OPINION OF ADVOCATE GENERAL COSMAS

delivered on 13 May 1997 *

In this case the Court of Justice is called upon to deliver judgment on the appeals brought by the Commission and the French Republic, pursuant to Article 49 of the EEC Statute of the Court of Justice, against the decision of the Court of First Instance of the European Communities of 18 September 1995. [1] The judgment under appeal upheld the action brought by the English company Ladbroke Racing Limited pursuant to Article 173 of the EC Treaty (hereinafter 'the Treaty') for the annulment of the Commission's decision of 29 July 1993. By that decision the Commission had rejected Ladbroke's complaint of 24 November 1989 (IV/33.374), concerning the way in which *pari mutuel* (totalizator) [2] horse-race betting was organized in France, and the exclusive rights given by the French legislation to *Pari Mutuel Urbain* (hereinafter the 'PMU'), that is to say to a national (French) association of companies.

At the outset it is worth pointing out that in the judgment under appeal the Court of First Instance adopted an interpretative approach to Articles 85 and 86 with particularly interesting repercussions, the correctness of which the Court of Justice is called upon to determine.

I — Facts and procedure

1. The facts of the case to be examined are described at length in paragraphs 1 to 25 of the judgment under appeal, to which I would refer the Court. In this appeal it is sufficient to recall as follows:

2. On 24 November 1989 Ladbroke lodged a complaint (IV/33.374) with the Commission against, first, the French Republic; secondly, the ten main racing companies ('*sociétés de courses*') in France; [3] thirdly, the

* Original language: Greek.

1 — Case T-548/93 *Ladbroke Racing* v *Commission* [1995] ECR II-2565.

2 — The essential feature of *pari mutuel* (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.

3 — These are the only bodies permitted to organize totalizator betting on horse-races, initially on and off course.

PMU. [4] 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 [5] (hereinafter 'Regulation No 17') as follows:

First, to find and order the termination of infringements of Article 85(1) of the 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.

Secondly, 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. 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 its dominant position by the PMU. [6] Finally, Ladbroke alleged that competition was affected by reason of the close links between the PMU and its principal suppliers.

3. In so far as its complaint was directed against the French Republic, Ladbroke requested the Commission to take a decision pursuant to Article 90(3) of the Treaty with a view to bringing to an end the infringement by the French Republic of the following provisions:

first, Articles 3(f), 5, 52, 53, 85, 86 and 90(1) of the Treaty, as a result of the enactment and maintenance of the abovementioned French legislation giving statutory backing to the agreements between the *sociétés de*

4 — The PMU is an economic interest grouping comprising the main *sociétés de courses* in France; it was 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' (Decree of 11 July 1930 on the extension of off-course totalizator betting). 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'. Furthermore, the exclusivity thereby conferred on the PMU is 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).

5 — First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87).

6 — Ladbroke maintains that betters using PMU's services are exploited, 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. Ladbroke also complains that 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.

courses inter se and with the PMU. Ladbroke complains that that legislation grants the latter exclusive rights to take off-course bets and prohibits anybody from placing or accepting off-course bets on horse-races organized in France otherwise than through the PMU;

secondly, Articles 3(f), 52, 53, 59, 62, 85, 86 and 90(1) of the Treaty, as a result of the enactment and maintenance of the abovementioned legislation prohibiting the unfettered placing in France of bets on races organized abroad;

thirdly, Articles 90(1), 92 and 93 of the Treaty, as a result of the grant to the PMU of illegal aid.

4. By letter of 11 August 1992, Ladbroke formally requested the Commission, pursuant to Article 175 of the Treaty, to define its position within two months with regard to Ladbroke's complaint of 24 November 1989. By letter of 12 October 1992, the Commission informed Ladbroke that it was still considering the complaint but that that examination required considerable time. On 21 December 1992 Ladbroke brought an action under Article 175 of the Treaty for failure to act, seeking a declaration that the Commission had failed to take a decision on the aspects of its complaint concerning Article 90. That action was held inadmissible by the Court of First Instance in a judgment of 27 October 1994. [7]

5. With regard to the limbs 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, by letter of 9 February 1993 the Commission informed Ladbroke in accordance with Article 6 of Regulation No 99/63 that it envisaged dismissing those limbs of the complaint. By decision contained in a letter of 29 July 1993, the Commission in fact rejected Ladbroke's complaint for reasons set out both in that letter and in the letter of 9 February 1993.

6. On 19 October 1993 Ladbroke brought an action challenging that decision before the Court of First Instance in which the French Government intervened. By its judgment of 18 September 1995 in Case T-548/93 the Court of First Instance upheld Ladbroke's claim, [8] annulling the Commission's decision of 29 July 1993. Appeals were lodged against that judgment successively, on 22 November 1995, by the Commission (Case C-359/95 P) and, on 27 November 1995, by the French Republic (Case C-379/95 P). By order of the President of the Court of Justice of

7 — Case T-32/93 *Ladbroke Racing* v *Commission* [1994] ECR II-1015.

8 — See footnote 1 above.

29 January 1996 those cases were joined for the purposes of the written and oral procedure and the judgment.

II — The judgment under appeal

7. The Commission asks that the contested judgment be quashed in so far as it annuls the decision rejecting the complaint, that the application brought by Ladbroke before the Court of First Instance be dismissed as unfounded and that Ladbroke be ordered to pay all the costs.

The French Republic asks the Court to quash the contested judgment in so far as it annuls the decision rejecting the complaint; it also asks that the Commission's claims before the Court of First Instance be upheld.

Ladbroke asks the Court to dismiss the above appeals, to order the Commission and the French Republic to pay the costs and, alternatively, if the Court allows the appeals, to retain the case and give judgment on the outstanding issues in Ladbroke's action, or to remit the case back to the Court of First Instance for judgment on those issues.

8. The relevant grounds supporting the operative part of the judgment of the Court of First Instance are contained in paragraphs 43 and 46 to 51 thereof, which read as follows:

'(Paragraph 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. (...)

(Paragraph 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.

(Paragraph 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.

(Paragraph 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.

(Paragraph 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.

(Paragraph 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.

(Paragraph 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.'

III — Grounds of appeal

A — *Case C-359/95 P*

In its pleadings, the Commission puts forward three grounds of appeal:

1. *First ground of appeal*

9. The Commission maintains that the Court of First Instance erred in law in holding that where both Article 90 and Articles 85 and 86 may be relevant to a case, the Commission must complete its investigation under Article 90 before ruling on the applicability of Articles 85 and 86 or before rejecting the complaint on the ground of lack of Community interest.

(a) First limb of the first ground of appeal

The first limb of the first ground refers to the above-cited paragraph 47 of the contested judgment.

10. The Commission states that it never maintained that the only way to examine complaints of infringement of Articles 85 and 86 of the Treaty was to examine first the compatibility of the relevant French legislation with the Treaty. In its defence lodged before the Court of First Instance, it confined itself to explaining that it had given priority to the examination of the French legislation in the light of Article 90 because it regarded the legislation in question as the most immediate obstacle to competition. Moreover it found that there was no Community interest in examining the conduct of the *sociétés de courses* before 1974.

(b) Second limb of the first ground of appeal

11. According to the appellant, in concluding that the Commission should have completed its investigation under Article 90

before rejecting the complaints based on Articles 85 and 86 of the Treaty, the Court of First Instance established an order of priority as between the procedure provided for in Regulation No 17 and the procedure against a Member State for failure to fulfil its obligations. That order of priority, maintains the Commission, has not been properly justified by the judgment of the Court of First Instance and is incompatible with the discretion of the Commission under Community law to decide the order in which the legal bases of a complaint should be examined. [9]

12. The respondent considers that the appellant's argument derived from the *Rendo* judgment is irrelevant, since the Commission did not in fact give priority to the part of the complaint based on Article 90, but ignored it until Ladbroke threatened to avail itself of the Article 175 procedure. According to the respondent, the sole aim of the Commission in the present case was to avoid giving a reply on the question whether the French measures infringed the Treaty, even though that question was essential for the proper processing of the complaint submitted by Ladbroke. The Commission's intentions can be deduced, in the respondent's view, from the fact that as yet there has been no Commission decision concerning the compatibility or otherwise of the French legislation in question with Community law.

9 — Judgment in Case C-19/93 *Rendo* [1995] ECR I-3319.

2. *Second ground of appeal*

13. In the context of the second ground of appeal, the Commission submits that the Court of First Instance erred in law because it failed to take account of the Commission's finding that there was no infringement of Articles 85 and 86 of the Treaty, regardless of the compatibility or otherwise of the French legislation with the Treaty. The Commission points out that its finding to the effect that several of the conditions necessary for application of the provisions in question were not fulfilled constituted a sufficient ground to justify its rejection of the complaint as to those legal bases, and there was no need for a prior analysis of the compatibility of the French legislation with the Treaty.

(a) First limb of the second ground of appeal

14. The Commission refers to points 6 to 10, 13 and 14 of its Decision providing the explanation for the rejection of Ladbroke's complaint, in which reference is made to the following: first, there was no agreement or evidence of any concerted practice that the principal *sociétés de courses* granted exclusive rights to the PMU prior to the 1974 legislation. Secondly, there was no evidence to support Ladbroke's allegations that those companies took action vis-à-vis the French authorities to obtain State aid for the PMU;

either way, even if such action had been demonstrated, it did not constitute concerted action under the Community rules on competition. Thirdly, there was no evidence of the extension of the PMU's activities outside France. Fourthly, at all events, the above did not affect trade between Member States, since the French legislation had in any event wholly isolated the French market.

(b) Second limb of the second ground of appeal

15. The Commission points out that at points 11 and 12 of its decision it reached the conclusion that there was no infringement of Article 86. First, the fact that the PMU was entrusted with the coordination and pooling of the bets on races organized by the *sociétés de courses* does not constitute an abuse. Secondly, trade between Member States could not be affected by the granting of exclusive rights to the PMU, because of the isolation of the French market brought about by the French legislation referred to above. Thirdly, the steps allegedly taken to obtain State aid do not constitute abusive conduct. Fourthly, with regard to the alleged exploitation of the betting public by the PMU, according to the appellant it is worth noting as follows: the supposed exploitation was not the subject of a formal request for a finding of infringement; it was, moreover, a result of French legislative choices to limit the extent of betting. One way or another the allegation was not proved and in any event cannot affect inter-State trade.

(c) Third limb of the second ground of appeal

16. The Commission states that it could adequately examine the complaint and reach the conclusion that there was no Community interest in a finding of a possible infringement of Articles 85 and 86 of the Treaty, irrespective of the results of its examination as regards ascertainment of a possible infringement of Article 90.

17. Ladbroke counters the above arguments by stating that the Commission may not rely on the French legislation in order to conclude that several necessary conditions for the application of Article 85 are absent, without first examining whether that legislation is compatible with Community law. In its view, if that legislation infringes the Treaty and does not produce lawful results, the conduct of the undertakings which would fall directly under the scope of application of Articles 85 and 86 of the Treaty if the French legislation in question did not exist cannot be covered by that legislation. [10]

10 — The respondent refers to the judgments in Case 136/86 *BNIC* v *Aubert* [1987] ECR 4789; Case 123/83 *BNIC* v *Clair* [1985] ECR 391; and Case 66/86 *Ahmed Saeed* [1989] ECR 803.

3. *Third ground of appeal*

18. The Commission maintains that the judgment under appeal lacks a sufficient statement of reasons. First, it does not explain why the Commission should have examined the French legislation in the light of Article 90 before rejecting the aspects of the complaint which were based on Articles 85 and 86. Secondly, it does not explain why the Commission was not entitled to take the Community interest into account when determining the priority to be given to different aspects of the complaint; nor at any point does the contested judgment indicate the reason why the Commission's appraisal was erroneous as regards the lack of Community interest in the present case.

19. The respondent replies that the above issues are adequately explained in paragraphs 42 to 47 of the judgment under appeal.

B — *Case C-379/95 P*

The French Government puts forward three grounds of appeal.

1. *First ground of appeal*

20. The appellant considers that the Court of First Instance erred, inasmuch as it failed to take into account the case-law of the Court of Justice in connection with the application of Articles 85 and 86 of the Treaty in cases where the conduct of the undertakings in question is dictated by national legislation which leaves them no choice in the matter.

The French Government maintains in particular that when undertakings retain autonomy of conduct, Articles 85 and 86 may be applied to them, regardless of the content of national measures. [11] Nevertheless, when national measures leave no freedom of conduct to undertakings, Articles 85 and 86 of the Treaty cannot be applied as long as those national measures remain in force. [12] According to the appellant, in that situation examination of the compatibility of national legislation with the Treaty would serve no purpose unless the Commission could require the undertakings, pursuant to Articles 85 and 86, not to comply with those national rules since they were contrary to Community law. Neither the Court of Justice nor the Court of First Instance have held as yet, however, that undertakings are bound to breach the laws applicable to them if such laws require them to act in a manner which is contrary to Community law. The French Government refers to case-law in which the Court of Justice refused to accept that directives have horizontal effect. [13]

11 — See Case 123/83 *BNIC* v *Clair* and Case 136/86 *BNIC* v *Aubert*, cited in footnote 10.

12 — The appellant refers to the judgments of the Court of Justice in 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 and Case 240/82 *Stichting Sigarettenindustrie* [1985] ECR 3831 and to the judgment of the Court of First Instance in Case T-7/92 *Asia Motor* [1993] ECR II-669.

13 — Case C-91/92 *Faccini Dori* [1994] ECR I-3325.

In consequence, since the French legislation in force after 1974 left no freedom of action to French *sociétés de courses*, the Commission could reject the part of the complaint which was based on Articles 85 and 86 of the Treaty, without first examining the relevant French legislation in the light of Article 90.

21. In its response, the Commission maintains that, for the purposes of Community law, a distinction must be drawn between State measures which oblige undertakings to engage in conduct contrary to Articles 85 and 86 of the Treaty and those which, while not requiring conduct contrary to those articles, create a legal framework which itself restricts competition. In the latter case, Article 85 of the Treaty may, in some circumstances, be inapplicable to agreements between undertakings where there is no appreciable effect on competition or on trade between Member States. Conversely, in the former case, adds the Commission, that article applies in spite of the fact that the conduct of the undertakings is governed wholly by the national legislation, irrespective of the treatment which those State provisions will receive under Community law. [14] The Commission submits that an undertaking not only can but must, by virtue of the primacy of Community law and the direct effect of Articles 85(1) and 86 of the Treaty, refuse to comply with a State measure which requires conduct contrary to the Community competition rules.

However, in this case, the Commission agrees with the position advocated by the French Government, since it considers that the 1974 French legislation does not require the conclusion of an agreement between the *sociétés de courses* but itself granted the PMU the exclusive right to organize off-track *pari mutuel* betting. Consequently, according to the Commission's abovementioned reasoning, the restriction of competition flowed directly from the national legislation. [15]

22. For its part, the respondent does not accept that Articles 85 and 86 of the Treaty do not apply where the conduct of an undertaking is mandated by a State measure while that measure remains in force. It also rejects the view that pre-existing agreements which subsequently become compulsory under national law should be treated differently from agreements that are compulsory from their inception. At all events, taking into account the interpretative approach to the relevant Community provisions followed by the French Government, it should be accepted, Ladbroke maintains, that in the case under examination a margin of autonomy was left to the *sociétés de courses* under which they concluded the relevant agreements before 1974. The autonomy both of the *sociétés membres* of the PMU and the PMU itself was not completely removed, according to Ladbroke's contentions, until the enactment of the decree of 1974.

Lastly, the respondent contends that no reliance may be placed on national provisions

14 — Reference is made to Case 13/77 *INNO* v *ATAB* [1977] ECR 2115.

15 — Case C-2/91 *Meng* [1993] ECR I-5751.

which infringe the Treaty as evidence from which the absence of a negative effect on inter-State trade may be inferred. According to Ladbroke, the fact that the undertakings cannot be blamed for complying with their national legislation does not preclude a finding that they have committed an infringement of Community law.

2. *Second ground of appeal*

(a) First limb of the second ground of appeal

23. According to the French Government, the Court of First Instance erred in not taking into account settled case-law to the effect that a person who submits a complaint pursuant to Regulation No 17 is not entitled to demand a definitive decision as to the existence of a breach of Articles 85 and 86 of the Treaty. [16]

(b) Second limb of the second ground of appeal

24. The French Government states that the Commission is always entitled to reject a complaint concerning conduct of an undertaking which infringes the rules of competition but which is dictated by national legislation, without having first to determine whether that legislation is compatible with the Treaty. According to the appellant, it is worth observing that the subsidiary reasoning regarding the absence of Community interest, justifying the rejection of the complaint, is based on an undisputed fact: since 1974 the absence of conditions of free competition on the French market in bet-taking has been a direct result of the French legislation. Consequently any finding of infringements of Articles 85 and 86 of the Treaty by the *sociétés de courses* would have no positive effect on the conditions of competition governing the French market in bet-taking after 1974.

25. According to Ladbroke's arguments, the Court of First Instance did not hold that the Commission was not entitled to reject a complaint on the ground of lack of Community interest. In reality it annulled the Commission's decision on the ground that Ladbroke's complaint was rejected because of the consequences of the French legislation on the French market in bet-taking but without the compatibility of that legislation with the Community rules of competition having been examined.

3. *Third ground of appeal*

26. The French Government contends that in the judgment under appeal the Court of First Instance *de facto* throws into question the Commission's discretion as to whether to take action against a Member State which maintains national legislation contrary to the

16 — To reinforce its arguments, the appellant relies on the judgments in Case 125/78 *GEMA* v *Commission* [1979] ECR 3173 and Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223.

Treaty. To that effect it points out that, according to settled case-law, the Commission has a wide discretion as to whether to initiate proceedings under Articles 169 or 90(3) of the Treaty. Although the judgment under appeal did not expressly hold that the Commission was bound to avail itself of the said procedures, the French Government questions what purpose examination of the French legislation in the light of the Community provisions on competition would serve if, in the event that the legislation were found to be incompatible with the Community rules, the Commission did not draw any legal consequences from that finding, that is to say, did not have recourse to the Article 169 procedure and did not adopt a decision under Article 90(3).

Lastly, the French Government challenges paragraph 46 of the judgment under appeal, in which it considers that the Court of First Instance accepts that if the Commission had not initiated the procedure under Article 90 of the Treaty, it could have rejected the claims in the complaint relating to Articles 85 and 86 without first examining the French legislation. That construction could lead the Commission to state when a complaint was submitted that it did not intend to examine the national legislation in the light of Article 90 so as to preserve its discretion.

27. The respondent considers that the reasoning of the French Government might deprive the complainant of the right conferred by Regulation No 17 to have the Commission adopt a decision on the substance of the complaint. The Commission is not bound, under Article 90, [17] to take action and consequently complaints based on Articles 85 and 86 of the Treaty could be systematically rejected on the ground that the conduct under examination was dictated by national measures which the Commission was under no obligation to investigate. Ladbroke accepts that under certain conditions the Commission may be justified in rejecting a complaint relating to infringements of Articles 85 and 86 without being required first to examine the national rules in question. However, in the present case, examination of the national measures was necessary, in the respondent's view, in order to ascertain whether the Commission was logically correct in rejecting the heads of Ladbroke's complaint founded on Articles 85 and 86. If the Commission had found that those national measures were contrary to the Community rules it would then have been bound, pursuant to Article 155 of the Treaty, to take the necessary measures to redress the situation, regardless of whether a complaint had been submitted, under the provisions of Regulation No 17.

IV — Examination of the grounds of appeal

The claims made by the Commission and the French Republic against the judgment under appeal relate to the following issues:

A — *Alleged omission on the part of the Court of First Instance to examine the other grounds of the complaint*

28. (1) In the first and second limbs of the second ground of appeal, the Commission

17 — See Case T-32/93 *Ladbroke*, referred to in footnote 7.

claims that the judgment under appeal should be set aside because the Court of First Instance failed to examine the grounds on which the rejection of the complaint was based in their entirety. According to the Commission, from those grounds it follows that there was no infringement of Articles 85 and 86 of the Treaty, regardless of whether the French legislation was compatible with the Community rules. It maintains further that the Court of First Instance misinterpreted the decision at issue as regards the fact that the rejection of the complaint was not based on the existence of French domestic legislation preventing competition and inter-State trade, but on the fact that no conduct falling within the scope of Articles 85 and 86 of the Treaty on the part of the companies who were the subject of the complaint was found by the Commission.

29. The Commission's decision, as described in paragraphs 14 to 18 of the judgment under appeal, apart from the reference to the fact that the French legislation had exempted the market in bet-taking from the rules of free competition, does contain alternative grounds consistent with the absence of infringement of Articles 85 and 86. In order, however, for the finding of the Court of First Instance to be open to challenge, those alternative grounds must have been advanced by the Commission in support of the decision of rejection as a whole; they should, in other words, if well founded, support the rejection of the head of complaint referring to the conduct of the *société de courses* and the PMU as a whole, not solely in part. If, conversely, those grounds refer only to some of the claims in the complaint, they cannot, by their nature, even if considered well founded, justify the final rejection of the complaint on the basis of Articles 85 and 86 of the Treaty. In that situation, the final rejection of the complaint is still based, at least in part, on the reasoning to the effect that, because of the French legislation in force, no infringement of Articles 85 and 86 of the Treaty was involved because there was no competition or inter-State trade in the French market in bet-taking; consequently, since the Court of First Instance held that that reasoning was wrong in law, it could, without there being any need for further investigation of the remaining grounds, annul the rejection of the complaint as based on reasoning that was wrong in law.

30. In consequence, the scope of the remaining grounds on which the contested Commission decision was based other than those held unlawful must be examined. The Commission cites points 6 to 14 of its decision, by which it considers that it has adequately justified the non-existence of infringements of Articles 85 and 86 without any mention of the French legislation in question needing to be made.

31. It follows from the decision at issue, as described in paragraphs 14 to 18 of the judgment under appeal, that those alternative grounds relate to the claims made by Ladbroke in its complaint relating to infringement of Article 86 as a whole, and a large part of the claims relating to infringements of Article 85(1) of the Treaty. They do not, however, concern the alleged infringements, as a whole, of Article 85(1) due to the exclusivity granted to the PMU in the management of totalizator betting in France which, according to the complaint, was the result of agreements or practices between the main *sociétés de courses*. The Commission's arguments in dealing with and rejecting those

claims (points 6 to 8 of the decision, as set out in paragraphs 14 of the judgment under appeal) are, principally, based on the reasoning that the provisions of Article 85 in question are not applicable, since the French legislation in force had abolished all competition and fully isolated the French market in bet-taking. No fully argued alternative ground is put forward in support of the Commission's decision of rejection as regards that head of Ladbroke's complaint.

32. It is appropriate to point out at this juncture that, contrary to the Commission's pleadings, both written and oral, before the Court of Justice, the Court of First Instance did not misunderstand the relevant passages of the contested decision; it did not, in other words, distort or alter the evidence. As regards the part of the complaint concerning the grant of exclusive rights by the French *sociétés de courses* to the PMU, the Commission accepts that there was collaboration between those companies which, however, was imposed on them by the French Decree of 11 March 1930. It also considers that it is not possible to speak of legitimization by the 1974 Decree of a pre-existing agreement or concerted practice contrary to Article 85 of the Treaty, 'since such collaboration and the agreements between the "sociétés de courses" which resulted from it .. were one of the conditions stipulated in 1930, i. e. long before the Treaty of Rome was signed, by the French Government for off-course totalizator betting.' [18] Furthermore, the Commission states in its decision: 'Rather, the "sociétés de courses" were not authorized to take off-course bets ... and there could therefore be no competition between them as to the choice of the operator to which they entrusted the organization of their betting.' [19]

33. From that reasoning two conclusions can be drawn. First, there was in fact collaboration between the *sociétés de courses*, but that collaboration, according to the Commission, could not be examined in the light of Article 85 because it took place under national legislation which required that conduct and had removed the French market in bet-taking from the conditions of competition. Secondly, the Commission's analysis did not focus on a detailed study of the conduct of the companies who were the subject of the complaint, in respect of which it is briefly stated, without further explanation, that no agreement had been discerned for grant of the privilege of exclusivity, but concerned the French legislative and regulatory system as a reason for Article 85 of the Treaty not applying in the case in question.

34. Consequently, in so far as it found that that interpretative approach to Article 85 was not legally warranted, the Court of First Instance could rely on its finding as to the unlawful nature of that reasoning and

18 — Point 6 of the contested Commission Decision, properly taken into account by the Court of First Instance and referred to in paragraph 14 of the judgment under appeal.

19 — Third paragraph of point 6 of the contested Commission Decision.

consider that the final rejection of Ladbroke's complaint on the basis of Articles 85 and 86 of the Treaty was unlawful and should be set aside. The submissions of the Commission and of the French Republic referring to the failure by the Court of First Instance to examine the other grounds of the contested decision should be dismissed as devoid of purpose, since those grounds could not cover the rejection in its entirety. [20]

35. (2) The third limb of the second ground of the Commission's appeal and the second limb of the second ground of the French Government's appeal allege that the Court of First Instance failed to examine the question whether the subsidiary reasoning contained in the Commission's rejection decision, described in paragraph 19 of the judgment under appeal, was well founded. According to that reasoning, even on the assumption that some of the conduct examined fell under Articles 85 and 86 of the Treaty, there was no Community interest in finding any infringement. Such infringements, if found, would concern only the period between 1962, when Regulation No 17 was adopted, and 1974, when the legislation by which exclusive rights in France were safeguarded to the PMU was adopted. A finding of such infringements would have no positive effect on the conditions of competition after 1974. The appellants maintain that the Court of First Instance was wrong in not taking that reasoning into account, which in their view is well founded.

36. First of all it is worth pointing out that, as paragraphs 44 and 45 of the judgment under appeal make clear, the Court of First Instance did not deny the Commission's right to reject a complaint for lack of Community interest. However, in this case the Commission's position as regards the lack of Community interest in respect of examination of Ladbroke's complaint is based on its logically prior assessment as to the non-existence of competition and inter-State trade in the bet-taking sector in France after the French Decree of 14 November 1974 entered into force.

37. In particular, the Commission takes as given the fact that the activities of the French *sociétés de courses* and the PMU could not have any effect on the French market after 1974 because the French Decree of 14 November 1974 completely isolated the market and required the companies in question to operate outside the rules of competition. Consequently, in order to reach the conclusion that there was no Community interest in a finding of any infringement, the Commission did not examine in depth the activities of the companies which were the subject of the complaint, but relied, on that point as well, on its position that there was no infringement of Articles 85 and 86 where the effects on competition and inter-State trade flowed exclusively and necessarily from the national legislation in force. Accordingly, in so far as the Court of First Instance found

20 — Nevertheless, from the foregoing, it can be concluded that it is not obvious that the rejection of the complaint by the Commission should be set aside as a whole. The Commission's mistake (according to the construction of Article 85 accepted by the Court of First Instance) lies in the way in which it rejected the first head of Ladbroke's complaint, i. e. the head referring to agreements and concerted practices by means of which the *sociétés de courses* granted the privilege of exclusivity to the PMU in the management of totalizator betting in France. That clarification is, in my view, necessary for a better understanding of the content of the judgment under appeal.

that that interpretation of Articles 85 and 86 was not compatible with the Treaty, it properly did not take into account the reasoning concerning the lack of Community interest; that, of course, presupposes that the interpretation of the provisions at issue followed by the Court of First Instance accords with Community law, a question which will next be examined.

B — *Restriction of the Commission's discretion under Articles 85 and 86 in conjunction with Article 90 of the Treaty*

38. (1) At the outset, I consider that the argument in the first limb of the second ground of appeal of the French Government, according to which the Court of First Instance was wrong in not following settled case-law to the effect that individuals who submit a complaint are not entitled to require the Commission to adopt a final decision, should be dismissed. That argument is founded on a mistaken assumption. The Court of First Instance did not call in question the Commission's discretion as to whether or not to reach a decision on a complaint, nor did it recognize any entitlement of those submitting a complaint to require the adoption of a decision. [21] It does, however, preclude the Commission from definitively rejecting a complaint in reliance on Articles 85 and 86 without having first completed the investigation required to ensure correct application of those provisions.

21 — No such entitlement exists, moreover. See the judgment in *GEMA*, cited above at footnote 16.

The above argument is therefore unfounded.

39. (2) The Commission and the French Government maintain that in the judgment under appeal the Court of First Instance undermines the Commission's discretion to decide the order in which it will examine the legal bases of a complaint. According to the appellants, the Court of First Instance applied a *de jure* or *de facto* order of priority as between the Articles 85 and 86 procedure, set out in Regulation No 17, and the Article 90 procedure.

40. That point, in my opinion, raises an issue of the interpretation of the line of reasoning in question (paragraphs 46 to 51) of the judgment under appeal. From the formulation of paragraph 46, it can be concluded, first, that the Court of First Instance, having taken into account the fact that in this case the procedure for examining Ladbroke's complaint under Article 90 had been initiated and was still pending, considered it expedient to reply to the question whether that procedure should have been terminated before a final decision was given on the head of the complaint alleging infringements of Articles 85 and 86 of the Treaty. At first sight the impression is given that the Court of First Instance construed the above provisions in conjunction with each other and concluded that, in respect of the complaint in question, the Commission was bound to complete its investigation on the basis of Article 90 before it came to a final decision on the basis of Articles 85 and 86. In other words the Article 90 procedure would appear, in certain circumstances, to take chronological precedence over the Articles 85 and 86 procedure.

41. That is the construction given by the appellants to the judgment under appeal but it is not, however, correct. [22]

42. First of all, it is doubtful whether the Commission's investigations on the basis of Article 90 can, on the facts, replace or at least suffice as the reply to be given to the totality of the claims put forward by Ladbroke pursuant to Articles 85 and 86. As stated above, [23] one of the points of special interest in the examination of the present appeal lies in the first head of Ladbroke's complaint, where reference is made to agreements and concerted practices between the *sociétés de courses* authorized in France and the PMU. As regards the assessment of the conduct of the French *sociétés de courses* from the Community law point of view, it is not clear whether investigation on the basis of Article 90 will provide an answer to the issues of law, inasmuch as that article does not concern monitoring of the compatibility of national legislation in general with Community law, but solely of legislation concerning undertakings to which special and exclusive rights have been granted. Consequently, in respect of certain points at least of the complaint which relate to the conduct of undertakings falling within the scope of application of Article 85, it would not appear to serve any direct purpose to complete the Article 90 procedure first. In other words, the crucial point as regards the complaint at issue cannot be the completion of the Article 90 procedure but the eventual completion of the investigation as to the compatibility of the French legislation with Community competition law in general.

43. In amplification of that last consideration, I believe that the way in which the appellants have presented the judgment under appeal does not reflect its true sense. In the present case, the Court of First Instance did not attempt to compare the provisions of Articles 85, 86 and 90 of the Treaty and allocate an order of priority to the procedures of Article 90 on the one hand and Articles 85 and 86 on the other, [24] ultimately, restricting the Commission's discretion to choose the manner in which it would act, that discretion being expressly recognized in the abovementioned paragraph 44 of the judgment under appeal. Its primary aim is not to require the Commission to examine the claims relating to infringements of Article 90 before giving a final decision on the claims relating to Articles 85 and 86. As can be seen from the formulation of paragraph 50, the Court of First Instance examined whether the Commission, in giving a final decision on Ladbroke's complaint,

22 — If that approach were correct, the judgment of the Court of First Instance would, in my view, have to be set aside. The two procedures instituted by the Commission pursuant to Article 90 and Articles 85 and 86 are completely independent of each other. Moreover, it cannot be concluded from an interpretation of those articles in conjunction with each other that completion of the investigation pursuant to Article 90 takes precedence over that required in the application of Articles 85 and 86. Inasmuch, therefore, as the Treaty allows the Commission discretion to choose when and in what manner it will act, any restriction on that discretion to choose the appropriate procedure has no legal basis in a comparison of those procedures. Such a restriction would be of no small practical significance, moreover. As the French Government rightly observes, the Commission could henceforth decline to initiate the Article 90 procedure before it finally rejected a complaint on the Articles 85 and 86 aspect, specifically so as to be able to avoid the obligations imposed on it by the Court of First Instance.

23 — See point 31.

24 — Reference to the abovementioned judgment of 19 October 1995 in Case C-19/93 P *Rendo* (footnote 9, paragraphs 21 to 23), in which the Court of Justice was called upon to rule on an appeal concerning a related issue, is very useful.

complied with the requirements of Community law; it found that it had not fulfilled its obligation to examine with the necessary care and thoroughness the factual and legal issues raised by the complaint in question, so as to ensure that the final rejection of that complaint did not give rise to doubt as to its correctness.

Consequently, the view taken by the Court of First Instance and challenged by the appellants is founded *solely* on its interpretation of Articles 85 and 86 and not on the relationship between the latter and Article 90.

44. That interpretative approach follows from the formulation of the judgment under appeal and in particular from paragraphs 48, 49 and 51 cited above. [25] According to the reasoning of the Court of First Instance, there are circumstances in which, in order to find whether the conduct of one or more undertakings infringes Articles 85 and 86, under certain conditions it is necessary to examine the national legislation in force in the framework of which the activity under examination evolved [26] since, if the State measures are contrary to Community law, the Commission will have to examine whether the companies' 'compliance ... 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.' [27] Examination of the compatibility of national legislation is, from that point of view, necessary, regardless of whether, for that purpose, the Article 90(3) procedure will be set in motion or whether a complaint against that legislation has been submitted to the Commission.

45. In other words, the cornerstone of the reasoning of the Court of First Instance lies in its interpretation of Articles 85 and 86 of the Treaty, which can be summarized as follows: *in cases where there is national legislation which itself impedes free competition or inter-State trade and dictates to undertakings, in binding fashion, conduct which would otherwise be likely to fall within the scope of application of Articles 85 and 86, the*

25 — The reader of the judgment under appeal should not be influenced by the fact that the last sentence of paragraph 46 refers to Article 90. First, in that paragraph the Court of First Instance was not expressing a view on the issue, but simply setting out the problem and evaluating the fact that in the case before it there was in fact a complaint on the basis of Article 90 which was still pending before the Commission. In other words, the Commission's obligation to examine the French legislation before reaching a final decision to reject the heads of complaint based on Articles 85 and 86 does not result from the fact that the complaint of infringement of Article 90 is still pending. The obligation in question flows directly from Articles 85 and 86, as the formulation of Articles 50 and 51 of the judgment under appeal makes clear, in my opinion. In the case in point it happened simply that the Article 90 procedure had already been set in motion, that procedure having been laid down directly by the Treaty for the purpose of the assessment, on the part of the Commission, of the compatibility of national legislation with the Community legal order (see below, point 68 et seq. of my Opinion).

26 — These are cases, such as this one, where the activity of individuals in respect of which well-founded reservations might have arisen as to its compatibility with the Community rules on competition, is dictated by national measures governing that activity which have removed the national market from the conditions of competition and inter-State trade. In those circumstances too, of course, it is not necessary a priori that the State rules should be examined in order for a final decision on Articles 85 and 86 to be given. The Commission has, for instance, the possibility of finding that examination of the activity of the undertakings concerned alone has shown that the latter have not put into effect any agreement, concerted practice or abuse of a dominant position. As in this case, the Commission need not, however, base its analysis on the conduct of those undertakings but on the fact that that conduct could not *in any case* affect competition or inter-State trade, because of the existence of national legislation which has wholly and necessarily brought about that result. Then what the Court of First Instance regards as the correct interpretation and application of Articles 85 and 86 of the Treaty necessarily ensues from the preceding assessment of the compatibility of the national legislation with Community law.

27 — Paragraph 49 of the judgment under appeal.

correct interpretation and application of those provisions requires that a final decision as to whether there is an infringement of Articles 85 and 86 should not be given until it has been established whether that national legislation is compatible with Community law because, in the case of a negative reply, it must be held that the companies which have complied with that national legislation have infringed the provisions of the said articles.

46. In taking that position, the Court of First Instance took account of the following:

First, the Commission's final rejection of the complaint concerning Articles 85 and 86 was based [28] on the existence of national legislation which impedes competition and leaves the companies with no freedom of action.

Secondly, as regards the investigation of the compatibility of the French legislation in question with Community law, Ladbroke's complaint on the basis of Article 90, the processing of which the Commission has already set in motion, was still pending.

Thirdly, the Commission itself recognized that the question of the investigation of the compatibility of the French legislation with Community law is crucial as regards resolving the questions concerning the competition regime which governs, or ought to govern, the French market in bet-taking. [29]

47. In the light of the foregoing, the Court of First Instance came to the conclusion that the final Commission decision on Ladbroke's complaint *did not demonstrate the requisite certainty and thoroughness* because the Commission had not 'carried out its duty to examine carefully the factual and legal issues brought to its attention by the complainants'. [30] Consequently, in the context of the complaint in question, the crucial factor

28 — As stated above (point 34), the remaining grounds set out by the Commission did not *per se* suffice as a basis for the final rejection of the complaint with regard to Articles 85 and 86 of the Treaty.

29 — See the abovementioned paragraph 47 of the judgment under appeal. In the first limb of the first ground of appeal, the Commission challenges the correctness of that reasoning, considering that it is based on a misunderstanding of the Defence it had lodged in the proceedings before the Court of First Instance. In reality, however, the Commission has not absorbed the true sense of paragraph 47. The Court of First Instance did not consider that the Commission found it necessary to complete the procedure that was pending on the basis of Article 90 before a final answer was given pursuant to Articles 85 and 86; it did, however, take into account the fact that, in the Commission's view as well, the competition problem raised in general by Ladbroke's complaint could not be satisfactorily resolved unless the question whether the French legislation in respect of PMU's monopoly was compatible with the Treaty provisions was answered.

30 — Paragraph 50 of the judgment under appeal.

as regards the final decision as to whether there was an infringement of Articles 85 and 86 was not completion of the pending Article 90 procedure, but the answer to the question whether the French domestic legislation was compatible with the Community competition rules. That is laid down by the Court of First Instance, without there being any intention of restricting the Commission's discretion [31] or of creating an order of priority between Article 90 and Articles 85 and 86.

48. Of course, even on that construction, the solution given by the Court of First Instance results *de facto* in restricting the Commission's discretion as to when and how to initiate, in the context of the complaint in question, the procedure under Article 90 for investigating the compatibility of the French legislation with Community law. The question, however, whether that practical consequence is based on a correct application of Community law forms part of the general issue whether the above interpretation of Articles 85 and 86 followed in this case is in accordance with Community law, which I will examine forthwith.

31 — According to the reasoning of the Court of First Instance, the Commission is directly obliged by Articles 85 and 86 and by the provisions of Article 155 of the Treaty to investigate the compatibility of national legislation with the Community competition rules. Contrary, therefore, to the contentions of the French Government in its third ground of appeal, the Commission cannot evade that duty by announcing at the time the claim is submitted that it does not intend to examine the national legislation in the light of Article 90 so as to preserve its discretion.

C — *The correct interpretation of Articles 85 and 86 of the Treaty*

(1) *Articles 85 and 86 of the Treaty in the light of paragraph 49 of the judgment under appeal*

49. In its first ground of appeal, the French Government alleges that the solution reached by the Court of First Instance in its judgment is contrary to that found in settled case-law on the question whether it is possible to apply Articles 85 and 86 of the Treaty in circumstances where the conduct of the undertakings concerned is dictated by national legislation. It observes further that until now no duty binding national undertakings not to comply with a national measure imposing obligations contrary to Community law has been recognized.

50. The Commission takes a different view from that of the French Government, in so far as it distinguishes between two situations, according to whether the national legislation imposes obligations on undertakings contrary to Articles 85 and 86 or whether the State measures themselves create a regulatory framework which restricts competition, where there is no conduct on the part of the undertakings (in the sense of Articles 85 and 86) which could effect competition and inter-State trade. According to the Commission, only in the second situation are Articles 85 and 86 inapplicable.

(a) Interpretative approach of the Court of First Instance to Articles 85 and 86 and existing case-law

51. The position taken by the Court of First Instance [32] in the judgment under appeal does not in fact appear to be consistent with existing case-law, at least as regards two important issues: first, as regards the question whether there is an infringement of Articles 85 and 86 on the part of those undertakings whose conduct contrary to Community competition rules is wholly dictated by binding national rules; secondly — and to my mind more significantly — the judgment under appeal diverges from the position generally taken in the case-law as regards the conditions in which national legislation of an economic nature may be examined in the light of Articles 5 and 85 of the Treaty.

52. (i) The Court of First Instance, as can be seen from the formulation of paragraph 49 of the judgment under appeal, did not follow the result originally accepted in the *Suiker Unie* judgment, which has not as yet been directly reversed. [33] According to the interpretation generally accepted, in that judgment the Court of Justice held that there was no infringement of Article 85 of the Treaty in cases where the activity of undertakings, despite in principle appearing to fall within the scope of application of the prohibitions in that article, was nevertheless dictated by State rules which left no freedom of action to the undertakings.

53. It is true that, in the judgments that followed, the Court of Justice sought to mitigate the consequences of that case-law. [34] To

32 — Relating to the Commission's duty in certain circumstances to evaluate first the compatibility of national legislation with Community competition law before reaching a final decision on a complaint pursuant to Articles 85 and 86.

33 — In that judgment of the Court of Justice of 16 December 1975 (cited in footnote 12), concerning undertakings marketing sugar, the following reasoning was followed (paragraphs 65 to 72):
'... Italian regulations and the way in which they have been implemented had a determinative effect on some of the most important aspects of the course of conduct of the undertakings concerned which the Commission criticizes, so that it appears that, had it not been for these regulations and their implementation, the cooperation ... either would not have taken place or would have assumed a form different from that found to have existed by the Commission.
... Further the object and effect of Italian regulations and the way in which they have been implemented was to match supply exactly with demand and thereby remove a vital element of normal competition.
Furthermore the system described above has substantially reduced the opportunities available to the parties concerned to negotiate a price which would have resulted from the free market forces of supply and demand.
In addition, the Italian regulations impeded, indirectly but fundamentally, the buyer's freedom to choose his supplier and vice versa.
... Although, as has been indicated earlier, the system of national quotas, by tending to partition national markets, only leaves a residual field for the operation of the rules of competition, that field is in turn to a great extent fundamentally restricted in its scope by the special organization of the Italian market.
These considerations show that the conduct complained of could not appreciably impede competition and does not therefore come within the prohibition of Article 85 of the Treaty.'

34 — It is, in my opinion, important to stress that in the *Suiker Unie* case the Court recognized that the content of the Italian legislation on the sugar trade was not obviously contrary to the Community legal order. Moreover, the Community institutions had not managed to create a system of unalloyed free competition for sugar. There were many derogations from the common organization of the market in that product in respect of the Italian market, which ultimately allowed the Italian legislature to restrict free competition to a minimum. Even though there was no direct allusion to the compatibility of the Italian legislation with Community law in the text of the judgment, I consider that the Court of Justice ultimately took that tacitly into account before deciding on the inapplicability of Articles 85 and 86 of the Treaty to undertakings operating on the Italian market. It is not, in my view, certain whether the final judgment would have the same content if the national legislation hampering the application of Articles 85 and 86 had been directly contrary to the Community rules.

be exact, although the exception first formulated in the *Suiker Unie* judgment has never been completely abandoned, it is difficult to apply in practice, in so far as the Court of Justice is particularly strict when asked to recognize that national legislation completely deprives undertakings of the possibility of shaping their activity freely and imposes mandatory conduct contrary to the Community competition rules. [35] Moreover the liability of the undertakings is not in doubt in cases where conduct contrary to Article 85 and 86 was encouraged or facilitated by the national authorities. [36]

54. (ii) The case-law referred to above concerns undertakings first and foremost, but the cases that I shall now cite directly touch on the interests of the Member States and concern the validity of national rules which restrict or abolish free competition. In his Opinion in *Meng*, [37] Advocate General Tesauro states that the position of the Court of Justice on that question can be summarized as follows:

'... the Court has always held that national rules governing the economic activity of undertakings fall outside the scope of Articles 85 and 86. Those articles are addressed (*ratione personae*) to undertakings, not to Member States; and they are intended (*ratione materiae*) to regulate freedom of competition, not to limit the prerogatives of the Member States in matters of economic policy, those prerogatives, in any event, being the subject of other provisions of the Treaty.

The Court has also repeatedly stated that "Articles 85 and 86 of the Treaty, in conjunction with Article 5, require the Member States not to introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings". [38]

The two statements are perfectly consistent with each other. Whilst it is true that Articles 85 and 86 deal with anti-competitive conduct on the part of undertakings, it is also true that the Member States must not allow such undertakings to evade the prohibitions that they impose by offering them a legislative "shield". If that were not the case, Articles 85 and 86 would be deprived of their effectiveness: *the Member States are therefore under an obligation not to undermine the effectiveness of the competition rules addressed to undertakings.*'

35 — A typical example is to be found in Case 240/82 *Stichting Sigarettenindustrie* (cited in footnote 12).

36 — See Case 229/83 *Leclerc* [1985] ECR 1 and Case 231/83 *Cullet* [1985] ECR 305.

37 — Cited in footnote 15.

38 — See, most recently, Case C-332/89 *Marchandise and Others* [1991] ECR I-1027, paragraph 22.

55. In view of the above, the Court may, only in certain circumstances and exceptionally, examine the compatibility of a national measure with Community law in the light of Articles 85 and 86 if those measures undermine the effectiveness of those articles. [39] The conclusions to be drawn from the case-law, in particular with regard to Article 85, which is of interest in this case, are summarized in paragraph 14 of the *Meng* judgment:

'... the Court has consistently held that Article 85, read in conjunction with Article 5 of the Treaty, requires the Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings. By virtue of the same case-law, such is the case where a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article 85 or reinforces their effects or deprives its own legislation of its official character by delegating to private traders responsibility for taking economic decisions affecting the economic sphere.'

A contrario, where national legislation does not relate to agreements or concerted practices of undertakings but itself lays down rules governing the market, the impairment of competition has as its starting point a pure State measure, which does not fall within the scope of application of Article 85. [40]

56. The position taken by the Court of First Instance in the judgment under appeal is not consistent with the foregoing. In particular it does not make the distinction between national measures which render Articles 85 and 86 ineffective and those which do not fall within the scope of application of those articles. On the contrary, in the general formulation of paragraph 49 of the judgment under appeal, the Court of First Instance calls upon the Commission to examine national measures generally on the basis of the Community competition provisions and to use the results of that examination to evaluate, on the basis of those same provisions, the conduct of the undertakings which complied with the measures in question. Without expressly so stating, the Court of First Instance departs from the position taken in the case-law hitherto relating to the prerequisites for examination of a national rule in the light of Articles 85 and 86 of the Treaty.

39 — See the above-cited judgments of the Court of Justice in *INNO* v *ATAB*, *BNIC* v *Clair*, *BNIC* v *Aubert*, *Ahmed Saeed*, *Meng* and in Case 209/84 *Asjes (Nouvelles Frontières)* [1986] ECR 1425; Case 311/85 *Vlaamse Reisbureaus* [1987] ECR 3801; Case 231/83 *Leclerc* [1985] ECR 305; Case 267/86 *Van Eycke* [1988] ECR 4769.

40 — In the abovementioned *Meng* judgment, the Court of Justice was called upon to assess German insurance legislation which prohibited the grant of commission to clients. The position it adopted on the question was based on the following grounds. '... it must be observed that the rules themselves prohibit the grant of special advantages to policyholders and do not delegate to private traders responsibility for taking decisions affecting the economic sphere. It follows that rules like those at issue in the main proceedings do not fall within the categories of State rules which, according to the case-law of the Court of Justice, undermine the effectiveness of Article 3(f), the second paragraph of Article 5 and Article 85 of the Treaty. Accordingly, it must be stated in reply to the question submitted by the national court that Article 3(f), the second paragraph of Article 5 and Article 85 of the EEC Treaty do not, *in the absence of any link with conduct on the part of undertakings of the kind referred to in Article 85(1) of the Treaty*, preclude State rules which prohibit insurance intermediaries from transferring to their clients all or part of the commission paid by insurance companies' (paragraphs 20 to 22).

The question consequently arises whether that reasoning by the Court of First Instance should be maintained on appellate review by the Court of Justice.

(b) Repercussions of the interpretative approach to Articles 85 and 86 followed by the Court of First Instance in the judgment under appeal

57. (i) At the outset I consider it particularly useful to repeat that Articles 85 and 86 set out complete rules of law with full (vertical and horizontal) direct effect. [41] Also, as provisions of the Treaty, they take precedence over national rules. Inasmuch, therefore, as the said provisions are higher in the hierarchy of rules of law than national provisions, it should, in principle, be regarded as inconceivable that the latter should interfere with their application. The obligation to comply with a rule having superior legal force, even if there is a measure of lesser force with a contrary content, is, moreover, a feature common to all systems of law. The logical consequence should therefore be that that obligation extends to individuals subject to Community law, even if that requires them ultimately not to comply with contrary national legislation in force. In the contrary case, not only would the higher rank but also the direct effect of the provisions contained in Articles 85 and 86 of the Treaty be thrown into question.

58. Nevertheless, those fundamental principles, although self-evident and appearing in the national legal systems, have not hitherto been fully applied in Community law and they do not wholly ensure the primacy of the Community legal system as against the national legal systems. The Community rules do not give rise to all the legal consequences due to their superior legal ranking, at least according to settled case-law.

59. (ii) At this juncture, it is worth emphasizing the consequences which would ensue if the case-law hitherto was overturned. I consider it appropriate to draw a distinction between the repercussions which the interpretative approach to Articles 85 and 86 adopted in the judgment under appeal would have, were it to prevail, on the legal treatment of undertakings, on the one hand, and on the economic legislation of the Member States on the other.

60. (aa) With regard to undertakings, it will henceforth have to be accepted that any time conduct is found which falls within the prohibitions of Articles 85 and 86, those

41 — It suffices to recall the development of the case-law of the Court of Justice from its judgment in Case 13/61 *Bosch* [1962] ECR 45 to Case 127/73 *BRT* v *SABAM* [1974] ECR 51 and Case 37/79 *Marty* [1980] ECR 2481.

undertakings which have so conducted themselves should suffer the consequences provided for in the above Treaty articles, without being able to rely on the existence of binding national legislation with a contrary content to absolve them from the illegality of their conduct. Conversely, in order not to incur the sanctions laid down in Articles 85 and 86, they are bound not to comply with the national measures concerning them.

61. I do not in principle disagree with the development of the case-law in that direction. Nevertheless, two important issues might arise. First, it would appear excessively severe to make the undertakings concerned suffer the negative consequences of an infringement of Community law for which the Member States are in actual fact responsible. Secondly, it is possible to object to the above interpretation of Articles 85 and 86 on the ground that it safeguards the Community legal order to the detriment of the interests of individuals, requiring the latter to suffer the consequences of their subjection to the national legislation and to become, in a manner of speaking, 'martyrs' in the defence of Community law.

62. In my opinion, it is possible to give a satisfactory response to those points.

63. First of all, the formulation of a general principle according to which individuals who comply with national rules are likely to be regarded as liable in Community law will certainly cause surprise. That is, however, the outcome of the principle of the primacy of a Community rule as against the corresponding national rule. Moreover, it is particularly important that a distinction be drawn between recognition of the existence of an infringement of Community law and the imputation of responsibility to the perpetrator of the infringement. Compliance by an undertaking with a binding national rule contrary to Articles 85 and 86 does not expunge the illegality, from the Community law point of view, of its conduct, but can however constitute a reason for removing the imputation of liability from the undertaking or for restricting its liability. [42] According to that approach, having found that a national rule dictating or imposing specific conduct on undertakings being investigated is not in conformity with Community law, the Commission will then find that the undertakings in question are in infringement of Articles 85 and 86 and will prohibit the continuation of that unlawful conduct, but will not impose a fine, or may limit the fine. [43] In that light I do not

42 — At this point reference could be made to the more general issue for which national legal systems have to find a solution both in criminal and disciplinary law as regards whether superior orders or ignorance of the law expunge the unlawful character of an act or simply preclude or restrict liability.

43 — For example, if those undertakings show that they have complied with national rules either because they justifiably considered them to be in accordance with the corresponding Community rules or because of the severity of the sanctions which non-compliance would entail. If, however, the national legislation is obviously contrary to Community law, a fact of which the undertaking is aware, I see no reason why the latter should be shielded by the State measure and thus avoid the sanctions of Article 85.
In any case, I consider that the said distinction is necessary; conversely, it would be excessively severe to impose the sanctions provided for on an undertaking compelled by national legislation to act contrary to Articles 85 and 86 without any other condition needing to be fulfilled. On that point, see the Opinion of Advocate General Jacobs of 27 February 1997 in Case C-90/94 *Haahr Petroleum* v *Åbenra Havn and Others*, Joined Cases C-114/95 and C-115/95 *Texaco* v *Middelfart Havn and Others* and *Olieselskabet Danmark* v *Trafikministeriet and Others* and Case C-242/95 *GT-Link* v *DSB* [1997] ECR I-4449.

consider that the suggested alteration in the interpretation of Articles 85 and 86 goes beyond what is appropriate or that it is unfair to undertakings.

64. As regards the situation where undertakings are required to act contrary to their national legislation and suffer the expected repercussions of that conduct, the following points should be made: the Community legal order has made available to individuals the appropriate legal means to defend their recognized rights when they are challenged or impaired by a national measure. On that issue, the contribution of the Court of Justice is known to be particularly important by way of the answers which it gives to questions referred to it for a preliminary ruling. In that regard, suffice it to recall the position taken by the Court in *Factortame I*, [44] when it held that Community law gives the individual adequate legal protection even in the national legal systems, in circumstances where a State measure affects the rights conferred upon the individual by the Community legal order. In the case before the Court, the undertaking which would incur sanctions on the ground of non-compliance with national legislation contrary to Community competition law has the possibility of bringing an action before the national courts which not only must disapply the said legislation but are obliged to provide adequate interlocutory legal protection. Consequently, the claim referred to above cannot be accepted without direct recognition that the legal protection afforded by the Community legal order to individuals is inadequate, which in my opinion is no longer true.

65. From all the foregoing, I conclude that the interpretation adopted by the Court of First Instance in the judgment under appeal involving, indirectly, divergence from the path set out in *Suiker Unie* is deserving of support and is more consistent with the fundamental principle of the primacy of Community law.

66. (bb) Nevertheless, as remarked previously, that position also entails a change in case-law as regards another fundamental issue, that of the possibility of relying on Articles 85 and 86 in conjunction with Article 5 of the Treaty when the compatibility of national rules with those provisions is being examined. In accordance with the foregoing, [45] that issue, in my view, embodies the essence of the problem of the correctness of the judgment under appeal, rather than the issue relied upon by the appellants of the *de facto* restriction of the Commission's discretion as regards whether a complaint should be examined first from the Article 90 angle or from the Articles 85 and 86 angle. The specific restriction of the Commission's discretion is but one — perhaps not the most important — legal consequence of the reasoning followed by the Court of First

44 — Case C-213/89 [1990] ECR I-2433.

45 — See point 56 et seq. of this Opinion.

Instance in paragraph 49 of the judgment under appeal.

67. In particular, if the interpretative approach to Articles 85 and 86 suggested by the Court of First Instance were accepted, in any case where the conduct of the undertakings under investigation were contrary to the Community competition rules but had been imposed by binding national measures laying down the mandatory framework for the exercise of a specific economic activity, the compatibility of those national measures with the Community legal order should be examined. [46] Thus there is established in those cases a duty to examine the national measures from the point of view of Community law in the framework solely of the application of Articles 85 and 86 of the Treaty. That obligation concerns principally the Commission in the exercise of the powers conferred upon it as regards compliance with the rules of the Treaty, and in particular as regards supervision of compliance by individuals with the provisions of Articles 85 and 86.

68. According to the settled case-law of the Court of Justice, national legislation which restricts competition, with the exception of State aid, may, first, fall within the scope of application of Article 90 (where public undertakings or undertakings to which special or exclusive rights have been granted are concerned); secondly, it may fall within the scope of Articles 85 and 86 in conjunction with Article 5 (when those provisions are rendered ineffective [47]); thirdly, it may avoid application of the Community rules on competition as contained in the provisions of Articles 85 to 94 of the Treaty. The above categorization would be overturned if the position introduced by the Court of First Instance in the judgment under appeal were accepted. National rules affecting or restricting competition may, in certain circumstances, be examined in their entirety as regards their compatibility with Articles 85 and 86; that examination is carried out *in limine*, before the competent Community institutions reach a decision on the conduct of undertakings which have complied with the said rules.

69. The above interpretative approach to Articles 85 and 86 requires a distinction to be drawn between national rules which also fall under Article 90 and those which are unrelated to that article. In the first case, the Commission has, theoretically, three options. First, it may pursue a complaint which has been brought before it, in reliance on Article 90, concerning the compatibility of the national legislation in question with the Community rules (this is the situation which most resembles the facts of this case). Secondly, it may commence proceedings under Article 169 et seq. or undertake, on its own initiative, a review of the national legislation, pursuant to Article 90, setting in motion the

46 — Provided, of course, that the Commission finds, when it carries out its examination, conduct on the part of the undertakings which falls within the scope of Articles 85 and 86.

47 — See the judgment in *Meng*, cited in footnote 15.

necessary procedure. [48] Thirdly, it may carry out an incidental review of the national legislation in the framework of Articles 5, 85 and 86.

70. If the national measure is not a measure governed by Article 90, the Commission may, theoretically, either seek a declaration that it is unlawful from the national law angle pursuant to the Article 169 procedure et seq. or carry out an incidental examination of the State legislation in the framework of application of Articles 5, 85 and 86.

71. The incidental examination method has the advantage of being simpler, but gives rise to more difficulties from the point of view of Community institutional law. It is not obvious whether the conferral of such a discretion is in keeping with the structure of the Treaty. According to the case-law, where the Commission finds that national legislation is not in conformity with the Community legal order, it must take the matter up with the Member State concerned. For that purpose there is the general procedure of Article 169 et seq., under which, in cases of non-compliance of the Member States with the Commission's position, a solution to the dispute is sought from the Court; of course, prior to the final decision of the Court, there is no recognized infringement on the part of the Member State — or unlawful national measure by extension — because the Commission is not empowered by the Treaty to issue a decision on that question, except by way of a measure of an advisory nature. [49] Exceptionally, and particularly in cases where Article 90 might apply, the Commission may choose between the said general procedure of Article 169 et seq. and the special procedure of Article 90(3); pursuant to that latter provision, the Commission itself reaches a decision on the compatibility of State measures with Community law. [50] At all events, however, it would be contrary to the accepted logic of primary Community law if the Commission could challenge national measures without taking a direct position, that is to say without addressing 'appropriate directives or decisions to Member States' within the meaning of

48 — From the case-law of the Court of Justice as regards application to national legislation of Article 90 on the one hand and Articles 85 and 86 in conjunction with Article 5 on the other, it can be concluded that the cumulation of those legal bases is not, in principle, possible. In particular, the basic criterion for considering that, exceptionally, national legislation falls within the scope of Articles 85 and 86, consists in a finding that the legislation in question has deprived it of its 'official character', precisely because it either requires, facilitates or reinforces individual conduct which impairs competition or delegates to individuals responsibility for taking economic decisions affecting the economic sphere (see the judgment in *Meng* cited in footnote 15). Conversely, in order for Article 90 to be applicable the impairment of competition must have been brought about by a purely State measure (see, for instance, the judgment in Case C-202/88 *France* v *Commission* [1991] ECR I-1223), in which the Commission's decision was annulled in so far as it required the Member States to adopt measures to terminate agreements which had been concluded by public telecommunications undertakings with users of rented terminals; those agreements did not fall under Article 90 in so far as they were not made mandatory by the Member States). Of course, where national legislation extends both to undertakings in the sense of Article 90 and to companies which do not fall into that category, its compatibility with Community law will be examined, in part from the Article 90 angle and in part from the Articles 5, 85 and 86 angle. (See the judgment in *Ahmed Saeed* cited in footnote 10 above.) A thorough analysis of the French legislation on betting might well reveal that the said legislation falls under both those legal bases.

49 — See the judgment in Cases 142/80 and 143/80 *Essevi and Salengro* [1981] ECR 1413.

50 — It should be noted that, where there is an issue of the compatibility with Community law of State measures granting undertakings special or exclusive rights, Article 90 is the *lex specialis* which should by implication be applied. (On the special character of Article 90 see the Opinion of Advocate General Reischl in Joined Cases 188/80 to 190/80 *France, Italy and the United Kingdom* v *Commission* [1982] ECR 2545.)

Article 90 [51] and without formulating observations and a reasoned opinion under the Article 169 procedure; [52] [53] nevertheless, the solution of incidental examination is, in my view, the most innovative.

72. If, however, the solution of incidental examination of national legislation pursuant to Articles 85 and 86 is excluded, then application of those articles, in accordance with the interpretative approach followed by the Court of First Instance, results in being conditional, in certain cases, on whether the Commission is disposed to set in motion the procedures under Article 90 and Article 169 et seq. The Court of Justice has hitherto recognized that the Commission has a wide discretion as regards the setting in motion and progress of those procedures and generally as regards its dealings which may lead it into a dispute with a Member State. [54] In other words it is not possible to derive from Articles 85 and 86 a direct or even indirect obligation on the part of the Commission to take action against national legislation pursuant to Article 90 and Article 169 et seq.

73. There remains the particular case in which there is already a complaint in reliance upon Article 90 and the Commission has begun its examination. That is, moreover, the form taken by the facts in this case. First of all, I consider that it would be contrary to the strict logic which should govern the Community legal order, as a system of law, if the solution to be given to such an important category of disputes were to depend on the fortuitous circumstance whether or not there was a complaint pending pursuant to Article 90. Furthermore, the institutional problem referred to above does not completely disappear. The Commission's discretion as regards the exercise of those of its powers which might bring it into conflict with the Member States is thrown into question, albeit indirectly; the Commission will no longer have

51 — It should not escape our attention that the Articles 85 and 86 procedure in conjunction with that of Article 5 of the Treaty may not lead to the adoption of a Commission decision addressed to Member States rather than to undertakings. See the order in Case C-229/86 *Brother Industries* [1987] ECR 3757 and in particular the judgment in Case T-113/89 *Nefarma* [1990] ECR II-797.

52 — It may be doubted, moreover, whether such a perspective does not, in addition, affect the rights of defence of the Member State. Since the Regulation No 17 procedure is directed against undertakings, the Member State will not be present when the question whether the national provisions in question are in keeping with Community law arises. Of course, it is possible for the Member State to be called upon to give its views even though no written provision is laid down to that effect. (See the position of the Court of Justice in the judgments in Case C-301/87 *France* v *Commission* [1990] ECR I-307 and Joined Cases C-48/90 and C-66/90 *Netherlands* v *Commission* [1992] ECR I-565.) An action may also be brought pursuant to Article 173 against the decision which the Commission adopts at the close of the Regulation No 17 procedure.

53 — Moreover, as the Commission observed in the course of the proceedings in *Meng*, cited above, such a possibility would perhaps undermine the uniformity of Community law: the Commission would be able to promote observance of the Community competition rules by having at its disposal a legal weapon additional to those usually employed to require the withdrawal of national measures running counter to the application of Community rules with a different content. The latter argument may, of course, be refuted by taking account of the special nature of the rules contained in Articles 85 and 86 but also of the economic nature of the Communities, at least at their origin. In addition, the fact that the powers of the Commission would be expanded as regards only one of the areas of the Community legal order is not sufficient reason to reject that perspective; it has been shown in practice that European integration cannot progress in the same manner on all questions.

54 — For the procedure of Article 169 see the judgment in Case 48/65 *Lütticke* v *Commission* [1966] ECR 19. For the procedure of Article 90 see the judgment of the Court of First Instance in Case T-32/93 *Ladbroke* cited in footnote 7. Nevertheless the possibility of a shift in the case-law towards the further restriction of the Commission's discretion should not be excluded. The Opinion of Advocate General La Pergola in Case C-107/95 P *Bundesverband der Bilanzbuchhalten* v *Commission* leans in that direction, and although it was not followed by the Court in its judgment of 20 February 1997, nevertheless suggests that the legal question in question cannot be regarded as settled.

complete freedom of choice as regards the order in which to examine two complaints, based in the one case on Article 90 and in the other on Articles 85 and 86 of the Treaty.

74. As I have already observed, [55] the restriction in question does not constitute the essential issue but is one of its manifestations. The question of law that arises from the judgment under appeal, and from paragraph 49 in particular, must be posed outside the particular framework of the specific circumstances of this case and the 'pseudo dilemma' of the choice between the Article 90 procedure and the Articles 85 and 86 procedure. The question that requires an answer from the Court of Justice at the present stage is simply that set out at the beginning of this section: is the interpretation of Articles 85 and 86 contained in paragraph 49 of the judgment under appeal, according to which, in certain circumstances, an assessment of the compatibility of national legislation with the Community competition rules is necessary before a final decision is given on the question whether certain undertakings have infringed the provisions of Articles 85 and 86, in keeping with the letter and the spirit of Community law?

75. (iii) From the foregoing analysis, the conclusion may be drawn that that position, without being directly contrary to the provisions of the Treaty, overturns the currently accepted interpretation of a number of fundamental principles and rules of Community law and is tantamount to abandoning certain of the more important solutions reached in the case-law of the Court of Justice. However great an effort is made to describe the changes which the position of the Court of First Instance, as set out in paragraph 49 of the judgment under appeal, might entail, it is certain that not all those changes are foreseeable or desirable. At all events, however, I consider that the interpretative approach to Articles 85 and 86 in question ensures the fullest possible legal protection of the rights of individuals recognized by those articles and in particular of the rights of undertakings which suffer the consequences of concentrations and abuse of a dominant position brought about by their competitors. I consider it useful to refer, for the sake of comparison, to the finding in the *Factortame III* judgment [56] on the question of the protection of the rights of individuals recognized by Community law in cases where those rights are infringed by the Member States.

'In addition, to make the reparation of loss or damage conditional upon the requirement that there must have been a prior finding by the Court of an infringement of Community law attributable to a Member State would be contrary to the principle of the effectiveness of Community law, since it would preclude any right to reparation so long as the presumed infringement had not been the subject of an action brought by the Commission under Article 169 of the Treaty and of a finding of an infringement by the Court. Rights arising for individuals out of Community provisions having direct effect in the domestic legal systems of the Member States cannot depend on the Commission's assessment of the expediency of taking action against a

55 — See above, points 48 and 66.

56 — Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, on the question of the conditions governing the liability of a Member State for damage caused to individuals by breaches of Community law attributable to it.

Member State pursuant to Article 169 of the Treaty or on the delivery by the Court of any judgment finding an infringement' (paragraph 95).

76. In that light, the position of the Court of First Instance, as set out in paragraph 49 of the judgment under appeal, is wholly in conformity with the principle of the effectiveness of Community law, but gives rise to questions as regards the consequences for the Commission in respect of the monitoring which it is entrusted by the Treaty to carry out of the compatibility of national measures with Community law.

(2) *Observations to cover the eventuality of the interpretative approach in paragraph 49 of the judgment under appeal not being upheld*

77. For the sake of completeness, I consider it expedient to examine the judgment under appeal again on the hypothesis that the above approach to the interpretation of Articles 85 and 86 is not adopted. I consider that the operative part is correct, even with different, less ambitious, reasoning, and even if the general interpretative principle of paragraph 49 as well as the references to the Article 90 procedure pending before the Commission are ignored.

78. The starting point for settling the dispute remains, of course, examination of the content of the Commission's original contested decision finally rejecting Ladbroke's complaint with regard to the claims concerning infringement of Articles 85 and 86 of the Treaty by the French PMU and a number of *sociétés de courses*. In accordance with the foregoing, the reasoning of the contested decision, at least with regard to Ladbroke's claim concerning unlawful collaboration between the ten most important *sociétés de courses* in France and between them and the PMU, is based at least in part on references to the regulatory framework in force in France governing the market in bet-taking in that country. The Commission relies on the effects of the French domestic legislation on the market in bet-taking and maintains that there is no Community interest on that ground in a finding of a possible infringement by the *sociétés de courses* inasmuch as, in any case, free competition is not impeded by any conduct on the part of undertakings but by the State measures in force.

79. I would point out here that that French legislation might theoretically be of concern

to Community competition law on two different grounds. On the one hand, in so far as it relates to undertakings to which special or exclusive rights have been granted, it is governed by the terms of Article 90 of the Treaty. On the other hand, in so far as it applies to undertakings other than those referred to in Article 90, it falls within the scope of application of Articles 85 and 86 if it renders those provisions ineffective, in accordance with what was held in the above-cited judgment in *Meng*. [57]

80. At all events, it can be concluded from the finding in the Commission's contested decision that the assessment of that national legislation is of fundamental importance for an understanding of the competition issue raised in the complaint in question. Also, should it ultimately be found that the national rules render Articles 85 and 86 ineffective, when, in accordance with *Meng*, [58] they fall within the scope of application of those articles, it might be necessary to examine whether that finding is of significance for the treatment, pursuant to Articles 85 and 86 of the Treaty, of undertakings that have complied with the French legislation in question. That requirement is admitted directly by the Commission in the observations which it submitted on the first ground of appeal of the French Government. [59]

81. As the Court of First Instance rightly held, the analysis in the Commission's decision is inadequate as regards that issue. There is merely a reference to the role played by the national legislation in the market in horse-race bet-taking, without sufficient explanation of the relationship of that legislation to the conduct of the undertakings under investigation; moreover the legislation is not examined in the light of Articles 85 and 86 in conjunction with Article 5 of the Treaty, and it is not made clear whether or not that legislation falls into the category of legislation rendering those provisions ineffective. [60] The Commission's contention that, because of the particular difficulties of assessing the legislation in question, it was unable for so many years to reach a decision, on the legal basis of Article 90, on the compatibility of those State measures with Community competition law, but was able adequately to assess the same legislation from the Articles 85 and 86 angle, taking refuge in the succinct findings of the contested decision, is logically inconsistent. [61] In consequence, the Commission's reasoning by which it finally rejected Ladbroke's complaint inasmuch as it concerns the alleged infringements of Articles 85 and 86, is inadequate and accordingly the decision was properly annulled. As the

57 — See footnote 15 above.

58 — See footnote 15 above.

59 — See point 21 above.

60 — The Commission's analysis of the French legislation (point 6 of the contested decision) confines itself to the finding that the 1974 Decree cannot be regarded as legitimizing pre-existing agreements or concerted practices on the part of the *sociétés de courses*, because they were imposed by the French Decree of 1930.

61 — It is not, moreover, for the Court of Justice or the Court of First Instance to replace or to supplement the reasoning of the contested decision. Consequently the observations of the Commission's agents during the written and oral procedure, according to which the French legislation in question does not fall within the category of legislation which renders Articles 85 and 86 ineffective, are to no avail. That finding should have been clearly apparent and duly reasoned in the contested decision, by way of a special examination of the domestic regulatory framework in the light of Articles 85 and 86. In other words the contested decision does not deal, in the necessary depth, with that legal issue, the importance and difficulty of which, however, were expressly recognized when the Commission was called upon to study the same legislation in the light of Article 90.

Court of First Instance expressly emphasized, the Commission did not carry out its duty to examine carefully the factual and legal issues brought to its attention by the complainant [62] and its final decision did not satisfy the requirements of certainty and thoroughness laid down in case-law. [63]

82. Even on that reasoning, of course, the solution reached in the judgment under appeal is not fully consistent with the case-law or, at least, with the usual interpretation given to that case-law. On the one hand doubt is indirectly cast on the rule of interpretation which takes as its starting point the *Suiker Unie* judgment and according to which there is no infringement of Articles 85 and 86 of the Treaty on the part of undertakings where their conduct is wholly dictated by mandatory national measures. [64] On the other hand — and that is, in my view, more important — the criteria in the case-law regarding the conditions under which national rules render Articles 85 and 86 ineffective and consequently fall within the scope of application of those articles henceforth bind the Commission in the exercise of the examination which it carries out pursuant to Articles 85 and 86 on the conduct of undertakings. [65]

83. In the final analysis, I consider that that solution is the more appropriate, since it ascribes to the provisions of Articles 85 and 86 the appropriate binding force [66] and is also required by the fundamental principle of the effectiveness of Community law. In consequence, even if the reasoning were to be amended and supplemented as indicated above, the judgment under appeal reached the correct solution, and the grounds of appeal should be rejected.

62 — See Case T-24/90 *Automec*, cited in footnote 16, and Case T-114/92 *BEMIM* [1995] ECR II-147, paragraphs 47 to 57.

63 — See paragraph 50 of the judgment under appeal, where further references are made to case-law.

64 — What use, moreover, would an investigation of the compatibility with Community law of the French legislation on bet-taking serve, if a finding of its binding nature as regards the conduct of the undertakings was sufficient to exempt the latter from application of Articles 85 and 86?

65 — It should be noted that those criteria in the case-law, as reproduced in the above-cited judgment in *Meng*, have been formulated by the Court in the context of replies to references for a preliminary ruling; in other words, these were cases where review of the national legislation on the basis of Articles 85 and 86 would be carried out by the national court and not by the Commission. When the latter examines the conduct of undertakings pursuant to those articles, it concentrates its review on that conduct. Similarly, where the Court of Justice is called upon to review decisions of the Commission pursuant to Regulation No 17, it confines itself to matters concerning the activity of the undertakings and assesses national legislation solely in order to ascertain whether that conduct was dictated and not in order to ascertain whether the legislation is in conformity with the Community rules.
On the reasoning I have set out above, the Commission is called upon to decide whether the French legislation in question renders Articles 85 and 86 ineffective in the context of the examination which it carries out of the conduct of the undertakings. That is to say, the Commission is required to reach an incidental finding as to the compatibility of the national legislation with Community law; consequently the views set out in point 71 et seq. of this Opinion apply to that situation as well. However, there is a difference, in that that incidental finding does not cover all the State measures which might restrict competition (as the general formulation in paragraph 49 of the judgment under appeal would suggest) but solely those national rules which render Articles 85 and 86 ineffective, as was held by the Court of Justice in the above-cited judgments *INNO* and *Meng*. In other words, the present approach simply reinforces and extends, in my opinion rightly, application of that case-law.

66 — The balance is now towards stricter application of Articles 85 and 86 of the Treaty, at the expense of national legislation. See Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Metropole Television and Others* [1996] ECR II-649, concerning the conditions in which an activity may be exempted from the scope of application of Article 85 as constituting 'a special service of public interest'. Also, as mentioned above (see footnote 54), there is a serious problem as regards the need to restrict the Commission's discretion in relation to the powers which it has been granted by Community competition law even where their exercise is likely to bring the Commission into conflict with a Member State.

V — Conclusion

84. In view of all the foregoing I would propose that the Court:

(1) dismiss all the heads of appeal put forward by the Commission and the French Republic in their entirety;

(2) order the appellants to pay the costs.