# OPINION OF ADVOCATE GENERAL TESAURO

delivered on 6 June 1995 *

1. These proceedings for a preliminary ruling once again bring to the Court's attention the question of the compatibility of the French legislation on the type-approval of telecommunications terminal equipment with Article 6 of Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment [1] (hereafter 'the directive').

The question referred to the Court arose in criminal proceedings brought against Mr Tranchant for having advertised between November 1992 and February 1993 equipment in respect of which the type-approval required by the French legislation had not been granted. In contesting the criminal nature of the allegations made against him, the accused claimed that the French legislation was incompatible with the principle laid down by Article 6 of the directive, according to which the body responsible for drawing up the technical specifications, monitoring their application and granting the type-approval certificate must be independent of public or private undertakings offering goods and/or services in the telecommunications sector.

2. The Court's answer to the question referred by the French court will swell the case-law, which began with the judgment in *GB-Inno-BM*, was refined by the judgments in *Lagauche*, *Gillon, née Decoster* and *Taillandier* and has developed in parallel with the liberalization of the market in telecommunications terminal equipment and with the progressive abolition of the national monopolies and exclusive arrangements in the sector of the marketing of such products. [2]

The principle firmly established by that case-law is that, at least as from the initial date laid down in Article 6 of the directive (1 July

* Original language: Italian.

1 — OJ 1988 L 131, p. 73.

2 — Judgments in Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941, in Joined Cases C-46/90 and C-93/91 *Lagauche* [1993] ECR I-5267, in Case C-69/91 *Gillon, née Decoster* [1993] ECR I-5335 and in Case C-92/91 *Taillandier* [1993] ECR I-5383.

1989), although the Member States are authorized to maintain or introduce measures to regulate and monitor the marketing of terminal equipment, they are obliged to guarantee separation between the authorities competent to draw up the regulations and carry out the monitoring and entities carrying out economic activities in the sector. [3]

3. Whilst the facts of the case, as I have briefly set them forth, are substantially identical to those which gave rise to references for preliminary rulings in *Gillon, née Decoster* and *Taillandier*, the French legislation relating to type-approval has been substantially amended in the meantime. Consequently, it will be necessary to set out its essential features.

## The French legislation

4. In accordance with the relevant Community requirements, France has implemented freedom of marketing of telecommunications terminal equipment, but has made it conditional in some cases on the grant of a type-approval certificate attesting that the equipment complies with certain essential requirements. In accordance with the provisions in force, terminal equipment intended to be connected to the public network may be manufactured for the domestic market, imported from third countries for sale, stocked for sale, marketed, distributed free of charge or for consideration, connected to the network or advertised, only on condition that type-approval has been previously granted by the Ministry of Posts and Telecommunications (hereinafter 'the Ministry'). [4] Infringement of the type-approval obligation attracts criminal sanctions. [5]

Until mid-1990, the procedure for the type-approval of terminal equipment was administered in its entirety by the Ministry. Differ-

3 — The Court's position may be described as unambiguous at least as regards the interpretation of the requirement laid down by Article 6 of the directive, which was clearly confirmed as having direct effect in *Lagauche*, *Gillon, née Decoster* and *Taillandier*, cited above. In contrast, as regards the validity of national legislation not guaranteeing the independence of the regulatory function from the commercial function in the period *prior* to 1 July 1989, the Court's attitude is in truth not unambiguous; in two judgments delivered on the same date in *Gillon, née Decoster* and *Lagauche*, the Court assessed the compatibility of, respectively, the French and the Belgian legislation (which moreover had many points in common), not only with Article 6 of the directive, but also with Article 3(f) and Articles 86 and 90 of the Treaty as regards matters which — *ratione temporis* or *ratione materiae* — escaped the application of the directive. The French legislation was held to be incompatible with both parameters (judgment in *Gillon, née Decoster*), whilst the Belgian was regarded as being incompatible with Article 6 of the directive, but compatible with Article 3(f) and Articles 86 and 90 of the Treaty (judgment in *Lagauche*); the result was, however, an implicit contradiction also with the statement which the Court had previously made (in the judgment in Case C-202/88 *France* v *Commission* [1991] ECR I-1223, paragraph 14) to the effect that the sole function of directives based (like Directive 88/301) on Article 90(3) of the Treaty is to specify the obligations already arising for the Member States from the Treaty.

4 — The provision, which was introduced as long ago as Decree No 85-336 of 12 March 1985, has been subsequently supplemented and complemented. The text at present in force appears in Article L.34-9 of the Postal and Telecommunications Code, as amended by Law No 90-1170 of 29 December 1990 (JORF, p. 16439; hereinafter 'the P and T Code').

5 — For present purposes, see Article L.39-3 of the P and T Code.

ent departments of the Ministry were responsible for formulating the technical specifications, monitoring their application and granting type-approval. In addition, other sub-divisions of the Ministry operated, under a monopoly system, the public network and dealt with the marketing of terminal equipment.

5. The French legislature made numerous rectifications to that situation, which was held to be unlawful by the Court in the judgments in *Gillon, née Decoster* and *Taillandier* on the ground that it was manifestly incompatible with Article 6 of the directive.

First, Law No 90-568 of 2 July 1990 [6] effected, at least on the level of administrative organization, a separation of the commercial activity from the activity of regulation, monitoring and type-approval. Under the reform, *France Télécom*, which was specially set up in the form of a body governed by public law and with separate legal personality, [7] was made responsible for the operation of the public network and activity of a commercial nature.

By the same token, Decree No 90-1121 of 18 December 1990 [8] specified that the functions of defining and adapting the general regulatory framework of the postal and telecommunications sector continue to be the responsibility of the *Direction de la réglementation générale* of the Ministry. In particular, it is charged with formulating the technical specifications and is responsible for granting type-approval.

6. Next, Decree No 92-116 of 4 February 1992 [9] lays down the detailed rules for the type-approval procedure, prescribing when it is necessary and the parameters for assessing that equipment is in conformity. Article R.20-2 of that decree emphasizes that the purpose of type-approval is to ensure, in the general interest, compliance with the essential requirements laid down by Article L.32-12° of the P and T Code, namely: safety of users and of the staff of telecommunications network operators, network security and,

6 — *Loi relative à l'organisation du service public de la poste et des télécommunications* (JORF, p. 8069).

7 — It is still under the responsibility of the Ministry: see Article 1 of the Law.

8 — *Décret portant organisation de l'administration centrale du ministère des postes, des télécommunications et de l'espace* (JORF, p. 15615).

9 — *Décret relatif à l'agrément des équipments terminaux de télécommunications, à leur conditions de raccordement et à l'admission des installateurs* (JORF, p. 1915). That decree, *inter alia*, implements in French law Council Directive 91/263/EEC of 29 April 1991, for which see section 9 *infra* and footnote 13.

where applicable, correct utilization of radio frequencies, together, where necessary, with the inter-compatibility of operation of services and terminal equipment, and data protection.

7. That decree lays down detailed rules on the procedure for applications for type-approval. [10] Applicants lodge with the *Direction de la réglementation générale* a file containing a series of information and documents relating to the product for which type-approval is requested. [11] Those documents may include, where the applicant already has them, the results of a test carried out by a laboratory designated by the competent authority in France or in another Member State.

Where, in contrast, the product has not yet been tested at an authorized laboratory in France or in another Member State, the applicant may be requested to provide a sample product 'to one of the laboratories designated' to that end (Article R.20-6, No 3°). The laboratory is responsible for checking the product's conformity with the essential requirements mentioned above and with any other requirement in the light of the relevant harmonized standards or common technical regulations or, in their absence, in the light of national provisions; the result of that check is then forwarded to the Ministry.

On the basis of all the data in its possession and provided that the result of the test was successful, the *Direction de la réglementation générale* issues a test certificate and then, after receiving from the applicant a formal undertaking to manufacture or market only products complying with that certificate, grants type-approval (Articles 20-7 and 20-10).

8. As appears from the order for reference, it is undisputed that to date only one laboratory in France has been authorized to carry out tests relating to the essential requirements other than the safety of terminal equipment, namely the *Laboratoire d'essai et d'agrément* (hereinafter 'the LEA'). [12]

It is also undisputed that the LEA constitutes an integral part of a research centre, the

10 — In fact, applicants are offered the choice between two alternative type-approval procedures, 'type examination' and 'declaration of conformity'; of the two, however, only the first is relevant in this case, since the second does not require the involvement of the test laboratories, whose independence, as will be seen, is at issue here.

11 — The complete list of documents to be annexed to the application for type-approval is set out in the *Arrêté du 11 mars 1992 relatif à la composition du dossier de demande d'agrément*, adopted pursuant to Article 20-5 of the P and T Code (JORF, p. 3846).

12 — A second laboratory, the *Laboratoire central des industries électriques* (LCIE), has been authorized to conduct the electrical tests.

*Centre national d'études des télécommunications* (CNET), which, in turn, is part of the *France Télécom* group. Moreover, as the French Government expressly admitted in a reply to a written question from the Court, the 'legal separation' of the LEA from *France Télécom* is not a priority objective, at least not in the short term.

9. Lastly, it should be observed that the LEA has been designated by the French Government to carry out the tests referred to in Article 9 of Council Directive 91/263/EEC of 29 April 1991 on the approximation of the laws of the Member States concerning telecommunications terminal equipment, including the mutual recognition of their conformity. [13] The designation of that laboratory was notified to the Commission pursuant to Article 10(2) of that directive and, to date, this has not been contested by the Commission or any Member State. [14]

## The national court's question

10. Starting from the uncontested premiss that the LEA comes under *France Télécom* and since it has doubts as to the legality of that dependence under Article 6 of the directive, the national court before which the main proceedings were brought considered that it was necessary to obtain a fresh preliminary ruling on the interpretation of that provision.

In particular, the national court asks the Court whether Article 6 precludes the application of national legislation on the type-approval of terminal equipment which lays down obligations of the kind laid down by the French legislation 'even though there is no guarantee that the laboratory responsible for monitoring the technical conformity of the equipment under the approval procedure

13 — OJ 1991 L 128, p. 1. This directive marks a further stage in the process of the full mutual recognition of type-approvals of terminal equipment issued in the various Member States. With the aim of developing and concurrently regulating the European market in terminal equipment intended for the public network, the directive lays down minimum requirements which the equipment must satisfy in order to enjoy freedom of marketing, circulation and use in the territory of the Member States. To that end, the directive introduces two (alternative) procedures for assessing the conformity of the products with the said requirements; products regarded as being in conformity after successfully going through those procedures are to be marked with the 'CE mark of conformity'. Under Article 10, to which reference has been made in the body of this Opinion, Member States are to notify to the Commission the bodies and national laboratories designated to carry out 'CE' conformity assessments (and to perform other surveillance tasks), and the Commission, after checking that they satisfy certain minimum criteria of competence, impartiality and independence, is to publish a list of those bodies and laboratories in the Official Journal. Of course, at the present stage of harmonization of standards in this sector, Directive 91/236 does not affect the application of national type-approval procedures (such as the one at issue in the main proceedings) relating to aspects not necessarily governed by harmonized standards or by common technical regulations.

14 — Under Article 10(4) of Directive 91/236, if a Member State or the Commission considers that a laboratory designated by a Member State does not meet the criteria for designation, the matter may be brought before an *ad hoc* committee provided for by Article 13, set up in order to assist the Commission in exercising the powers conferred on it by the directive.

is independent from any economic agent offering goods or services in the telecommunications sector'.

11. It should be stated forthwith that the question as it is worded may seem a rhetorical one. The obligation of independence is plainly set out in Article 6 itself and the applicability of Article 6 as from 1 July 1989 is unquestionable; it is clear, moreover, that legislation which does not guarantee such independence may not be held to be in conformity with the directive.

The question should therefore be interpreted as meaning that the national court is seeking to ascertain whether the LEA's dependence on *France Télécom* is such as to affect the compatibility of the entire type-approval procedure as laid down by the French legislation with the obligations prescribed by Article 6 of the directive.

12. In this connection, it is worth observing by way of preliminary that, as I have already mentioned, in requiring there to be a separation between the bodies carrying out the rule-making and regulatory function and those carrying on economic and commercial activities in the telecommunications sector, Article 6 of the directive draws a distinction as regards the first function between three main stages: drawing up the technical specifications, monitoring their application, and granting type-approval.

Whilst it is irrelevant for the purposes of Article 6 whether those three stages are carried out by one or more different bodies, that provision does require *each* of those stages to be carried out by entities which in turn are *independent* of public or private undertakings offering goods and/or services in the telecommunications sector.

13. The French legislation at issue gives a department of the Ministry — which today at least is formally separated from the body responsible for operating the network and supplying associated goods and services — responsibility for the stages of the drawing-up of technical specifications and the actual grant of type-approval.

In contrast, monitoring the technical specifications — albeit formally performed by that same department of the Ministry — is based on technical checks and tests carried out by a laboratory which comes under *France Télécom*.

14. I shall say immediately that that legal dependence seems to me manifestly to conflict with not only the letter, but also the spirit, of Article 6 of the directive.

The French Government's argument that, despite that legal dependence, the LEA carries on its activities with absolute freedom of judgement and impartiality has not been proved. On the contrary, at the hearing, the French Government's agent expressly conceded that the LEA's staff are answerable to its director and he, in turn, is answerable to *France Télécom*.

15. Consequently, we are faced with a situation in which the laboratory, which is a subdivision of a public undertaking responsible for operating the network and carrying out commercial activities, has been required to carry out the testing designed to assess the conformity of equipment manufactured by that undertaking's competitors.

It does not seem to me that that situation satisfies the prescribed requirements of independence and impartiality. In those circumstances, every assessment of conformity with a negative outcome, or even mere delays in carrying out the tests (maximum time-limits are not laid down for these), will not be able to avoid suspicions of partiality.

16. It is to no avail to argue, as the French Government has done, that the testing carried out by the LEA is nothing more than an activity of a technical nature and that assessment of the results of the testing falls in any event to the competent department of the Ministry.

In reality, the tests carried out by the LEA cannot, by definition, be subjected to a further judgement on the part of the administration. On the contrary, the outcome of the testing is a technical judgement certifying that the equipment tested does or does not comply with certain parameters. The fact that the result of the testing is subsequently forwarded to the administration clearly does not imply that there should be a further check by the administration.

In the final analysis, the administration does not *evaluate* the test result, but simply takes note of it. It follows that the testing carried out by the LEA does not constitute merely an aspect of the stage of monitoring the technical specifications, but substantially exhausts the monitoring stage.

17. Consequently, whilst the requirement of independence laid down by Article 6 of the directive is complied with, at least formally, by the French rules as regards the stages of the drawing-up of the technical specifica-

tions and the grant of type-approval, [15] it is not satisfied as regards the stage of monitoring the application of those specifications.

18. Next, the fact that neither the Commission nor other Member States have called in question the designation of the LEA by the French Government as the laboratory responsible for assessing conformity at Community level within the meaning of Articles 9 and 10 of Directive 91/263/EEC does not alter the terms of the problem.

As far as compliance with the obligation laid down by Article 6 of the directive is concerned, that circumstance is completely irrelevant.

**Inapplicability of the French legislation**

19. In conclusion, it should be observed that, in the event that the Court should subscribe to that interpretation of Article 6 of the directive, the national court should, in accordance with principles laid down by case-law which is now more than settled, declare inapplicable the whole of the rules governing the type-approval procedure, including the criminal sanctions currently imposed in the event of their infringement.

20. Although I confirm in principle the concerns which I expressed in my Opinion in *Gillon, née Decoster* about the potential consequences of the (even temporary) absence of rules applicable in a sector in which, among other things, user safety is at stake, I do not consider that any other conclusion is possible. What is involved, in fact, is a breach of a provision — Article 6 of the directive — which has had direct effect since 1 July 1989.

Moreover, the same conclusion was reached, without any apparent hesitation, by the French Cour de Cassation (Court of Cassation) itself in the wake of the judgments in *Gillon, née Decoster* and *Taillandier*. [16]

15 — It is not appropriate here to take a stand on the actual independence of *France Télécom* from the Ministry. Some doubts might be prompted in this regard above all by the status of the body, which, as I have already mentioned, operates under the responsibility of the Ministry itself and has a board of directors (14 out of the 21 members of which are appointed by decree) which acts within the confines of guidelines fixed by the Government. However, this point is not raised in the request for a preliminary ruling before the Court and, moreover, has not been raised by the parties.

16 — See Cass. crim. 21 February 1994, No B 92-81.421 PF, *Ochtman*, and Cass. crim. 21 February 1994, No G-91-86.230 PF, *Procureur général près de la Cour d'appel de Versailles*. It should be noted, moreover, that those judgments are a clear indication of a complete change of course on the part of the Cour de Cassation, since only a few months before the judgments in *Gillon, née Decoster* and *Taillandier*, it held that the French legislation on type-approval was applicable, without even considering it appropriate to make a reference for a preliminary ruling (Cass. crim. 19 January 1993, No S 90-84.624 PF, *Gilles*).

21. In the light of the foregoing observations, I therefore propose that the Court answer as follows the question referred by the Tribunal de Grande Instance (Regional Court), Paris:

'Article 6 of Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment must be interpreted as meaning that it precludes the application of national rules which prohibit economic agents from, and penalize them for, manufacturing, importing, stocking for sale, marketing, distributing or advertising terminal equipment without furnishing proof, in the form of a type-approval certificate or other document regarded as equivalent, that such equipment conforms to certain essential requirements relating in particular to the safety of users and the proper functioning of the network, even though there is no guarantee that all the bodies taking part in the type-approval procedure, including the laboratories responsible for monitoring the conformity of the said equipment with the technical specifications, are independent from economic operators offering goods and services in the telecommunications sector.'