JUDGMENT OF THE COURT
11 November 1997 *

In Joined Cases C-359/95 P and C-379/95 P,

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,

and

French Republic, represented by Jean-François Dobelle, Deputy Director of the Legal Affairs Directorate of the Ministry for Foreign Affairs, assisted by Catherine de Salins, Head of Section in that directorate, and Jean-Marc Belorgey, Special Adviser in that directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

appellants,

APPEALS against the judgment of the Court of First Instance of the European Communities (First Chamber, Extended Composition) in Case T-548/93 *Ladbroke Racing* v *Commission* [1995] ECR II-2565), seeking to have that judgment set aside,

the other party to the proceedings being:

* Language of the case: English.

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

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. Gulmann, H. Ragnemalm and R. Schintgen (Presidents of Chambers), G. F. Mancini, P. J. G. Kapteyn (Rapporteur), J. L. Murray, D. A. O. Edward, J.-P. Puissochet, G. Hirsch and P. Jann, Judges,

Advocate General: G. Cosmas,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 21 January 1997,

after hearing the Opinion of the Advocate General at the sitting on 13 May 1997,

gives the following

Judgment

1 By applications lodged at the Court Registry on 22 and 27 November 1995, the Commission of the European Communities (C-359/95 P) and the French Republic (C-379/95 P) each brought an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 18 Septem-

ber 1995 in Case T-548/93 *Ladbroke Racing* v *Commission* ([1995] ECR II-2565, hereinafter 'the contested judgment') annulling the decision of the Commission in its letter of 29 July 1993 to reject a complaint lodged by Ladbroke Racing Ltd ('Ladbroke') under Articles 85 and 86 of the EC Treaty ('the contested decision').

2 By order of the President of the Court of Justice of 29 January 1996, Cases C359/95 P and C-379/95 P were joined for the purposes of the written and oral procedure and the judgment.

3 The contested judgment states (paragraphs 2 to 7) that Ladbroke lodged a complaint (No IV/33.374) with the Commission on 24 November 1989 against the French Republic under Article 90 of the EC Treaty and against the 10 main racing companies (*sociétés de courses*) in France and against the Pari Mutuel Urbain ('PMU'), an economic interest grouping created by the 10 companies in France to manage their rights to organize off-course totalizator betting on horse racing, under Articles 85 and 86 of the Treaty.

4 The PMU initially managed the rights of the racing companies to organize such betting as a 'joint service' operating in the context of a decree of 11 June 1930 on the extension of off-course totalizator betting, adopted in implementation of Article 186 of the Finance Law of 16 April 1930. Article 1 of the decree provided: 'With the authorization of the Minister for Agriculture, totalizator betting may be organized and operated outside racecourses by the Parisian racing companies acting jointly with the aid of the provincial racing companies'. Under Article 13 of Decree No 74-954 of 14 November 1974 on horse-racing companies, the PMU has, since that date, exclusive responsibility for managing the rights of the racing companies in relation to off-course totalizator betting, inasmuch as the article provides that 'the racing companies authorized to organize off-course totalizator betting ... shall entrust its management to a joint service to be called the Pari Mutuel Urbain'. The exclusive rights thereby conferred on the PMU are also protected by the prohibition on the placing or accepting of bets on horse-races by anyone other

than the PMU (Article 8 of the Interministerial Decree of 13 September 1985 governing the Pari Mutuel Urbain). This exclusivity extends to bets taken abroad on races organized in France and bets taken in France on races organized abroad, which likewise may be taken only by the authorized companies and/or the PMU (Article 15(3) of Law No 64-1279 of 23 December 1964 on the 1965 Finance Law and Article 21 of Decree No 83-878 of 4 October 1983 on the horse-racing companies and the PMU) (paragraph 3 of the contested judgment).

5 The complaint was directed principally against that method of organizing off-course totalizator betting in France.

6 As regards its complaint against the PMU and its member companies, Ladbroke alleged that there were agreements or concerted practices between the racing companies authorized in France and between them and the PMU the object of which was, in breach of Article 85 of the Treaty, to grant the latter exclusive rights in the management and organization of off-course totalizator betting on races organized or controlled by those companies, (paragraph 5 of the contested judgment). The complaint also alleged that the grant of such exclusive rights to the PMU constituted an abuse of a dominant position on the part of the racing companies, in breach of Article 86 of the Treaty (paragraph 6 of the contested judgment).

7 That part of the complaint was also directed moreover against agreements and concerted practices whose object was to support a request for State aid to the PMU, thereby enabling the PMU to extend its activities to Member States other than the French Republic, in breach of Article 85 (paragraph 5 of the contested judgment). It also requested that the breaches of Article 86 resulting from the PMU's receipt of illegal State aid and the use of advantages procured by that aid to meet competition be terminated. Lastly, Ladbroke notified the Commission of other abuses of a dominant position by the PMU, consisting in the exploitation of those placing bets, the users of its services (paragraph 6 of the contested judgment).

8 As regards its complaint against the French Republic, Ladbroke claimed that the latter had infringed, first, Articles 3(g) [formerly Article 3(f)], 5, 52, 53, 85, 86 and 90(1) of the EC Treaty by enacting and maintaining in force legislation providing a legal basis for the agreements between the racing companies *inter se* and between them and the PMU granting the latter exclusive rights to take off-course bets and prohibiting anyone else from placing or accepting off-course bets on horse-races organized in France otherwise than through the PMU. Secondly, it had further breached Articles 3(g) [formerly Article 3(f)], 52, 53, 59, 62, 85, 86 and 90(1) of the EC Treaty by enacting and maintaining in force legislation prohibiting the placing in France of bets on races organized abroad save through authorized companies and/or the PMU. Lastly, it had breached Articles 90(1), 92 and 93 of the EC Treaty by granting the PMU illegal aid (paragraph 7 of the contested judgment).

9 By the contested decision the Commission rejected the complaint under Articles 85 and 86 of the Treaty against the PMU and its member companies on the grounds, first, that Articles 85 and 86 were not applicable and, secondly, the absence of a Community interest (paragraphs 13 to 19 of the contested judgment).

10 The Commission did not take a position on the aspects of the complaint directed against the French Republic under Article 90 of the Treaty. Before the Commission adopted the contested decision Ladbroke brought an action for failure to act on the ground that the Commission had failed to exercise the powers conferred on it by Article 90(3) of the Treaty, which was declared inadmissible by the Court of First Instance in its judgment of 27 October 1994 in Case T-32/93 *Ladbroke* v *Commission* [1994] ECR II-1015, paragraph 37 (paragraph 10 of the contested judgment).

11 In the contested judgment the Court of First Instance annulled the contested decision on the ground that, by definitively rejecting the part of the complaint directed against the PMU and its member companies on the ground that Articles 85 and 86 of the Treaty did not apply and there was no Community interest, without first having completed its examination of the compatibility of the French

legislation with the Treaty rules on competition, the Commission had failed to fulfil its duty to examine carefully the factual and legal issues brought to its attention by the complainants so as to satisfy the requirement of certainty which a final decision determining whether an infringement exists must satisfy (paragraph 50 of the contested judgment). The Commission's reasoning was thus based on a misinterpretation of the conditions governing the definitive determination of the existence of alleged infringements (paragraph 51 of the contested judgment).

12 For a more detailed account of the facts which gave rise to the dispute reference may be made to paragraphs 1 to 19 of the contested judgment.

13 The Commission submits that the Court should:

(1) quash the judgment in so far as it annuls the contested decision;

(2) dismiss the application under Article 173 of the EC Treaty as unfounded; and

(3) order Ladbroke to pay the costs in the proceedings before both the Court of First Instance and the Court of Justice.

14 The French Republic submits that the Court should:

(1) set aside the judgment in so far as it annuls the contested decision; and

(2) uphold the submissions put forward by the Commission before the Court of First Instance.

15 Ladbroke submits that the Court should:

(1) dismiss the appeals in Cases C-359/95 P and C-379/95 P;

(2) order the Commission and the French Republic to pay Ladbroke's costs;

(3) alternatively, if the Court allows the appeals, retain the case and give judgment on the outstanding issues in Ladbroke's application in Case T-548/93 or remit the case to the Court of First Instance for judgment on those issues.

16 The Commission puts forward three pleas in support of its appeal. The first is that the Court of First Instance erred in law in holding that where both Article 90 and Articles 85 and 86 of the Treaty may be relevant to a case, the Commission must complete its investigation under Article 90 of the Treaty before ruling on either the applicability of Articles 85 and 86 or the existence of a Community interest in investigating the complaint. The Court of First Instance has thereby established an order of priority as between the procedure provided for in 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) and the procedure against a Member State for failure to fulfil its obligations, which is incompatible with the Commission's discretion to decide what aspect of a complaint should be considered first and against whom (the undertakings or the State) proceedings should be first initiated.

17 The second plea is that the Court of First Instance erred in law in holding that this general principle must apply even where a finding on Article 90 is not logically necessary for a ruling on the applicability of Articles 85 and 86 of the EC Treaty.

The Court has thus overlooked the Commission's finding that, regardless of the compatibility of the French legislation with the Treaty, certain prior conditions necessary for the application of Articles 85 and 86 were not satisfied and, in any event, there was insufficient interest in investigating the complaint under Articles 85 and 86.

18 The third plea is based on lack of reasoning, inasmuch as the Court of First Instance failed, first, to explain why the Commission was bound to examine the French legislation in the light of Article 90 before rejecting the requests made in the complaint relating to Articles 85 and 86 and, secondly, failed to state why the Commission was not entitled to take into account the Community interest in order to determine the priority to be given to different aspects of the complaint, or in what way the Commission's appraisal of the Community interest in this case was manifestly wrong.

19 The French Government also relies on three pleas in support of its appeal. The first is that the Court of First Instance erred in law by failing to take into account the Court's case-law to the effect that, where State measures leave no freedom of action to undertakings, as was the position in this case from 1974 onwards, Articles 85 and 86 of the Treaty cannot be applied to such undertakings as long as those measures remain in force.

20 In response to that plea, however, the Commission submits that it is necessary to distinguish between State measures requiring undertakings to engage in conduct contrary to Articles 85 and 86 and measures that do not require any conduct contrary to those rules but simply create a legal framework that itself restricts competition. In the first case, the Commission considers that Article 85 remains applicable to undertakings' conduct despite the existence of national statutory obligations and irrespective of the possible application of Articles 3(g), 5 and 85 of the Treaty with regard to those State measures. In fact, the Commission argues that

an undertaking can and, by virtue of the primacy of Community law and the direct effect of Articles 85(1) and 86 of the Treaty, must refuse to comply with a State measure that requires conduct contrary to those provisions.

21 In the second case, by contrast, Article 85 may in certain circumstances not apply. That is the case here, since the 1974 legislation does not require the conclusion of an agreement between the main racing companies but itself grants the PMU the exclusive right to organize off-course totalizator betting. The restriction of competition thus flowed directly from the national legislation, without any action on the part of undertakings being necessary.

22 The second plea relied on by the French Government is that the Court of First Instance erred in law in failing to take into account well-established case-law to the effect that a complainant under Regulation No 17 is not entitled to a final decision as to the existence of an alleged infringement of Articles 85 and 86 of the Treaty. In particular, the Court of First Instance overlooked the Commission's reasoning as to the lack of Community interest in investigating the complaint, based on the fact that since 1974 the absence of competition on the French market for taking bets resulted directly from the legislation. Accordingly, a finding that the racing companies and the PMU had infringed Articles 85 and 86 would have had no effect on competition after that date; as regards the period prior to 1974, the finding of an infringement of the Treaty rules could lead only to an award of damages and interest, which the Commission has no power to order.

23 The third plea relied on by the French Government is that the Court of First Instance erred in law by calling in question the Commission's discretion as to whether to take action against a Member State in respect of legislation which is allegedly contrary to the Treaty.

24 It is to be noted that in their pleas the Commission and the French Republic challenge, albeit in different terms and for different purposes, the Court of First

Instance's reasoning that it was necessary for the Commission to complete its examination of the compatibility of the French legislation with the Treaty rules on competition before it could definitively reject the complaint concerning Articles 85 and 86 of the Treaty.

25 Accordingly, it is necessary to consider that finding and the reasoning on which it is based.

26 In paragraph 46 of the contested judgment the Court of First Instance found that the Commission had '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'. The Court stated that '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'.

27 In paragraph 47 of the judgment it stated that '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)'. The Court of First Instance concluded 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'.

28 The Court of First Instance stated that if the Commission were to find that the national legislation was consistent with the provisions of the Treaty, then conduct

of the racing companies and the PMU complying with that national legislation would likewise have to be regarded as compatible with Articles 85 and 86 of the Treaty, whereas if their conduct was not in compliance with the national legislation, it would remain to be determined whether it infringed Articles 85 and 86 of the Treaty (paragraph 48 of the contested judgment). If, however, the Commission were to find that the legislation infringed the Treaty, it would then have to consider whether or not the fact that the companies and the PMU were complying with that legislation could lead to the adoption of measures against them in order to terminate infringements of Articles 85 and 86 of the Treaty (paragraph 49 of the contested judgment).

29 The Court of First Instance therefore concluded, in paragraph 50 of the contested judgment, that '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 ... so as to satisfy the requirement of certainty which a final decision determining whether or not an infringement exists must [satisfy] ... 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'.

30 That reasoning is thus based on the premiss that the lawfulness, in terms of Articles 85 and 86, of conduct of undertakings complying with national legislation, and the action which should be taken against them, depends on whether that legislation is compatible with the Treaty.

31 However, the compatibility of national legislation with the Treaty rules on competition cannot be regarded as decisive in the context of an examination of the

applicability of Articles 85 and 86 of the Treaty to the conduct of undertakings which are complying with that legislation.

32 Although an assessment of the conduct of the racing companies and the PMU in the light of Articles 85 and 86 of the Treaty requires a prior evaluation of the French legislation, the sole purpose of that evaluation is to determine what effect that legislation may have on such conduct.

33 Articles 85 and 86 of the Treaty apply only to anti-competitive conduct engaged in by undertakings on their own initiative (see to that effect, as regards Article 86 of the Treaty, Case 41/83 *Italy* v *Commission* [1985] ECR 873, paragraphs 18 to 20; Case C-202/88 *France* v *Commission* — the so-called 'telecommunications terminals' judgment — [1991] ECR I-1223, paragraph 55; and Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941, paragraph 20). If anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Articles 85 and 86 do not apply. In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings (see also Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 36 to 72, and more particularly paragraphs 65, 66, 71 and 72).

34 Articles 85 and 86 may apply, however, if it is found that the national legislation does not preclude undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition (Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125; Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others* v *Commission* [1985] ECR 3831; and Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411).

35 When the Commission is considering the applicability of Articles 85 and 86 of the Treaty to the conduct of undertakings, a prior evaluation of national legislation affecting such conduct should therefore be directed solely to ascertaining whether that legislation prevents undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition.

36 The Court of First Instance therefore erred in law in holding that by definitively rejecting the complaint on the ground that Articles 85 and 86 did not apply, and that there was no Community interest, before having completed its examination of the compatibility of the French legislation with the Treaty rules on competition, the Commission was relying on an interpretation of the conditions governing the definitive determination of the existence of alleged infringements which was wrong in law.

37 Consequently, the contested judgment should be set aside, without its being necessary to examine the other arguments relied on by the appellants.

Referral of the case to the Court of First Instance

38 According to the first paragraph of Article 54 of the EC Statute of the Court of Justice, if the appeal is well founded the Court of Justice is to quash the decision of the Court of First Instance. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

39 Since it is not possible at this stage to give final judgment because the Court of First Instance ruled on only one of the complaints raised by Ladbroke, it is necessary to refer the case back to that Court.

On those grounds,

THE COURT

hereby:

1. Sets aside the judgment of the Court of First Instance of 18 September 1995 in Case T-548/93 *Ladbroke Racing* v *Commission*.

2. Refers the case back to the Court of First Instance.

3. Reserves costs.

Rodríguez Iglesias Gulmann Ragnemalm

Schintgen Mancini Kapteyn Murray

Edward Puissochet Hirsch Jann

Delivered in open court in Luxembourg on 11 November 1997.

R. Grass G. C. Rodríguez Iglesias

Registrar President