II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 22 September 1993

concerning aid granted by the French Government to the Pari mutuel urbain (PMU) and to the racecourse undertakings

(Only the French text is authentic)

(93/625/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Having, in accordance with the abovementioned Article, given notice to the parties concerned to submit their comments,

Whereas :

I

On 7 April 1989, seven companies belonging to the Ladbroke group lodged a complaint with the Commission against aid granted by the French Government to the economic interest grouping Pari mutuel urbain (PMU). By letter dated 27 July 1989, the Commission asked the French authorities for information on the aid.

In the light of the information provided to it, the Commission concluded that the PMU had benefited and was continuing to benefit from a series of facilities granted by the French State. Such facilities consisted mainly of tax exemptions or reliefs under which the Treasury waived certain revenue payable to it or granted deferrals of payment. The measures are described in detail below.

After having examined the measures, the Commission decided, on 17 December 1990, to initiate Article 93 (2) proceedings [1] in respect of the aid for the following reasons. Thanks to the resources which the French State had waived, the PMU had been able to reverse an unfavourable financial situation and had been able to computerize its network for taking bets on horse-races. Availing itself of this situation, it had moreover endeavoured, since the beginning of the 1990s, to increase its share of the betting market in other Member States, where it was in competition with, amongst others, companies belonging to the Ladbroke group. Such measures had to be regarded as State aid within the meaning of Article 92 (1) of the EEC Treaty.

Since three of the measures had continued to be granted after the initiation of the Article 93 (2) proceedings, the Commission adopted, on 11 June 1991, an interim Decision requiring the French authorities to stop granting the aid forthwith [2].

II

As part of the proceedings, the French Government submitted its comments to the Commission by letters from its Permanent Representation dated 12 April 1991 and 7 February 1992. In them, it stated that it had never regarded its economic relations with the PMU as possibly involving State aid and requiring notification. The total amount of the levies received by the State was more than it would have obtained through strict application of the ordinary rules of law. It had never been the State's

[1] OJ No C 38, 14. 2. 1991, p. 3.
[2] OJ No L 14, 21. 1. 1992, p. 35.

intention to give any backing whatsoever to the PMU's export activities, which were a matter for the racecourse undertakings alone.

On 27 December 1991, the French Government also informed the Commission that it was prepared to abolish on 31 December 1991 the measures referred to in the interim Decision. Subsequently, the French authorities put forward a series of other dates for abolishing the measures, finally informing the Commission on 20 July 1993 that one of the measures had been adopted with effect from 1 October 1992, the second with effect from 1 July 1993 and the third as from 1 January 1994.

The comments received by the Commission as part of the Article 93 (2) proceedings following publication of its notice initiating them were communicated to the French authorities, translated into French, by letter dated 23 May 1991. The Commission staff had several meetings with the French authorities and the management of the PMU in the period 1991 to 1993.

III

In France, racecourse undertakings are responsible for organizing and ensuring the proper conduct of horse-races and for organizing betting on such races. Only 10 racecourse undertakings are authorized to organize totalizator betting outside their racecourses, by the Decree of 11 July 1930, as amended in particular by the Decree of 12 May 1948. For this purpose, they set up the economic interest grouping Pari mutuel urbain (PMU), which is permitted to take bets placed in France. The PMU holds a monopoly in off-course horse-race betting. It has existed as a legal entity only since 13 September 1985. Previously, it had merely been a joint technical service operated by the 10 racecourse undertakings.

For every FF 100 in registered bets, the PMU levies about FF 30 and pays back about FF 70 to the bettors. Of the FF 30 withheld, the PMU uses about FF 5,5 to cover its expenses whilst the national authorities and the city of Paris keep about FF 18, and the rest is allocated to the racecourse undertakings. The amounts not distributed to bettors are called levies. The levy for the racecourse undertakings is intended to allow them to cover the costs associated with organizing races and to finance the bulk of the incentives for horse-breeding. In 1990, the amount of bets handled by the PMU totalled some FF 33 billion.

Horse-race betting is organized in most Member States, and bettors in one Member State can bet on races run in another Member State. There are two types of horse-race betting. The totalizator system is used in several Member States, either exclusively, as in France, or together with the bookmaking system. Under the totalizator system, the amounts bet are pooled and, after deduction of a levy, part of the total is paid back to the winners. Under the bookmaking system, the bookmaker offers bettors odds on horses and pays the winners the odds multiplied by the stake.

As far as its horse-racing activities are concerned, the Ladbroke group acts mainly as a bookmaker and to a lesser extent also as a taker of totalizator bets. It is established in several Member States.

The amounts bet annually in games of chance in the Community are estimated, as far as legal betting is concerned, at some ECU 50 billion. Whilst lotteries are the preferred betting medium in Germany and Spain for example, horse-race betting is more popular in France and the United Kingdom. However, the markets have traditionally been partitioned, either *de jure* or *de facto,* along national or even regional lines.

The amounts bet on horse-races in the Community totalled an estimated ECU 14 billion in 1990. The PMU took ECU 4,87 billion in bets in 1990.

While horse-races are organized and run on national racecourses, betting on such races is organized internationally. Thus, the PMU accepts in France bets on races run in Belgium, and Ladbroke accepts in Belgium bets on French races. In Germany, 40 % of bookmakers' revenue comes from bets on French races and 20 % from bets on races run in the United Kingdom.

Trade here does not therefore involve the physical movement of products from one Member State to another, but the supply of services in one Member State by an undertaking (or in connection with the activities of an undertaking) established in another Member State.

Ladbroke's activities in this respect are significant. In most of the countries in which it is established, the company takes bets either on national horse-races or on races run in other countries. Whereas the PMU's activities outside France were limited before 1989, the setting up of the Pari mutuel international (PMI) in that year so as to allow it to extend its activities internationally shows that the PMU does not wish to confine its business to France alone. The PMI has moreover concluded an agreement with a German undertaking for the televising of French races to German bookmakers and another agreement with

the PMU Belge allowing it to take bets in France on races run in Belgium.

It is in fact since January 1989, when the PMI (in which the PMU has a majority shareholdings) was set up, that the PMU has expressly made clear its desire to extend its activities beyond France. It it through the agreements concluded in Germany and Belgium that it has entered into active competition with other betting organizations and racecourse undertakings, and more particularly with Ladbroke.

IV

Seven aid measures taken by the French State in support of the PMU were in force when the Article 93 (2) proceedings were initiated, namely:

1. the amounts resulting from unclaimed winnings are handed over to the PMU, but must be used primarily to finance social security expenditure and secondarily to finance monitoring, supervision and operating costs, horse-breeding incentives and investment directly connected with the organization of horse-racing and of totalizator betting. The allocation of unclaimed winnings is governed by Decree No 83/878 of 4 October 1983. If the amounts thus allocated are not entirely used up on the abovementioned expenditure, the remainder is paid into the general budget of the State. The French authorities state that the sums deriving from unclaimed winnings have always been considered normal resources;

2. the amount deriving from the rounding of betters' winnings down to the nearest 10 centimes has since 1967 been allocated to the general budget of the State (Finance Law of 17 December 1966). In 1982, the French State temporarily waived this revenue in favour of the PMU until 1985. The total amount which the PMU received during that period was FF 315 million. The French authorities argue that the awarding of this sum was justified by the PMU's computerization requirements at the time. The PMU was carrying out manually millions of operations involved in recording, pooling and processing bets. The racecourse undertakings were not able to finance all the necessary investment themselves;

3. as from 1984, the racecourse undertakings were showing a deficit. As a result, in addition to the introduction of a recovery plan, the French authorities decided, by Decrees of 23 January 1985 and 12 March 1986, to change the share-out of the levies. This change in the levies was subsequently maintained in force. The French authorities consider that the changes in the levels of the levy are an essential instrument in the arrangements for organizing betting on horse-racing;

4. the PMU is exempt from corporation tax. The French Government argues that, since the PMU was legally set up as an economic interest grouping ('Groupement d'Intérêt Économique'), it cannot show any profits at the end of a financial year. The exemption cannot constitute aid;

5. the PMU has to pay the French State the share of the levies going to the Treasury. In normal circumstances, these public levies would have to be paid into the budget in three instalments, namely on 20 and 30 of the month in which the charges were levied and on 10 of the following month. On 24 April 1980, the Minister for the Budget allowed such payments to be deferred and to be reduced to a single instalment. The deferral amounted to 20 days' additional cash resources. The French authorities stated that the measure was justified in order to bring the arrangements for paying the PMU levies into line with those for the lotto levies. In 1982, the Minister for the Budget extended the deferral to 30 days;

6. the racecourse undertakingts making up the PMU were exempted from the one-month delay rule for VAT deductions as from 1 August 1969. The French Government considers that this advantage was offset from 1989 onwards by a permanent deposit which the racecourse undertakings had to lodge with the Treasury. The measure was abolished as from 1 July 1993;

7. under French legislation, employers have to contribute to the building of subsidized housing through a tax levied on their payroll. The rate of the tax has varied from 0,8 % in 1980 to 0,65 % in 1990. The PMU was exempted from the contribution. The revenue which the French State thus waived has varied from FF 5 165 million in 1986 to FF 3 858 million in 1990.

   The French authorities justify this exemption on the grounds that all agricultural activities in France are exempted from the contribution and that the State deems racing activities to be agricultural in nature. They base this view on a 1962 Decree of the Council of State confirming the agricultural nature of such activities. Although a judgment by the Court of Cassation took the opposite view in 1966, the Ministry of Finance considers that it is obliged to follow the approach adopted by the Council of State, since the rules laid down by the administrative jurisdiction are mandatory for any administrative authority.

   The French Government informed the Commission that proceedings have been initiated to abolish the exemption as from 1 January 1994.

The latter three measures are the ones which the Commission, by a Decision adopted in June 1991, required the French Government to suspend in respect of the PMU.

V

It should first be considered separately for each of the seven measures described under Section IV whether they fulfil the criteria for applying the provisions of Article 92 (1) of the EEC Treaty, and more particularly whether the measures derogate from the normal application either of tax provisions specific to the PMU or of general taxation.

1. In so far as the amounts deriving from unclaimed winnings have always been considered to be normal resources, they form part of the non-public levies. The fact that Decree No 83-878 of 4 October 1983 in particular provides that the sums not entirely used up by the racecourse undertakings should be paid back to the State, thus restricting their use, does not in any way alter the fact that such resources are a non-public levy. The use of such resources to finance social security expenditure in particular cannot therefore be regarded as State aid within the meaning of Article 92 (1), since the State-resources criterion is not met.

2. The amount deriving from the practice of rounding bettors' winnings down to the nearest 10 centimes forms part of the public levy. The waiving from 1982 to 1985 of part of the levy so as to allow the racecourse undertakings to finance the computerization of the PMU's operations must be regarded as aid within the meaning of Article 92 (1), since it was a measure limited in time and intended to solve a specific problem. It was through the resources which the State temporarily waived that the PMU was able to strengthen its market position.

3. The change made to the levy in 1984 does not, by contrast, appear to be an *ad hoc* operation designed to solve a specific problem, since the change has been maintained since then. It must also be viewed in the light of the opinion which the Commission sent the French authorities in March 1991, which states that :

   'The tax arrangements applicable to horse-races are the responsibility of the national authorities ; consequently, any upward or downward adjustments made to the rates of tax set do not amount to the granting of State aid provided that the changes resulting from such adjustments are applicable uniformly to all the undertakings concerned.

   However, the existence of State aid cannot be ruled out where a significant reduction in the rate of taxation results in the strengthening of the financial situation of an undertaking in a monopoly position ; in such circumstances, the reduction in the rate of taxation would have to be assessed in the context of Article 92 (1) of the Treaty.'

   The measure involved a limited reduction (some 1,6 %) in the public levy, a reduction which was subsequently maintained. The public authorities did not therefore finance a specific *ad hoc* operation, but made an adjustment to the levies acting within the framework of their powers and responsibilities. Since they were acting within this framework with the aim of increasing the resources of the recipients of the non-public levies on a permament basis and taking account of the particularity of the recipients' situation (see Section IV), the measure does not constitute aid within the meaning of Article 92 (1) of the EEC Treaty. It is equivalent to a reform in the form of a 'tax' adjustment that is justified by the nature and economy of the system in question.

4. The exemption from corporation tax enjoyed by the PMU must be considered to stem from the normal application of the general tax system. Corporation tax cannot apply to the PMU since its legal form is that of an economic interest grouping ('Groupement d'Intérêt Economique').

5. The cash resource advantages deriving from the deferral allowed in the paying to the State of its share in the levies do not fulfil the conditions for the application of Article 92 (1) either. This measure has had the effect of increasing the share of the non-public levy continuously since 1981. It does not therefore involve a temporary waiving of resources by the public authorities nor a specific *ad hoc* measure. Its assessment in the light of the provisions of Article 92 (1) is the same as that of the measure referred to in point 3.

6. Exemption from the one-month delay rule for deducting VAT does, by contrast, constitute a cash resources advantage that must be regarded as State aid, since, even though provided for under Community legislation, it derogates from the normal arrangements for payment of VAT. However, this advantage has since 1989 been offset by a permanent deposit lodged with the Treasury.

7. As mentioned previously (see Section IV, point 7), the French authorities consider that the activities of the PMU and of the racecourse undertakings are agricultural activities and that the PMU and the racecourse undertakings do not therefore have to pay the housing levy, since such activities are generally exempt from that tax. The French authorities base their view on a Decree adopted by the Council of State.

   The Decree concerns two racecourse undertakings that are not members of the PMU and does not in any way concern their activities relating to the taking of bets on horse-races. While the Commission could perhaps accept the position of the Ministry of Finance as regards the racecourse undertakings, it cannot accept its position as regards the PMU. The PMU's activity, namely the organization and processing of betting and the payment of winnings, is quite clearly not an agricultural activity. The fact that the PMU's shareholders, namely the racecourse undertakings, are recognized as exercising such an activity cannot of itself confer on the PMU the status of being a professional agricultural body. Such reasoning would mean that any undertaking handling business in a non-agricultural area would have to be recognized as being agricultural if the majority of its shareholders had such status. Consequently, the tax exemption which the PMU enjoys must be regarded as not being justified by its status

and as conferring on it aid within the meaning of Article 92 (1), since the exemption derogates from the general tax system.

The Commission therefore considers that the following measures must be deemed to be State aid within the meaning of Article 92 (1) of the EEC Treaty:

— the waiving from 1982 to 1985 of amounts deriving from the practice of rounding bettors' winnings down to the nearest 10 centimes,

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

— exemption from the employers' contribution to building and construction work.

As was shown above, there is some competition in the Community market in this sector, and it can reasonably be stated that there is trade between Member States in the taking of bets, notably through the exchange of television pictures. The PMU decided, through the PMI, to extend its activities abroad, and in the Community in particular, as from 1989. The export activities of the PMU and of the racecourse undertakings — its shareholders — were clearly confirmed at a press conference held by its chairman in January 1991. The PMU's policy, he said in substance, was to export its technical expertise in the taking and computerized processing of bets and thus to engage in international competition. The conclusion which should be drawn is that competition and trade in this market will increase, while undertakings operating in this sector will endeavour to increase their market shares or to consolidate them.

It should also be noted in this respect that the PMU is in a privileged position in that its activity is protected in the second-largest market in terms of betting volume in this sector, namely France.

Having regard to the above considerations, the measures referred to in points 2, 6 and 7 are State aid that is liable to affect trade between Member States and distort competition, and they consequently fulfil the conditions of Article 92 (1) of the EEC Treaty.

VI

The aid referred to in points 2, 6 and 7 of point V of this Decision should have been notified to the Commission pursuant to Article 93 (3) of the EEC Treaty. Since the French Government failed to do so, the Commission was unable to express its views on the measure before it was implemented. Consequently, the aid has been unlawful under Community law since the time it was granted, since the provisions of Article 93 (3) were not complied with.

It should be noted that, given the mandatory nature of the procedural rules laid down in Article 93 (3) of the EEC Treaty, which are also important from the point of view of public policy, and whose direct effect the Court of Justice recognized in its judgments of 19 June 1973 in Case 77/72 [1], of 11 December 1973 in Case 120/73 [2], of 22 March 1977 in Case 78/76 [3] and of 21 November 1991 in Case C-354/90 [4] the unlawfulness of the aid cannot be corrected retrospectively.

Furthermore, where aid is incompatible with the common market, the Commission can make use of an option made available to it by a judgment delivered by the Court of Justice on 12 July 1973 in Case 70/72 [5] upheld by the judgments of 24 February 1987 and 20 September 1990 respectively in Case 310/85 [6] and Case C-5/89 [7] by requiring Member States to recover from recipients any aid granted unlawfully.

VII

Article 92 (1) of the EEC Treaty provides that aid having the characteristics it defines is in principle incompatible with the common market.

As far as the derogations from this principle are concerned, those set out in Article 92 (2) of the EEC Treaty are inapplicable in this instance, given the nature and objectives of the aid in question. The French Government has not claimed this derogation, in any case.

Article 92 (3) specifies which types of aid may be considered to be compatible with the common market. The compatibility of aid with the Treaty has to be assessed in the context of the Community as a whole and not that of a single Member State. So as to ensure the proper functioning of the common market and compliance with Article 3 (f) of the Treaty, the derogations from the principle laid down in Article 92 (1) that are set out in Article 92 (3) should be interpreted strictly in examining any proposed aid scheme or individual grant of aid.

[1] [1973] ECR, p. 611.
[2] [1973] ECR, p. 1471.
[3] [1977] ECR, p. 595.
[4] [1991] ECR, p. I-5505.
[5] [1973] ECR, p. 813.
[6] [1987] ECR, p. 901.
[7] [1990] ECR, p. I-3437.

In particular, the derogations are applicable only if the Commission is able to establish that, if the aid were not granted, market forces alone would not induce the potential recipient to behave in a way that would help to achieve one of the abovementioned objectives.

Allowing derogations for aid which does not in any way contribute to such an objective or which is not necessary for that purpose would amount to granting an unfair advantage to industries or firms in certain Member States by simply improving their financial position, and would be liable to affect trading conditions between Member States adversely and to distort competition, without any Community interest as justification, as is required by Article 92 (3).

As far as the derogation pursuant to Article 92 (3) (b) is concerned, the aid was clearly not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the French economy. Aid for betting is not apt to solve the type of situation described in Article 92 (3) (b).

As far as the derogation pursuant to Article 92 (3) (a) and (c) on aid to promote the development of certain regions is concerned, the aid granted to the PMU does not have any regional objective, nor has the French Government cited any such grounds in order to justify the aid.

Lastly, as regards the derogation provided for in Article 92 (3) (c) for aid to facilitate the development of certain economic activities, the following points should be taken into consideration :

1. the FF 315 million in aid which the PMU received for the computerization of its bet-taking and processing operations covered almost 29 % of the cost of such computerization. Computerization had become essential in order to speed up and improve the processing of bets. The intensity of the aid is high. The Commission accepts similar rates of investment aid in the Community's less-developed regions. Such a situation clearly does not obtain here. In addition, there is growing competition in the sector. Before applying the derogation provided for in Article 92 (3) (c) in such circumstances, the Commission must assess whether the aid distorts or threatens to distort competition and the growing trade in the sector to an extent contrary to the common interest or whether, on the contrary, its disruptive effect on the Community market is too small to outweigh the beneficial effect of the aid on the development of the sector. In this instance, the Commission considers that, 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 computerization 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 in horse-breeding. The aid was therefore compatible with the common market pursuant to Article 92 (3) (c) of the Treaty ;

2. the measure in the form of exemption from the one-month delay rule for VAT deductions resulted in a cash resources facility. In this instance too, since the aid ranks as operating aid that is potentially more harmful to competition than that described in point 1, the Commission must assess whether the aid could, in view of the market situation, have produced disruptive effects that would have outweighed any beneficial effects on the development of the sector. For the same reason as that described in the previous point, the Commission considers that, up to January 1989, the aid was compatible with the common market pursuant to Article 92 (3) (c). As described above, the aid was after 1989 offset in full by a permanent deposit which the racecourse undertakings had to lodge with the Treasury ;

3. the exemption from the employers' contribution to building and construction work conferred cash resources facilities on the PMU. Like the aid granted through exemption from the one-month delay rule for deduction of VAT, this aid granted to the PMU qualifies up to 1989 for the derogation provided for in Article 92 (3) (c), but, given the development of trade thereafter, must be considered incompatible with the common market after 1989.

VIII

As mentioned in Section VI, since the aid granted by the French Government to the PMU was not notified in accordance with Article 93 (3) of the EEC Treaty, the Commission may require the aid to be repaid if it deems it ineligible for any of the derogations pursuant to Article 92 (3). Consequently, the aid in the form of exemption from the contribution to building and construction work received by the PMU should be repayable as from 1989, the date on which the PMU started to operate in other Community countries.

Nevertheless, the Commission considers 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 Decree of the Council

of State referred to in Section IV, point 7. However, this 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 has not been given the means to quantify for itself the aid element to be recovered in respect of this latter measure. For this reason, in adopting the implementing measures required to comply with this Decision, the French Government must be required to determine itself and communicate to the Commission the amount of aid to be recovered.

Such recovery must be carried out in accordance with the procedures and provisions of French law, notably as regards interest on arrears owed to the State, with such interest starting to run as from 11 January 1991, the date on which the Commission notified the French authorities of its decision to initiate proceedings,

HAS ADOPTED THIS DECISION:

Article 1

The aid granted by the French authorities to the Pari mutuel urbain (PMU) in the form of:

— the financial yield from the rounding-down of winnings to the nearest 10 centimes, granted from 1982 to 1985,

— exemption from the one-month delay rule for the deduction of VAT prior to 1989,

— exemption from the employers' contribution to building and construction work,

are hereby declared unlawful, since they were granted in breach of the provisions of Article 93 (3) of the EEC Treaty. The aid referred to in the first two indents, and the aid referred to in the third indent granted before 1 January 1989, are compatible with the common market pursuant to Article 92 of the EEC Treaty. However, the aid referred to in the third indent granted since 1 January 1989 is incompatible with the common market pursuant to Article 92 (1) of the EEC Treaty.

Article 2

France shall abolish forthwith the aid in the form of exemption from the employers' contribution to building and construction work referred to in the third indent of Article 1.

Article 3

France shall require the PMU to repay the aid granted as from 11 January 1991 in the form of exemption from the employers' contribution to building and construction work referred to in the third indent of Article 1.

The aid shall be recovered in accordance with the procedures and provisions of French law, notably as regards interest on arrears owed to the State, with such interest starting to run as from 11 January 1991.

Article 4

France shall inform the Commission within two months of notification of this Decision of the measures taken to comply with it.

Article 5

This Decision is addressed to the French Republic.

Done at Brussels, 22 September 1993.

For the Commission

Karel VAN MIERT

Vice-President