II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 11 June 1991

requiring France to suspend the implementation of the aid described below in favour of the Pari Mutuel Urbain (PMU), introduced in breach of Article 93 (3) of the EEC Treaty

(Only the French text is authentic)

(92/35/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 93 (2) and (3) thereof,

Whereas :

(1) By letter dated 27 July 1989, the Commission requested the French authorities to comment on alleged State aids granted in favour of the Pari Mutuel Urbain (PMU) and to provide all relevant information to enable the Commission to assess the measures pursuant to Articles 92 and 93 of the EEC Treaty and reminded the French authorities of their obligation pursuant to Article 93 (3) of the EEC Treaty to inform the Commission in sufficient time to enable it to submit its comments, of any plans to grant or alter aid.

(2) By letter dated 23 August 1989, the French authorities requested the Commission to extend the deadline for response by one month to which the Commission agreed by telex of 29 August 1989.

(3) The French authorities replied by letter dated 11 October 1989 and a meeting to discuss the measures took place between the Commission and the French authorities on 6 November 1990.

(4) By letter dated 11 January 1991, the Commission informed the French authorities that it had decided to initiate the Article 92 (3) procedure in respect of seven aid measures granted in favour of the PMU. The Commission requested the French Government to comment on the measures within a period of two months, and also requested all necessary information to enable the Commission to calculate the precise amount of these aids and the periods during which they had been provided.

(5) The French authorities replied by letter dated 12 April 1991. The reply did not contain all the necessary information to establish the precise amount of aid and the period during which it was being granted, as well as sufficient information to enable the Commission to access the compatibility of the measures with the internal market.

(6) On the basis of the information currently at its disposal, the Commission understands that three of the seven aid measures were only granted in the past but that the other four have an ongoing character. Of these four, the exemption from corporation tax has no financial effect at the present time because of the deficit nature of the financial position of the PMU and its members.

(7) The Commission understands the three remaining ongoing aid measures to be as follows :

Treasury facilities

The financial resources of the PMU have been swelled to the detriment of the State by allowing it to defer on a temporary basis the payment to the

State of certain charges which are levied on horserace betting. This enables the PMU to earn considerable amounts of interest during the additional period that these monies transit in the treasury resources of the PMU. The treasury facilities date from 1980 and an extension of the period of deferment was granted in 1982.

Exemption from the one-month delay rule for VAT payment

This exemption allows the PMU to deduct immediately the VAT it has paid to suppliers compared to the normal situation under which deduction can only be made one month later. It thus enables the PMU to earn extra interest at the expense of the State.

Exemption from the social housing levy

The PMU is an economic interest grouping composed of 10 members, all of which are racecourse undertakings. Racecourse undertakings are assimilated to professional agricultural bodies which are exempted from the payment by the employer of a charge on the employee payroll in respect of the social housing levy. As such the PMU is exempted from the payment of the social housing levy on its payroll, although it is not engaged in an agricultural activity.

(8) *The Community market for horserace betting and related services*

The provision of trade statistics for service activities is generally difficult. For the service activity concerned by this case, namely horserace betting and related services, it is particularly difficult. Nevertheless the information provided below is sufficient in the Commission's opinion to demonstrate that there is trade and competition in horserace betting and related services, that the PMU and a limited number of competitors take part in this trade, that trade is increasing and that bookkeeping or tote betting cannot be considered as separate, unrelated markets whose development and functioning is independent each of the other. By these means the Commission considers that, notwithstanding the difficulty of obtaining precise trade statistics, the circumstances necessary to motivate its decision as laid down by the Court in its ruling in joined cases 296/82 and 318/82 (Leeuwarder) [1], have been satisfied.

Market composition, competition and trade

Horserace betting is allowed and operated in all Member States except Luxembourg. Even in Luxembourg permission was granted to a bookmaking multinational to open an 'agence hippique', although the venture did not subsequently materialize.

Betting can take two forms: bookmaking, where bets are placed against the bookmaker who thus can incur a financial risk dependent upon the precise bets placed and horserace result, or under a tote or totalizator arrangement, where bets are pooled and winnings paid out as a given percentage of the betting monies received with no financial risk to the operator of the betting system. A skilled bookmaker by adjusting the odds he provides on bets can much reduce and even eliminate totally his inherent financial risk.

The tote is the more common form of betting and is allowed and operated in the eleven Member States mentioned. Bookmaking is additionally allowed and operated in Belgium, Germany, Ireland, Italy and the United Kingdom.

The total estimated size of horserace betting in 1989 was ECU 14 570 million. The two largest national markets are the United Kingdom and France with totals of ECU 8 042 million and ECU 4 456 million respectively. The third largest national market is Germany (ECU 516 million) followed by Italy (ECU 444 million), Ireland (ECU 407 million) and Belgium (ECU 381 million). In the United Kingdom bookmaking is the dominant form representing over 96 % of all betting. In France only the tote form is allowed, so that by definition tote betting represents 100 % of all betting.

Ladbroke

In the United Kingdom the major market players are Ladbroke, Brent-Walker and Corals with market shares of approximately 25, 20 and 12 % respectively. All are organized as corporate bodies paying the normal company taxes in addition to the special separate taxes on betting which is a common feature in the Member States. In terms of trade, Ladbroke is the most active. It has offices in Ireland, Belgium, Germany, Italy, Spain and the Netherlands.

[1] [1985] ECR, p. 809.

In Ireland Ladbroke has 50 betting shops and in Belgium it has over 900 outlets and is the market leader with an estimated market share of over 41 %. In second place is the PMU belge with a market share of approximately 16 %, an organization separate from the PMU (France), but operating on the same principle of tote betting. In third place is Tiercé franco-belge which is owned by Corals, with a 13 % market share. It is clear that both Ladbroke and Corals trade in the Belgian market.

In the Netherlands, Ladbroke currently operates the State monopoly on tote betting which was awarded after adjudication to Ladbroke by the Dutch authorities in 1986. At the end of 1990, Ladbroke sought to renegotiate the contract with the competent Dutch authorities, the NDR. During the course of these negotiations a number of Ladbroke units were visited by representatives of the NDR accompanied by representatives of the PMU. On 28 March 1991 Ladbroke gave six months notice of its intention to terminate the contract. Subsequently both Ladbroke and the PMU as well as certain other companies were asked to make proposals for the provision of a computer/totalizator system. On 25 May 1991 the competent Dutch authorities (NDR) published a press statement that they would purchase an American totalizator system. It is clear that Ladbroke is currently trading in the Dutch market and that the PMU and Ladbroke have been in competition in that market.

PMU

In France, the PMU holds an effective monopoly established by law for all off-course horserace betting. Off-course betting represents about 85 % of the French market with the remaining 15 % represented by on-course betting, mainly organized by the PMU but also by individual racecourse undertakings taking bets, at races on their own courses.

Although it is only in recent years that the PMU has actively sought to increase its role and trade in markets for betting and related services outside France, under the Law of 23 December 1964 the PMU was already the sole body authorized in France for the taking of bets from abroad on French races and the placing of French bets on foreign races.

The PMU, either directly or indirectly through commercial companies such as the Pari Mutuel International (PMI) in which the PMU has a majority holding of 77,5 % of the share capital, is actively engaged in exporting betting and related services in competitive, commercial markets in other Member States and outside the Community. Indeed, this objective is clearly stated in Article 3 of the PMI's Articles of Association.

During the 1980s, within the protected domestic market, the PMU has developed, with assistance provided by the State, a sophisticated computer system and terminals for the taking of on- and off-course bets.

At the same time it has developed the necessary skills and expertise for the television recording of French horseraces and the live transmission to betting shops and other outlets by means of satellite links and terminal equipment. Background information on horses' form and previous race results are mixed into the pictures. This is essential information in order to remain competitive for the custom of the modern punter. Ladbroke in conjunction with the other major bookmaking firms in the United Kingdom have developed similar systems for transmitting pictures and commentary of UK races.

The PMU is involved in the Belgian market in different ways.

Through its subsidiary, the PMI, the PMU established a subsidiary in Belgium on 26 May 1989 called the Pari Mutuel Belge, abbreviated to PMB. The PMB includes under its objective the organization and operation in Belgium of all forms of bets authorized by law. The PMB is constituted by a share capital which is 99,98 % owned by the PMI.

It is involved in a proposal organized by a joint venture called the Groupement Hippodromes Wallons to build two new racecourses in the Wallon region of Belgium. The PMU is to provide the necessary technology and technical expertise for the taking of off-course bets, on both Belgian and French races. In connection with the provision of these services the PMU will transmit to Belgium its pictures and commentaries on French racing. According to the proposal this will involve an investment by the PMU of several hundred million Belgian francs.

As from 20 March 1991 the PMU outlets in Paris and the north-east of France can and have taken bets on Belgian races on the first and third Wednesdays of each month. An agreement introducing this arrangement was signed between the two organizations on 25 May 1990 and its implementation was made legally possible in France by Decree 91-118 of 31 January 1991.

Under the arrangements, the monies placed by punters in France are combined with the monies from Belgian punters to form a single pool of bets for the purposes of the totalizator. Winnings are paid out to punters after a retention charge by both PMU and the PMU belge. For the first three meetings the volume of the French bets exceeds those placed in Belgium, with the French bets representing an average of between 54 and 60 % of the total volume of bets placed. Based on the first three meetings, the average volume of bets placed by French punters amounts to some FF 2,3 million per meeting, equivalent to approximately BF 14 million. This corresponds to an annual turnover of BF 336 million.

Whilst the figure is small compared to the total turnover for betting in Belgium of ECU 381 million, i.e. it represents around only 2 %, it is based on an extrapolation of only the first three meetings. It is quite possible that as the French public become more aware of the attractions of betting on Belgian races and as the PMU extends the operation to other parts of France, these figures will increase.

More important than demonstrating the existence of interstate trade by the PMU is the fact that this is an example of the type of cooperation agreements that the PMU wishes to establish with similar organizations in Community Member States. More particularly, the PMU wishes to establish the facility to take bets in Member States outside France on horseraces held in France.

This will place the PMU in direct competition with Ladbroke. For example, 95 % of Ladbroke Belgium's turnover represents the taking of bets on the results of horseraces held in France. Similarly in Germany about 40 % of the bets placed relate to the results of French horseraces. The PMU wishes to capture a part of these markets and use the proceeds to support French horseracing activity.

Another example of the PMU's competition with Ladbroke can be found in the complaint that it lodged before the Belgian courts concerning the taking of bets on French races in Belgium. In that complaint, the PMU said that it was losing business to Ladbroke from punters, both in Belgium as well as in France living in the border region, who placed bets by telephone. No figures are available to the Commission to indicate the volume of telephone bets. The Commission understands that the volume of telephone bets. The Commission understands that the volume of of telephone bets, combined with the use of credit cards, which can be placed either in the same country as the caller or on a cross-border basis, is generally increasing. Certainly the trade exists, through apparently it only represents a small part of overall activity.

Another example of 'tele-betting' is the Minitel service. Under this service a punter can receive information for horserace betting through a normal television set that might be placed in his own home. A bet can be placed either through the television or by telephone. In France Minitel betting is relatively common. The Minitel service provided by the PMU in France is now being advertised and sold into Belgium. The objective must be to encourage Belgian punters to place bets on French races with the PMU rather than with other operators in the Belgian market. This brings the PMU into competition with other operators in the Belgian market and clearly, trade is again involved.

A last example of the competition between the PMU and Ladbroke in Belgium and of the exports of the PMU into Belgium is the complaint by Ladbroke on the refusal of the PMU to provide Ladbroke with television pictures and commentary on French racing for use in connection with off-course betting. The PMU has stated its intention to supply pictures and commentary within the context of its joint venture with the Groupement Hippodromes Wallons. The Commission is investigating this complaint.

In Germany, through the PMI and its German agent, Deutscher Sportverlag, the PMU sells live television pictures and commentary on French races to German bookmakers. Based on the price list for the services charged and the number of subscribers, the Commission estimates that the PMU is realizing a turnover of approximately ECU 1 million in Germany.

There is also a complaint currently being examined by the Commission concerning the PMU's refusal to sell such coverage to the Ladbroke office in Germany. Within this complaint the Commission has become aware of the Hellmund judgment of the District Court of Saarbrücken. This case concerned the refusal of the PMU and the Deutscher Sportverlag to sell live television coverage o French races and to sell the necessary decodin equipment to receive the television pictures an sound. The German court considered that the tele vision coverage was indispensable for the conduc of the bookmaker's business and ordered the PM and the Deutscher Sportverlag to sell the televisio pictures and sound to the German bookmaker.

The Commission attaches particular importance the judgment by the District Court of Saarbrücke since it not only made clear the existence of t PMU's trading activities in Germany, but also t vital importance of live TV pictures and comme tary to a bookmaker's business.

In Switzerland with effect from 14 April 1991 PMU is operating 50 outlets for the taking of b

on French horseracing. The contract to provide this service was obtained by the French PMU initially in direct competition with Ladbroke. Notwithstanding the fact that Switzerland is not a member of the Community, in the light of the Court's ruling in the Tubemeuse case (Case 142/87) [1], the Commission considers this relevant information, since the PMU's operations in Switzerland can strengthen its position in intra-Community markets and trade. It also demonstrates the general competition between the two companies for the provision of betting and related services and is another example of the export activities of the PMU.

The export activities and aims of the PMU are no secret. They have been confirmed by the French authorities, and the President of the PMU at a public press conference on 30 January 1991 made clear the policy objectives of the PMU to export its technical expertise in the area of the computerized collection and processing of off-course betting and thus to participate in international competition.

The conclusion that the Commission must draw from this lengthy list of observations is that the PMU participates either directly or indirectly in intra-Community trade, that the PMU is pursuing an active policy of export expansion and that it is one of the major market players. The information also shows that there is trade and competition in the provision of betting services in the Community, that competition in the international market is intensifying as the main market participants seek to consolidate or expand their market shares and as the barriers between national markets fall away as a result of advances in modern telecommunications and the processing power of computers.

The Commission also notes the privileged position of the PMU in this competition in that it has effectively a legally-protected monopoly in the second largest national market in the Community.

(9) The Commission notes that the test established by the Court in the Philip Morris case (Case 730/79) [2] for establishing a distortion of competition and an effect on intra-Community trade is stated as follows :

'When state financial aid strengthens the posiiton of an undertaking compared with the other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid'.

The foregoing paragraphs have demonstrated the award of state aid and the existence of other undertakings competing in intra-Community trade. The Commission must therefore consider that the conditions for the application of Article 92 (1) are fulfilled.

If this is the case then the conditions for prior notification under Article 93 (3) must also certainly be applicable, because the scope of application of Article 93 (3) must be greater than that of Artice 92 (1). If this were not so, the Commission's capacity to assess the compatibility of aids would be much diminished and impaires. The Court has always upheld this approach.

In consequence the aids were introduced in breach of Article 93 (3), in that they were not notified in advance to the Commission at the planning stage and must therefore be deemed to be unlawful.

(10) In view of the above, and as the Court has acknowledge in its judgment of 14 February 1990 in Case C 301/87 *(Boussac)* [3], where an infringement of Article 93 (3) has been committed, the Commission is entitled to take a provisional decision requiring France to suspend immediately the payment of aid to firms and to provide all the documents, information and particulars necessary for examining the compatibility of the aids with the common market.

Furthermore, pursuant to existing case-law, should France fail to comply with this Decision by not suspending the implementation of the scheme and the payment of the aid, the Commission could, while pursuing its examination of the substance of the case, refer the matter to the Court of Justice direct in order to have such infringement established, in accordance with the second subparagraph of Article 93 (2).

(11) Given the direct effect of Article 93 (3) [4] and the clear and unconditional requirement that payment of the aid be suspended immediately, this Decision must apply in full in the French legal system. The Commission would point out in this respect that, as made clear in the case law of the Court of Justice, not only national courts but also national

[1] [1990] ECR I, p. 959.
[2] [1980] ECR, p. 267.
[3] [1990] ECR I, p. 307.
[4] See Judgments in Case 77/72 *Capolongo* [1973] ECR, p. 611, Case 120/73 *Lorenz* [1973] ECR 1471 and Case 78/76 Steinicke [1977] ECR, p. 595.

administrative authorities, including local or regional authorities, have to apply Community law rather than national law where there is a conflict between the two [1].

(12) The Commission has also already initiated the procedure provided for in Article 93 (2) in respect of the aid since it takes the view that, on the basis of the information available to it, the aid is not compatible with the common market pursuant to Article 92 (1) and cannot at this stage qualify for the exemptions provided for in Article 92 (2) and (3).

The Commission would point out that, should a negative final decision be taken subsequently on the aid, the Commission may require any unlawful aid that has been paid in breach of the procedural rules provided for in Article 93 (3) to be repaid [2]. The abolition of the aid would involve repayment, in accordance with the procedures and provisions of French law, in particular those relating to interest on arrears on debts due to the State, with interest starting to run on the date on which the unlawful aid was granted. This measure is necessary in order to restore the *status quo* [3] by removing the financial benefits which the firms receiving the unlawful aid have improperly enjoyed since the date on which the aid was paid.

(13) By letter dated 24 April 1991, the Commission requested France to confirm that the three ongoing aid measures had been suspended in accordance with the obligation imposed pursuant to Article 93 (2) of the EEC Treaty and to confirm their position within five working days. By fax dated 30 April 1991, the French authorities informed the Commission that they had not suspended the grant of the aid,

HAS ADOPTED THIS DECISION:

Article 1

France shall suspend forthwith the payment of the following aid:

— treasury facilities enabling the PMU to defer on a temporary basis the payment of taxes levied on the horseracing bets administered by the PMU,

— exemption from the one-month delay rule for VAT payment,

— exemption from the payment of the social housing levy in respect of the PMU's employees,

introduced in breach of Article 93 (3), and shall communicate to the Commission, within 15 days, the measures which it has taken to comply with this Decision.

Article 2

France shall, within 30 days of notification of this Decision, provide all appropriate information allowing substantive assessment of the aid referred to in Article 1.

Article 3

This Decision is addressed to the French Republic.

Done at Brussels, 11 June 1991.

For the Commission

Leon BRITTAN

Vice-President

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[1] See Judgments in Case 166/77 *Simmenthal* [1978] ECR, p. 629 and Case 103/88 *Costanzo* [1989] ECR, p. 1839.

[2] See Judgments in Case 70/72 *Kohlegesetz* [1973] ECR, p. 813 and Case 310/85 Deufil [1987] ECR, p. 901. See also Commission communication, OJ No C 318, 24. 11. 1983, p. 3.

[3] See Judgment in Case C-142/87 *Tubemeuse* cited above.