JUDGMENT OF THE COURT
9 November 1995 *

In Case C-91/94,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal de Grande Instance, Paris, for a preliminary ruling in the proceedings pending before that court between

Thierry Tranchant

and

Téléphone Store SARL, party liable in civil law,

on the interpretation of Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment (OJ 1988 L 131, p. 73),

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, D. A. O. Edward, J.-P. Puissochet and G. Hirsch (Rapporteur) (Presidents of Chambers), F. A. Schockweiler, J. C. Moitinho de Almeida, P. J. G. Kapteyn, C. Gulmann, J. L. Murray, P. Jann and H. Ragnemalm, Judges,

* Language of the case: French.

Advocate General: G. Tesauro,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— Syndicat des Industries de Télécommunication (SIT) and Syndicat des Industries du Matériel Professionnel Electronique et Radioélectrique (SPER), civil parties to the main proceedings, by Jeanne Champigneulle Mihailov, of the Paris Bar,

— Mr Tranchant, the accused in the main proceedings, and Téléphone Store, the party liable under civil law, by Charly Bensard, of the Paris Bar,

— the French Government, by Jean-Marc Belorgey, Chef de Mission in the Legal Department of the Ministry of Foreign Affairs, and Catherine de Salins, Deputy Director in that department, acting as Agents,

— the Commission of the European Communities, by Francisco Enrique González Díaz, of the Legal Service, and Jean-Francis Pasquier, a national expert seconded to the Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the accused in the main proceedings and the party liable under civil law, represented by Laurent Salem, of the Paris Bar, the civil parties to the main proceedings, represented by Jeanne Champigneulle Mihailov, the French Government, represented by Jean-Marc Belorgey, assisted by Jean-Marc Chaduc, Deputy Director responsible for technical questions in the Postal and Telecommunications General Directorate of the Ministry for Posts and

Telecommunications, and the Commission, represented by Francisco Enrique González Díaz and Jean-Francis Pasquier, at the hearing on 29 March 1995,

after hearing the Opinion of the Advocate General at the sitting on 6 June 1995,

gives the following

Judgment

1 By judgment of 28 February 1994, received at the Court on 16 March 1994, the Tribunal de Grande Instance (Regional Court), Paris, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment (OJ 1988 L 131, p. 73) for the purpose of assessing the compatibility with that directive of the type-approval procedure for telecommunications equipment laid down by the French legislation.

2 The question arose in criminal proceedings brought against Mr Tranchant for having advertised between November 1992 and February 1993 cordless telephones, telephone-answering systems and facsimile machines which had not been granted prior type-approval by the Minister for Telecommunications, an offence under Articles L. 34-9 and L. 39-3 of the French Postal and Telecommunications Code ('the Code'), as amended by Law No 90-1170 of 29 December 1990 on the regulation of telecommunications (JORF, p. 16439, hereinafter 'the French Law').

3 Under Article L. 34-9 of the Code, terminal equipment intended to be connected to a public network may not be manufactured for the domestic market, imported from non-member countries of the European Communities for sale, stocked for sale, marketed, distributed free of charge or for consideration, connected to a public network or advertised, unless type-approval has been previously granted by the Minister for Telecommunications. The purpose of type-approval is to ensure, in the public interest, compliance with the essential requirements laid down by Article L. 32-12 of the Code, namely, safety of users and of the staff of telecommunications network operators, network security and, where applicable, correct utilization of radio frequencies, together, where necessary, with the interworking of services and of terminal equipment, and data protection. Article L. 39-3 of the Code lays down the penalty for persons who advertise contrary to Article L. 34-9.

4 Decree No 92-116 of 4 February 1992 on the type-approval of telecommunications terminal equipment, requirements for the connection of such equipment and the approval of installers (JORF 1992, p. 1915) lays down the detailed rules for the type-approval procedure.

5 That decree provides for two type-approval procedures, namely 'type examination' and 'certification'. However, only the first procedure, which is at issue in this case, requires the involvement of test laboratories.

6 According to the decree, under that procedure applicants have to 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. The

file may contain, where available, the results of tests carried out by a laboratory designated by the competent authority in France or in another Member State.

7 In contrast, where no such results are available, the applicant is requested to provide a sample product to one of the designated laboratories for testing in order to check that it complies with the essential requirements. If the results are positive, the *Direction de la Réglementation Générale* issues an examination certificate and then, after receiving from the applicant an undertaking to manufacture or market only products complying with that certificate, grants type-approval. If the results are negative, a certificate is refused by reasoned decision notified to the applicant.

8 According to the national court's judgment, only one laboratory in France, namely the *Laboratoire d'Essai et d'Agrément* (hereinafter 'the LEA') has been authorized to carry out tests relating to essential requirements other than the safety of terminal equipment (French decrees of 2 April 1990, 3 June 1992 and 27 October 1992). The LEA is part of the *Centre National d'Etudes des Télécommunications* (CNET), a scientific body attached to France Télécom, the public establishment which operates the public telecommunications network and markets terminal equipment.

9 In addition, the LEA has been designated by the French Government to carry out the tests relating to the procedures 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 (OJ 1991 L 128, p. 1). The designation of that laboratory was notified to the Commission pursuant to Article 10(2) of that directive.

10 Before the national court, Mr Tranchant argued that the fact that the LEA was not independent of France Télécom, which markets telephones, infringed Article 6 of Directive 88/301 and therefore rendered the criminal provisions of the French Law inapplicable.

11 Article 6 of Directive 88/301 provides as follows:

'Member States shall ensure that, from 1 July 1989, responsibility for drawing up the specifications referred to in Article 5, monitoring their application and granting type-approval is entrusted to a body independent of public or private undertakings offering goods and/or services in the telecommunications sector.'

12 In those circumstances, the Tribunal de Grande Instance, Paris, suspended the proceedings and referred the following question to the Court for a preliminary ruling:

'Does Article 6 of Directive 88/301 of 16 May 1988 preclude 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 or another 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 the test laboratory responsible for monitoring the technical conformity of the equipment under the type-approval procedure is independent from any economic agent offering goods or services in the telecommunications sector?'

13 The French Government argues in particular that, in connection with the task of 'monitoring the application of specifications', which is performed in France by the *Direction de la Réglementation Générale* of the Ministry of Posts and Telecommunications, the LEA merely applies known observation and measurement procedures and sets down the unprocessed results in a report. Such a test report is only one of the factors, namely a technical aid, used by the public authority in issuing the examination certificate prior to the grant of type-approval.

14 The civil parties to the main proceedings state that the test constitutes an inspection, that is to say, a technical operation carried out in accordance with a specified mode of operation, whereas evaluation constitutes a check, namely an administrative operation carried out by comparing test results against the essential requirements.

15 The Commission argues *inter alia* that the monitoring of technical specifications consists in checking, by means of laboratory tests and trials, whether the terminal equipment for which an application for type-approval has been submitted matches those specifications. Consequently, type-approval is closely determined by the result of that monitoring. In any event, the role played by the laboratory cannot be regarded as being an ancillary one.

16 The Commission argues in that connection that it is possible for the LEA to delay the marketing of equipment competing with that marketed by the public operator by prolonging the time taken to carry out the tests and that, in the event of negative results, it would be hard to contest the methods used or the reliability of the results, given that there are no other authorized laboratories in France from which an expert counter-report could be sought.

17 According to the ninth recital in the preamble to Directive 88/301, in order to ensure that technical specification and type-approval procedures are applied trans-

parently, objectively and without discrimination, the drawing-up and application of such rules should be entrusted to bodies independent of the competitors in the market in question.

18 Furthermore, in the judgment in Case C-202/88 *France* v *Commission* [1991] ECR I-1223, paragraph 51, the Court held that a system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators. The Court concluded from this (in paragraph 52) that maintaining effective competition and securing transparency required the drawing-up of technical specifications, monitoring their application and granting type-approval to be carried out by a body independent of public or private undertakings offering competing goods and/or services in the telecommunications sector (see also the judgment in Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941, paragraph 26).

19 The requirement of independence laid down by Article 6 of Directive 88/301 therefore seeks to eliminate any risk of a conflict of interests between, on the one hand, the regulatory authority responsible for drawing up the technical specifications, monitoring their application and granting type-approval and, on the other hand, undertakings offering goods or services in the telecommunications sector.

20 It is uncontested that, under the French legislation, the public authority monitors the application of technical specifications essentially on the basis of test results. Those results form an integral part of the operation designed to assess whether terminal equipment complies with the technical specifications.

21 It is also uncontested that those tests are carried out by a laboratory attached to an economic operator, namely France Télécom, which itself markets terminal equip-

ment. Moreover, the director of the LEA is a servant of France Télécom, as the French Government acknowledged at the hearing.

22 In those circumstances, a laboratory such as the LEA cannot be regarded as being independent within the meaning of Article 6 of Directive 88/301. Consequently, its involvement in the type-approval procedure is not in conformity with that provision.

23 That conclusion is not invalidated by the argument put forward by the French Government and the civil parties to the main proceedings to the effect that Council Directive 91/263, cited above, specifies the conditions for the application of the principle of independence laid down by Article 6 of Directive 88/301, as far as test laboratories are concerned. They argue that the LEA satisfies the criteria of impartiality, independence and integrity laid down by European Standard EN-45001 specifying the general criteria for the operation of test laboratories adopted by the Common European Organization for Standardization (CEN/Cenelec), which Directive 91/263 requires compliance with.

24 As the Commission has observed, the rationale of Council Directive 91/263 is different from that of Commission Directive 88/301. The Council directive aims at reducing repetitions of procedures once type-approval has been obtained in one Member State by facilitating the reciprocal recognition of type-approvals through the definition of common technical specifications, whilst the Commission directive sets out to forestall the potential detrimental consequences in terms of competition of partiality of the body responsible for testing for conformity with a view to the grant of type-approval. Moreover, a subsequent directive with a different purpose cannot be taken into account in order to interpret Article 6 of Commission Directive 88/301.

25 In those circumstances, the reply to the national court's question should be that Article 6 of Directive 88/301 must be interpreted as precluding 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 or another 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 where there is no guarantee that a test laboratory responsible for technically monitoring the conformity of the equipment with the technical specifications is independent from economic agents offering goods or services in the telecommunications sector.

Costs

26 The costs incurred by the French Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Tribunal de Grande Instance, Paris, by judgment of 28 February 1994, hereby rules:

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 precluding 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 or another 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 where there is no guarantee that a test laboratory responsible for technically monitoring the conformity of the equipment with the technical specifications is independent from economic agents offering goods or services in the telecommunications sector.

Rodríguez Iglesias Edward Puissochet

Hirsch Schockweiler Moitinho de Almeida

Kapteyn Gulmann Murray

Jann Ragnemalm

Delivered in open court in Luxembourg on 9 November 1995.

R. Grass G. C. Rodríguez Iglesias

Registrar President