting shops already in existence when the agreement was made and not ones opened after that date, as were the Ladbroke shops.

5 On 24 November 1989 Ladbroke lodged a complaint with the Commission against PMU, PMI and DSV for breach of Articles 85 and 86 of the EEC Treaty, supplemented by a letter of 31 July 1990 stressing the breach of Article 86 and, on 23 August 1990, by an application for interim measures.

6 According to Ladbroke's complaint, the market in horse-race betting in Germany, for which there is a turnover of approximately DM 150 million, has two distinctive features: the importance of French races, as opposed to races held in other countries, for German punters (DM 36 million worth of bets placed in Germany on

French races) and the lively competition on the ancillary market in sound and picture relay of television recordings of horse-races between betting outlets seeking rights to retransmit the latter to their clients.

7 As a result, DSV's refusal to supply Ladbroke with pictures and commentary on French horse-races, together with the fact that for that product there was no other source of supply in Germany, placed Ladbroke at a competitive disadvantage compared with other betting outlets which could offer televised pictures and commentary on French horse-races.

8 As regards the alleged infringement of Article 85 of the Treaty, Ladbroke maintained that those quantitative and qualitative restrictions were imposed without objective reason and constituted a distortion and restriction of competition, so that there could be no exemption for the agreement between PMI and DSV under Article 85(3) of the Treaty.

9 As regards the alleged infringement of Article 86 of the Treaty, Ladbroke maintained, in essence, that the refusal to supply its outlets with television pictures and commentary on French horse-races should be considered in the light of four circumstances: first, the dominant position enjoyed by PMU/PMI on the market for relaying pictures and commentary on French horse-races and the dominant position jointly enjoyed by PMI and DSV as regards the relaying of those pictures in Germany; secondly, the size of the demand for the product in question in Germany and the dependence of German betting shops on supplies of the product in question, there being no substitute product; thirdly, the absence of objective justification for the refusal to supply its outlets, the sole purpose of which is to restrict competition; and fourthly the significant effect on trade between Member States

owing to the economic importance of PMU/PMI and DSV on their respective territories.

10 Ladbroke therefore asked the Commission to order PMI directly, or through the intermediary of DSV, to supply it with television pictures and commentary on French races, and to conduct an investigation pursuant to Articles 11 and 14 of Regulation No 17 of the Council of 6 February 1962, the first regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87, hereinafter 'Regulation No 17'), in order to ascertain whether there was restriction of competition and to ensure that the copyright interests in question were exploited without unfair discrimination.

Treatment of the complaint in the context of Article 85 of the Treaty

11 On 20 December 1990 the Commission decided to investigate the complaint as regards the alleged infringement of Article 85 of the Treaty, and sent to PMU and PMI on 21 December 1990, and to DSV on 18 January 1991, a statement of objections to the effect that the agreement between them fell within Article 85(1) of the Treaty and an individual exemption under Article 85(3) could not be made because the agreement had not been notified to it as required by Article 4 of Regulation No 17.

12 PMU and PMI responded to the statement of objections on 15 February 1991 and DSV on 27 March 1991. The Commission conducted a hearing on 17 April 1991.

13 On 15 February 1991 PMI and DSV had also notified to the Commission a new agreement made on 4 December 1990 with effect from 1 July 1990, and requested a Commission decision declaring that the investigation need not continue ('negative clearance') or exemption under Article 85(3) of the Treaty.

14 Following that notification, the Commission sent PMU, PMI and DSV a fresh statement of objections on 22 January 1992, to the effect that some clauses in the new agreement between PMI and DSV were incompatible with Article 85(1) of the Treaty in so far as DSV's subcontractors in Germany, to whom DSV was to cede relay rights for televised pictures and sound commentary on French races, were to be selected on the basis of vague criteria as to good conduct, and were bound by the three-fold obligation to recognize the intellectual property rights enjoyed by French racing associations and PMI in all countries and not only Germany, to supply certain information of a confidential nature and to guarantee observance of the agreements by the parent company and the group to which they belonged.

15 As a result of the new statement of objections PMI and DSV removed or amended the clauses complained of, whereupon the Commission issued a notice pursuant to Article 19(3) of Regulation No 17, published on 24 September 1992 (OJ 1992 C 246, p. 3), in which it stated that it proposed to adopt a favourable attitude to the agreement notified and invited interested third parties to send their comments to it.

16 Ladbroke submitted its comments to the Commission by letter of 22 October 1992. It stated that it could not agree with the favourable position which the Commission proposed to adopt with regard to the new agreement between PMU/PMI and DSV, maintaining that there was nothing in the agreement to justify exemption

under Article 85(3) of the Treaty. It maintained that such exemption could not be granted without the Commission's first ascertaining whether the conduct of the parties to the agreement was compatible with Article 86 of the Treaty.

Treatment of the complaint in the context of Article 86 of the Treaty

17 As regards the part of its complaint which related to Article 86 of the Treaty, Ladbroke wrote to the Commission on 31 July 1990, 23 August 1990, 5 December 1990, 4 February 1991, 25 September 1991 and 6 March 1992 asking it to define its position as to the application of that provision in the actual case. In response to Ladbroke's letter of 5 December 1990 (referred to above) Commission staff informed Ladbroke orally, as is apparent from Ladbroke's letter of 25 September 1991 (also referred to above), that although there had been no decision to reject the part of the complaint relating to Article 86, they saw no purpose in pursuing the matter under that provision because the restriction on competition which was the subject-matter of the complaint could be effectively remedied under the provisions of Article 85 of the Treaty. In a letter dated 4 February 1992, to which it referred in another letter dated 5 June 1992, Ladbroke formally requested the Commission to inform it within two months by letter in accordance with 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 1963-64, p. 47, hereinafter 'Regulation No 99/63') of the reasons for its failure to act under Article 86 of the Treaty as requested by Ladbroke.

18 Finally, in response to another letter from Ladbroke dated 27 May 1992, as well as the letter of 5 June 1992 referred to above, requesting the Commission to define its position on the complaint with regard to Article 86 and to apply not only Article 85 but also Article 86 in the case of DSV's persistent refusal to supply Ladbroke's outlet in the former territory of East Berlin, the Commission wrote to it on 19 June

1992 stating that it was doubtful whether it was possible to condemn on the basis of either Article 85 or Article 86 the refusal to supply its outlet in former East Berlin in view of the fact that that territory was not covered by the agreement between PMI and DSV, as had been established by a judgment delivered on that day by the Berlin Landgericht.

19 On 26 June 1992 Ladbroke formally requested the Commission, as provided for in Article 175 of the EEC Treaty, to define its position on the complaint of 24 November 1989 and on the request set out in Ladbroke's letter of 4 February 1992, either by letter in accordance with Article 6 of Regulation No 99/63, or by a decision capable of being challenged under Article 173 of the Treaty. There was no response to that request.

Procedure

20 In those circumstances, Ladbroke brought this action on 22 September 1992.

21 On 21 October 1992 the Commission lodged a preliminary plea of inadmissibility under the first paragraph of Article 114 of the Rules of Procedure.

22 The applicant lodged its observations on the preliminary plea on 12 January 1993 and by letter of the same date requested that if the issues of admissibility and substance were joined the Court of First Instance should consider the written procedure complete, the defendant having included its defence on the merits of the application in the preliminary plea. The Commission opposed that request in a communication of 27 January 1993.

23 On 13 May 1993 the Court of First Instance (Second Chamber) made an order reserving its decision on the preliminary plea for the final judgment.

24 On 15 February 1993 DSV applied for leave to intervene in support of the defendant. The Court of First Instance (Second Chamber) made an order on 13 May 1993 giving it leave to intervene and its statement in intervention was lodged on 29 July 1993.

25 On 6 September 1993 Ladbroke indicated that it would not lodge a reply, and accordingly the Commission did not lodge a rejoinder.

26 The parties were invited by the Court of First Instance by letter of 9 December 1993 to submit their comments on DSV's statement in intervention. They informed the Court that they had no observations to make.

27 Upon hearing the Report of the Judge-Rapporteur the Court of First Instance (Second Chamber) decided to open the oral procedure without any preliminary measures of inquiry. However, it invited the parties to reply to certain written questions, which they did within the required time.

28 At the public hearing on 9 June 1994 the parties submitted argument and answered oral questions from the Court.

Forms of order sought by the parties

29 The applicant submits that the Court of First Instance should:

— declare that the Commission's failure to define its position within two months of receipt of the formal request contained in the letter of 26 June 1992, in relation to:

(a) its complaint generally, and

(b) the request made in a letter dated 4 February 1992 for a letter from the Commission pursuant to Article 6 of Regulation No 99/63,

is in breach of Article 175 of the EEC Treaty;

— further, or alternatively, annul the Commission's implicit decision to reject its complaint;

— order the Commission to take the necessary steps to comply with the order of the Court within one month of the date of the said order; and

— order the Commission to pay the costs of the application and, in particular, if the Commission takes action which is held by the Court to render the application moot, order that such costs be paid on an indemnity basis.

30 The Commission contends that the Court of First Instance should:

— reject the application as inadmissible, or alternatively as being rendered moot as from the date of publication of the notice pursuant to Article 19(3) of Regulation No 17 or, in the further alternative, as unfounded;

— order the applicant to pay the costs.

31 The intervener submits that the Court of First Instance should:

— reject the application as inadmissible, or alternatively as unfounded;

— order the applicant to pay the costs, including those of the intervener.

The application under Article 175 of the Treaty

32 In the light of the pleas and arguments of the parties and the way in which the Commission has dealt with the applicant's complaint, the Court considers it appropriate to examine that part of the application which refers to the alleged failure of the Commission to act under Article 85, first, and under Article 86, secondly, of the Treaty.

The alleged failure of the Commission to act under Article 85 of the Treaty

Summary of the parties' arguments

33 The Commission submits that this aspect of the application is inadmissible because in the notice published on 24 September 1992 pursuant to Article 19(3) of Regulation No 17 the Commission defined its position with regard to the restriction

of competition alleged by the applicant in its complaint and with regard to the letter of 4 February 1992, in which the latter asked for a letter to be addressed to it in accordance with Article 6 of Regulation No 99/63, in the same way as it could have done by means of a letter issued pursuant to the latter provision (Case 125/78 *GEMA* v *Commission* [1979] ECR 3173; Case T-64/89 *Automec* v *Commission* [1990] ECR II-367, hereinafter '*Automec I*'; Case T-28/90 *Asia Motor France* v *Commission* [1992] ECR II-2285; order of 13 March 1993 in Case T-86/92 *Ladbroke* v *Commission*, not published in the ECR). Moreover, it defined its position within two months of the formal request of 26 June 1992, since the decision to publish the notice was taken on 18 August 1992. Finally, the Commission submits that the application would in any event have lost its purpose after the date of publication of the notice under Article 19(3) of Regulation No 17, which was 24 September 1992.

34 As regards the substance, the Commission submits that its investigation of the complaint, and in particular the two statements of objections addressed to PMU/PMI and DSV, together with the publication of the Article 19(3) notice shows that there was no infringement of the combined provisions of the first paragraph of Article 175 of the Treaty and Article 6 of Regulation No 99/63. It considers that it is only obliged to proceed on the basis of the latter provision when it intends to reject an application made under Article 3(2) of Regulation No 17 and not when it decides, as in this case, to act upon it by initiating a procedure under Article 9(3) of the regulation with a view to resolving the competition matter raised by the complainant.

35 The applicant submits, as regards the admissibility of the application in this respect, that the notice issued under Article 19(3) of Regulation No 17 does not constitute a definition of the Commission's position and that in any event it was not notified of it within two months of the formal request, having been published on 24 September 1992, after this action was brought.

36 As regards the substance, the applicant relies on its right as a complainant to require the Commission to adopt a position on its complaint and, if necessary, to adopt a decision capable of being challenged in court (Case 26/76 *Metro* v *Commission* [1977] ECR 1875 at p. 1902; Opinion of Advocate General Mancini in Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487 at p. 4545, see pp. 4551 and 4552; Opinion of Judge Edward acting as Advocate General in Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, '*Automec II*', at p. 2226, and *Asia Motor France*, cited above, paragraph 19). The applicant claims that the Commission has thus breached the Treaty by failing to fulfil its obligation under Article 6 of Regulation No 99/63 to address to it, as a complainant under Article 3(2) of Regulation No 17, an act other than a recommendation or an opinion, indicating the reasons for its refusal to uphold the complaint, and to fix a period within which it could submit its observations on the matter.

37 The intervener submits that the application in this respect is inadmissible because the notice published pursuant to Article 19(3) of Regulation No 17 constitutes a definition of the Commission's position for the purposes of the second paragraph of Article 175 of the Treaty and, having been adopted on 18 August 1992, was made within two months of the formal request dated 26 June 1992.

38 The intervener has made no observations regarding the substance.

Assessment of the Court

39 It must be noted, first, that an action for failure to act under Article 175 of the Treaty may lie only where the institution has an obligation to act, so that the alleged failure to act is contrary to the Treaty.

40 When the Commission is seised of a complaint under Article 3 of Regulation No 17 alleging breach of Article 85 or Article 86 of the Treaty, it is obliged, in accordance with the provisions of Regulations No 17 and No 99/63, to examine carefully the evidence of fact and of law brought to its notice by the complainant in order to decide whether it must initiate the procedure for establishing the breach or reject the complaint or, finally, decide not to pursue the matter (see *Automec I*, cited above).

41 It is common ground that following Ladbroke's complaint of 24 November 1989, which was brought under Article 3(2)(b) of Regulation No 17, the Commission decided on 20 December 1990 to initiate a procedure within the meaning of Article 9(3) of the regulation, and sent a statement of objections to PMU/PMI by letter of 21 December 1990 and to DSV by letter of 18 January 1991 to the effect that the agreement initially made on 25 August 1989 between PMI and DSV ceding to the latter retransmission rights for televised pictures and sound commentary on French horse-races in the Federal Republic of Germany within the frontiers prior to reunification, including the former territory of West Berlin, and Austria, contained clauses incompatible with Article 85(1) of the Treaty.

42 Secondly, during the procedure thus initiated by the Commission, PMI and DSV, who submitted their replies to the statement of objections of 21 December 1990 on 15 February and 27 March 1991 respectively, also notified to the Commission on 15 February 1991 a new agreement made on 4 December 1990, with effect from 1 July 1990, succeeding the first agreement of 25 August 1989 which had expired on 30 June 1990, and sought from the Commission either negative clearance or exemption under Article 85(3) of the Treaty. It is common ground that following that notification the Commission issued a new statement of objections to PMI and to DSV on 22 January 1992 to the effect that the new agreement thus notified contained clauses incompatible with Article 85(1) of the Treaty and that the conditions for applying Article 85(3) were not fulfilled.

43 Thirdly, it has not been denied that following that second statement of objections communicated on 22 January 1992 the parties to the agreement amended its clauses in order to make them compatible with the requirements of Article 85 of the Treaty, in the light of the statement of objections, as a result of which the Commission considered that it could adopt a favourable attitude to that agreement, as indicated in the notice published on 24 September 1992 under Article 19(3) of Regulation No 17.

44 Consequently, when, on 26 June 1992, the applicant formally requested the Commission to adopt a position on its complaint within the meaning of Article 175 of the Treaty, the Commission had already initiated and was pursuing the procedure for investigating the alleged breach of Article 85 of the Treaty, and in view of the progress made in the investigation on that date was not really in a position to make a communication to the applicant in accordance with Article 6 of Regulation No 99/63, particularly in view of the fact that it was not its intention to dismiss the complaint; still less was it able to adopt a position on the complaint by means of a decision rejecting the complaint definitively, in view of the fact that between the date of the second statement of objections, 22 January 1992, and the formal request to it to act, 26 June 1992, no more than about 5 months had elapsed, a period insufficient in the circumstances to enable the complaint to be fully investigated and the Commission to adopt a position on the applicant's complaint, based on the results of the investigation, by a measure capable of being regarded as remedying the alleged failure to act.

45 As far as the alleged breach of Article 85 of the Treaty is concerned, the Commission could not, therefore, be regarded on 26 June 1992 as having failed to act within the meaning of Article 175 of the Treaty, and the applicant was therefore not justified in addressing to it on that date a formal request to adopt a position regarding its complaint and therefore in bringing this action on 22 September 1992 on the expiry of the two months allowed by Article 175 of the Treaty.

46 Consequently, in so far as the application seeks a declaration that the Commission failed to adopt a position on the applicant's complaint in so far as it is based on Article 85 of the Treaty, it must in any event be dismissed as unfounded without its

being necessary to rule on its admissibility. However, that does not prejudice the Court's assessment of the admissibility of the application as regards the Commission's alleged failure to act under Article 86 of the Treaty.

The alleged failure of the Commission to act under Article 86 of the Treaty

Summary of the arguments of the parties

47 The applicant maintains that the notice published by the Commission on 24 September 1992 under Article 19(3) of Regulation No 17 failed entirely to address its complaint under Article 86 of the Treaty, as is evident from both the absence of any reference in the notice to that article of the Treaty and the Commission's announcement of its intention to grant exemption for the agreement between PMI and DSV without having examined the complaint under Article 86 of the Treaty. The applicant emphasizes the fact that in so far as the agreement between PMI and DSV must be considered not to apply to the territory of the former German Democratic Republic, Article 85 could not constitute a sufficient legal basis for remedying DSV's refusal to supply pictures and commentary on French races to its outlet in the former territory of East Berlin.

48 Furthermore, the applicant denies that it may be regarded as having accepted restriction of the administrative procedure for examining its complaint to the breach of Article 85 by reason of the fact that it participated in the procedure, since its complaint alleged breach of both Article 85 and Article 86 of the Treaty. It points out that it has never ceased to rely on the latter provision, as is evident in the series of letters it addressed to the Commission, after the submission of its complaint, on 5 December 1990, 25 September 1991, 4 February 1992, 6 March 1992 and 5 June 1992.

49 Finally, the applicant points out that the Commission cannot reasonably maintain that it adopted a position on its complaint under Article 86 of the Treaty by means of the Article 19(3) notice, assimilating that notice to a letter issued in accordance with Article 6 of Regulation No 99/63, without contradicting its assertion that it did not reject the complaint or did not intend to reject it in so far as it was based on Article 86 of the Treaty. Ladbroke submits that the vagueness of the position the Commission claims to have adopted in the context of the notice issued under Article 19(3) of Regulation No 17 is capable of excluding the possibility of judicial review, because even if that notice constituted a definition of position for the purposes of Article 175 of the Treaty, it cannot be challenged under Article 173 of the Treaty and thus may lead to a simple 'comfort letter' which is likewise not open to challenge.

50 The Commission considers that the definition of its position on Ladbroke's complaint in the notice published on 24 September 1992 under Article 19(3) of Regulation No 17 applies both to that part of the complaint alleging infringement of Article 85 of the Treaty and to that alleging breach of Article 86 of the Treaty. In support of that argument the Commission refers to its freedom to determine the order of priority for dealing with complaints by applying the criterion of the Community interest (*Automec II*, cited above, and Case T-16/91 *Rendo* v *Commission* [1992] ECR II-2417). It maintains that it must enjoy the same freedom to determine which legal basis for a complaint is best suited for resolving a competition matter where a complaint is based on the alleged breach of several Treaty provisions. It also considers that if a complainant relies on both Article 85 and Article 86 of the Treaty the Commission must be regarded as having satisfied its demands when it acts on the basis of only one of those two provisions.

51 The Commission considers that its decision to deal with the complaint exclusively under Article 85 of the Treaty was justified in this case by the circumstance that DSV based its refusal to supply the applicant on the fact that its contractual obligations to PMI/PMU did not permit it to supply the complainant with pictures and commentary on French horse-races. Consequently, the Commission maintains, it was only if that difficulty dealt with initially under Article 85 were to continue in the form of further refusal by the DSV to meet Ladbroke's request that application

of Article 86 could be contemplated. The Commission points out that it has never rejected the complaint based on the latter provision. The facts of the case confirm the correctness of that approach, because following the initiation of the procedure to establish breach of Article 85 of the Treaty and the issue of the statement of objections on 22 January 1992, which led to the amendment of the agreement of 4 December 1990 notified to it, the restriction of competition complained of by Ladbroke ceased, as is evident from, *inter alia*, a letter dated 27 May 1993 in which the DSV offered to supply the applicant with the pictures and commentary on French horse-races which it had requested. The Commission adds that after having been informed by its staff of that approach to its complaint, and as is evident from the letter Ladbroke wrote to the Commission on 25 September 1991, Ladbroke accepted it and participated actively in the administrative procedure for examining the complaint on the basis of Article 85 of the Treaty.

52 The intervener considers that the Commission's definition of its position in the form of the notice published under Article 19(3) of Regulation No 17 covers both Article 85 and Article 86 of the Treaty. It points out that the Commission's decision not to apply Article 86 and to resolve the matter solely on the basis of Article 85 of the Treaty was justified in view of the fact that following amendments to the agreement between itself and PMU/PMI it no longer refused to supply pictures and commentary on French horse-races to all betting agencies within the territory to which the agreement was applicable, including the applicant's outlet in the Rhineland-Palatinate.

53 In that regard the intervener refers to correspondence exchanged with Ladbroke between 30 June 1992 and 23 June 1993, including the letter of 27 May 1993 referred to above, from which it is clear that it offered to grant it a sub-licence for pictures and commentary on French races from 1 September 1993, the date on which, according to a letter from Ladbroke dated 25 May 1993, the Rhineland-Palatinate outlet was to commence business. However, the intervener pointed out that although Ladbroke held an authorization to open that outlet on 26 October

1989, it failed to do so for nearly four years because it considered that the business would not be profitable. It adds that Ladbroke retained that authorization solely in order to be able to continue its actions against the intervener and other parties, including this action, which is an abuse of Community legal procedure.

Assessment of the Court

— Admissibility

54 In the complaint lodged on 24 November 1989 the applicant alleged that the conduct of PMU/PMI and DSV was incompatible with both Article 85 and Article 86 of the Treaty. The complaint was thus also based on Article 86 of the Treaty as is evident, moreover, from the letters referred to above which were written by the applicant to the Commission after its complaint had been submitted, in particular the letter dated 4 February 1991 in which it formally requested the Commission to define its position on the complaint with regard to Article 86 of the Treaty.

55 The procedure for investigating the complaint which was initiated both by the first and by the second statement of objections was so initiated with reference exclusively to Article 85 of the Treaty and not Article 86 as the applicant had requested.

56 On 26 June 1992, therefore, the date on which the applicant formally requested the Commission to define its position on the complaint within two months in accordance with Article 175 of the Treaty, and on the date of the initiation of these proceedings, 22 September 1992, the Commission could not, *prima facie*, be regarded as having defined its position on the complaint in so far as it was based on Article

86 of the Treaty, so that the application must in principle be declared admissible in so far as the applicant relies on the Commission's failure to act with regard to that article.

57 It is necessary to examine in this context, however, the Commission's argument that because it is free to determine the order of priority for dealing with complaints it also enjoys the freedom to choose which legal basis is the most appropriate for resolving competition problems raised by complainants, so that having acted under Article 85 of the Treaty and having succeeded in obtaining, after two successive statements of objections, the second dated 22 January 1992, the alteration of the agreement between PMI and DSV so as to make it compatible with Article 85 of the Treaty, and having thus succeeded in removing the source of the restriction of competition which was the subject-matter of the complaint, the Commission must be regarded as having also, by implication, defined its position on the complaint with regard to Article 86 of the Treaty.

58 As regards that argument the Court notes first that when the Commission is seised of a complaint under Article 3 of Regulation No 17 it is not bound either to adopt a position by means of a decision confirming the alleged breach, or to pursue an investigation in every case for that purpose; secondly, it is free to determine the degree of importance to be given to a complaint before it in the light of the Community interest (*Automec II*, cited above).

59 Secondly, the Court notes that in the light of its obligations regarding investigations of complaints the Commission is bound, nevertheless, in view of the procedural guarantees provided for in Article 3 of Regulation No 17 and Article 6 of Regulation No 99/63, both to examine first carefully the evidence of fact and of law brought to its notice by the complainant in order to determine whether it reveals the existence of conduct incompatible with the competition rules, and to give the reasons for any decision it adopts in that context, in order to enable the Community judicature to exercise its power of review regarding the legality of such decisions.

60 Consequently, whilst the Commission was free in this case to decide to initiate and pursue the investigation solely on the basis of Article 85 of the Treaty, and not Article 86, if that appeared to be in the Community interest, it was bound to examine first, in the context of the first stage of the procedure after the submission of the complaint (*Automec I*, cited above), the evidence of fact and of law relevant to an application of Article 86 of the Treaty, as requested by the applicant, and then, if it decided that an investigation of the complaint on that basis was either unwarranted or unnecessary, to inform the applicant of that decision, explaining the reasons for it, in order to enable its legality to be the subject of judicial review.

61 In this case the Commission at no time addressed to the applicant either a reasoned decision of that nature, or a provisional notice under Article 6 of Regulation No 99/63. In view of the time which elapsed between the submission of the complaint and the date on which the letter calling upon the Commission to act was received, the applicant was entitled to obtain from the Commission, if not a reasoned decision, at least a provisional notice under Article 6 of Regulation No 99/63 (*Asia Motor France* v *Commission*, cited above).

62 Accordingly, even if the Commission initiated and completed its examination of the complaint in the light of Article 86 of the Treaty, in order to decide in the light of the evidence of fact and of law referred to it by the applicant whether it was in the Community interest for the complaint to be investigated under that provision (a supposition which is in any case at odds with the Commission's statement that it was pursuing its examination of the complaint on the basis of Article 86 and that it intended to take action under that provision if the matter referred to it could not be resolved solely on the basis of Article 85 of the Treaty), on the date on which the applicant formally requested the Commission to act under Article 86 of the Treaty, the defendant could not be regarded as having defined its position on the applicant's complaint in so far as the complaint was based on Article 86 of the Treaty.

63 Since the Commission failed to respond to the formal request to act thus addressed to it by the applicant in due form, the action brought in this case on 22 September 1992, which seeks a declaration that the Commission failed to define its position on the applicant's complaint in so far as the complaint was based on Article 86, fulfilled on that date the conditions for admissibility provided for in Article 175 of the Treaty and must accordingly be declared admissible.

64 It is also necessary to examine, however, whether, as the Commission argues, the application has become devoid of purpose as a result of the publication on 24 September 1992 of the notice pursuant to Article 19(3) of Regulation No 17, or as a result of the cessation of the restriction of competition alleged by the applicant in the complaint.

65 As regards, first, the notice published on 24 September 1992, the Commission confined itself therein to stating that the agreement of 4 December 1990 between PMI and DSV was compatible, following the amendments made to it in order to meet the statement of objections of 22 January 1992, with Article 85 of the Treaty, and indicating that it intended to adopt a favourable position with regard to the agreement, and although that notice was brought to the applicant's attention it was addressed when published, in accordance with Article 19(3) of Regulation No 17, to other interested parties, who were invited thereby to submit their comments to the Commission. Consequently, that notice cannot be regarded in form or in substance as constituting the Commission's definition of its position to the applicant on the latter's complaint of 24 November 1989 in so far as the complaint was founded upon Article 86 of the Treaty.

66 As regards, secondly, the question whether the application has lost its purpose because the restriction of competition referred to it by the complaint has been terminated, as argued in the letter to the applicant from DSV dated 27 May 1993 offering to supply it with pictures and commentary on French horse-races, the Court considers that even if, contrary to what has already been found (see paragraph 55, *supra*), the Commission's action under Article 85 in the form of the statement of objections of 22 January 1992 could by implication constitute a definition

of its position with regard to Article 86, and if when that statement of objections was communicated the purpose it was intended to achieve, that is to say, termination of the restriction of competition complained of, was accomplished, this action for failure to act cannot be regarded as having lost its purpose.

67 The reason is that the alleged disappearance of the restriction of competition which was the subject-matter of the applicant's complaint could have no effect other than to alter the facts initially brought by the complainant to the notice of the Commission, the only result of which could be to lead the latter to adopt a decision not to pursue the investigation, or to decide to reject it in so far as it was based on an alleged breach of Article 86 of the Treaty; it could not entitle the Commission to dispense with the requirement of defining its position on the applicant's complaint, in conformity with the procedural guarantees provided for in Article 3 of Regulation No 17 and Article 6 of Regulation No 99/63. The Commission failed to address an act to the applicant as required by those provisions, and cannot therefore be regarded as having defined its position on the complaint as regards Article 86 of the Treaty solely as a result of the fact that the restriction of competition complained of with reference to that provision was terminated by its intervention.

68 It follows that in so far as this action concerns the Commission's failure to act under Article 86 of the Treaty it cannot be regarded as having lost its purpose and the Court must rule on the substance.

— Substance

69 The applicant's complaint based on Article 86 of the Treaty was submitted to the Commission on 24 November 1989 and the latter was formally requested in accordance with Article 175 of the Treaty to define its position thereon; it failed to address to the applicant a measure other than a recommendation or an opinion, in so far as it failed either to initiate the procedure for establishing breach of Article 86 of the Treaty, so that a decision confirming such a breach could be adopted, or

to dismiss the complaint after having sent the applicant a letter under Article 6 of Regulation No 99/63, or, finally, to make a duly reasoned decision not to pursue the complaint on the ground of lack of Community interest.

70 The application must therefore be declared well founded in so far as the Commission's alleged failure to act concerns Article 86 of the Treaty.

The application under Article 173 of the Treaty

71 In so far as the application for annulment can be regarded as directed against the Commission's implied decision rejecting the applicant's complaint under Article 86 of the Treaty, the Court considers that in view of the fact that the application for a declaration of failure to act has been declared admissible and well founded, as stated above, it is not necessary to rule on the applicant's alternative pleas, which now have no purpose.

72 In so far as the alternative pleas for annulment are to be regarded as directed against the Commission's definition of its position on the applicant's complaint under Article 85 of the Treaty, the Court is of the opinion that although the Commission cannot be regarded as having failed to act, within the meaning of Article 175 of the Treaty, because on the date of the formal request to act, 26 June 1992, and on the date this action was brought, 22 September 1992, it had initiated and was pursuing the procedure for examining the complaint, the definition of its position which is contained in the statement of objections communicated on 22 January 1992 does not constitute a decision capable of forming the subject-matter of an application for annulment (see Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 21, and Joined Cases T-10/92, 11/92, 12/92 and 15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, paragraph 34). Finally, the Court considers that the same applies, in any event, to the notice issued by the Commission in

accordance with Article 19(3) of Regulation No 17, which was published on 24 September 1992, after this action was brought.

73 The alternative pleas for annulment must therefore be dismissed in any event as inadmissible, in so far as they concern Article 85 of the Treaty.

The order sought for the Court to issue directions to the Commission to comply with the judgment

74 The applicant requests the Court of First Instance to order the Commission to take the measures necessary to comply with the judgment to be delivered in this case within one month.

75 It is not for the Court to issue directions to the institutions or to substitute itself for them (see Case T-19/90 *Von Hoessle* v *Court of Auditors* [1991] ECR II-615, paragraph 30). This is particularly the case in the context of judicial review, where the administration concerned is under a duty to take the necessary measures to comply with the judgment of the Court, and applies to both actions for annulment (Case 53/85 *AKZO* v *Commission* [1986] ECR 1965 and Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 181) and actions for failure to act (orders made by the Court of First Instance in Case T-56/92 *Koelman* v *Commission* [1993] ECR II-1267 and Case T-5/94 *J* v *Commission* [1994] ECR II-391).

76 That part of the application must therefore be dismissed as inadmissible.

Costs

77 Under Article 87(2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs if they have been applied for. Where there are several unsuccessful parties the Court of First Instance shall decide how the costs are to be shared. Under Article 87(6), where a case does not proceed to judgment the costs shall be in the discretion of the Court of First Instance.

78 Pursuant to those provisions, taken together, in the circumstances of this case where each of the parties has been unsuccessful in some of their submissions, the Court considers it appropriate in the light of those circumstances to order the Commission to pay its own costs and three-quarters of those of the applicant, and the intervener to pay its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby declares:

1. In breach of the EEC Treaty the Commission has failed to define its position on the applicant's complaint (No IV/33.375 — Ladbroke GmbH/PMU-PMI-DSV) in so far as the latter was based on Article 86 of the Treaty.

2. The remainder of the application, in so far as it is based on Article 175 of the Treaty, is dismissed.

3. It is not necessary to rule on the application under Article 173 of the Treaty in so far as it concerns Article 86 of the Treaty.

4. In so far as the application for annulment concerns Article 85 of the Treaty it is dismissed as inadmissible.

5. The application seeking to have the Court issue directions to the Commission is dismissed as inadmissible.

6. The Commission shall pay its own costs and three-quarters of those of the applicant.

7. The intervener shall pay its own costs.

Cruz Vilaça Briët Kalogeropoulos

Barrington Biancarelli

Delivered in open court in Luxembourg on 24 January 1995.

H. Jung J. L. Cruz Vilaça

Registrar President