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 appeal brought by the Belgian company Tiercé Ladbroke SA (hereinafter 'Ladbroke'), 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 dismissed the action brought by the appellant company pursuant to Article 173 of the EC Treaty (hereinafter 'the Treaty') for the annulment of the Commission's decision of 18 January 1993. By that decision Ladbroke's complaint (IV/34.013) under Articles 92 and 93 of the Treaty concerning the conditions under which bets were placed in France on Belgian horse-races was rejected.

I — Facts and procedure

1. The facts of the case to be examined are described at length in paragraphs 1 to 23 of the judgment under appeal, to which I would refer the Court. In this appeal it is sufficient to recall as follows: On 18 March 1991, the French *Pari Mutuel Urbain* (hereinafter 'the French PMU') [2] and the Belgian *Pari Mutuel Unifié Belge* (hereinafter 'the Belgian PMU') [3] entered into an agreement under which the French PMU is authorized to take, on the latter's behalf, bets in France on Belgian horse-races.

2. That agreement was made against the background of the French legislation then in force including Finance Law No 64-1279 of 23 December 1964 for 1965. Article 15(3) thereof provides that the *sociétés de courses* authorized to organize off-course totalizator [4] betting may be empowered to collect bets placed in France on foreign races. The bets taken are to be centralized and incorporated in the pool to be distributed in accordance with the rules applicable to the body or bodies responsible for operating totalizator betting in the country concerned. That article further provides that the bets thus collected are to be subject to the statutory and fiscal levies in force in the country in which the race is organized; the proceeds of

* Original language: Greek.

1 — Case T-471/93 *Tiercé Ladbroke* v *Commission* [1995] ECR II-2537.

2 — This is an economic interest grouping with exclusive responsibility for organizing off-course *pari mutuel* (totalizator) betting in France. See also footnote 4 of my Opinion of today's date in Joined Cases C-359/95 P and C-379/95 P *Commission and French Republic* v *Ladbroke Racing*.

3 — The object of this association is the joint organization of the taking of bets on Belgian horse races and it was given the exclusive mandate to organize off-course totalizator betting on those races.

4 — For the nature of totalizator betting, see footnote 2 of my Opinion in Joined Cases C-359/95 P and C-379/95 P.

those levies are to be apportioned between the country in which the bets are collected and the country in which the race takes place. Such apportionment may include a special portion to cover administrative costs.

3. In France, the aggregate rates of the various statutory and fiscal levies which may be imposed on amounts staked on horse-races may not exceed 30% by virtue of Article 18 of the 1967 Finance Law. In Belgium, such levies on the proceeds of bets placed on horse-races may, in contrast, be up to a maximum of 35%.

4. Against the background of those legislative provisions, the abovementioned agreement between the French PMU and the Belgian PMU provided that the levy on the proceeds of bets taken in France on Belgian horse-races, at the rate of 35%, was to be apportioned according to a system which takes account of actual turnover. For that purpose, the agreement provides for four cases according to turnover. The first case relates to turnover under FF 50 million, in respect of which the French public recipients receive 6.386% of the levy and the Belgian party 23.114%. The second case relates to turnover between FF 50 and 75 million, in respect of which the French share rises to 10.817% and the Belgian share falls to 16.183%. The third case relates to turnover between FF 75 and 100 million, in respect of which the French share reaches 15.238% and the Belgian share 9.762%. Finally, for turnover above FF 100 million the Belgian share falls to 5.602% and that of the French authorities rises to 19.169%.

5. On 12 July 1991, Ladbroke, which carries on business as a bookmaker, taking bets at fixed odds (*pari à la cote*) in Belgium on horse-races run abroad, lodged a complaint with the Commission against the French PMU, the Belgian PMU and the French Republic pursuant *inter alia* to Articles 92 and 93 of the Treaty. By that complaint Ladbroke requested the Commission to find that the said agreement made on 18 March 1991 between the French PMU and the Belgian PMU entailed the provision by France of unlawful State aid to the Belgian PMU, which at all events had not been notified to the Commission. According to Ladbroke, the fact that the French State, the French PMU and the *sociétés de courses* retain only 9% of the levy on amounts staked on Belgian races and not 28%, as is the case for the levy on amounts staked on French races, entails fiscal treatment which, since it involves a charge on the French State and a profit for its recipient, the Belgian PMU, constitutes unlawful State aid for the Belgian PMU.

6. The part of Ladbroke's complaint concerning unlawful State aid was rejected by the Commission's decision of 18 January 1993 on the ground that the abovementioned agreement between the two PMUs contained

no aid within the meaning of Article 92(1) of the Treaty. [5]

7. As stated above, on 22 March 1993 Ladbroke brought an action before the Court of First Instance challenging that Commission decision. Ladbroke's action was dismissed on 18 September 1995 by judgment of the Court of First Instance in Case T-471/93.

8. On 17 November 1995 the present appeal was lodged against that judgment, asking that it be set aside and the respondent Commission's original decision of rejection annulled and that the Commission be ordered to pay all the costs. For its part, the Commission asks to the Court to dismiss the appeal and order the appellant to pay the costs. As it did at first instance, the French Government intervened in support of the Commission.

II — Ground of appeal

9. The appellant claims that the judgment under appeal should be set aside because the Court of First Instance failed to examine its arguments as set out in paragraphs 35 to 36 of that judgment. According to Ladbroke, the ground of the judgment of the Court of First Instance, according to which examination of the arguments in question was not necessary since the Belgian PMU gained no commercial advantage in any case from the agreement of 18 March 1991 and hence no State aid was involved, is erroneous. The error of law committed by the Court of First Instance, in the appellant's view, lies in its assessment that there was no commercial advantage for the Belgian PMU.

5 — According to the decision, the levy on the proceeds of betting on horse-races cannot be termed a *tax*: on the one hand it is itself subject to public deductions of a fiscal nature; on the other hand in France, as in Belgium, the levy varies depending on a number of factors, including the place where the race is organized and its allocation to different funds, such as the fund for horse-breeding establishments or the national fund for the development of water supply and the general budget.
According to the decision it would also be *inappropriate* to subject the 35% levy on bets taken in France on Belgian races to a public retention of the order of 18% as applies to bets on French races; that French public retention includes 'exclusively French' contributions, such as contributions to the French horse-breeding fund (from 1.86% to 3.36%) and VAT of 22% calculated on the proportion of the levy going to the French *sociétés de courses*. Consequently, the French public retention of 18% could not be applied in its entirety to the 35% levy on bets on Belgian races, but only to the portion remaining after deduction of the exclusively French contributions, which come to some 5%. The French public retention therefore falls to less than 13% of bets taken on Belgian races so that it is close to the French public retention of 6.4% imposed during the period in question on the 35% levy applied to the proceeds of bets taken in France on Belgian races.
Furthermore, according to the Commission, the share of the levy which accrues to the Belgian PMU is almost the same whether the bet is collected in France or in Belgium. If the bets on Belgian races were taken in Belgium, the Belgian PMU's share would amount, depending on the region, to between 25% and 28%, less 5.5% operating costs, which would give a share of between 19.5% and 22.5% as against 23.114% when the bets are taken in France. Deducting from that 23.114% the Belgian PMU's additional expenses (advertising, prizes and information costs) attributable to taking bets outside the national Belgian territory demonstrates that for bets taken in France on Belgian races the Belgian PMU receives a share which is broadly equivalent to the share it would receive if it collected the bets on Belgian races itself.
Finally, according to the decision, the agreement between the two PMUs considered as a whole appears to be advantageous to the Belgian PMU only during its initial phase, concerning turnover of less than FF 50 million. The opposite is the case in the later phases, where, with increased turnover, the Belgian PMU's share of the levy decreases significantly.
At all events, in its decision the Commission reserves the right to review the agreement after a period of four years and requests the French authorities to submit an annual report on how the terms of the agreement between the two PMUs are being implemented in practice.

A — *Arguments of the parties*

10. Ladbroke's submissions comprise of four limbs, corresponding to the grounds put forward by the Court of First Instance for reaching the conclusion that the agreement in question did not involve the grant of any advantage to the Belgian PMU. The Commission and the French Government reply to those submissions in turn.

(1) First limb of the ground of appeal

11. The appellant challenges paragraph 58 of the judgment under appeal, which reads as follows:

'The Court considers that that argument of the applicant is not by itself such as to put in question the Commission's assessment. With regard, first, to the revenue realized in France by the Belgian PMU, even if, as the applicant claims, without the agreement at issue between the two PMUs the bets concerned would not have been placed, the revenue deriving therefrom for the Belgian PMU could still not be regarded as aid within the meaning of Article 92(1) of the Treaty. The opening of the French market in taking bets on horse-races, enabling the Belgian PMU to gain access, through the French PMU, to French betters and to increase its revenue by the amounts they stake, is a choice made by the French legislature concerning the organization of the national market in taking bets on horse-races and the arrangements for the exercise by the French PMU of its exclusive rights under the national legislation on taking bets on foreign horse-races (see above, paragraph 1). Consequently, the choice made by the French legislature which permitted the agreement at issue between the two PMUs to be made cannot in itself be impugned as contrary to Article 92(1) of the Treaty solely because application of the agreement at issue may have the effect of increasing the revenue not only of the French PMU on foreign races but also of the Belgian PMU on bets on horse-races run in Belgium which are normally taken by it directly.'

12. Although it does not question the fact that a Member State may allow a foreign undertaking access to its market, Ladbroke maintains that the commercial benefit obtained by that undertaking from access to the market may be regarded as State aid where it is equivalent to an advantage conferred directly by the State or by a transfer of funds to that undertaking from another source at the instigation of the State. [6] In such circumstances, according to Ladbroke's reasoning, those benefits are presumed to constitute State aid unless it is shown that they are reciprocal in character and constitute the normal payment for services rendered by that foreign undertaking. For that

6 — Ladbroke refers to the judgment in Case 78/76 *Steinike und Weinlig* v *Germany* [1977] ECR 595.

reason, the Court of First Instance erred, since it failed to examine the following: first, on the one hand whether the share of the levy on bets paid to the Belgian PMU arose as a result of a compulsory levy provided for by the rules of French public law and, on the other hand, whether the revenue of the Belgian PMU arose from transfers of funds. Secondly, if the reply to the first question is in the affirmative, what share, if any, of that revenue could be said to be payment for services rendered by the Belgian PMU to the French PMU. Should the Court find that the Court of First Instance erred in the above failure, the appellant considers that the judgment under appeal is wrong in law and there is no need to examine the other grounds contained in the appeal.

13. The Commission contends that the levy in question does not constitute a 'State resource'. It constitutes merely the residue which the totalizator operator must distribute to winning punters. [7] According to the Commission, it is only the specific and general taxes payable by the totalizator operator which can be termed State resources. The respondent also contends that the Court of First Instance rightly held that the levy in question does not constitute a compulsory tax provided for by the rules of French law as regards the Belgian PMU. According to the Commission, bets are collected in France on behalf of the Belgian PMU and the levy is deducted by the Belgian PMU on the basis of the relevant Belgian provisions, not under the French legal system. Moreover, the Commission emphasizes that it is not the Belgian PMU which is providing a service to the French PMU; rather it is the French PMU which, by collecting bets, provides a service to the Belgian PMU for which it receives a commission of 5.5%.

For its part, the French Government emphasizes the special features of the French system for organizing bet-taking. By law no profit may be sought on bet-taking, but the aim is to collect resources for the general improvement of horse-breeding. It is also pointed out that the appellant's above arguments cannot cast doubt on the correctness of the judgment of the Court of First Instance under appeal, for which, according to the French Government adequate reasons are given, because in the present case no State aid from the French State to the Belgian PMU is involved.

(2) Second limb of the ground of appeal

14. Ladbroke's submissions under point (ii) of its appeal are directed against paragraph 59 of the judgment under appeal. That paragraph reads as follows:

'With regard, secondly, to the applicant's argument criticizing the fact that the two

7 — The Commission points out that that levy is not fixed but, under the provisions of Belgian law, could be determined at a percentage less than the present 35%.

bets are not treated in France in the same way, even if it is accepted that the applicant, which does not operate on the French market in taking bets on horse-races, can complain about the grant to a third party of an advantage due to a difference in fiscal treatment which could in fact affect only those authorized to operate on that market and hence in this case the French PMU, the Court considers that that argument likewise cannot put in question the validity of the Commission's assessment that the revenue ultimately received by the Belgian PMU on the levy concerned under the agreement at issue is equal to the revenue which it would receive on that levy if the bets on Belgian races were taken directly by it. In the absence of any evidence adduced by the applicant in its complaint or in the proceedings before the Court demonstrating that in comparing the rates of revenue realized by the Belgian PMU in France and in Belgium the Commission committed a manifest error in its findings of fact or in its assessment of the data relating to the rates of the various retentions and taxes on the levies which are imposed in Belgium and in France on amounts staked on horse-races run in Belgium, the Court considers that the contested decision, by assuming that the Belgian PMU draws no real advantage from the application of the agreement at issue, is not the result of an erroneous assessment justifying its annulment (see the judgments of the Court of Justice in Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraphs 12 and 13; Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 45; Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 40 and Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 29).'

15. The appellant maintains that the Court of First Instance should not have investigated whether the Commission committed an obvious error as regards the finding of the facts [8] but whether the Commission applied Article 92(1) of the Treaty properly to the case under examination. As regards the interpretation of that provision, Ladbroke considers that the Commission has no discretion on the issue justifying an investigation as to whether or not it committed a manifest error in its assessment.

According to the appellant, to compare the amounts received by the Belgian PMU on bets placed in France in respect of races on Belgian territory with the corresponding amounts which would be received if, for the same races, those bets had been placed in Belgium, is wrong in law. The comparison should properly have been between the levies on bets placed in France in respect of races outside France and levies on bets placed in France in respect of races on French territory. In accordance with Ladbroke's argument, if a Member State asserts jurisdiction over a particular economic activity, [9] it is bound to subject that activity, as a whole, to the same system. [10]

16. For their part, the Commission and the French Government contend that comparison between the revenue of the Belgian

8 — Ladbroke stresses that its complaints do not relate to the findings of fact but to the question of law concerning the correct interpretation of Article 92(1) of the Treaty and hence are admissibly put forward in the appeal.

9 — State involvement may take the form of taxation or imposition of levies of another type.

10 — The appellant relies on Case 173/73 *Italy* v *Commission* [1974] ECR 709, from which it concludes that a Member State may not, under Community law, justify an advantage granted to a particular undertaking on the ground that that commercial advantage is intended to put the undertaking into the same legal and factual position as it would have been in if that undertaking had engaged in the same economic activity in another Member State.

PMU in Belgium and in France constitutes the correct criterion for the application, in the present case, of Article 92(1) of the Treaty. They point out, further, that since the economics of horse-racing and totalizator betting display substantial differences, it is not compulsory for the revenue from bets placed in France relating to French and Belgian races to be subject to exactly the same tax treatment.

alleged by Ladbroke in its complaint, should be examined by taking into account the fact that the treatment of the levy accruing in France to the Belgian PMU would normally be subject to statutory and fiscal retentions, which would have meant that the Belgian PMU would receive a share of that levy equivalent to the share which would in principle accrue to it in the country in which the horse races concerned are run, namely Belgium.'

(3) Third limb of the ground of appeal

17. The appellant casts doubt on the correctness of paragraph 60 of the judgment under appeal, which reads as follows:

'It must also be added that in comparing, for the purposes of examining whether there is any real advantage to the Belgian PMU, the revenue realized by the PMU in France with that which it would realize in itself taking bets on Belgian races, the Commission cannot be regarded as committing an error of law with regard to Article 92(1) of the Treaty. According to Article 15(3) of the French Finance Law for 1965, cited above (see above, paragraph 4), allowing bets to be placed in France on races run abroad, the bets so collected are subject to the statutory and fiscal levies in force in the country in which the races are organized. The Commission was accordingly entitled to consider that the existence of any advantage, as

18. According to the appellant, the Court of First Instance does not explain why the Commission was correct in basing itself on Article 15 of the French Finance Law for 1965. Ladbroke points out that the question whether a national measure constitutes State aid should be decided on the basis of Community law, not national legislation. Consequently, it is not sufficient to rely on the content of provisions of the said French law as the basis for considering that the difference between treatment of the revenues of the French and Belgian PMUs falls outside the scope of Article 92 of the Treaty.

19. The Commission replies that in so far as the allegation in the complaint concerned State aid by way of exceptional tax arrangements, it was necessary to examine the fiscal system applicable in France in order to determine whether the derogations from that system in fact constituted State aid.

(4) Fourth limb of the ground of appeal

20. Under this point, the appellant's arguments cast doubt on the correctness of paragraph 62 of the judgment under appeal, which states that:

'The way in which the levy on bets on Belgian races is treated in France, whereby, the Belgian PMU receives a share of that levy comparable to the share which would accrue to it upon application of the Belgian statutory and fiscal retentions, in accordance with the abovementioned provisions of Article 15 of the French Finance Law for 1965, cannot constitute a State aid mechanism, since such treatment does not constitute a measure which derogates from the scheme of the general system but on the contrary accords with the general system, the main feature of which is, precisely, that amounts staked on races run abroad are subject to the statutory and fiscal retentions of each country in which the horse-races concerned are run.'

21. The appellant maintains that, contrary to the finding of the Court of First Instance, the general system of statutory levies on totalizator betting in France must be regarded as that governing the French PMU in respect of bet-taking on races run in France. Moreover, prior to the entry into force of French Decree No 91-118, Article 15 of the French Finance Law for 1965 had not in fact been applied. The only and hence general system of levies was that concerning races on French territory. Consequently, concludes Ladbroke, a new regime of levies different from that governing French races, which was introduced in 1991, does not mean that the different regime becomes the 'general system', particularly when it applies to only one undertaking. [11] Further, the appellant accepts that a Member State is entitled to grant double taxation relief in order to ensure that a cross-border activity does not suffer higher taxation than an equivalent activity performed exclusively within the territory of one Member State. Nevertheless, the difference between the tax treatment of bets placed in France on French races and that of equivalent bets placed in France on Belgian races cannot be regarded as double taxation relief since the Belgian authorities do not claim any tax on the revenue of the Belgian PMU from bets placed in France.

22. The Commission and the French Government contend that French Decree No 91-118 follows the general system laid down by Article 15(III) of the French Finance Law for 1965. That article lays down the general principles governing the organization of totalizator betting, in accordance with which all bets are pooled by a single operator and the proceeds distributed on an equal basis to all winning punters. Compliance with those principles implies that the regulatory and fiscal provisions relating to the operation of the totalizator should be the same, at least as far as the winners are concerned, for all bets.

11 — The appellant refers to the judgment in Joined Cases 6/69 and 11/69 *Commission* v *France* [1969] ECR 523.

Consequently, all bets on races must be subject to the regulatory and fiscal provisions of the Member State in which the totalizator (and therefore the races) are organized and where most of its customers are by inference located. French Decree No 91-118 follows the guideline principles of that general system. Moreover, according to the Commission, the fact that the Belgian PMU is the sole totalizator undertaking to which the rules of Article 15 of the French Finance Law for 1965 apply — precisely because Belgian races are the sole races outside French territory in respect of which bets may be placed in France through the French PMU — does not mean that the system under which it falls is contrary to the general system described above.

Lastly, the Commission considers that Ladbroke's arguments on this point are contradictory. While Ladbroke accepts that the reason for double taxation relief is to ensure that a cross-border activity should suffer no higher taxation than an equivalent activity performed exclusively within the territory of one Member State, it refuses to accept that similar relief was correctly enacted in this case. In the Commission's view, the French system of taxing the Belgian PMU does no more than ensure the same tax treatment to that undertaking as it would receive if bets had been placed in Belgium rather than in France.

B — *My reply to the above arguments*

23. Article 92(1) of the Treaty provides: 'Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.' Consequently, in principle aid which has the following three cumulative features is prohibited: it must originate from the State, it must consist in favouring one or more undertakings, and it must distort or threaten to distort competition. In this case the Court of First Instance held that rejection of the complaint submitted by Ladbroke to the Commission was perfectly lawful, because the evidence produced did not disclose favourable treatment of the Belgian PMU, the subject of the complaint, on the part of the French State.

24. It should be pointed out, first of all, that the ground of appeal put forward by Ladbroke concerns a pure question of law, and is accordingly admissible. [12] It should also be emphasized that that question presents a

12 — It cannot, moreover, be maintained that that same question was raised before the Court of First Instance which alone may appraise the facts and hence, when submitted as a ground of appeal, is inadmissibly confusing the Court's jurisdiction to set aside a judgment with second instance review (see the orders in Case C-19/95 P *San Marco* v *Commission* [1996] ECR I-4453, paragraphs 36 to 39 and Case C-293/95 P *Odigitria* v *Council and Commission* [1996] ECR I-6129, paragraphs 44 and 45). The appellant does employ, in the appeal proceedings, a number of the legal arguments on which it relied before the Court of First Instance, but no longer to support its claims as to the illegality of the original contested Commission decision, but in order to found its ground of appeal alleging exclusively errors in the judgment under appeal. Consequently those arguments are admissible.

number of difficulties, precisely because of the particular nature of the factual and legal circumstances of the present case. It is worth stressing the following points.

25. First, in the case in point the question arises whether and under what conditions there may be aid from a Member State to an undertaking from another Member State. It could be argued that such a form of aid is inconceivable, in so far as it is not, in principle, likely that a Member State would wish to achieve unlawful favourable treatment of foreign undertakings at the expense of equivalent domestic undertakings. [13] Nevertheless, according to the letter of the law, the prohibition of State aid laid down in the Treaty does not depend on a stipulation of nationality of that kind. Furthermore, that prohibition has an objective character; it refers to 'aid ... which distorts or threatens to distort competition by favouring certain undertakings ...' [14] regardless whether that distortion is intended or not by the Member State. [15] Consequently a case of State aid to an undertaking governed by foreign law and interests is, theoretically at least, perfectly possible.

26. Secondly, doubts as regards the legality of the complaint by Ladbroke at issue might arise from the fact that the complainant is a company, incorporated under Belgian law, operating in Belgium and not on the French market in bet-taking which is the relevant market in the present case and the market to which the complainant does not have access and in which it has no equivalent interests. Consequently, it may be doubted whether a company is entitled to object to the favourable fiscal treatment of a third party which, at first sight, may affect the interests only of such undertakings as are authorized to exercise the same activity as the company alleged to be receiving favourable treatment and not those of the complainant. The Court of First Instance referred to the problem in paragraph 59 of the judgment under appeal, but was not required to give its view on it. It would have been more logical, if in fact the Belgian PMU is subject to unlawful favourable taxation in relation to those operators exercising the same activity in France, for the latter, as those directly harmed, to submit the question to the Commission, rather than Ladbroke, which does not operate on the French market.

In the context, at all events, of the breadth of interpretation with which the subject of State aid has been treated by the Court of Justice, [16] I consider that Ladbroke was properly not deprived of the right to submit the complaint in question, in reliance on the albeit indirect consequences as regards its financial position brought about by the agreement of 18 March 1991 between the French and Belgian PMUs. By way of the

13 — In fact by that provision the Community legislature intended to preclude Member States from giving aid to undertakings of the same nationality in the context of the development of statist and interventionist economies. The risk of distortion of competition in the initial years of the EEC arose principally, if not exclusively, from aid from that source.

14 — Article 92(1) of the Treaty.

15 — In Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 8, the Court held that Article 92 of the Treaty '... does not ... distinguish between the measures of State intervention concerned by references to their causes or their aims but defines them in relation to their effects'. See also Case 173/73 *Italy* v *Commission* [1974] ECR 709 and Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809.

16 — The Community judicature has repeatedly emphasized that the prohibition in Article 92 is aimed at State aid in any form whatsoever. See, for instance, Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraphs 31 and 32; Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433.

prohibition in Article 92, the Treaty aims to prevent any risk of distortion of competition, whether occurring within the market of the Member State which has taken steps to grant unlawful aid or outside that market, as in this case. Consequently, a case of distortion of competition to the detriment of a Belgian undertaking falls within the scope of that article because of the indirect and unlawful strengthening on the Belgian market of another Belgian company, where the aid to the latter is brought about through the more favourable treatment of that company on the part of France on the French market as compared with the other companies operating on that market, although the complainant undertaking which claims to have suffered harm is not, nor could be, one of those companies.

On the subject of the errors alleged by the appellant to have been made by the Court of First Instance in its judgment, I would make the following observations:

(1) First limb of the ground of appeal

27. First of all Ladbroke submitted before the Court of First Instance [17] that when it examined the complaint the Commission should first have investigated whether the financial benefit derived by the Belgian PMU from its participation in the French market consisting in a certain percentage on the levies on bets taken came ultimately from 'State resources'. If that was the case, it should, according to Ladbroke, have given rise to a presumption that State aid had been given unless it was shown that the amounts received by the Belgian PMU were in the nature of consideration, in other words constituted compensation for services provided. Ladbroke maintains that that was also the only correct way to deal with the evidence in the complaint which the Commission failed to do, and for that reason its decision should have been annulled. Consequently, inasmuch as the Court of First Instance did not answer that important claim, its judgment should, according to Ladbroke, be set aside.

28. I consider that claim to be fruitless. For a finding of State aid, it is necessary to show, first, an economic advantage for the company aided and, secondly, the benefit received must come from the State or from State resources. That evidence is required to be cumulative. Consequently, the Court of First Instance rightly found that the Commission was entitled to found its rejection of the complaint solely on the reasoning that the undertaking alleged to have received aid did not obtain favourable treatment. [18] At all events it was possible for the negative position taken by the Commission with regard to the complaint to be founded exclusively on the absence of one of the cumulative prerequisites for a finding of State aid. Consequently, there was no need for an extensive analysis of the legal nature of the amounts received by the Belgian PMU as its share of

17 — Paragraphs 35 and 36 of the judgment under appeal.

18 — See, for instance, Joined Cases C-72/91 and C-73/91 *Sloman Neptun Schiffahrts* [1993] ECR I-887, in which it was held that where there is no particular advantage paid from State resources there cannot be State aid (paragraphs 21 and 22).

the levies on bets as regards whether they constituted a 'State resource', whether, in other words, they came from a compulsory charge provided for under the rules of French public law, a share of which is transmitted directly to the Belgian PMU; [19] the Commission could adequately found its rejection of the complaint on the absence of favourable treatment of the Belgian PMU on the part of France, provided, of course, that the reasoning in question is lawful and adequate. As a logical consequence, inasmuch as the Court of First Instance found that the reasoning in question displayed the necessary evidence of lawfulness and adequacy, it properly did not carry out a specific examination of the other abovementioned claims submitted by Ladbroke, unless its finding on the legal issue as to whether or not there had been favourable treatment of the Belgian PMU is wrong in law, which is a question I shall now proceed to examine.

(2) Other limbs of the ground of appeal

29. From paragraphs 59 to 62 of the judgment under appeal, properly interpreted, the following can be concluded: the Court of First Instance considers that the reasoning relied upon by the Commission, according to which there was no favourable treatment of the Belgian PMU because the revenue received on bets taken in France, in application of the agreement at issue, was equal to the revenue which it would receive if it had itself taken the bets in question on Belgian horse-races, was in keeping with the letter and spirit of Article 92(1) of the Treaty. The Court of First Instance took the view that that was the appropriate criterion for ascertaining whether or not there was a real benefit to the Belgian PMU given the fact that the French legislation in force had provided as a general rule that bets on horse-races run abroad were subject to the same statutory and fiscal retentions in force in the country in which the races were organized. Consequently the agreement in question could not be regarded as providing an advantage, because it does not diverge from the scheme of the general system set up by the French legislature to govern bets taken in France 'but on the contrary accords with the general system, the main feature of which is, precisely, that amounts staked on races run abroad are subject to the statutory and fiscal retentions of each country in which the horse-races concerned are run'. [20] That reasoning cannot, according to the Court of First Instance, be called into question by the fact that bets taken in France on Belgian horse-races and bets taken there on horse-races run on French territory do not receive the same treatment under French law but are subject to a different level of statutory and fiscal retentions.

30. It should be pointed out, first, that the formulation of the rule relating to

19 — Moreover, the Commission observes correctly in its contested decision, as described in paragraph 14 of the judgment under appeal, that it would be wrong to regard the variations in the amounts collected by the French State from bets on French and Belgian races as the result of different tax treatment favouring the Belgian PMU; the levy on the proceeds of horse-races cannot be termed a tax, because it is itself subject to public deductions of a fiscal nature. Consequently, it cannot be maintained that by collecting a smaller share of the levy in the case of bets on Belgian horse-races than on bets on French horse-races the French State is automatically surrendering to the Belgian PMU an amount deriving from public revenue and from tax. For that reason, moreover, the appellant's argument that this case involves an issue parallel to that examined by the Court of Justice in the *Steinike* case (see footnote 6 above) cannot be accepted.

20 — Paragraph 62 of the judgment under appeal.

Article 92(1) is somewhat elliptical. Where the 'favouring' of an undertaking, or an economically-assessed advantage provided to it, is concerned, there is an implied precondition of comparison of the treatment of the undertaking alleged to be aided with the treatment accorded to other undertakings. In other words it is necessary to define the point of reference on which the comparison is made in order to ascertain whether there is an advantage.

There are two possible definitions which may be given to the term 'advantage' and in most cases they end up being synonymous. An advantage, as generally defined, may consist in the grant of a benefit other than the benefits which could be obtained in conditions of free competition. According to the other, perhaps safer method, favourable treatment may be sought in relation to the treatment accorded to those traders (competitors) who are in the same legal and factual position as the allegedly aided company and who carry on the same activity as it does. In that light, the prohibition of State aid appears as the result of the general principle of equality and the rule derived from it that a like rule should apply to like situations.

31. If, from a theoretical point of view, the above distinctions appear sufficiently clear, their application in practice, in cases such as this, is not self-evident. With what can the treatment of the Belgian PMU be ultimately compared in order to ascertain whether or not it is 'favourable'? The Court of First Instance followed the Commission and accepted comparison of the revenue of the Belgian PMU in France with its hypothetical revenue if the same bets had been taken in the place where the horse-races were run, that is to say, Belgium, as the criterion. Conversely, Ladbroke considers that the comparison should be made between the percentage of the levy going to the French State from bets on French horse-races with that from bets on Belgian horse-races. In other words the question arises as to which activity is ultimately like that carried on by the Belgian PMU on the French market in bet-taking, so as to ascertain whether the treatment of the Belgian PMU is more favourable than that accorded generally to that activity.

32. The Court of First Instance considers that that activity consists in the offer of totalizator betting on the French market for horse-races run abroad. That activity falls under the general rule formulated in the French legislation in question, according to which the retentions on bets on horse-races abroad are to be those laid down in the country in which the races in question are run. Consequently, inasmuch as the Court of First Instance did not find that the treatment of the Belgian PMU diverged from that general rule (because, as had been ascertained, the Belgian PMU received 23% of a bet placed on Belgian horse-races, which is more or less what it would receive if the bet had been placed in Belgium), it reached the conclusion that there was no 'favouring' of the undertaking in question.

33. I consider that the above comparison provides an indication that in the case in point the Belgian PMU did not receive favourable treatment. [21] Nevertheless I believe that the argument in question can easily be rebutted by the observation that the percentage going to the Belgian PMU pursuant to the agreement of 18 March 1991 is not stable but varies according to the overall level of the bets placed per annum. [22] Could it, therefore, be maintained that, in the hypothetical situations of bets exceeding FF 50, 75 or 100 million, when the percentage of the Belgian PMU's profit is significantly reduced, there is a divergence from the general system provided for by the French legislature and hence disadvantageous treatment of the Belgian PMU? Moreover, it is not, in my view, possible to accept that the inequality of the French public retentions on bets on French and on Belgian horse-races, as alleged by Ladbroke, is irrelevant in the present case because the Belgian PMU's revenue would be equally high if the same bet had been placed in Belgium. [23] Since the bets in question were placed on the French market, the argument that they are subject to a lower level of public retention than equivalent bets on French horse-races may, in certain circumstances, prove crucial for a finding of unlawful aid. At all events, if aid is not to fall under Article 92 of the Treaty, the difference in the level of public retentions must be justifiable; such justification cannot, in my opinion, be that following from a comparison of the revenue of the Belgian PMU in France and its (hypothetical) revenue in Belgium.

34. I therefore consider that the correct reply to the question of law raised should be sought elsewhere and not only by reference to the criterion followed by the Court of First Instance resulting from a comparison of the percentages taken by the Belgian PMU in France and in Belgium for the same horse-races and from the content of the French legislation in force, in particular Article 15 of the French Finance Law for 1965. [24] Consequently, the comparison made by the Commission and followed by the Court of First Instance between the amounts received by the Belgian PMU in France and the amounts which would be received had the bet been taken in Belgium does not constitute adequate reasoning from which it may be inferred that that company did not obtain favourable treatment from the French State.

21 — Similarly, in the contrary case, if the Belgian PMU's profit was higher in France than the profit it could hope to obtain in Belgium from exactly the same bet, that would simply be an indication that its treatment in France might fall within the prohibition of Article 92 of the Treaty.

22 — Moreover, the fact that that general system has been applied only once in practice, in the case of the Belgian PMU, can only detract from the weight of that argument.

23 — In fact the Court of First Instance did not examine that argument as to its substance. It states only: '... that argument likewise cannot put in question the validity of the Commission's assessment that the revenue ultimately received by the Belgian PMU on the levy concerned under the agreement at issue is equal to the revenue which it would receive on that levy if the bets on Belgian races were taken directly by it'.

24 — Totalizator betting, by its nature, requires the overall level of the levies on the proceeds of bets to be the same for all bets placed on the same horse-race. It would not therefore be possible, in respect of a race organized in Belgium, for all the bets placed in that country to be subject to a levy of the order of 35% and the corresponding bets in France to be subject to a levy of 30%, inasmuch as the special feature of the totalizator system consists precisely in the fact that the stakes constitute a common pool which, after various levies, is distributed to the winners. It would, therefore, be contrary to the rules of competition for the same bet on the same horse-race, to deal out a different level of winnings to the winners according to the country in which the bets were placed. That is the scheme of the general system to which the Court of First Instance refers, but it does not require the sharing out of the levy between the States and individual operators concerned in all the States in which bets are placed in exactly the same manner.

35. On the other hand, the correctness of the reasoning put forward by Ladbroke, using as the exclusive and absolute criterion comparison of the French public retentions on bets on French horse-races on the one hand and on Belgian races on the other must be examined. That reasoning is founded on the view that the offer to take bets on French horse-races constitutes the same activity as that of organizing bets on Belgian horse-races, and hence the statutory and fiscal regime applicable should be exactly the same. As bet-taking in France has been organized principally for horse-races on French territory (the opening of the market in Belgian horse-races constitutes the only exception) what applies to French horse-races should also be applied in the case of agreements between the French and Belgian PMU. Therefore where the French State clearly imposes smaller retentions on the profits of the Belgian PMU than it does on the French PMU in respect of bets on French horse-races, the appellant maintains that it is thereby giving aid to the Belgian PMU.

36. Although that argument does not lack a certain logic, I consider that it should not be followed in this case because it overlooks the special nature of bets on Belgian horse-races and their differences as compared with equivalent bets on French races. It advances, in my view, an exaggeratedly restricted theory of the regulatory role of State power, depriving it of discretion to adapt rules to the particular requirements of each situation. That is because, ultimately, the two categories of bets are not wholly the same; it cannot, accordingly be concluded that there is 'favouring' within the meaning of Article 92(1) of the Treaty arising from dissimilar regulation of dissimilar situations.

37. I consider, on that question, that the grounds on which the Commission rejected Ladbroke's complaint — and formulated in the contested Commission decision, as described in the judgment under appeal (paragraphs 14 to 18) — are lawful and sufficiently clear. In particular, the Commission correctly focused on the fact that, first, the system of retentions applicable to bets on French horse-races cannot be transposed to the case of bets on horse-races run in Belgium, because they comprise 'purely French' charges and retentions such as, for instance, those intended for the French fund for horse-breeding establishments. Moreover, the allocation of the levy between the operators entitled cannot take place as regards bets on French and Belgian horse-races on exactly the same basis, inasmuch as the level of the levy is not the same in those two cases. [25]

38. Consequently, although the Commission recognizes that there is a difference between the French public retentions on bets on French horse-races and those on bets on Belgian horse-races — a difference which, in

25 — As, moreover, was pointed out above (see footnotes 2 and 4), the difference on the overall percentage of the levy between bets on French and Belgian horse-races is required by the nature and particular features of the totalizator system which is the only system permitted for horse-racing bets in France.

any event, is not of the order maintained bythe complainant —, it rightly concluded that that difference is not *per se* sufficient to justify a finding of unlawful State aid in favour of the Belgian PMU. The decisive argument forming the basis of the rejection of the claims concerning State aid cannot, as stated above, [26] be that derived from a comparison between the profit of the Belgian PMU from a bet placed in France with the profit which would hypothetically be received if the same bet were made in Belgium. The abovementioned difference in the French public retentions is justified by the particular nature of bet-taking on horse-races run in Belgium in relation to bet-taking on French horse-races, but also by the fact that the agreement in question between the French and Belgian PMUs, regarded as a whole, does not result in conferring a clear advantage to the Belgian operator. In particular, as is clear from paragraph 17 of the judgment under appeal, the Commission examined the agreement as a whole and concluded that the advantage that appears to be conferred on the Belgian PMU in the initial phase of application of the agreement is removed in the following phases; moreover, where the turnover from the bets in question exceeds FF 100 million, the lion's share of the levy goes to the French State, and the percentage of that share on the whole bet (19.169%) exceeds the corresponding percentage on bets on French horse-races (13%). The Commission finds, in conclusion, that the agreement in question, regarded as a whole, is not unjustifiable or excessively favourable to one of its parties, that is to say, the Belgian PMU. In other words, the variation in the percentages of the levy allocated between those entitled may serve commercial and financial purposes which are directly bound up with the special nature of the agreement as described above, without benefiting the Belgian PMU unilaterally and beyond any contractual and commercial logic. [27]

39. In conclusion, the Commission rightly found, first, that the French public retentions should not and could not be exactly the same

26 — See points 33 and 34 above.

27 — In reality, in evaluating as a whole the agreement of 18 March 1991, the Commission found by implication that France, in authorizing the agreement itself or through the French PMU which it also controls, acted as an ordinary economic agent and did not confer a financial advantage on the Belgian PMU by renouncing the profit which it would normally have obtained. As is well known, the criterion of the 'ordinary economic agent' is frequently used by the Commission and the Community judicature for the purpose of deciding whether economic action originating from the State constitutes a disguised State aid. (See the above-cited judgments in Case 323/82 *Intermills* and C-303/88 *Italy* v *Commission*, and the particularly interesting analysis by the Court of First Instance in Case T-358/94 *Air France* v *Commission* [1996] ECR II-2109.)
I shall not enlarge upon the correctness of that position in detail. According to settled case-law, moreover, in reviewing an act of the Commission involving a complex economic appraisal, the Court 'must confine itself to verifying whether the Commission complied with the relevant rules governing procedure and the statement of reasons, whether the facts on which the contested finding was based have been accurately stated and whether there has been any manifest error or assessment or a misuse of powers' (Case 56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 11, with further references to the case-law.). It suffices simply to point out as follows:
The agreement at issue between the French and Belgian PMUs appears profitable both for those two companies and for the French State, which increases its revenue, albeit by a smaller percentage (in the first phase of the agreement) in relation to that received on French horse-races. In reality, the French State does not *ex post facto* tax betting on horse-races on French territory but contributes to the organization of the market in bet-taking, receiving directly a share of the stakes in addition to the relevant taxes. By the agreement in question it undertakes to introduce a new product onto the French horse-racing market, from which both the two PMUs and the French State could expect an increase in revenue. As long as that product has a marginal position on the market, the French State has no interest in collecting a large percentage on the levies. If however, it takes a large share of the French market, then the turnover for that category of bets will also be increased proportionately and the agreement provides for a phased increase in the percentages to be paid to the French State and a corresponding decrease in the revenue of the Belgian PMU. Therefore the Commission was correct in considering that the agreement of 18 March 1991 regarded as a whole did not appear to benefit the Belgian PMU, implying also that, in taking that position, the French State did not go beyond the boundaries within which an ordinary economic agent would be expected to act.

in respect of bets on horse-races run in France and those run in Belgium, and secondly, that the agreement in question between the French and Belgian PMUs, regarded as a whole, did not confer on the latter any advantage which should be regarded as involving State aid; in consequence the contested decision rightly rejected Ladbroke's complaint and was properly reasoned. Accordingly, the Court of First Instance correctly dismissed the action brought by Tiercé Ladbroke SA in the judgment under appeal, regardless of its more detailed grounds, and, in consequence, the appeal should be dismissed as unfounded.

III — Conclusion

In view of the foregoing, I suggest that the Court:

(1) dismiss the appeal brought by Tiercé Ladbroke SA in its entirety;

(2) order the appellant to pay the costs.