II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 31 January 1995

relating to a proceeding under Articles 85 and 86 of the EC Treaty

(IV/33.375 — PMI-DSV)

(Only the German and French texts are authentic)

(95/373/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by the Act of Accession of Spain and Portugal, and in particular Articles 2 and 6 thereof,

Having regard to the complaint lodged on 24 November 1989 concerning an alleged infringement of Articles 85 and 86 of the EC Treaty by Ladbroke Deutschland GmbH against

— Deutscher Sportverlag Kurt Stoof GmbH & Co, Cologne (Germany),

— Groupement d'intérêt économique (GIE) Pari Mutuel Urbain, Paris (France), and the nine French racing associations of which it is composed,

— Pari Mutuel International SA, Paris (France),

Having regard to the notification and application for negative clearance submitted to the Commission on 15 February 1991 by Pari Mutuel International SA concerning the PMI-DSV agreement of 4 December 1990,

Having regard to the summary of the notification published [2] pursuant to Article 19 (3) of Regulation No 17,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas :

I. THE FACTS

A. The undertakings concerned

(1) (a) Pari Mutuel International SA ('PMI'), Paris, France, is a subsidiary of Groupement d'intérêt économique (GIE) Pari Mutuel Urbain ('PMU'), three banks, and the nine racing associations which are members of PMU. Its purpose is to develop the exploitation of television pictures and news of French races outside France.

(b) PMU, Paris, France, was set up by the French racing associations authorized to take off-course bets. Under French law, all associations organizing races are authorized to organize totalizator betting at their racecourses. Nine of them are also authorized to take off-course bets (in their

[1] OJ No 13, 21. 2. 1962, p. 204/62.

[2] OJ No C 246, 24. 9. 1992, p. 3.

own agencies, and in cafés, tobacconists' shops, etc.). These nine associations (four in the Paris area, five in the provinces) entrusted PMU with the task of drawing up the programme of meetings, totalizing bets and calculating winnings.

The organizing associations retain the intellectual property rights to the races; they film, produce and commentate them themselves.

(c) Deutscher Sportverlag Kurt Stoof GmbH & Co ('DSV'), Cologne, Germany, is a German sports publisher, one of whose publications is a racing paper that covers French races. DSV also participates in relaying television pictures and news of horse races.

B. The complaint

(2) On 24 November 1989, Ladbroke Racing (Deutschland) GmbH, Cologne ('Ladbroke Deutschland'), the German subsidiary of Ladbroke Racing Ltd, the largest United Kingdom turf accountants, lodged a complaint with the Commission against PMI and DSV concerning an alleged infringement of Articles 85 and/or 86 of the EC Treaty.

According to Ladbroke, those two Articles were infringed by the clauses of the agreement between PMI and DSV which prevented DSV from sublicensing the use of sound and pictures relating to French horse-races to turf accountants that were corporate bodies or which did not exist at the date when the agreement was concluded.

It asked the Commission to require, through a Decision pursuant to Article 3 (1) of Regulation No 17 in the same terms as in Commission Decision 89/205/EEC, (Magill) [1], either PMI directly or DSV, on the instructions of PMI, to place at its disposal, on a non-discriminatory basis, the same televised colour pictures and commentaries as was supplied to all other German bookmakers.

Ladbroke also asked the Commission to undertake investigations pursuant to Articles 11 and 14 of Regulation No 17 in order to verify all the terms of the agreement between PMI and DSV for the purposes of establishing whether it contained any other conditions which restricted competition and of ensuring that any copyright which might exist was exploited on a non-discriminatory basis.

[1] OJ No L 78, 21. 3. 1989, p. 43.

C. The market

(3) (a) In the Commission's view, this case involves neither the betting market proper nor the market in televised pictures and news of horse races as such.

(b) The betting market proper takes two distinct forms:

1. Non-pool betting, in which the bettor bets on the winning horse against a bookmaker on the basis of odds ('5 to 1', '10 to 1', etc.) agreed between the bettor and the bookmaker or of conventional odds to which the parties refer, e.g. the starting odds at the racecourse, or the dividends of national or foreign totalizator betting published in the specialized press.

   This type of betting is practised in the United Kingdom (96 % of the market), Germany (19 %), Belgium (68,5 %) and several other countries. It is prohibited in France.

2. Totalizator betting, in which the stakes are combined into a pool of which 70 % is paid back to the bettors who have correctly predicted the winning horse or the finishing order of a group of horses (first two, first three, first four, first five, etc.), with 15 % to the State by way of tax and 15 % to the organizer [2].

   This type of betting, which is generally organized by national racing associations, is practised in France (100 % of the market), Germany (8 %), Belgium (31,5 %), the United Kingdom (4 %) and other countries.

It emerges from the Commission's investigation that the betting market can function perfectly well without the television pictures and news produced by the racing associations being relayed by satellite to betting shops. However, where this option is available on the market, it may have a marked effect on competition.

[2] These percentages correspond to the deductions applied in France. In Belgium, the deduction made for tax is only half as much.

(c) The market in relaying televised pictures and news of horse races (in the Commission's view, the relaying of greyhound races or other sports events are separate markets) is shared between the UK company SIS (Satellite Information Services Ltd), the shareholders of which are the three main UK bookmakers (including the complainant), which relays the pictures and news of British races, and the French company FCR (Société France Câbles et Radio), which relays those of French races on PMI's behalf. Only a sound broadcast is relayed of German races. Belgian races are not relayed at all.

In the United Kingdom, SIS is the only supplier of televised pictures and news of horse races. The same applies to FCR in France. In Belgium, where FCR's broadcasts are not received, 5 % of bookmakers receive SIS broadcasts. Of bookmakers in Germany, which take 19 % of total bets in that country, 79 % receive SIS broadcasts, 86 % receive FCR broadcasts and 65 % receive both.

This market in relaying televised pictures and news of horse races is at present characterized by the fact that the pictures and news in question are essentially intended for transmission to betting shops for the purposes of supplying their customers with information which facilitates their choice and, in so doing, of inducing them to bet more. Consequently, this market is closely linked to the type of betting (odds-type betting or totalizator betting) or the origin of the race pictures (United Kingdom, France) on which basis bets are taken in betting shops which receive these pictures and news.

(d) The Commission therefore considers that the market in question, i.e. that of the relaying of television pictures and news of horse races for the customers of betting shops, is ancillary to the betting market.

(e) As regards the geographical scope of this type of market, it takes the view that, for reasons of legislation, and owing to the habits of bettors, especially in their choice as between odds-type and totalizator betting (see (b) above) and between betting on national and on foreign races (1), and also because it is a characteristic of the main market — the market in betting — that it calls for a close relationship between bettors and bet-takers, the ancillary market in pictures and news transmitted by satellite is subject to the same territorial limitation, with the result that every national market has to be regarded as a separate market.

(1) In France and the United Kingdom, all betting is on national races, in Germany, 88,6 % is on national races and 11,4 % on French and British races, while in Belgium, 31,5 % is on national races, 63 % on French races and less than 5 % on British races.

D. Contracts preceding the notified contract

(4) Following the lodging of Ladbroke Deutschland's complaint, the Commission asked the firms concerned to inform it of the agreements under which pictures and sound of French races were relayed live by satellite to German betting shops.

The Commission concluded from the replies sent by the firms concerned that:

1. the French racing associations (of which there were still ten at that time) had, by contract dated 9 January 1990 with retroactive effect from 1 August 1989, granted PMU the right to market in France and abroad, in the latter case through PMI and subject to their prior consent to each such operation, the television pictures and news (that is to say, pictures and sound, winning dividends, commentaries, programmes and forecasts) of the races organized by them, so as to promote off-course betting on those races;

2. by contract dated 12 January 1990, PMU transferred to PMI the operating rights in pictures and commentaries that it had been granted by the racing associations for the races organized by them, for the Federal Republic of Germany as then constituted, West Berlin and Austria;

3. by contract dated 25 August 1989 between PMI and DSV, it was agreed that the pictures and news of the French races already transmitted by FCR to PMU agencies in France under a contract between PMU and the French racing associations would also be relayed live to betting shops run by the turf accountants appointed by DSV in the Federal Republic of Germany as then constituted, West Berlin and Austria.

(5) In the Commission's view, this latter contract contained two restrictions of competition likely to affect trade between Member States:

1. a clause (paragraph 4) by which the right to receive relayed pictures and news of horse races was limited to natural persons. Corporate turf accountants such as Ladbroke Deutschland could receive the transmissions only if the parties came to a separate agreement;

2. a clause (paragraph 5) by which DSV could transmit pictures and news only to betting shops already in existence when the contract was signed. However, this restriction did not apply to new concessions granted by virtue of the principles defined in paragraph 4 of the contract.

(6) The Commission sent statements of objections to PMU and PMI on 21 December 1990, and to DSV on 18 January 1991, announcing its intention of finding that the conditions for the application of Article 85 (1) of the EC Treaty were met as regards the two clauses summarized above, and that there were no grounds for applying Article 85 (3), and consequently of ordering that the infringements be brought to an end immediately.

PMI replied on 15 February 1991 to this statement of objections, PMU on 20 February and DSV on 27 March. All three asked to be heard by the Commission, and a hearing was held on 17 April.

Meanwhile, on 15 February, PMI and DSV notified the Commission of a new contract replacing that of 25 August 1989.

E. The notified contract

(7) This contract, signed on 4 December 1990, with retroactive effect from 1 July, was notified on 15 February 1991 with an application for negative clearance or, if the Commission was not prepared to grant such clearance, exemption under Article 85 (3).

(a) Under this contract, PMI granted DSV an exclusive operating licence in the Federal Republic of Germany as constituted before unification, West Berlin and Austria for pictures, commentaries and other relevant information; the ownership rights, which belong to the associations or to PMU, are described in the preamble to the contract.

(b) Consequently PMI undertook to supply to DSV's subcontractors (the bookmakers) the equipment for decoding the coded satellite signal needed to receive the television pictures and news in their betting shops.

(c) The contract also included a number of provisions that DSV undertook to impose on the subcontractors through a standard subcontract approved by PMI, which would check compliance in each case. Among the provisions were three that the Commission considered incompatible with Article 85 of the Treaty. After the Commission had sent a statement of objections on 22 January 1992, those provisions were amended to ensure compliance with Article 85 of the Treaty.

The provisions in question were the following:

1. A requirement for honesty on the part of the subcontractor: the Commission found this clause insufficiently precise, and lacking in objective criteria to determine the choice of subcontractors (they should not have been penalized by any legal or administrative authoritiy or have been involved in any country whatsoever in proceedings relating to infringements of the laws on betting and gaming). The new wording of the clause limits its scope to a prohibition on subcontractors who have been found guilty of infringements in the territories governed by the contract.

2. A clause requiring subcontractors to recognize in all countries the ownership rights of the racing associations and PMU as described in the preamble. The Commission pointed out to the parties that this clause might mean that a subcontractor's contract could be cancelled if he did not recognize the existence in all Member States of rights that were included among the general 'ownership rights' referred to by the racing associations and that it prevented him from invoking before the courts, where appropriate, the absence of any legal protection of those rights. The amended version of the clause no longer requires subcontractors to recognize these ownership rights.

3. A clause on corporate subcontractors:

— requiring them to notify DSV, which would pass on the information to PMI, of all relevant information about the company (balance sheet, distribution of shareholders, holdings, etc.)

— in the case of companies belonging to a group, requiring the parent company to undertake, for and on behalf of the member companies, that all the clauses in the contract signed by DSV and the subsidiary would be complied with and enforced,

— requiring the parent company and all the subsidiaries of a group to satisfy the conditions of honesty set out in the preceding articles of the contract.

The Commission pointed out to the parties that this clause would require corporate subcontractors to divulge highly confidential information, which amounted to serious discrimination that could not be objectively justified by specific reasons showing it to be essential to the application of the contract. Nor was it justified by any greater risk of default on the part of corporate subcontractors. As a result of the Commission's remarks, the requirement in the first indent of the clause was limited to documents subject to compulsory publication in the territories covered by the contract; the requirement in the second indent was replaced by a provision merely requiring the subcontractor to promise that it would not use its links with other companies to evade its commitments; and the requirement in the third indent was deleted.

(d) The contract provides that the sub-licensee will refrain from transmitting or relaying television pictures and information either to another place or to another agency or to a third party not authorized by DSV.

(e) The contract prohibits DSV from concluding contracts with subcontractors who do not agree to refrain from carrying out, in the agency receiving the pictures and sound, any other activity relating directly or indirectly to games of chance, unless otherwise provided for by the laws in force.

(f) The contract requires DSV to ensure that, at all times, at least 40 betting shops are equipped with decoders.

(g) It lays down arrangements for the remuneration of PMI.

(h) It gives the racing associations and PMI the opportunity to place bets on German races, either direct or in association with third parties (such as the German Lotto companies).

(i) The contract has a duration of five years; an extension may be negotiated between the parties.

(8) A summary of the notified agreement, as amended following the statement of objections sent on 22 January 1992, was published pursuant to Article 19 (3) of Regulation No 17.

The Commission announced that it proposed to adopt a favourable attitude towards the notified agreement and invited interested third parties to send their comments before it did so. It received three letters in reply to the notice.

(9) The letters, all dated 22 October 1992, were from :

— Ladbroke Deutschland,

— SIS the firm which relays by satellite pictures and sound of British horse races to German bookmakers,

— Betting Office Licensees Association Ltd (BOLA), the association of British off-course turf accountants.

The three undertakings/association of undertakings object to :

1. the fact that the notified contract is limited, as regards Germany, to the territories of the Federal Republic of Germany as constituted before unification and West Berlin, which they regard as an inadmissible partitioning of the territory of the present Federal Republic of Germany,

2. the provision in the contract prohibiting DSV from relaying the pictures and sound it receives from PMI to agencies outside the licensed territory,

3. the fact that the racing associations, PMU and PMI hold the intellectual property rights in the racing results and announcements of winning dividends.

II. LEGAL ASSESSMENT

(10) Following the amendements made to the contract by PMI and DSV at the Commission's request, none of the clauses of the contract is now caught by Article 85.

(11) The provision limiting the exclusive operating licence granted to DSV to the Federal Republic of Germany as constituted before unification, West Berlin and Austria (see paragraph 7 (a) above) is not caught by Article 85 either. The holders of the copyright to the pictures and commentaries of French races, namely the racing associations, were entitled, in granting PMU the right to use such pictures and commentaries, to require it to seek their approval whenever PMI wished to exercise those rights abroad.

(12) The same is true of the provision requiring DSV subcontractors to refrain from transmitting or relaying television pictures and news received from FCR to another place, either on behalf of another betting shop or on behalf of a third party not authorized by DSV (see paragraph (7) (d) above). Such clauses form part of the rights granted to copyright holders under present Community rules.

Such a clause could not be caught by Article 85, since the licensor remains free, under such Community rules, to choose his licensee and the size of the territory which he grants him. If such a clause were not included, the licence would become a European licence under which the licensor would no longer be free, in particular, to choose his sub-licensee for the other Member States for business or financial reasons or on the grounds of honesty. The omission of such a clause might also deprive the licensor of the right to check the subcontractor's technical capacities, such as his capacity to relay properly the sound and pictures sent to him, bearing in mind in particular the fact that the authorization conferred on FCR for the relay of such sound and pictures stops at the boundaries of the territory granted under the agreement of 4 December 1990. If such a clause were not included, therefore, the licensor would be unable to coordinate the management of all the relays of sound and pictures to the other Member States.

(13) As regards the provision prohibiting subcontractors from pursuing in the betting shop receiving the pictures and sound, any other activity directly or indirectly related to games of chance unless otherwise provided for by the laws in force (see paragraph (7) (e) above), it amounts to allowing only lawful acts. The fact that it does not prohibit lawful actions means that it is not liable to restrict competition within the meaning of Article 85 (1).

(14) Turning lastly to whether racing associations hold intellectual property rights in racing results and tote dividends, the Commission notes that the question may in future be submitted by sub-contractors for appraisal by the national courts. In its revised version, the contract no longer includes any obligation on the part of sub-contractors to acknowledge such rights. Since those sub-contractors are now free to refer the matter to the courts, the contract no longer contains, in this regard, any elements restricting competition within the meaning of Article 85 (1).

(15) Since the PMI-DSV contract and the subcontract offered by the latter to German bookmakers no longer contain any clauses caught by Article 85, the complaint lodged by Ladbroke on 24 November 1989 pursuant to Articles 85 and 86 of the Treaty is now inapplicable.

In particular, following the delegation of the clauses contrary to Article 85, DSV is now free to grant sub-licenses to any bookmaker established in the territory covered by the licence, irrespective, of the bookmaker's legal status.

Consequently, there is no longer any basis for the view that the contract between PMI and DSV is caught by Article 85 or 86,

HAS ADOPTED THIS DECISION:

Article 1

On the basis of the facts in its possession the Commission has no grounds for action under Articles 85 and 86 of the EC Treaty in respect of the agreement concluded between Pari Mutuel International SA and Deutscher Sportverlag Kurt Stoof GmbH & Co on 4 December 1990.

Article 2

This Decision is addressed to :

— Pari Mutuel International SA,
Paris,
France ;

— Deutscher Sportverlag Kurt Stoof GmbH & Co,
Cologne,
Germany.

Done at Brussels, 31 January 1995.

For the Commission
Karel VAN MIERT
Member of the Commission