

Case T-67/94

Ladbroke Racing Ltd
v
Commission of the European Communities

(Action for annulment — State aid — Market in bet-taking —
Article 92(1) and (3) of the EC Treaty — Concept of aid —
Tax measures — Obligation to refund)

Judgment of the Court of First Instance (Second Chamber, Extended Composition), 27 January 1998 II - 7

Summary of the Judgment

1. *State aid — Concept — Competence conferred on the Commission and the national courts to characterise a domestic measure as State aid — Commission's discretion not broad (EC Treaty, Art. 92(1))*

2. *State aid — Concept — Reduction in a Member State's levy on bets taken on horse-races by the body with an exclusive right to manage the organisation of totalisator betting in that State — Covered — Tax measure of an ongoing character, limited and not aimed at financing a specific ad hoc operation — Irrelevant (EC Treaty, Art. 92(1))*

3. *State aid — Concept — Cash-flow benefits flowing from the authorisation to defer payment of the State's share of levies on bets on horse-races — Covered — Measure of indirect benefit to other economic operators — Irrelevant*
(EC Treaty, Art. 92(1) and (3)(c))

4. *Actions for annulment — Pleas in law — Pleas which may be raised by the complainant in respect of a final Commission decision concerning State aid — Plea based on the failure to examine certain State measures criticised in the complaint — Measures not covered by the decision to initiate the procedure — Commission's failure to adopt a position not challenged by the complainant — Inadmissible*
(EC Treaty, Arts 93(2), 173, fourth para., and 175)

5. *State aid — Concept — State measure placing unclaimed winnings at the disposal of the national body responsible for the organisation of totalisator betting, in order to finance social expenditure — Covered*
(EC Treaty, Art. 92(1))

6. *State aid — Prohibition — Derogations — Aid which may be considered compatible with the common market — Commission's discretion — Review by the Community judicature — Limits*
(EC Treaty, Arts 92(3) and 173)

7. *State aid — Commission decision finding aid incompatible with the common market and ordering it to be repaid — Reliance by the national authorities on temporal limitation of the obligation to repay arising from the recipient's legitimate expectation that the aid was lawful — Not permissible*
(EC Treaty, Arts 92 and 93)

8. *State aid — Commission decision finding aid incompatible with the common market and ordering it to be repaid — Member States' obligations — Obligation to recover — Scope — Restoration of the status quo ante — Commission entitled to leave the national authorities with the task of calculating the exact amount to be repaid*
(EC Treaty, Art. 93(2))

9. *Actions for annulment — Jurisdiction of the Community judicature — Form of order seeking re-examination of the complaint — Inadmissible*
(EC Treaty, Arts 173 and 176)

1. In determining the extent to which the Community judicature may review the criteria chosen by the Commission for assessing whether a particular national measure is caught by Article 92(1) of the Treaty, it must be borne in mind that the latter provision does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects. It follows that the concept of aid is objective, the test being whether a State measure confers an advantage on one or more particular undertakings. The characterisation of a measure as State aid, which, according to the Treaty, is the responsibility of both the Commission and the national courts, cannot in principle justify the attribution of a broad discretion to the Commission, save for particular circumstances owing to the complex nature of the State intervention in question.

2. Although both tax legislation and the implementation of tax arrangements are matters for the national authorities, the fact remains that the exercise of that competence may, in certain cases, prove incompatible with Article 92(1) of the Treaty.

The Commission cannot legitimately conclude that a fiscal measure reducing the State's share of the levy on bets on horse-races — taken by the body which enjoys the exclusive right to manage the organisation of totalisator bets in that State — is 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 is justified by the nature and economy [sic] of the system in question' on the ground that the measure is of an ongoing character, is not intended to finance a specific *ad hoc* operation and constitutes merely a limited reduction in the rate of taxation.

As regards the criterion of the ongoing character of the measure in question, Article 92(1) of the Treaty does not distinguish between permanent and provisional measures. Furthermore, in view of the frequency with which tax rates are adjusted by national authorities and the possibility of transforming a permanent measure into a provisional measure, and *vice versa*, to apply such a criterion would make application of Article 92 so unpredictable as to make that criterion incompatible with the principle of legal certainty.

As regards the criterion according to which the measure in question was not intended to finance a specific operation, Article 92(1) does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects.

Lastly, as regards the Commission's third criterion, the limited nature of the reduction applied by the French authorities to

the rate of the public levy, the fact that the level of aid is relatively low does not as such rule out the application of Article 92(1) of the Treaty.

3. A Member State's decision authorising the body responsible for managing the organisation of totalisator betting in its territory to defer payment of part of the State's share of levies on bets taken on horse-races is caught by the definition of State aid for the purposes of Article 92(1) of the Treaty.

Such a measure has the effect of granting financial advantages to an undertaking and improving its financial position. Although it may also, indirectly, benefit a number of other operators whose affairs depend on the direct beneficiary's principal activities, it does not follow that the measure in question is a general measure outside the ambit of Article 92(1) of the Treaty; at the very most it may qualify for the sectoral derogation provided for in Article 92(3)(c) of the Treaty.

4. The right of third parties to lodge a complaint with the Commission for infringement of Article 92 of the Treaty and thereby to induce it to open the procedure under Article 93(2) of the Treaty

in respect of the Member State concerned, which may culminate in its adoption of a final decision, is not governed by any provisions of secondary legislation analogous to Regulation No 17.

However, if the Commission decides to reject a complaint by adopting a decision to that effect, that decision must, pursuant to Article 190 of the Treaty, contain a statement of reasons which enables the person concerned to ascertain the reasons for the measure and, where appropriate, assert his rights before the Community judicature.

Where there is no decision expressly rejecting the complaint but, on the contrary, a decision is adopted to open the procedure under Article 93(2) of the Treaty, if the complainant considers that by so doing the Commission has failed to adopt a position on all the State measures which were the subject of the complaint, it may call upon the Commission to do so in accordance with Article 175 of the Treaty. If it considers that the Commission's reply to the formal notice constitutes a definition of the Commission's position, impliedly rejecting the part of the complaint in which the measures were criticised, it may bring an action for annulment under Article 173, fourth paragraph, of the Treaty.

Consequently, where a complainant fails to initiate or follow the procedure laid

down in Article 175 of the Treaty, or to bring in due time an action for annulment, any challenge which that complainant may make — in the course of proceedings contesting the final decision on the measures complained of — concerning the fact that the Commission failed to address a measure which was not the subject of the procedure which had been initiated is inadmissible.

5. The condition for applying Article 92(1) of the Treaty, namely that State resources be transferred to the aid recipient, is satisfied where a Member State permits the body responsible for managing the organisation of totalisator betting to retain unclaimed winnings in order to finance social expenditure, since, in so doing, the legislature of that State in effect merely waives revenue which would otherwise have to be paid to the Treasury.

However, in so far as those resources are used to finance social expenditure, they constitute a reduction in the social security commitments which an undertaking must normally discharge, and hence a grant of aid.

6. Article 92(3) of the Treaty confers on the Commission a broad discretion to adopt a decision derogating from the general prohibition laid down in Article 92(1). The question in such cases whether a particular form of State aid is compatible with the common market raises problems

which entail examination and appraisal of economic facts and circumstances which are complex and liable to change rapidly.

Since, in actions for annulment, the Community judicature cannot substitute its own assessment of the facts for that of the deciding authority, especially in the economic sphere, the review which it is called upon to carry out in respect of the Commission's assessment must be confined to verifying compliance with the rules governing procedure and the statement of reasons, the accuracy of the facts on which the decision was based, and the absence of manifest error of assessment and of misuse of powers.

7. When the Commission finds that State aid is incompatible with the common market, it may instruct the Member State concerned to recover the aid from the recipient undertaking since abolishing unlawful aid by means of recovery is the logical consequence of such a finding inasmuch as it enables the *status quo ante* to be restored.

In exercising its power of appraisal in that regard, the Commission cannot place a temporal limitation on the obligation of the authorities of the Member State concerned to recover aid because the latter argue that the recipient of the aid had a

legitimate expectation that it was lawful. 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 invoke the existence of exceptional circumstances on the basis of which it had entertained legitimate expectations, leading it to decline to repay the unlawful aid.

In so far as the calculation of the amount of aid to be recovered may, in the case of fiscal measures, call for consideration of the relevant national legislation, the Commission is entitled merely to make a general statement that the recipient is obliged to repay the aid in question and to leave to the national authorities the task of calculating the exact amount of aid to be recovered.

8. The intention underlying the obligation for a Member State to abolish, in accordance with Article 93(2) of the Treaty, aid regarded as incompatible with the common market is to restore the position to the *status quo ante*, an objective which is attained where the aid at issue, together with any default interest, is repaid to the State by the recipient.

Far from constituting a delegation of unlawful powers, such a decision on the part of the Commission should be viewed as part of the wider obligation of cooperation in good faith between the Commission and the Member States in the implementation of Article 93 of the Treaty.

However, no provision of Community law requires the Commission to determine the sum to be reimbursed when it demands repayment of aid declared incompatible with the common market. The requirements in this area are merely that recovery of aid granted unlawfully should restore the position to the *status quo ante* and that repayment should be made in accordance with the rules of national law, which must not restrict the scope and effectiveness of Community law.

9. Claims put forward in proceedings for annulment that the Court should instruct the Commission to re-examine a complaint are inadmissible. The Community judicature is not entitled, when exercising judicial review of legality, to issue directions to the institutions or to assume the role assigned to them; rather, it is for the institution concerned to adopt the necessary measures under Article 176 of the Treaty to implement a judgment given in proceedings for annulment.