

POMOC PAŃSTWA — ZJEDNOCZONE KRÓLESTWO**Pomoc państwa nr C 16/2005 (ex N232/2004)****Planowana sprzedaż Tote na rzecz Racing Trust****Wezwanie zainteresowanych stron do przedstawienia uwag zgodnie z art. 88 ust. 2 Traktatu WE**

(2005/C 168/09)

(Tekst mający znaczenie dla EOG)

Pismem z dnia 1 czerwca 2005 r., zamieszczonym w języku oryginału stronach następujących po niniejszym streszczeniu, Komisja powiadomiła Zjednoczone Królestwo o decyzji wszczęcia procedury określonej w art. 88 ust. 2 Traktatu WE, dotyczącej wyżej wspomnianego środka pomocy.

Zainteresowane strony mogą zgłaszać uwagi na temat środka, względem którego Komisja wszczyna procedurę, w ciągu jednego miesiąca od daty publikacji niniejszego streszczenia i następującego po nim pisma, kierując je do Rejestru pomocy państwa w DG ds. Konkurencji na następujący adres lub numer faksu:

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Uwagi te zostaną przekazane Zjednoczonemu Królestwu. Zainteresowane strony przedstawiające uwagi mogą wystąpić z odpowiednio umotywowanym pisemnym wnioskiem o objęcie ich tożsamości poufnością.

STRESZCZENIE**Ocena****Procedura**

Pismem z dnia 27 maja 2004 r. zgodnie z art. 88 ust. 3 Traktatu WE rząd Zjednoczonego Królestwa zgłosił planowaną sprzedaż totalizatora wyścigów konnych Horserace Totalisator Board („Tote”) na rzecz konsorcjum udziałowców sektorze brytyjskich wyścigów konnych („Racing”). Zgłoszenie było kilkakrotnie uzupełniane, ostatnio pismem z dnia 15 marca 2005 r.

Opis środka pomocy

Totalizatorowi Tote powierzono świadczenie usług tzw. zakładów wzajemnych (w ramach monopolu ustawowego), lecz działa on również na rynku zakładów tzw. stałych kursów (w konkurencji z innymi bukmacherami). W kontekście propozycji dotyczącej otwarcia rynku zakładów wzajemnych na zasady konkurencji rząd Zjednoczonego Królestwa zamierza znieść istniejący monopol statutowy i sprywatyzować Tote. Ze względu na niecodzienną sytuację, jaką jest brak właściciela Tote, proces sprzedaży jest poprzedzony przeniesieniem majątku Tote do nowego podmiotu, którego właścicielem będzie rząd i który następnie sprzeda Tote konsorcjum Racing w ramach zamkniętej procedury sprzedaży. Nowy totalizator Tote otrzymałby wyłączną licencję na działania związane z zakładami wzajemnymi na okres przejściowy 7 lat. Kupując nowy podmiot Tote, Racing nie zapłaciłby ceny odpowiadającej jego wartości rynkowej, lecz 50 % tzw. „wartości godziwej” totalizatora Tote w stosunku do/dla Racing. Ustalenie wartości godziwej należałoby do niezależnego eksperta na krótko przed transakcją sprzedaży.

W oparciu o informacje przedstawione przez rząd Zjednoczonego Królestwa Komisja ma wątpliwości dotyczące zgodności planowanej transakcji sprzedaży.

Zgodnie z ustaloną praktyką Komisji sprzedaż przedsiębiorstw publicznych można uznać za wolną od pomocy państwa w przypadku, gdy poprzedza ją otwarta, przejrzysta i wolna od wszelkich warunków procedura, lub gdy cena sprzedaży jest równa lub wyższa od wartości rynkowej przedsiębiorstwa ustalonej przez niezależnego eksperta. W omawianym przypadku nie można wykluczyć istnienia pomocy ze względu na fakt, iż Racing przejmie Tote płacąc 50 % „wartości godziwej” zamiast pełnej kwoty równej „wartości rynkowej”.

Rząd Zjednoczonego Królestwa utrzymuje, że pomoc jest zgodna z zasadami określonymi w art. 87 ust. 3 lit. c) Traktatu WE. Komisja ma wątpliwości co do konieczności i proporcjonalności pomocy. W zakresie pomocy na rzecz sektora wyścigów konnych wątpliwości Komisji są spowodowane tym, że rząd Zjednoczonego Królestwa nie wskazał, które działania wymagały wsparcia państwa, ani że pomoc skierowana do omawianego sektora była ograniczona do koniecznych przypadków. Ponadto przedmiotowa pomoc mogła również przynieść korzyści działaniom prowadzonym przez Tote w związku z zakładami i w ten sposób prowadzić do zakłócenia konkurencji na rynku zakładów. Także w tym zakresie Komisja ma wątpliwości dotyczące zgodności, ponieważ rząd Zjednoczonego Królestwa nie wykazał, że pomoc była konieczna do utrzymania odpowiedniego poziomu zakładów wzajemnych. Rząd Zjednoczonego Królestwa utrzymuje również, że pomoc jest zgodna z zasadami określonymi w art. 87 ust. 3 lit. d) Traktatu WE. Komisja ma jednak wątpliwości, czy pomoc płynąca z planowanej transakcji sprzedaży można uznać za środek na rzecz promowania kultury. Głównym celem pomocy nie jest produkt ani projekt związany z kulturą.

Na obecnym etapie procedury Komisja ma zatem wątpliwości dotyczące zgodności planowanej transakcji sprzedaży z postanowieniami Traktatu WE. W związku z powyższym, Komisja podjęła decyzję o wszczęciu formalnego postępowania wyjaśniającego zgodnie z art. 88 ust. 2 Traktatu WE.

Zgodnie z art. 88 ust. 3 Traktatu omawiany środek nie może zostać wprowadzony w życie przed podjęciem ostatecznej decyzji przez Komisję. Ponadto zgodnie z art. 14 rozporządzenia Rady (WE) nr 659/1999 wszelka bezprawnie przyznana pomoc może podlegać odzyskaniu od jej beneficjenta.

TEKST PISMA

„The Commission wishes to inform the United Kingdom that, having examined the information supplied by your authorities on the measures referred to above, it has decided to initiate the procedure laid down in Article 88(2) of the EC Treaty.

I. PROCEDURE

- (1) By letter registered on 27 May 2004, the UK authorities notified the envisaged sale of the Horserace Totalisator Board (the »Tote«) to a consortium of British racing interests (»Racing«), pursuant to Article 88(3) of the EC Treaty. The Commission requested additional information on the notified transaction by letter of 29 June 2004. Following an extension of the deadline, the UK Government submitted additional information by letter registered on 9 September 2004.
- (2) After a meeting between the UK authorities and the Commission took place on 23 September 2004, the UK authorities announced, by letter of 24 September, that they would submit additional information. This information was finally submitted by letter registered on 15 March 2005. By letter dated 13 April 2005, the UK Government agreed to extend the deadline for adopting a decision on the notified transaction.

II. DESCRIPTION OF THE MEASURE

- (3) The UK Government is currently in the process of modernising the British gambling industry. To this end, the UK government has brought forward the Horserace Betting and Olympic Lottery Act, which gained Royal Assent on 28 October 2004. One of the objectives of the overall reform is to open up the pool betting sector to competition. In this context, the UK Government is seeking to transfer ownership of the Tote (a public law betting operator) to the private sector and to abolish the Tote's current monopoly for pool betting on horseracing. The Tote would cease to exist and all assets and liabilities would be vested into a new company limited by shares wholly owned by the UK authorities. In order to ensure a smooth transition to full competition, the current statutory monopoly will be replaced with a 7-year exclusive licence for this successor company ⁽¹⁾.

⁽¹⁾ The proposed exclusive licence would be different from the present statutory monopoly in so far as the licence contains certain obligations imposed on the licence holder which do not exist at present (e.g. regarding the scope of pool betting activities and relationship to other operators).

- (4) The UK authorities envisage selling the successor company in a closed sale transaction to the Racing Consortium (»Racing«), which represents the various constituent parts (mainly trade associations) of the horse-racing sector. Among the various sales options, the Government rejected the sale by competitive auction, which — while likely to maximise proceeds — would probably lead to a break-up of the Tote's business and might have resulted in a reduction in the Tote's contributions to Racing over time.
- (5) In order to ensure that Racing will pay a fair price, the UK authorities have instructed an independent consultancy to carry out a valuation of the Tote, including the exclusive licence, on the basis of a well established, commonly-used methodology ⁽²⁾. According to the UK authorities, the evaluation as well as the sales transaction itself needed to take into account the various objectives pursued by the Government, namely that the Tote was to be sold as a single entity, that the sale should not impede Tote's commercial development, that the sale should not reduce horsebetting opportunities, that the financial interests of both the taxpayers and Racing were safeguarded and that the sale should reduce uncertainty over Tote's future.
- (6) The thus determined »fair value of the Tote to Racing« was estimated by PriceWaterhouseCoopers (in May 2004) as being between [...] ^(*) and [...] (or including an increase due to possible synergies: [...]). The UK authorities recognised that the market value of the Tote which could be achieved in an open tender would probably be 10-30 % higher (i.e. in the range between [...] and [...] million, based on a calculation in May 2004). However, there are indications that the market is willing to pay substantially more (i.e. around GBP 500 million).
- (7) For reasons explained in more detail below (cf. para. 21 and 22), the Government plans to sell the Tote to Racing at 50 % of the »fair value« as established by the independent expert in the course of a final valuation nearer the time of the sale. In this context, the UK Government also explained that Racing would not and could not pay the full market value.

III. BACKGROUND INFORMATION

A. Parties involved in the envisaged transaction

1. The Tote

- (8) The Tote (Horserace Totalisator Board) was established in 1928 as a statutory corporation with no equity shares (i.e. no owner). Since its inception, the Tote enjoys a legal monopoly for pool betting on horseracing. The purpose of this was to provide punters with an alternative to fixed odds betting and to secure a stable source of income for

⁽²⁾ PwC performed a discounted cash flow valuation for the first »indicative valuation of the Tote«. In a final evaluation, the results would be crosschecked against other valuation techniques.

^(*) Covered by the obligation of professional secrecy.

the British horseracing industry. According to the UK, the Tote was, ever since its establishment, effectively run in the interests of the racing sector. The profits generated by the Tote would not be paid to the Government as dividends but would either remain within the corporation or be distributed on a voluntary basis to the horseracing sector (for instance, in the form of direct payments to racecourses and through a commercial sponsorship programme). Furthermore, the Tote pays, as all other bookmakers, the so-called Horseracing Betting Levy, plus additional contributions as agreed with the Horseracing Levy Board ⁽³⁾.

- (9) In 1961, betting away from racecourses became legalised and licensed betting shops opened throughout the UK. From 1972, the Tote was also allowed to offer fixed-odds bets on horseracing and other sporting events.
- (10) Following a recent re-branding, the Tote is operating two divisions: »Totesport« and »Totepool«. Totesport represents the Tote's retail, phone and internet businesses. As part of its retail business, the Tote owns 78 betting shops at 47 racecourses and over 450 licensed betting shops in the UK. Totepool comprises the Tote's pool betting business and the retailing of pool betting products on British racecourses ⁽⁴⁾.
- (11) The Tote generated a turnover (all figures for the year to 31 March 2004) of GBP 1,471 million, a profit before taxation of GBP 11,7 and contributions to Racing of GBP 11,5 million. Pool betting on horseracing, for which the Tote still holds a legal monopoly, accounted in that same period for a turnover of GBP 269 million, approximately 18 % of the total turnover ⁽⁵⁾.

2. The Racing consortium

- (12) The UK authorities envisage selling the Tote to the Racing consortium (or Racing Trust) which comprises representatives of the racing sector. The Racing consortium includes the *Racecourse Association* (an association of owners and organisers of racecourses that markets the supply of TV pictures and rights), the *Racehorse Owners Association* (a private company having as its principal activity the promotion and protection of interests of racehorse owners), the *Jockey Club* (responsible for the governance and regulation of horseracing), the *Industry Committee for horseracing* (an umbrella organisation comprising representatives from trade bodies for jockeys, trainers, stable lads, bloodstock agents and others) and the *British Horseracing Board* (BHB). The BHB's main responsibilities include: strategic planning of, and formulating policy for, British horseracing; encouraging the breeding of bloodstock; central marketing and promotion of British racing; controlling the fixture list and race planning. Some of the members of the Racing consortium are represented on the Board of the Tote.

⁽³⁾ Bookmakers have to pay a percentage of their profits to the Horseracing Levy Board to finance the racing industry. The Tote's payment in respect of fixed odds betting are similar to other bookmakers whereas the payments for its pool betting operations are settled between the Tote and the Horseracing Levy Board.

⁽⁴⁾ Source: Tote Annual report 2004.

⁽⁵⁾ Op. cit.

B. Markets concerned by the envisaged transaction

1. Betting market

- (13) Horserace betting is available in most Member States and generally operated by state sponsored or state run exclusive pool betting operators similar to the Tote. In many countries, these systems exist to provide financial support to the horseracing sectors of the respective Member States.
- (14) Horserace betting in the UK can take two distinct forms: pool betting and bookmaking (fixed odds betting). In pool betting, all the stakes on a race are pooled and a deduction is made to cover costs and to allow for a reasonable profit for the betting organiser with nobody knowing the precise return for a given ticket until after the race. The remainder of the pool is then equally divided among the winning tickets. Hence, pool customers bet against each other whereas in fixed-odds betting, customers bet against the bookmaker on the basis of fixed odds set by the betting operator. Whereas pool betting in the UK is at present subject to a statutory monopoly, fixed odds betting is an activity in a fully competitive environment.
- (15) Bookmakers operate at horse racecourses, through licensed betting offices, over the telephone and through the Internet. Five companies account for around two thirds of betting turnover — Ladbrokes (26 % of off-course turnover), William Hill (22 %), Coral (12 %), Stanley Racing (6 %) and the Tote (2 %). A number of companies, known as betting exchanges, also offer services over the Internet where consumers can accept and offer bets on horseracing. The largest of these companies is »Betfair« ⁽⁶⁾.

2. The racing sector

- (16) The racing sector comprises various commercial activities and markets like the organisation of *racecourses*, an important spectator sport in the UK with more than five million people attending races every year. There are 59 horse racecourses in Great Britain where the British Horseracing Board runs races. Half of these race courses are managed by three large groups: Northern Racing Ltd, Arena Leisure Plc and The Jockey Club (through their subsidiary, the Racecourse Holdings Trust). The remaining courses are owned independently ⁽⁷⁾.
- (17) Another important activity of the racing sector is *horse-breeding*. There are several thousands thoroughbred breeders in the UK, though only a fraction of these, about 350, are engaged full time. The principal firms involved in the sale of horses at auction are Tattersalls and Doncaster Bloodstock Sales, which together accounted for over 95 % of the market in 1999 ⁽⁸⁾.

⁽⁶⁾ Source: »Horserace Betting and Olympic Lottery Bill — Regulatory Impact Assessment«, prepared by the Department for Culture, Media and Sport, December 2003, p. 6. These figures are based on 1997 data and the Tote's market share as of today is higher (around 5 %).

⁽⁷⁾ Source: Op. cit., p. 5.

⁽⁸⁾ Source: Op. cit., p. 6.

- (18) Further commercial activities in the racing sector consist of the *supply of TV pictures/TV rights*, horseracing being an important televised sport in the UK. The racing sector also supplies *pre-race data* which include data for each race, names of riders and horses running in specific races. Bookmakers need this data to take bets on races and broadcasters use it to prepare their horseracing programmes. All players which are part of the Racing consortium are important constituents of the racing sector.
- (19) The Racing sector receives financial support through the Horserace Betting Levy Board («Levy Board»). The Levy Board has the responsibility of collecting the betting levy from bookmakers and Tote and to apply the funds to the improvement of horseracing, improvement of breeds of horses as well as the advancement of veterinary science or veterinary education. In the context of the current reform plans, the levy system would be abolished and replaced by income from commercial sources⁽⁹⁾. In addition, the racing sector benefited from voluntary contributions made by the Tote, in particular in the form of sponsorships.

IV. OBSERVATIONS MADE BY THE UK GOVERNMENT AS WELL AS THIRD PARTIES

A. Arguments brought forward by the UK Government maintaining that the envisaged sales transaction should be deemed compatible with the EC Treaty

1. *The envisaged sales transaction does not involve State aid to Racing*
- (20) The UK authorities are of the opinion that the envisaged sales transaction does not involve State aid, and, as a subsidiary line of argument, even if there was aid, the aid should be deemed compatible.
- (21) In the notification of May 2004, the UK authorities argued that the closed sale to Racing for a monetary consideration representing 50 % of the Tote's «fair value to Racing» reflected the government's recognition of the racing industry's stake in the Tote⁽¹⁰⁾. Such a split would also avoid potential subsequent litigation if the Tote were not sold to Racing.
- (22) In its latest submission of March 2005, however, the UK Government clarified that, in its view, Racing was unlikely to sustain a successful proprietary claim in the Tote in private or public law. However, the UK Government maintains that — even in the absence of a legally enforceable claim — the racing industry had a legitimate interest in the Tote. In the absence of any other logic, it was only equitable to settle that interest by a «50:50 split».
- (23) As regards the envisaged payment by Racing of a consideration taking into account «the fair value of the Tote to Racing» instead of the market value, the UK Government argues that this was justified because Racing did not benefit from synergies with betting activities, since it was not yet active in the betting market. Other potential buyers (bookmakers, alone or with financial investors) with purely commercial considerations would be able to reap these synergies.
- (24) Finally, the UK Government argued that the Government would retain certain claw back rights under the terms of the envisaged sale agreement. If Racing were to sell its share in the successor company or if the successor company were to sell its assets or any significant proportion of them to a third party within a specified period, it would have to pay back to the Government a percentage of any profits the Government would have made from such a sale had the Government not sold its stake⁽¹¹⁾.
2. *Even if the envisaged sales transaction involved aid, this aid should be regarded as compatible with the EC Treaty either under Article 87(3)(c) or Article 87(3)(d) of the EC Treaty*
- (25) With regard to Article 87(3)(c) EC Treaty, the UK Government stressed that the envisaged sales transaction was in the Community interest because it was part of the Government's plans to open up the pool betting sector to competition and to reduce the level of State involvement in the industry. Selling the Tote to Racing would also preserve the Tote as an independent player in the UK betting industry which is dominated by three mayor players.
- (26) Furthermore, the closed sale of the Tote to Racing facilitated the development of certain economic activities such as horseracing and pool betting because it ensured the self-financing of the horseracing sector and helped to preserve and develop pool betting.
- (27) The UK Government argued that the closed sale would adequately address market failures arising in the horseracing sector: The racing sector generates positive externalities for the betting industry which base some of their activities on horseracing. On the other hand, the racing industry is not able to reap the full benefits of these externalities. The financing of the racing sector by means of charging bookmakers for the value of the horseracing products through a mandatory betting levy or other revenues generated through the commercial exploitation of the racing product (e.g. sale of TV pictures) have been insufficient and/or fraught with uncertainties. In the absence of sufficient financial funds channelled from e.g. the betting industry back into racing, an economically inefficient level of activity in the racing sector would take place. It was also argued that market forces alone did not ensure a fair distribution of revenues between all stakeholders of the racing sector (race course owners, horse breeders, etc.).

⁽⁹⁾ However, these plans have been postponed at least until 2009, apparently because of difficulties in finding viable solutions for replacing the levy income with commercial revenues.

⁽¹⁰⁾ As explained above (cf. para. 8), the UK Government maintained that the Tote was, ever since its establishment, run in the interests of Racing.

⁽¹¹⁾ The circumstances in which the clawback clause could be triggered would still need to be negotiated with Racing.

- (28) If Racing were the owner of the Tote, it could directly exploit some of the positive externalities which the horse-racing product provides for the betting industry. This would — according to the UK authorities — be an efficient way to address the identified market failure. The income from the Tote would be used for the development of the whole horseracing sector.
- (29) As regards the development of pool betting, the UK Government claims that the universal coverage and development of pool betting across Britain at the end of the seven year transitional period (after the exclusive licence has come to an end) could only be assured if the Tote is owned by Racing rather than by a commercial book-maker.
- (30) In addition, the UK Government maintains that the closed sale did not affect trading conditions and competition in the Community to an extent that was contrary to the common interest. There were almost no negative effects on competition and effects on Intra-Community trade were negligible. This was in particular due to the fact that the Tote held only a very small share of the overall betting market in the UK.
- (31) Finally, the UK Government argued that the closed sale was also compatible with the EC Treaty pursuant to Article 87(3)(d) EC Treaty, because the measure promoted culture and heritage conservation, while not adversely affecting trading conditions and competition in the Community. The UK Government argues that horseracing forms an important part of British culture, being a major national sport deeply entrenched in British society and with an important influence on English language and art.

3. The exclusive licence for pool betting

- (32) Concerning the award of the exclusive licence for pool betting to the successor company of the Tote, the UK authorities explained that the licence was only a technical means to phase out the monopoly over a temporary period of seven years. The UK authorities underline that the licence is not a contract but rather a regulatory act whereby a prohibition on the provision of certain services is relaxed in a limited period of transition from a monopoly to an open market for those services. Furthermore, the licence lacks certain remedies which are typical for a contract. Notably, if the licence holder fails to carry out the activities covered by the licence, the grantor has no remedy of specific performance or damage: it can only revoke the licence. Consequently, the UK authorities do not consider this licence to be a service concession within the meaning of Directive 2004/18/EC⁽¹²⁾ and of the Commission's interpretative communication on concessions under Community law⁽¹³⁾. Therefore, a closed sale of the Tote to Racing, including the exclusive licence on pool betting was justified.

⁽¹²⁾ OJ 2004, L 134/114.

⁽¹³⁾ OJ 2000, C 121/2.

B. Arguments brought forward by third parties alleging that the envisaged sales transaction could not be regarded as compatible with the EC Treaty

- (33) Subsequent to the notification of the envisaged sale of the Tote, the Commission received comments from several third parties. These parties claim that the envisaged closed sale at 50 % of the so-called »fair value«, including the award of an exclusive pool betting licence for a period of 7 years, was incompatible with Community law.
- (34) It is claimed that the envisaged sales transaction would enable Racing to acquire a pool betting and fixed-odds betting business with a recognised and unique brand without paying a market price. Competitors or other new entrants looking to establish a similar fixed-odds business would need to incur much higher cost. Furthermore, since the transaction was comparable to a »leveraged buyout«, Racing would not have to pay for the Tote but the price for the transaction would be effectively financed through the Tote itself. Since the debt level of the Tote would be lower than if the Racing Trust had to pay the true market value, it would enjoy greater facility to borrow from capital markets for upcoming investment programmes, competing directly with the established bookmakers. Hence, the transaction granted a considerable financial advantage to Racing. With reference to estimates made by investment banks in London, it is claimed that the value of the Tote would be at least GBP 500 million.
- (35) Moreover, some parties assert that various conflicts of interest could arise if the Racing Trust would gain ownership of the Tote as Racing provides various inputs to bookmakers with which they, as owners of the Tote, would compete downstream in the betting market.
- (36) The aid resulting from this transaction could not be declared compatible under Article 87(3)(c) EC Treaty because it was doubtful whether the racing industry actually needed State support in addition to the existing means and revenues generated by normal commercial activities of this sector. Moreover, the adverse effects on competition — in particular as regards fixed odds betting — would be severe and disproportionate.

V. PRELIMINARY ASSESSMENT

A. State aid within the meaning of Article 87(1) EC Treaty

- (37) According to the EC Treaty and consolidated case-law there is State aid within the meaning of Article 87(1) when:
- there is an intervention by the State or through State resources;
 - it confers an advantage on the recipient;
 - it distorts or threatens to distort competition;
 - the intervention is liable to affect trade between Member States;

State resources

(38) Pursuant to the Horserace Betting and Olympic Lottery Act 2004 assets of the Tote shall be transferred to the successor company, which is wholly owned by the UK Government. Consequently, when selling the newly established Tote to Racing, the Government disposes of public property. By selling the Tote below market value, the UK Government foregoes revenues resulting from the sale of public property, which involves State resources within the meaning of Article 87(1) EC.

Advantage

(39) In accordance with established practice, the Commission considers that the privatisation of a publicly-owned company does not involve a financial advantage to the acquirer within the meaning of Article 87(1) EC provided that:

- the company is sold by a competitive tender or an equivalent procedure, that is open, transparent and unconditional;
- the company is sold to the highest bidder;
- bidders have enough time and information to carry out a proper valuation of the assets on which to base their bids ⁽¹⁴⁾.

(40) If, on the other hand, there is no public tender the transaction needs to be examined for possible State aid implications. The Commission has to ascertain that the company is sold at a price corresponding to its actual market value. The determination of the market price may rely on studies carried out by independent experts. Provided that the potential sales price was actually fixed at or above the market value established by the expert, it can be assumed that the State behaved like a private investor operating under normal market economy conditions, trying to obtain a maximum return from the sale without pursuing other policy objectives, including possible support measures. Under such circumstances, the notified measure can be assumed not to include State aid elements.

(41) Based on the information submitted by the UK authorities, the Commission has serious doubts that the transaction can be regarded as being free of aid because, instead of paying the market price, Racing is supposed to pay only 50 % of what is called a »fair value« of the Tote as estimated by PwC.

(42) In principle, only an independent evaluation of the »market value« may replace the tender as a means of determining the »market price«, with the consequence that »no aid« is being given. However, the estimation of the value of the Tote is lowered by the fact that PwC takes into account that the Tote is to be sold to a specific buyer ⁽¹⁵⁾. The UK authorities admit that the sale of the

Tote through an auction would probably yield higher revenues for the seller.

(43) The reasons for a closed sale to Racing were concerns about the Tote's future (in case of a sale of different business segments) as well as concerns about a possible reduction of the Tote's contributions to racing over time (if sold to another commercial bookmaker). In the preliminary view of the Commission, these are policy considerations and not those of a private investor aiming at maximising his revenues.

(44) The UK Government argued that the envisaged »clawback«-clause ⁽¹⁶⁾ would eliminate any undue financial advantage to Racing in case of a re-sale of the acquired assets. The Commission does not share this view. First of all, the »clawback«-clause is limited in time (»within a specified period«) and in scope (sale of the company or »any significant proportion« of company's assets). Furthermore, it would only apply in the case of a re-sale thus not eliminating the advantage resulting from the ownership of the Tote (i.e. it would only limit the possibilities of Racing cashing in the advantage) ⁽¹⁷⁾. The fact that Racing had also benefited from financial flows from the Tote prior to the sales transaction, and will continue to benefit from such flows after the transaction as the new owner of the Tote does not exclude the presence of (new) aid. The legal position of Racing as the new owner of the Tote is more advantageous than its previous position (e.g. it has the legally recognised ownership of the Tote and enjoys more commercial freedom as regards its business activities).

(45) The Commission is therefore of the preliminary view that the envisaged sale of the Tote to Racing at a »fair value« instead of the market value gives Racing a financial advantage.

(46) Furthermore, the Commission considers that the payment of only 50 % of the »fair value« constitutes an additional advantage to Racing.

(47) There may be circumstances in which a reduction of the sales price could be regarded as not constituting aid, e.g. conceivably where it were demonstrated that the reduction in the sales price merely reflects the recognition of Racing's stake (ownership) in the existing Tote or where it is demonstrated that the reduction is in fact a compensation for losses suffered by Racing due to expropriation or similar action as a consequence of the transfer of the Tote to State ownership ⁽¹⁸⁾. It may also be in line with the behaviour of a private investor to come to an equitable

⁽¹⁴⁾ XXIII report on competition policy (1993), point 402 and further.

⁽¹⁵⁾ In the introduction to the interim report, PwC states that they were asked to »...calculate an updated indicative valuation range of 100 % of the equity of the Tote, which reflects the value of the Tote to Racing.»

⁽¹⁶⁾ According to that clause, the Government would get a certain percentage of the profits generated by any future sale of the Tote or a significant proportion of its assets.

⁽¹⁷⁾ For similar reasoning, cf. Commission's decision of 20 January 1999 on the acquisition of land under the German Indemnification and Compensation Act, OJ L 107/21, 24.4.1999.

⁽¹⁸⁾ Cf. Commission's decision of 20 January 1999 on the acquisition of land under the German Indemnification and Compensation Act, OJ L 107/21, 24.4.1999.

agreement in order to avoid costs and uncertainties linked to possible litigation. That would be the case where the existence of the respective claims has in principle been demonstrated and quantified and where a proper risk analysis has been carried out by the State authorities leading to the conclusion that such an agreement is in the State's interest⁽¹⁹⁾. In any case, the sales price could only be reduced by an amount which corresponds to (or is less than) the value of the legal claim.

- (48) However, the Commission is of the preliminary view that the UK authorities have not demonstrated any such circumstances.
- (49) The UK authorities have not demonstrated that Racing had a legal claim regarding the Tote. In the absence of a legal obligation on the UK Government vis-à-vis Racing, the conditions of the transaction cannot be regarded as being free of aid. The Commission does not share the UK Government's argumentation that also in the absence of a legally enforceable claim a recognition of what is called a »legitimate interest« of Racing in Tote could be regarded as justified and thus not involving State aid. This legitimate interest (i.e. the interest to continue receiving financial flows from the Tote) has neither been demonstrated nor quantified. Even if there was such a legitimate interest of Racing to continue to receive funding, the fact that the UK Government honours that interest does not exclude the presence of aid, rather the contrary.
- (50) Furthermore, the UK Government explicitly stated that the transfer of the Tote into State ownership was not a nationalisation infringing property rights of Racing. Consequently, the 50 % reduction of the sales price cannot be regarded as a compensation for an expropriation or similar action by the State.
- (51) Finally, the Commission considers that, in the absence of a legally recognised and enforceable claim by Racing, the Government was not exposed to any financial risks concerning the sale of the Tote to a party other than Racing. Therefore, the 50 %-arrangement cannot be regarded as being in the State's interest.
- (52) In light of these considerations, the Commission comes to the preliminary conclusion that the envisaged payment by Racing, that is limited to 50 % of the »fair value«, constitutes an advantage to racing.
- (53) In summary, based on the currently available figures it is difficult to establish the exact amount of aid resulting from the envisaged closed sale of the Tote to Racing. Based on the fair value estimated by PwC, within a range between [...] and [...], and the 50 % reduction, Racing would be obliged to pay a price amounting to approximately between [...] and [...]. When comparing this with the market value of around GBP 500 million estimated by some market players, the envisaged sale would provide Racing with an advantage of at least [...].

⁽¹⁹⁾ Cf. Commission's decision of 13 March 2000 regarding the settlement agreement Leuna 2000/Elf/Mider (State aid N 94/98 — Germany).

Distortion of competition and effect on trade

- (54) Finally, the Commission considers that this financial advantage to Racing and the Tote may distort competition and affect trade on the respective markets (horseracing and betting).
- (55) In line with the Commission's assessment in previous decisions, the Commission considers that the betting market is a European market⁽²⁰⁾. The competitors of the Tote (the three main players in the UK Ladbrokes, William Hill and Coral) are established in several Member States and betting operators accept bets on foreign races (and other sporting events). The effects on trade are also evidenced by the fact that the Tote offers its betting services also over the Internet, which is easily accessible from other Member States. Furthermore, competition and trade in the racing market and the betting market takes place notably through the exchange of television pictures including foreign operators.
- (56) As regards the horseracing industry, there are many activities with an international dimension, for example the organisation of horse racecourses (in particular of international reputation), horse breeding or the marketing of television rights. Any aid granted to horseracing by the envisaged transaction therefore can have an effect on trade.
- (57) The fact that the Tote holds a small market share on the UK betting market does not exclude effects on competition and trade. In particular given the increased commercial freedom enjoyed by the new Tote, it can be expected that the Tote will expand its competitive activities.
- (58) Horseracing products are important input factors for the betting market. The constituents of the Racing consortium are very strong players in the racing market. The fact that they also — moreover jointly — become active in the downstream market of betting services, competing directly with other betting operators (for which they provide important inputs such as pre-race data and have access to commercially sensitive about these betting operators), may lead to additional distortions of competition.

B. Compatibility under Article 87(3) EC Treaty

1. Compatibility assessment under Article 87(3)(c) EC Treaty

- (59) Pursuant to Article 87(3)(c) of the EC Treaty, aid to facilitate the development of certain economic activities or of certain economic areas may be considered to be compatible with the common market, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

⁽²⁰⁾ In the Commission decision regarding PMU, the Commission considered the betting market to be a European market. The decision points out that „While horse-races are organised and run on national racecourses, betting on such races is organised internationally“. The Commission also stated that there was „...some competition in the Community market in [the betting] 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“. See Commission Decision of 22 September 1993 concerning aid granted by the French Government to the Pari mutuel urbain (PMU) and to the racecourse undertakings, published in the OJ L 300 , 7.12.1993, pp. 15.

(60) In applying this Treaty provision, the Commission needs to ascertain that the proposed aid contributes to the achievement of Community objectives and is necessary and proportionate to attain those objectives.

Does the proposed aid contribute to the achievement of Community objectives?

(61) The UK Government referred to some of the underlying objectives of the proposed sales transaction, namely the withdrawal of government intervention in the governance of the Tote and the gradual opening of the pool betting market to competition, while ensuring an adequate support for racing as being in the Community interest.

(62) The liberalisation of markets in general and the establishment of a level playing field between various operators may have positive effects for competition within the European Union. However, the UK Government has, in any event, not demonstrated that the aid granted to Racing is necessary for the attainment of these objectives and proportionate. It has neither been demonstrated that the smooth transition from a statutory monopoly situation to full competition could not be achieved by requesting Racing to pay the full market price, nor has it been demonstrated that the aid resulting from the sales transaction actually leads to a long-term decrease of State support for the racing industry. Furthermore, there are no safeguards against Racing and the Tote using funds received through the envisaged transaction to distort competition in the betting market. Finally, as regards the use of funds for the benefit of the racing sector it has not been demonstrated to what extent such funds are limited to what is necessary and proportionate (for a detailed assessment of the necessity and proportionality of the aid measure, see below).

Is the proposed aid necessary to attain these objectives?

(63) Based on the explanations provided by the UK Government, the Commission assessed the necessity of the envisaged aid both as regards the racing industry and the betting industry.

(64) As regards the alleged necessity of the proposed aid measure for the horseracing industry, the Commission is not convinced that there is a market failure as maintained by the UK Government. In particular, it has not been shown that the alleged positive externalities stemming from the provision of horseracing are not adequately remunerated by the betting industry through levies and other means. Furthermore, the UK Government has not shown which activities within the horseracing industry actually need additional support. It has also not explained in the necessary detail how the revenues stemming from the Tote would be distributed to the various components of the horseracing industry, let alone the specific purposes for which the revenues would be used. The general reference to improvements of racecourses, horse breeding, etc. cannot be regarded as sufficient, without there being detailed rules and conditions according to which revenues would be allocated. Therefore, the Commission does not share the UK Government's argument that the aid in question would ensure a fair distribution of financing between the different stakeholders of the racing sector.

(65) It appears that in particular the responsibilities of the British Horseracing Board comprise support measures for racing, including e.g. general marketing, breeding of bloodstock, training and education. Aid channelled into these activities could be regarded as compatible provided that the support granted is in compliance with the respective Community guidelines⁽²¹⁾. However, the Commission observes that the UK Government has not shown that any such funds would be granted in compliance with the respective Community rules. Therefore, the Commission has, based on the currently available information, doubts about the compatibility of any such aid for these activities.

(66) To the extent that the aid may be used to the benefit of commercial activities carried out by the constituent parts of Racing, including the organisation of racecourses, breeding, supply of TV pictures and rights and supply of pre-race data, the Commission has doubts about the compatibility of such aid, since the UK Government has not demonstrated that additional financial support for these activities is necessary.

(67) As regards the pool betting sector, the Commission is not convinced that the proposed aid is necessary. The UK Government has not demonstrated that only the Tote if owned by Racing would be a reliable provider of — what the Government considers as — adequate pool betting services. Neither has it been shown that commercial bookmakers would limit their offerings of pool betting services and that a reduction of the scope of pool betting services could not be overcome by other — in particular regulatory — means. Furthermore, and even assuming that only the Tote if owned by Racing would guarantee the maintenance of adequate pool betting activities, the UK Government has not demonstrated that the envisaged aid would be necessary to compensate the Tote/Racing for this. The above considerations are certainly valid for the duration of the exclusive licence. In respect of the time after the transitional period of seven years, it has to be borne in mind that pool betting will be organised in a different way and not necessarily by the Tote (alone). Therefore, after the seven year transitional period and the expiry of the exclusive license, the aid granted to Racing cannot now be considered to have any incentive effect. Finally, the UK Government has not substantiated that the preservation of the Tote as an independent market player could only be achieved by means of selling the Tote to Racing below market value.

Is the proposed aid proportionate?

(68) Since the Tote will be sold to Racing, the direct beneficiary of the aid is Racing as the new owner of the Tote. However, the assessment of the proportionality of the aid is not limited to the markets on which the constituent parts of Racing are present (racing sector) but extends to the betting market on which the newly acquired Tote is present.

⁽²¹⁾ See e.g. the Commission's decision regarding the Irish „Thoroughbred Foal Levy” (State aid NN 118/02), where the Commission declared an aid scheme pursuing the objective of providing technical assistance to breeders, breeding stock and their foals, market development and promotion of sales of bloodstock as being compatible with the EC Treaty.

(69) There is no certainty that the profits generated by the Tote would be channelled in their entirety into the racing sector. Part of these profits might remain within the company. With increased commercial freedom, such retentions for reinvestment (in fixed odds betting activities competing with other bookmakers) may even increase. With the acquisition of the Tote below its market value, Racing as the new owner may distort competition on this highly competitive market for fixed odds betting. It also receives a competitive advantage as regards pool betting allowing it to be better prepared for the full market opening in pool betting services at the end of the exclusive licence. Under these circumstances, the Commission considers that aid benefiting the betting activities of the Tote cannot be regarded as compatible.

2. Compatibility assessment under Article 87(3)(d) EC Treaty

- (70) It is recalled that the Treaty of Maastricht introduced an article which defines the role of the Community in the field of culture (Article 151) and a possible compatibility clause for State aid aimed at promoting culture (Article 87(3)(d)).
- (71) In accordance with Article 151(4) of the Treaty, the Community is to take cultural aspects into account in its action under other provisions of the Treaty, in particular in order to respect and to promote the diversity of its cultures.
- (72) Pursuant to Article 87(3)(d) EC Treaty, aid to promote culture and heritage conservation may be considered to be compatible with the common market, where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest.
- (73) It should be recalled that this exemption needs to be interpreted in a restrictive manner ⁽²²⁾.
- (74) The Commission has doubts that the proposed aid resulting from the closed sale of the Tote to Racing can be regarded as justified under Article 87(3)(d) EC Treaty as a measure promoting culture. This measure would not seem to be mainly targeted at a cultural product or project and the award of the proposed aid does not seem to be linked to the alleged cultural value of horseracing. Any funds

generated by the measure which would be allocated to the horseracing industry would not primarily benefit activities which could be regarded as related to culture and/or heritage conservation.

VI. CONCLUSIONS

In the light of the foregoing considerations, the Commission has doubts about the compatibility of the proposed closed sale of the Tote to Racing. Based on the information submitted by the UK authorities and other interested parties in the course of the preliminary investigation, the Commission has come to the preliminary conclusion that the proposed transaction contains aid. Furthermore, the Commission has doubts that the proposed aid can be declared compatible under Article 87(3)(c) or (d) of the EC Treaty.

Consequently, the Commission, acting under the procedure laid down in Article 88(2) of the EC Treaty, requests that the United Kingdom submit its comments and to provide all such information as may help to assess the measure, within one month of the date of receipt of this letter. It also requests that the UK authorities forward a copy of this letter to the potential recipient(s) of the aid immediately.

The Commission wishes to remind the United Kingdom that Article 88(3) of the EC Treaty has suspensory effect. It would also like to draw the United Kingdom's attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that, where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all the necessary measures to recover the aid from the beneficiary, unless this would be contrary to a general principle of Community law.

The Commission wishes to remind the United Kingdom that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication."

⁽²²⁾ See for example in para. 26 of the Commission's communication on State aid in the field of public service broadcasting, where it is stated: „It should be recalled that the provisions granting exemption from the prohibition of State aid have to be applied strictly. Therefore, the notion of »culture« within the meaning of Article 87(3)(d) must be interpreted restrictively.”