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Judgment of the Court of 16 May 2000. - French Republic v Ladbroke Racing Ltd and Commission of the European Communities. - Appeal - Competition - State aid. - Case C-83/98 P.

European Court reports 2000 Page I-03271

Keywords

1. State aid - Definition - Legal nature - Interpretation on the basis of objective factors - Judicial review - Scope

(EC Treaty, Art. 92(1) (now, after amendment, Art. 87(1) EC))

2. State aid - Definition - Aid from State resources

(EC Treaty, Art. 92(1) (now, after amendment, Art. 87(1) EC))

Summary

1. State aid, as defined in the Treaty, is a legal concept which must be interpreted on the basis of objective factors. For that reason, the Community courts must in principle, having regard both to the specific features of the case before them and to the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 92(1) of the Treaty (now, after amendment, Article 87(1) EC).

(see para. 25)

2. Article 92(1) of the Treaty (now, after amendment, Article 87(1) EC) covers all the financial means by which the public sector may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector.

(see para. 50)

Parties

In Case C-83/98 P,

French Republic, represented by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and F. Million and J.-M. Belorgey, Chargés de Mission in the same Directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Second Chamber, Extended Composition) of 27 January 1998 in Case T-67/94 Ladbroke Racing v Commission [1998] ECR II-1, seeking to have that judgment set aside in part,

the other parties to the proceedings being:

Ladbroke Racing Ltd, established in London, represented by C. Vajda QC and S. Kon, Solicitor, with an address for service in Luxembourg at the Chambers of Arendt and Medernach, 9-10 Rue Mathias Hardt,

applicant at first instance,

and

Commission of the European Communities, represented by G. Rozet, Legal Adviser, and J. Flett, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant at first instance,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida, D.A.O. Edward, L. Sevón and R. Schintgen (Presidents of Chambers), P.J.G. Kapteyn (Rapporteur), J.-P. Puissochet, G. Hirsch, P. Jann, H. Ragnemalm and V. Skouris, Judges,

Advocate General: G. Cosmas,

Registrar: R. Grass,

having regard to the Report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 23 November 1999,

gives the following

Judgment

Grounds

1 By application lodged at the Registry of the Court of Justice on 26 March 1998, the French Republic brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 27 January 1998 in Case T-67/94 Ladbroke Racing v Commission [1998] ECR II-1 (the judgment under appeal), by which the Court of First Instance had annulled in part Commission Decision 93/625/EEC of 22 September 1993 concerning aid granted by the French authorities to the Pari Mutuel Urbain (PMU) and to the racecourse undertakings (OJ 1993 L 300, p. 15; the contested decision).

Facts and procedure before the Court of First Instance

2 In the judgment under appeal, the Court of First Instance made the following findings of fact:

1 The applicant, Ladbroke Racing Ltd (hereinafter "Ladbroke"), is a company incorporated under English law and controlled by Ladbroke Group plc whose activities include organising and providing betting services in connection with horse-races in the United Kingdom and other countries in the European Community.

2 The Pari Mutuel Urbain ("the PMU") is an economic interest group (groupement d'intérêt économique) consisting of the principal racecourse undertakings (sociétés de courses) in France (Article 21 of Decree 83-878 of 4 October 1983 concerning racecourse undertakings and totalisator betting), which was set up to manage the organisation of off-course totalisator betting on behalf of its members. In discharging that responsibility, the PMU's status was initially that of a "joint administrative department" (decree of 11 July 1930 extending totalisator betting to off-course operations). Article 13 of Decree 74-954 of 14 November 1974 concerning the racecourse undertakings provides that as from that date the PMU alone may manage the organisation of off-course totalisator betting by the racecourse undertakings. The PMU's exclusive position is further safeguarded by the preclusion of persons other than the PMU from offering to receive or receiving bets on horse-races (Article 8 of the Interministerial Order of 13 September 1985 laying down rules for the PMU). It covers the taking of bets on races in France and bets in France on races abroad, services which likewise can be offered only by the racecourse undertakings which are authorised to do so and/or the PMU (Article 15(3) of Law 64-1279 of 23 December 1964 laying down the Finance Law for 1965, and Article 21 of Decree 83-878, cited above).

3 On 7 April 1989 seven companies belonging to the Ladbroke Group, including the applicant, submitted a complaint to the Commission in respect of several forms of aid which the French authorities had granted to the PMU and which those companies maintained were incompatible with the common market.

...

5 By letter of 11 January 1991, the Commission informed the French authorities of its decision to initiate the procedure laid down in Article 93(2) of the EEC Treaty in respect of the following seven categories of aid granted to the PMU (OJ 1991 C 38, p. 3):

"1. cash-flow benefits represented by the deferring of the periods for the payment of the Treasury levy, as from 1980 and 1981;

2. waiving of [FRF] 180 million of the levies for 1986;

3. exemption from the one-month delay rule for the deduction of VAT;

4. use of unclaimed winnings to pay an additional redundancy allowance in 1985;

5. exemption from the housing levy;

6. waiving from 1982 to 1985 of amounts deriving from the practice of rounding bettors' winnings down to the nearest ten centimes;

7. exemption from corporation tax."

...

13 On 22 September 1993 the Commission adopted [the contested decision], terminating the procedure initiated against France.

...

16 In the contested decision, the Commission drew a distinction between two types of sums collected on horse-race betting, namely "levies" or "public levies" ("prélèvements publics"), which go to the Treasury, and "non-public levies", which are distributed between bettors. According to the contested decision, for every [FRF] 100 in registered bets, the PMU levies about [FRF] 30 and pays back about [FRF] 70 to the bettors. Of the [FRF] 30 withheld, the PMU uses about [FRF] 5.5 to cover its expenses, the national authorities and the City of Paris retain about [FRF] 18, and the rest is allocated to the racecourse undertakings.

17 The Commission went on to point out that whereas the markets in games of chance have traditionally been partitioned along national lines, betting on horse-races on national courses is organised internationally, and it was not until January 1989, when the Pari Mutuel International ("the PMI") was set up, that the PMU expressly made clear its desire to extend its activities beyond France by concluding agreements in Germany and Belgium, and by thereby entering into competition with other betting organisations and particularly with Ladbroke (part III of the contested decision).

18 Of the seven measures adopted by the French Government in favour of the PMU with regard to which the procedure under Article 93(2) of the Treaty was initiated, three were identified by the Commission as State aid within the meaning of Article 92(1) of the Treaty.

19 The Commission considered that the waiver between 1982 and 1985 of part of the levy ([FRF] 315 million) on the amount deriving from the practice of rounding down bettors' winnings to the nearest ten centimes - allocated to the Treasury since 1967, pursuant to the Finance Law of 17 December 1966 - constituted aid since it was a "measure limited in time and intended to solve a specific problem", namely computerisation of the PMU's operations in order to assist it in strengthening its market position (parts IV and V, point 2).

20 It also regarded the exemption from the one-month delay rule for the deduction of VAT as a cash-flow benefit equivalent to State aid; however, the Commission found that this had been offset between 1989 and its abolition on 1 July 1993 by a permanent deposit lodged with the French Treasury (parts IV and V, point 6).

21 Lastly, as regards the PMU's exemption from the social housing levy, the Commission considered that, even though the Conseil d'État held in a 1962 judgment that horse-racing was an agricultural activity and therefore exempt from such contributions, the PMU's activity - organising

and processing bets - fell manifestly outside the scope of agricultural activities. Accordingly, since the exemption at issue was not justified under the PMU's articles of association, it constituted State aid (parts IV and V, point 7).

22 However, the Commission considered that the three forms of aid in question qualified for exemption under Article 92(3)(c) of the Treaty.

23 As regards the aid resulting from the waiver of the amounts deriving from the practice of rounding down winnings to the nearest ten centimes, the Commission took the view that, although the intensity of that aid was high (almost 29% of the total cost of computerisation), "given the state of development of competition and trade before the setting-up of the PMI in January 1989, the aid granted between 1982 and 1985 for the computerisation of the PMU did not produce any disruptive effects on the market contrary to the common interest, bearing in mind the direct and indirect effects of the aid in developing all the economic factors making up the sector, including the improvement of bloodstock" (part VII, point 1).

24 In the case of the exemption from the one-month delay rule for the deduction of VAT, the Commission took the view that - for the same reasons as were cited in connection with the aid just referred to - it had likewise to be regarded as compatible with the common market up to January 1989. Thereafter, any adverse effects of that aid on competition were offset in full by a permanent deposit lodged with the Treasury (part VII, point 2).

25 As for the aid attributable to the exemption from the housing levy, the Commission considered that, like the aid resulting from the exemption from the one-month delay rule for deduction of VAT, it qualified up to 1989 for the derogation provided for in Article 92(3)(c); thereafter, however, it had to be declared incompatible (part VII, point 3).

26 However, with regard to the obligation to repay the aid obtained in that form as of 1989, the Commission stated that "... repayment as from that date should not be required in view of the French authorities' argument that the contribution could not be levied because of the 1962 decision of the Conseil d'État referred to in part IV, point 7" (see above, paragraph 21); none the less, "[that] argument cannot be accepted as from the time when the initiation of proceedings was notified to the French authorities, namely on 11 January 1991". The Commission also stated that it had not been given the means to quantify for itself the amount of aid to be recovered and requested the French authorities to determine themselves and communicate to the Commission such amount (part VIII).

27 In the case of the other four measures, the Commission decided that the conditions laid down for the application of Article 92(1) of the Treaty were not satisfied.

28 As regards the amounts resulting from unclaimed winnings, the Commission considered that, in so far as those amounts have always been regarded as normal resources, they form part of the non-public levies. Their use to finance in particular social security expenditure together with monitoring and supervision costs, horse-breeding incentives and investment connected with the organisation of horse-racing and totalisator betting cannot therefore be regarded as State aid, since the State resources criterion is not met (parts IV and V, point 1).

29 As regards the change in the allocation of the public levies (see above, paragraph 16), the Commission stated that the tax arrangements applicable to horse-races are the responsibility of the Member States and increases or reductions in the rate of tax do not constitute State aid provided that they apply uniformly to all the undertakings concerned. The question of State aid arises only where a significant reduction in the rate of taxation strengthens the financial situation of an undertaking in a monopoly position. That was not the case here, however, in so far as the 1984

reduction in the public levy on bets was limited (some 1.6%) and subsequently maintained, and was thus not designed to finance a specific ad hoc operation. The French authorities acted with the aim of increasing the resources of the recipients of the non-public levies on a permanent basis. Taking account of the special nature of the recipients' situation, the measure in question did not constitute State aid, but a "reform in the form of a tax adjustment that is justified by the nature and economy of the system in question" (parts IV and V, point 3).

30 As regards the PMU's exemption from corporation tax, the Commission took the view that, in so far as corporation tax "cannot apply to the [economic interest group] PMU since its legal form is that of an economic interest grouping", the exemption must "be considered to stem from the normal application of the general tax system" (part V, point 4).

31 Regarding the cash-flow benefit - amounting to nearly two months' additional resources - deriving from the deferral allowed in the payment of the public levies, which was granted to the PMU by decisions of the Minister for the Budget of 24 April 1980 and 19 February 1982, the Commission considered that in so far as that advantage had had the effect of increasing the share of the non-public levies continuously since 1981, it did not involve "a temporary waiving of resources by the public authorities or a specific ad hoc measure", and accordingly fell to be assessed in the same way as the change in the allocation of the levies (see above, paragraph 29) (parts IV and V, point 5).

3 It was in those circumstances that Ladbroke brought an application before the Court of First Instance for annulment of the contested decision in so far as the Commission had decided therein:

(1) that the following measures fell outside the scope of Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC):

(a) cash-flow benefits allowing the PMU to defer the payment of certain betting levies to the State;

(b) exemption from corporation tax;

(c) exemption from income tax;

(d) waiver of FRF 180 million of betting levies in 1986;

(e) the PMU's entitlement to retain unclaimed winnings;

(f) exemption from the one-month delay rule for the deduction of VAT from 1 January 1989 onwards;

(2) that the following measures were compatible with the common market pursuant to Article 92 of the Treaty:

(a) the rounding down of bettors' winnings to the nearest ten centimes between 1982 and 1985, representing FRF 315 million;

(b) the exemption from the one-month delay rule for the deduction of VAT prior to 1 January 1989;

(c) the exemption from the housing levy prior to 1 January 1989;

(3)(a) that there should be no repayment of aid granted to the PMU in the form of exemption from the housing levy in respect of the period prior to 11 January 1991;

(b) that the Commission had no obligation to determine itself the amount of the aid in respect of

the exemption from the housing levy that it ordered to be repaid from 11 January 1991.

The judgment under appeal

4 In the judgment under appeal, the Court of First Instance held that in the case of decisions as to whether a measure is to be characterised as State aid, which, under the Treaty, are the responsibility of both the Commission and the national courts, there is in principle no reason to attribute a broad discretion to the Commission in the absence of special circumstances arising from the complex nature of the State intervention in question. It also pointed out that, while both tax legislation and the implementation of tax arrangements are matters for the national authorities, the exercise of that competence may nevertheless, in certain cases, prove to be incompatible with Article 92(1) of the Treaty (paragraphs 51 to 54).

5 In the light of those considerations, the Court of First Instance first examined the three criteria used by the Commission to determine whether the change in the allocation of levies in 1985 and 1986 fell within the scope of Article 92(1) of the Treaty (paragraphs 55 to 66). According to the contested decision, the measure in question (a) was merely a limited reduction in the rate of the levy (approximately 1.6%) and did not strengthen the financial situation of a monopoly undertaking, (b) was ongoing in character and (c) was not aimed at financing an ad hoc operation but at increasing the resources of the recipients of the non-public levies (see paragraph 51).

6 The Court held that the three criteria, as applied in this instance, were not such as to justify the finding by the Commission that the reduction in the levy rate was not State aid for the purposes of Article 92(1) of the Treaty but should be classed as a reform in the form of a tax adjustment that was justified by the nature and scheme of the system in question (paragraph 62).

7 Second, with regard to the cash-flow facilities enabling the PMU to defer payment of certain betting levies, the Court of First Instance found that the mere fact that the measure in question belonged to a separate system intended to apply solely to the sector concerned, and did not fall within the derogations from the general fiscal arrangements, did not remove it from the ambit of Article 92(1) of the Treaty (paragraphs 74 to 77).

8 The Court declared that any State measure, whether permanent or temporary, which has the effect of granting financial advantages to an undertaking and improving its financial position falls within the definition of State aid for the purposes of Article 92(1) of the Treaty and, accordingly, the question whether a change in the rules for allocation of the levies is temporary or permanent is not an adequate test for determining whether that provision applies in a particular case (paragraph 78).

9 As for the fact that the change in the rules concerning payment to the Treasury of the public levies did not constitute an ad hoc derogation but was a general amendment to the tax regime for the entire horse-racing sector, the Court observed that, contrary to the Commission's assertion, there was no statement to that effect in the contested decision, according to which the Minister for the Budget had allowed the payments due to the Treasury to be deferred solely in the case of the PMU. The fact that, as a general rule, the operation of the pari mutuel in France could benefit not only members of the PMU but also, indirectly, non-member companies, could not be regarded as decisive (paragraph 79).

10 With respect to the Commission's argument that the State intervention in question was made in the context of the exceptionally heavy taxation of the horse-racing sector, which was considerably higher than in other sectors, the Court found that that argument, put forward for the first time before it and unsupported by adequate evidence, was not sufficient in itself to show that the Commission's view was well founded (paragraph 81).

11 Third, with regard to the PMU's access to unclaimed winnings, the Court of First Instance held that resources of that kind could not be regarded as normal resources belonging to the racecourse undertakings and the PMU, but constituted State resources, the allocation of which to the Treasury depended on whether certain statutory conditions were met (paragraphs 105 to 108). The same conclusion could be inferred from the decision of the French legislature to extend the range of uses to which unclaimed winnings could be put to certain activities of a social nature carried on by the racecourse undertakings (paragraphs 109 and 110).

12 Consequently, the Commission's finding that although the measure in question was designed to finance social expenditure of the racecourse undertakings linked to the organisation of totalisator betting it did not constitute State aid because no transfer of State resources was involved was based on false premisses (paragraph 111).

13 Fourth, so far as concerns the exemption from the one-month delay rule for VAT deductions as from 1 January 1989, the Court of First Instance found that it was clear from the file that, as conceded by the Commission at the hearing, the permanent deposit with the French Treasury which the racecourse undertakings had been required to lodge in return for the exemption granted to them on 1 August 1969 had existed not since 1989 but since 1969, and that the contested decision was therefore vitiated on that point by a manifest error (paragraphs 118 and 119).

14 In the absence of a detailed examination by the Commission of the question whether, before 1989, the permanent deposit had offset the cash-flow benefits resulting from the alteration to the time for the deduction of VAT, the Court considered that it could not rule as to whether State aid was involved. Since the Commission's assessment of the measure in question was in any event vitiated by error, the Court held that the applicant's claims had to be upheld and that the contested decision had to be annulled in that regard (paragraphs 120, 121 and 122).

15 Finally, with regard to the obligation to recover aid incompatible with the common market, the Court of First Instance considered whether the Commission, when it adopts a decision instructing the Member State concerned to recover such aid, may restrict the effects in time of that decision on the ground that the Member State considers that a judgment delivered by a domestic court was liable to give rise to a legitimate expectation on the part of the recipient of the aid that the latter was lawful (paragraph 180).

16 After reviewing the relevant case-law, the Court held that it is not for the Member State concerned, but for the recipient undertaking, in the context of proceedings before the public authorities or before the national courts, to plead exceptional circumstances on the basis of which it had entertained legitimate expectations, justifying refusal to repay unlawful aid (paragraphs 179 to 184). Accordingly, in so far as the contested decision limited the temporal scope of the French authorities' obligation to require repayment of aid not to the period commencing in 1989 (the date from which it was declared incompatible), but to the period commencing with the opening of the procedure on 11 January 1991, it was vitiated by infringement of Article 93(2) of the EC Treaty (now Article 88(2) EC) (paragraph 185).

17 The Court of First Instance consequently annulled the contested decision in so far as it had found:

- first, that various advantages granted to the PMU, through

(a) the amendment in 1985 and 1986 of the allocation of the levies,

(b) cash-flow benefits granted to it by the authorisation to defer payment of certain levies on

betting,

(c) access to unclaimed winnings, and

(d) exemption from the one-month delay rule for the deduction of value added tax, after 1 January 1989,

did not constitute State aid for the purposes of Article 92(1) of the Treaty;

- second, that the obligation on the French authorities to require repayment of the aid deriving from the PMU's exemption from the housing levy applied not as from 1989, but as from 11 January 1991.

18 The remainder of the action was dismissed and each party was ordered to bear its own costs.

The appeal

19 The French Republic relies on two grounds of appeal, which are founded on errors of law allegedly made by the Court of First Instance in the application of Articles 92(1) and (2) and 93(2) of the Treaty.

First ground of appeal

20 By its first ground of appeal, which is in four parts, the appellant challenges the judgment of the Court of First Instance in so far as it found that the contested decision was defective in that it excluded from the scope of Article 92(1) of the Treaty the measures relating to (i) the amendment in 1985 and 1986 of the allocation of betting levies, (ii) the cash-flow benefits granted to the PMU as a result of the authorisation to defer payment of certain of those levies, (iii) the PMU's access to winnings unclaimed by bettors and (iv) the exemption from the one-month delay rule for the deduction of VAT in respect of the period after 1 January 1989.

21 In the first part of the first ground of appeal, the appellant contends that the Court of First Instance made several errors of law in holding that the three criteria relied on by the Commission in declining to categorise the measure concerning the reduction in the public levies for the benefit of the PMU as State aid were not an appropriate basis for ruling out the existence of aid for the purposes of Article 92(1) of the Treaty.

22 The appellant maintains, first of all, that in reaching that conclusion the Court of First Instance gave insufficient grounds, contrary to Article 190 of the EC Treaty (now Article 253 EC), for certain steps in its reasoning, that it failed to adopt a position with regard to certain crucial factors relied on both by the Commission, in the contested decision and in its pleadings before the Court of First Instance, and by the appellant itself, in its statement in intervention, and that it based part of its reasoning on false premisses.

23 It should be noted at the outset that the appellant's argument relates to the nature and scope of review of the Commission's assessment as to whether a measure adopted by national authorities is to be categorised as State aid.

24 According to the appellant, the particular nature of the review of State aid means that, when the court carrying out the review is called on to assess the facts of the case in the light of legal criteria, it must limit itself to satisfying itself that there is no manifest error of assessment. That form of review cannot be reserved for special circumstances, whose existence is in any event often difficult to ascertain. Consequently, the Court of First Instance erred in law in its definition of the nature of the review which it was to carry out in that it stated, in essence, that in the absence of

special circumstances, arising in particular from the complex nature of the State intervention in question, review by it is not to be confined to determining whether there has been a manifest error of assessment as to whether aid is involved.

25 The short answer to that is that State aid, as defined in the Treaty, is a legal concept which must be interpreted on the basis of objective factors. For that reason, the Community courts must in principle, having regard both to the specific features of the case before them and to the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 92(1) of the Treaty. The Court of First Instance therefore did not err in law so far as concerns the scope of judicial review of the Commission's assessments.

26 Second, the appellant alleges that, in its review of the present case, the Court of First Instance incorrectly assessed the arguments relied on by the Commission when finding that the measure reducing the public levies was not caught by Article 92(1). The appellant maintains that the Court of First Instance wrongly failed to verify whether the criteria adopted by the Commission were justified, as stated in the contested decision, by the nature and scheme of the particular system at issue, whose existence the Court of First Instance indeed acknowledged. It accordingly erred in law, decisively affecting the outcome of the case.

27 The appellant argues that, in the context of regimes applicable to the economy as a whole, consideration of the compatibility of particular measures with Article 92(1) of the Treaty by reason of the nature and scheme of the system of which they form part is essential where the issue is one of distinguishing mechanisms which may constitute State aid from others which are not caught by Article 92(1) precisely because they are justified by the nature and scheme of the system. The Court of First Instance could therefore not avoid consideration of whether there was such a justification here before categorising the measure at issue as aid.

28 As to that, it is clear from paragraph 76 of the judgment under appeal that the Court of First Instance not only was aware of the specific nature of the tax regime applicable to horse-race betting in France but also took account of it.

29 Furthermore, the appellant's reasoning is founded on an incorrect analysis of the contested decision. As the Advocate General states in points 25 and 26 of his Opinion, the Commission did not rely, a priori and in vague terms, on the particular nature of the French system of fiscal levies on horse-race betting in order to decide that the reduction in the public levies was not State aid. On the contrary, it applied three criteria of interpretation from which it derived the three propositions set out in paragraph 5 of this judgment, in order to reach the conclusion that that reduction amounted not to State aid but to a reform in the form of a "tax" adjustment that is justified by the nature and economy of the system in question. There is thus no substance to the proposition that the criterion relating to the nature and scheme of the system is independent of the other three criteria or constitutes the legal basis of the Commission's assessment.

30 It follows that the Court of First Instance neither misconstrued nor refused to take account of the criterion of the nature and scheme of the system when it considered whether, having regard to the facts of the case, the Commission was entitled to find that the measure reducing the public levies did not fall within the scope of Article 92(1) of the Treaty.

31 Third, the French Government alleges that the Court of First Instance erred with regard to the legal characterisation of the facts by implicitly holding that the Commission could not infer from the fact that a specific operation was not financed and from the limited change in the public levies that the reduction in the rate of levy of 1.6% for the benefit of the PMU was consistent with the nature and scheme of the system and did not amount to aid within the meaning of Article 92(1).

32 It should be noted that in paragraphs 57, 58 and 59 of the judgment under appeal the Court of First Instance queried the validity of those two criteria adopted by the Commission, but it found in any event that the change in the rate of the public levies was designed to finance a specific operation and that the reduction in the rate of levy was not limited in nature.

33 In those circumstances, it is unnecessary for the Court to establish whether the Court of First Instance was wrong to find that the Commission was not entitled to have recourse to those criteria in order to determine whether the fiscal measure at issue constituted State aid.

34 In addition, the arguments relied on by the appellant to contest the findings of the Court of First Instance referred to in paragraph 32 of this judgment effectively dispute the Court's assessment of the facts, a matter not open to challenge on appeal. Those arguments must therefore be rejected as inadmissible.

35 The final argument in the first part of the first ground of appeal consists in the assertion that a contradiction is apparent in the grounds of the judgment under appeal. The appellant refers in particular to paragraph 154 of the judgment, where the Court of First Instance stated that it is apparent from the contested decision that before the PMI was set up in January 1989 there was no trade between France and the other Member States, which means that before that date there was not even competition between the PMU and the other economic operators active on the Community market in bet-taking.

36 According to the appellant, on the very wording of Article 92(1) of the Treaty that statement should have led the Court of First Instance to find that no measure implemented for the benefit of the PMU before 1989, nor in particular adjustments to the public levies as from 1985 - at least so far as concerns their effects until the end of 1988 - could constitute State aid caught by that provision.

37 That proposition cannot be accepted. It is apparent from paragraphs 51 to 62 of the judgment under appeal that the Court of First Instance merely determined whether the three criteria referred to in the contested decision concerning the change in the public levies were sufficient to justify the finding that that change amounted to a reform in the form of a tax adjustment that was justified by the nature and scheme of the system in question. On the other hand, the Court of First Instance did not rule on the remaining criteria for application of Article 92(1) of the Treaty, in particular on the question whether competition in the Community betting market was affected by that adjustment of the public levies. There can thus be no contradiction between the conclusion set out in paragraph 62 of the judgment under appeal and the statements contained in paragraph 154 thereof.

38 The same considerations hold good for the other State measures examined by the Court of First Instance.

39 The first part of the first ground of appeal must accordingly be rejected.

40 In the second part of the first ground of appeal, the French Republic criticises the judgment under appeal in so far as the Court of First Instance held that the Commission had misapplied Article 92(1) of the Treaty when it found that the cash-flow facilities enabling the PMU to defer the payment of certain betting levies did not constitute State aid.

41 It should be noted at the outset that the appellant repeats in part the objections raised in the first part of this ground of appeal, relating to the scope of judicial review and the alleged failure of the Court of First Instance to take account of the particular nature of the system of levies on horse-

race betting in France and the way in which it is organised. For the reasons set out in paragraphs 23 to 30 of this judgment, those objections must be rejected.

42 Next, the appellant criticises the Court of First Instance for finding, in paragraph 79 of the judgment under appeal, that the contested decision contains no statement to the effect that the change in the rules concerning payment to the Treasury of the betting levies did not constitute an ad hoc derogation but was a general amendment to the tax regime for the entire horse-racing sector and not only for the PMU.

43 Finally, the appellant alleges that, contrary to the statement made by the Court of First Instance in paragraph 81 of the judgment under appeal, the Commission did indeed set out in the contested decision evidence showing that the State intervention in question was made in the context of exceptionally heavy taxation of the horse-racing sector, which is significantly higher than in other sectors.

44 In that regard, suffice it to state, as the Advocate General has done in points 37 and 39 of his Opinion, that those arguments relate to the Court of First Instance's assessment of the facts, which cannot be challenged before the Court of Justice on appeal. Consequently, the second part of the first ground of appeal must be rejected.

45 In the third part of the first ground of appeal, the appellant contends that the Court of First Instance erred in law by holding, in paragraph 111 of the judgment under appeal, that the Commission's finding that the PMU's access to winnings unclaimed by bettors, while designed to finance social expenditure of the racecourse undertakings, did not constitute State aid because no transfer of State resources was involved was based on false premisses and for that reason had to be annulled.

46 According to the appellant, the judgment under appeal should be set aside in that respect since, having regard to the nature and scheme of the system in question, the funds retained by the PMU after payment of winnings to bettors and of the public levies constitute normal resources. The mere fact that at a given moment the State restricts use of part of those resources to particular objectives cannot transform their nature and convert them into State resources.

47 In that regard, it is to be noted that in paragraphs 105 to 108 of the judgment under appeal the Court of First Instance explains its assessment concerning the categorisation of the national measure in question as State aid. As the Advocate General states in point 42 of his Opinion, that assessment leaves no room for criticism of its legal correctness.

48 It is clear from those paragraphs of the judgment under appeal that the measure enables the racecourse undertakings to cover certain social expenditure of the PMU and that the amount of the sums corresponding to the unclaimed winnings is monitored by the competent French authorities. The Court of First Instance inferred therefrom in paragraph 109 that, inasmuch as national legislation extended the range of uses to which those sums may be put to activities of the racecourse undertakings other than those initially envisaged, the national legislature, by virtue of that extension, in effect waived revenue which in principle should have been paid over to the Treasury.

49 The Court of First Instance added in paragraph 110 that in so far as those resources had been used to finance social expenditure, in particular, as stated in the contested decision, it was settled case-law that they constituted a reduction in the social security commitments which an undertaking normally had to discharge, and thus constituted aid to it.

50 The judgment in Case T-358/94 Air France v Commission [1996] ECR II-2109, relied on by the

appellant, provides very clear confirmation, at paragraph 67, that Article 92(1) of the Treaty covers all the financial means by which the public sector may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Consequently, even though the sums involved in the measure allowing the PMU access to unclaimed winnings are not permanently held by the Treasury, the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State aid and for the measure to fall within Article 92(1) of the Treaty.

51 The third part of the first ground of appeal must accordingly be rejected.

52 The fourth part of the first ground of appeal relates to paragraphs 118 to 122 of the judgment under appeal, in which the Court of First Instance held that the Commission erred in fact with regard to the implementation of the exemption from the one-month delay rule for the deduction of VAT inasmuch as it found that the system of the permanent deposit with the French Treasury, offsetting the cash-flow benefits resulting from the altered time of deduction, had existed only since 1989 when it had begun to apply in 1969.

53 The appellant contends that the Court of First Instance set aside the Commission's assessment regarding the period after 1 January 1989 by relying on matters which essentially relate to the period before that date. Furthermore, the Court of First Instance could not rely solely on those matters in order to conclude that the Commission's assessment in respect of the entire period after 1 January 1989 was erroneous. In this respect, the judgment of the Court of First Instance is, in its submission, vitiated by defective reasoning and, in any event, by an inadequate statement of grounds.

54 Those objections cannot be upheld since they are based on an incorrect analysis of the judgment under appeal. Contrary to the appellant's assertions, the Court of First Instance did not hold that the exemption from the one-month delay rule for the deduction of VAT constituted State aid as regards the period after 1 January 1989 but merely found that, given the manifest errors of fact on which the whole of the Commission's line of argument was founded, it was impossible for it to rule as to whether or not State aid was involved. Such an assessment of the substance falls outside the scope of the appellate review which the Court of Justice may carry out. Accordingly, the final part of the first ground of appeal must be rejected as inadmissible.

Second ground of appeal

55 In its second ground of appeal, the French Republic contends that the judgment under appeal is vitiated by an error of law inasmuch as the Court of First Instance held in paragraph 185 that the contested decision infringed Article 93(2) of the Treaty by limiting the temporal scope of the French authorities' obligation to require repayment of the aid derived from the PMU's exemption from the housing levy to the period after 11 January 1991, the date on which the procedure against the French Republic was opened, when reimbursement of the State aid should have been required from the date from which it was declared incompatible with the common market, that is to say from 1989.

56 It should be recalled that the Commission found in the contested decision that the PMU's exemption from the housing levy was incompatible with the Treaty from 1989; however, it considered that the PMU had to repay the corresponding sums only from the date on which the procedure was opened in January 1991, because until that time the PMU entertained legitimate expectations as to the legality of the exemption by reason of a judgment of the French Conseil d'État according to which operations of the racecourse undertakings were agricultural and therefore qualified for exemption from the housing levy.

57 The Court of First Instance stated in paragraph 184 of the judgment under appeal that the Commission could not itself take into account the recipient's legitimate expectations, as invoked by the Member State, in order to set aside the requirement that aid considered by it to be incompatible with the common market should be repaid.

58 According to the appellant, the judgment under appeal is vitiated by an error of law. More specifically, it complains that the Court of First Instance has denied the Commission the possibility of examining a Member State's argument that a recipient of aid entertained a legitimate expectation as to its legality. It adds that the position adopted by the Court of First Instance makes the procedure excessively cumbersome, since it does not allow a fundamental argument directly affecting the question of recovery of the aid to be considered at the stage of the Commission's review.

59 It is unnecessary to examine whether the Court of First Instance was right in stating, at paragraph 183 of the judgment under appeal, that it is not for the State concerned, but for the recipient undertaking, in the context of proceedings before the public authorities or before the national courts, to plead exceptional circumstances on the basis of which it had entertained legitimate expectations, justifying refusal to repay unlawful aid. It need merely be stated that, as Ladbroke correctly submitted before the Court of First Instance, the reasoning in the contested decision was in any event inadequate so far as concerns waiver of the requirement to repay part of the aid declared incompatible with the common market.

60 In the contested decision, the Commission merely referred to the existence of the judgment of the Conseil d'État, without in any way indicating why, in its opinion, it amounted to an exceptional circumstance liable to give rise to legitimate expectations on the part of the recipient of the aid notwithstanding the failure to comply with the rules laid down in Article 93 of the Treaty.

61 The Court of First Instance was accordingly right to conclude that the contested decision had to be annulled in so far as it required repayment of the aid deriving from the PMU's exemption from the housing levy only from the opening of the procedure, that is to say from 11 January 1991.

62 The second ground of appeal must therefore be rejected.

63 Accordingly, neither ground of appeal relied on by the appellant is well founded and the appeal must be dismissed.

Decision on costs

Costs

64 Under Article 69(2) of the Rules of Procedure, which applies to the appeal procedure by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has requested that the French Republic be ordered to pay the costs and the French Republic has been unsuccessful, it must be ordered to pay the costs.

Operative part

On those grounds,

THE COURT

hereby:

1. Dismisses the appeal;

2. Orders the French Republic to pay the costs.