OPINION OF ADVOCATE GENERAL TESAURO
delivered on 19 April 1994 *

Mr President,
Members of the Court,

1. This case raises once again the question whether the French rules concerning type approval (*agrément*) for terminal equipment are compatible with Community law — and in particular with Article 30 of the Treaty and Directive 88/301/EEC on competition in the markets in telecommunications terminal equipment.

The national rules at issue, which the Court has already had the opportunity of considering in its judgments in *Decoster* [1] and *Taillandier*, [2] are those laid down in Decree No 85-712 of 11 July 1985 and in Law No 89-1008 of 31 December 1989. I shall mention their main provisions.

Articles 1 and 2 of Decree No 85-712 provide that terminal equipment manufactured for the domestic market or held with a view to sale or offered for sale or distributed is to comply with certain technical and safety requirements listed in detail in Articles 3 and 4 of the decree. [3] Article 6 requires the manufacturers, importers and distributors of such equipment to prove that it complies with the requirements laid down in Articles 3 and 4. Compliance may be attested either by approval granted in pursuance of the Postal and Telecommunications Code, or by other recognized equivalent certification. Finally, Article 7 lays down the penalties to be imposed in cases of breach of the obligation to produce evidence that terminal equipment complies with the requirements laid down.

Article 8 of Law No 89-1008 provides that it is prohibited, and punishable by a fine, to advertise terminal equipment which is capa-

* Original language: Italian.

1 — Case C-69/91 *Decoster* [1993] ECR I-5335.

2 — Case C-92/91 *Taillandier* [1993] ECR I-5383.

3 — Article 3 provides that terminal equipment must:
(a) possess specifications compatible with those of the network;
(b) not interfere with the working of the network;
(c) under normal conditions, ensure that every type of signal can be exchanged with the network;
(d) transmit and regenerate communications accurately;
(e) not cause unusual external electromagnetic induction and not be disturbed by such induction;
(f) possess specifications capable of ensuring the combined use of materials of the same kind, including those that enable continuous service to be provided;
(g) be supplied with connecting apparatus suitable to the network.
Article 4 provides furthermore that the equipment must:
(a) ensure that people, domestic animals and property are protected against the risks arising from electrical overload occurring accidentally in the network;
(b) not transmit accidental electrical overload;
(c) provide protection against sound shocks.

ble of being connected to the public telecommunications network but which does not possess the required certificate of conformity.

2. I now turn to the facts of the case. Mr Rouffeteau and Mr Badia, the defendants in the main proceedings, are traders operating in the Reims area. Both are charged with marketing terminals without type approval or other certificate of compliance, in breach of the provisions of Decree No 85-712. Mr Rouffeteau is also charged with advertising such equipment, in breach of the requirements of Article 8 of Law No 89-1008.

In the proceedings before the national court, the defendants contended *inter alia* in their defence that the abovementioned national provisions were incompatible with Community law. In their view, the requirement in French law for equipment to be approved is not justified where the equipment offered for sale (or advertised) is not intended to be connected to the public telecommunications network, since it is intended in particular to be *re-exported* out of the country.

In view of that objection, the national court stayed the proceedings and referred a question to the Court for a preliminary ruling on whether Article 30 of the Treaty and Directive 88/301/EEC [4] must be interpreted as precluding national legislation which prohibits the import, possession with a view to sale and marketing of terminal equipment which has not been granted type approval, without any exception being made for cases where the importer, holder or seller clearly states that the equipment is intended solely for re-export and not for connection to the public network.

Subject-matter of the question

3. The question submitted by the national court calls for some clarification. First, the wording of the question might suggest that the national court is asking only whether the prohibition on marketing non-approved terminals (imposed by Decree No 85-712) is lawful, and not whether the prohibition on advertising such terminals (imposed by Article 8 of Law No 89-1008) is lawful as well. It is however plain that the two questions are indissolubly linked. The prohibition on advertising is ancillary to the prohibition on marketing, which it seeks to make more effective. Moreover, as I have said, in order to assess the position of one of the two defendants, Mr Rouffeteau, who is charged with a contravention of Article 8 of Law No 89-1008, it is essential to consider whether the ban on advertising is lawful. Taking account of those considerations, and in order to provide the national court with a helpful answer for the purposes of resolving the dispute before it, therefore, I consider it necessary for the Court to give a specific ruling as to whether not only the prohibition

4 — Commission Directive of 16 May 1988 (OJ 1988 L 131, p. 73).

on marketing non-approved terminals (intended for re-export) contained in Decree No 85-712 is lawful, but also the prohibition on advertising such terminals contained in Law No 89-1008.

4. Secondly, as is apparent from the order for reference, the defendants in the main proceedings referred to a (not clearly identified) Commission document and challenged the lawfulness of submitting for type approval terminals which are not in general intended to be connected to the public network, including both terminals intended for re-export and those intended to be connected to private networks. Throughout the proceedings, however, it has never been claimed that the terminals at issue are, or can be, used in private networks. In particular, the national court expressly restricts its question to re-exported terminals only, without any reference to the various problems relating to terminals intended for use in private networks. [5] Furthermore, both the Commission and the French Government have confined themselves to considering only whether or not it is lawful to extend the requirement of type approval to terminals intended for re-export. I therefore consider that, in this case, it would be appropriate for the Court to rule on that point only, leaving open (except for some clarification set out below) the question whether it is lawful to require type approval in respect of terminals intended for connection to private networks.

5. Finally, for the sake of completeness, it should be pointed out that in the main proceedings the defendants raised another objection to the national legislation at issue. In their view, the French authorities have not laid down the technical specifications and type-approval procedures for terminals as provided for in Directive 88/301. The national court rejected that objection as invalid, [6] however, noting that those specifications and procedures had already appeared in an *avis* (notice) on the application of Decree 85-712, which was published in the Official Gazette of the French Republic on 1 November 1985 (and to which a supplement was later added in October 1991). [7]

6. Taking those considerations into account, I consider that the question submitted for a preliminary ruling should be set out in the following terms: Do the provisions of Directive 88/301 and Article 30 of the Treaty preclude national rules such as those laid down

5 — See point II of the order for reference, headed 'Incompatibility with Community law of the requirement of type approval in respect of terminal equipment intended for re-export'.

6 — See point I of the order for reference.

7 — Still according to the national court, Law No 90-568 of 2 July 1990 — which endowed France Telecom with independent legal personality — clearly separated, in accordance with the provisions of Article 6 of Directive 88/301, the regulatory duties and monitoring procedures carried out by the Ministry of Posts and Telecommunications from the commercial operations carried on by France Telecom. It follows that at the material time (September 1991), and as distinct from the findings of the Court in the abovementioned *Decoster* and *Taillandier* cases, the technical specifications and approval procedures applied in France did comply with the provisions of Directive 88/301.

in France by Decree No 85-712 and by Law No 89-1008, prohibiting both the marketing and the advertising of any non-approved terminals, without providing for a derogation from such prohibitions where the trader has clearly informed the purchaser that such equipment is intended for re-export and cannot, for that reason, be connected to the national telecommunications network? In the observations below, the question will be considered first in the light of Directive 88/301 and then in the light of Article 30 of the Treaty.

Directive 88/301/EEC

7. On this subject, a point to note is that Directive 88/301 does not lay down any rules specifically relevant to resolving the legal issue raised by the national court. The purpose of the directive, adopted by the Commission on the basis of Article 90(3) of the Treaty, is to encourage genuine competition on the market in telecommunications terminals. To that end, the directive provides in substance for: the withdrawal of special or exclusive rights granted by Member States to telecommunications undertakings (Article 2); the right of traders — subject to certain essential requirements being satisfied — to import, market, connect and bring into service terminal equipment (Article 3); access for users to public network terminal points (Article 4); notification to the Commission and publication of technical specifications and type-approval procedures (Article 5); the separation in the telecommunications sector of commercial activity from regulatory and monitoring responsibilities (Article 6); the possibility of terminating, on a year's notice, leasing or maintenance contracts in respect of terminal equipment (Article 7); notification to the Commission of draft technical specifications and type-approval procedures (Article 8); provision of annual reports on compliance with the provisions of Articles 2, 3, 4, 6 and 7 (Article 9).

It is apparent from that legislation that, although the directive recognizes the right of traders to import and market terminal equipment (Article 3), it is also true that the directive does not affect the right of Member States to require the terminals to be checked for compliance with certain essential requirements, relating mainly to the safety of users and operators, and also to the protection and proper functioning of the public telecommunications network (requirements laid down in Article 2(17) of Council Directive 86/361/EEC which is expressly referred to in Article 3 of Directive 88/301 [8]). It may also be seen from the directive (Articles 5 and 8 in particular) that testing for compliance must be performed according to type-approval procedures laid down by the Member States and — before the achievement of harmonization at Community level [9] — on

8 — Directive 86/361/EEC (OJ 1986 L 217, p. 21) was later replaced by Directive 91/263/EEC (OJ 1991 L 128, p. 1) — mentioned below —, which subsequently set out (in Article 4) the essential requirements which terminals must satisfy.

9 — See Directive 91/263.

the basis of national technical specifications. [10]

8. The directive is therefore founded on the *premise* that in order to ensure that certain requirements in the general interest, and absolutely consistent with the Community legal order, are satisfied, the Member States have the power to approve terminal equipment. In specifically referring to type approval, the directive merely provides for two conditions: (i) that the Commission and third parties should be duly informed of technical specifications and type-approval procedures (Articles 5 and 8); (ii) that the specifications should be drawn up, their application monitored and type approval granted by a body independent of public or private undertakings offering goods and/or services in the telecommunications sector (Article 6).

9. On the other hand, the directive does not contain any provision regarding the *scope* of the requirement of type approval imposed by the Member States to ensure that equipment complies with the abovementioned essential requirements. It is therefore impossible to tell whether a Member State may require approval *even with respect to equipment intended for re-export*. Nor, as is clear, does the directive contain any provision relating to advertising of terminals, whether or not they have been approved. Accordingly, I consider that the answer to the question raised by the national court cannot be found in the provisions of the directive, but that the question should instead be approached with reference to the principles to be deduced from the primary legislation and particularly from Article 30 of the Treaty.

Article 30 of the Treaty

10. My analysis will be along the following lines:

(a) the contested national legislation is not a barrier to imports from within the Community;

(b) on the assumption that such a barrier were discernible, it is in any event proportionate to the need to satisfy imperative requirements which are entirely consistent with the Community legal order;

(c) alternatively, if the legislation at issue were considered to constitute a measure

10 — The first indent of the second paragraph of Article 3 of Directive 88/301 also states that 'in the absence of technical specifications, [the Member States may] refuse to allow terminal equipment to be connected and brought into service where such equipment does not, according to a reasoned opinion of the body referred to in Article 6, satisfy the essential requirements laid down in Article 2(17) of Directive 86/361/EEC'.

having equivalent effect which is prohibited by Article 30 of the Treaty, it would have to be made clear that Article 30 is applicable only with respect to imports of goods from other Member States and not from non-member countries.

(a) *The contested national legislation is not a barrier to imports from within the Community*

11. In this case, it is highly unlikely that the application of the national rules in question could create a barrier to imports that is prohibited, as such, by Article 30. To arrive at the conclusion that such a barrier does or may exist, it is necessary to start from a premiss which, to my mind, is more theoretical than real. That premiss is as follows: (i) generally speaking (and this is the only point that may be taken to be established), requiring type approval for the sale, or even the mere advertising, of terminals makes it more difficult or onerous to market them; (ii) consequently, the imposition of that requirement for *re-exported* terminals hinders their sale; (iii) the barrier created to the sale of terminals specifically and exclusively intended for re-export may, in turn, reduce imports of terminals distinguished by that specific and exclusive purpose. However, if the requirement of type approval did not apply to re-exported terminals, that might be supposed to favour the import of terminals *for re-export*.

12. This complicated hypothesis is, however, based on the assumption that there might be an interest in importing into a Member State terminals which, precisely because they have not been approved, cannot in any case be sold on the domestic market, but can *only* be re-exported. Such an assumption hardly seems plausible. What interest would traders belonging to the normal distribution channels have in buying products which, by definition, cannot be resold on the domestic market (that is to say, to their usual customers)? [11]

13. In the light of those considerations, it might be thought, with reference to the judgment in *Krantz*, [12]that this case is one in which the existence of a barrier to imports from within the Community is so *uncertain and indirect* as to exclude in substance the possibility of applying Article 30 of the Treaty to the national legislation at issue.

11 — The situation might be different in the case of:
(i) traders located in border areas;
(ii) firms specializing in triangular import-export transactions.
So far as concerns the first case, however, the chance of a trader selling non-approved terminals to users resident in another Member State (or to passing tourists) is greatly decreased by the doubts which purchasers may entertain (unless they are experts) as to whether the equipment (the cost of which is not insignificant) is capable of working properly on the network in their own countries. With regard to the second case, triangular operations of that sort may appear in principle unattractive from the commercial point of view (why should a trader in the re-exporting Member State obtain supplies from a firm in another Member State, which has in its turn imported the product from a third Member State, instead of obtaining supplies direct?) while, as the French Government confirms, such transactions may in any case be exempted from the requirement of type approval, since in that case there is in fact a guarantee that the equipment — which is not introduced into national distribution channels — will indeed be re-exported and will not therefore be connected to the national network.

12 — Case C-69/88 *Krantz* v *Ontvanger der Directe Belastingen and Staat der Nederlanden* [1990] ECR I-583.

14. That conclusion might be reinforced by the consideration that the French legislation — in so far as it is in fact aimed at (re-)exported products — would more properly lend itself to examination in the context of Article 34 rather than Article 30 of the Treaty. It is noteworthy that in Case C-80/92 *Commission* v *Belgium*, [13] the Commission challenged the legality of Belgian legislation which did not exempt from type approval certain terminal equipment intended for export, relying in fact on Article 34 of the Treaty. [14]

(b) *The barrier allegedly created by the contested legislation is in any event 'proportionate'*

15. If the French legislation is thought to be capable of hindering trade within the meaning of Article 30 of the Treaty, it will be necessary to ascertain whether that barrier is proportionate to the need to satisfy imperative requirements deemed to be consistent with the aims of the Community order.

16. Let me now summarize the positions of the parties. The Commission and the French Government are at one in thinking that the requirement for terminal equipment to be approved is, in principle, compatible with Article 30 of the Treaty, because it is necessary in order to ensure that that equipment satisfies certain essential requirements relating especially to user safety and to the proper functioning of the public telecommunications network.

17. The only difference of views concerns, as stated, the *scope* of that requirement. According to the Commission, the requirement of type approval should not apply to equipment which is intended for re-export and which is therefore incapable of causing damage within the State or of interfering with the functioning of the national telecommunications network. The Commission considers that it is sufficient to require the trader to indicate clearly the intended use of the product and to take any other appropriate step to inform the purchaser that the equipment has not been approved and cannot, therefore, be used within the State. Such precautions would allow non-approved terminals intended for re-export to be marketed, without prejudice to the purchaser's liability for any improper use of the equipment. Still according to the Commission, in Council Directive 91/263 a similar approach was adopted, which confirms the validity of that interpretation of Article 30.

13 — Case C-80/92 *Commission* v *Belgium* [1994] ECR I-1019.

14 — Furthermore, *prima facie* at least, the French legislation, like the Belgian legislation examined in Case C-80/92, would not appear to conflict with Article 34 as interpreted by the Court (see also the judgment in Case 237/82 *Jongeneel Kaas* v *Netherlands* [1984] ECR 483); it merely subjects exported products to the same treatment as that applied to products offered for sale on the domestic market.

18. The French Government, on the other hand, considers that requiring type approval may be considered unjustified only if it is certain that the terminals will actually be re-exported. In general, however, that is far from certain. When the terminals are marketed (and advertised) in France through the normal distribution channels, without there being any specific guarantee that the purchaser will in fact export the equipment, it must be thought more than likely that the purchaser of the terminal will use it *in loco*, that is, by connecting it to the national network. Therefore, to allow non-approved terminals to be freely marketed, even if they are stated to be exclusively for re-export, would amount to jeopardizing both the system of verifying compliance through the approval of equipment and the essential requirements of safety and proper functioning of the network, which such verification is intended to safeguard.

19. When analysing the question, the point to bear in mind is that the Court has already noted in the area under consideration that the obligation to have terminal equipment approved, while it may to some extent hinder intra-Community trade in that equipment, is none the less essential in order to satisfy fundamental requirements in the public interest and the obligation is therefore, in principle, quite compatible with Article 30 of the Treaty. Indeed, according to the Court:

'In the absence of Community rules on the establishment of public telecom-munications networks, and in view of the technical diversity of the networks in the Member States, the Member States retain, on the one hand, the power to lay down technical specifications which telephone equipment must meet to be capable of being connected to the public network and, on the other, the power to examine whether the said equipment is fit to be connected to the network in order to satisfy the imperative requirements regarding the protection of users as consumers of services and the protection of the public network and its proper functioning.' [15]

In the same judgment, moreover, the Court stated, relying on the principle of proportionality, that since any refusal by the national supervisory authority to grant authorization can lead in practice to denial of access to the market of a Member State to terminal equipment imported from another Member State and hence to a barrier to the free movement of goods, it must be open to traders to challenge such refusal before the courts. [16]

20. With respect to the national legislation which is the subject-matter of these proceedings, it is essentially a matter of ascertaining whether imposing the requirement of type approval *even* in respect of terminals

15 — Judgment in Case C-18/88 *Régie des Télégraphes et des Téléphones* v *GB-Inno-BM* [1991] ECR I-5941.

16 — See also the recent judgment in Joined Cases C-46/90 and C-93/91 *Procureur du Roi* v *Lagauche and Others* [1993] ECR I-5267.

intended for re-export (and previously imported from other Member States) constitutes a barrier to trade which is disproportionate and thus incompatible with Article 30 of the Treaty.

Let me at once say that, in my view, it does not, essentially for three reasons. First, I believe that in the absence of such an obligation the system of type approval and the requirements which it is aimed at satisfying could be systematically evaded by traders. Secondly, it seems to me to be appropriate, when considering whether the legislation at issue is proportionate, to repeat the point I made under (a), which is that requiring approval for terminals intended for re-export may create minor, if not negligible, barriers to imports from within the Community. Thirdly, and finally, the conclusion advocated here seems to me to be in agreement — contrary to the Commission's assertion — with the system established by Directive 91/263/EEC for checking whether the terminals comply with the requirements laid down.

(i) *The risk that the system of type approval might be evaded*

21. With regard to the first point, it must first of all be stressed that the terminals in question, although they are said to be for re-export, still constitute equipment quite capable of being connected to the national telecommunications network. As the French Government has rightly pointed out, such equipment enters the normal commercial distribution channel — to which, after all, the defendants in the main proceedings belong — and is then offered for sale to customers who are *normally* interested, not in exporting it out of France but in using it *in France* by connecting it to the national network. If, therefore, non-approved equipment is permitted to be sold, with a mere indication that it is intended for re-export, there is a strong risk that the purchasers — perhaps at the discreet suggestion of the vendors themselves — will buy a non-approved terminal, frequently at a lower price, and then connect it to the national network. After all, the facts of the present case clearly speak for themselves. The defendants in the main proceedings are in fact traders operating in the Reims region, who have obtained cordless telephones and fax machines which lack proper type approval or any other certificate of compliance with the technical specifications in force in France, and then offered those products to purchasers who, in all probability (otherwise than in entirely hypothetical cases), will be interested in using the telephones and fax machines in houses and offices in that region, or in adjacent regions, and certainly not in re-exporting them out of France.

22. In the circumstances, to allow traders to offer non-approved terminals for sale on the national market, with the sole precaution of informing the public that the terminals are

intended for re-export, is tantamount purely and simply to authorizing the sale, potentially on a large scale, of non-approved equipment capable of being connected to the national network. In other words, traders and their customers would be given a convenient means of evading the compulsory type-approval system for terminals.

23. That outcome would appear to conflict with the approach so far taken both by the Court and by the Community legislature. It is clear from the case-law cited above and from Council Directives 86/361 and 91/263, as well as from Commission Directive 88/301, that the requirement for terminals to be approved is an essential safeguard, in so far as it is intended to prevent equipment which is unsatisfactory from the point of view of safety or technical efficiency from being marketed and connected to the national network.

It follows that Article 30 of the Treaty cannot be interpreted in such a way as to allow traders and individuals to avoid compliance with that requirement simply by sleight of hand, thus jeopardizing its effectiveness.

24. Moreover, it must also be borne in mind that while this solution is meant in fact to secure compliance with the requirement of type approval, it does not subject traders and consumers to improper restrictions imposed by the national authorities. Apart from the consideration that, following Directive 91/263, type approval is granted on the basis of harmonized technical specifications which are not of national origin, the point is that in accordance with the abovementioned case-law both the technical specifications laid down, on the basis of which approval is granted, and refusals to grant approval must in any case be open to challenge before the courts, a safeguard which at least allows any misuse of the national authorities' power to grant approval to be remedied.

(ii) *Limited effect on trade of the requirement of type approval in respect of terminals said to be for re-export*

25. Secondly, let me repeat that extending the requirement of type approval to terminals intended for re-export can produce only a *very marginal* (if not quite negligible) effect on intra-Community trade. For the reasons already given (see point (a)), it is hard to imagine a flow of terminal imports which, lacking type approval, cannot be sold on the domestic market but can be intended *only* for re-export. However, if this is so, there is no discernible advantage in exempting from

approval terminals intended for re-export as well. On the one hand, the flow of products imported solely for the purpose of re-export is so marginal in economic terms as to suggest that, even in the absence of the requirement of type approval, there cannot in any case be any significant advantage in terms of increased trade or integrated markets; on the other hand, as I have said already, to allow non-approved terminals to be freely sold in shops, with the mere indication 'for export only' (or other equivalent statement), runs the risk of making the system of type approval itself substantially ineffective.

26. On this point, I think it would also be helpful to make it clear that the cost of the type-approval procedure and the time it takes are, generally speaking, reasonable and acceptable to an undertaking interested in marketing a new type of equipment (approval is granted once only for each type of terminal; the cost is therefore spread over the various models of each type of approved terminal sold on the market in question; on average the cost of approval is about BFR 100 000).

(iii) *Directive 91/263/EEC*

27. Finally, it is worth noting that the solution put forward here appears to be in line with Council Directive 91/263 on the approximation of the laws of the Member States concerning telecommunications terminal equipment, including the mutual recognition of their conformity (which, however, came into force after the events material to this case).

28. The directive distinguishes between terminal equipment intended to be connected to a public network (Article 1(2)) and equipment which, while capable of being connected to a public network, is not expressly intended for that purpose (Articles 1(3) and 2(1)). The former is subject to a harmonized system for assessing whether it satisfies the essential requirements of safety and proper functioning of the network; that assessment, which takes the form *inter alia* of type approval, allows the 'CE' mark and also the symbol which indicates that the equipment is suitable for connection to the network to be affixed to products (Articles 9 and 11 and Annex VI). The second category of equipment — which is not expressly intended to be connected to the public network — is governed instead by what might be described as a 'simplified' procedure. That procedure is based on a declaration by the manufacturer or supplier as to the intended purpose of the equipment (Article 2(1)) and permits a symbol to be affixed indicating that the equipment is not suitable for connection to the public networks of the Member States (Article 11(4) and Annex VII). Equipment in one category or the other, bearing the prescribed symbols, may in principle move freely, except where national protective measures are applied (it goes without saying that there is a much wider range of commercial outlets for equipment considered suitable for connection to the public network and that, if

the equipment satisfies the prescribed technical standards, traders have, therefore, every interest in giving preference to the usual system rather than to the 'simplified' procedure).

29. According to the Commission, a manufacturer or supplier of equipment intending to release it into circulation within the Community is quite free to decide whether or not that equipment is intended to be connected to the public network and, therefore, whether its conformity must be assessed with the essential requirements or with the 'simplified' procedure. Still according to the Commission, equipment which on the express declaration of the manufacturer or supplier is intended for re-export (outside the Community) should be counted as equipment not expressly intended to be connected to the public network; under the system established by the directive therefore, it is possible to release into circulation in the Community equipment which has not been approved (or whose compliance with the essential requirements is not otherwise certified), merely accompanied by the indication that since the equipment is intended for re-export, it is unsuitable for connection to the public network. That shows, the Commission concludes, that even before the directive was adopted it would have been possible for the national legislature to adopt a system that was less restrictive and thus consistent with the principle of proportionality.

Conversely, the French Government has argued that, even within the framework of the directive, equipment which appears objectively to possess the technical and operating characteristics of normal terminal equipment should in any event be subject to type approval. In its view, the simplified procedure provided for by the directive can be chosen by the trader only where the equipment concerned exhibits distinctive characteristics making it particularly suitable for use in private networks and not in the public network. Any other solution would undermine the practical effect of the system of type approval, considered in the directive itself to be of the first importance in safeguarding the essential requirements laid down. It follows that even within the framework of the directive, traders should not be given the right to sell terminal equipment merely accompanied by an indication that it is intended solely for re-export out of the Community.

30. The interpretation put forward by the French Government seems to me the more convincing. It is true that the directive provides for two kinds of system: one based on verification of conformity, by means of type approval (or otherwise), in the case of terminal equipment intended for the public network, and the other based on the 'simplified' procedure for equipment not expressly intended for connection to the public network. It is also true, however, that the application of the one type of system or the other

seems not to be left *just* to the *free* choice of the trader, but to depend on *objective* considerations. It follows from Article 2(2) of the directive that the manufacturer or supplier intending to use the 'simplified' procedure must be in a position to *justify the intended purpose* of the equipment on the basis of its 'relevant technical characteristics, its functions' and 'the market segment it is intended for'. That would seem to suggest that, if the equipment is normal terminal equipment, capable of being connected to the public network, and does not possess objectively distinctive features making it suitable for a different purpose — which is to say for use in private networks — then such equipment *must* be subject to the usual system and not to the 'simplified' procedure; it must therefore be subject to verification to assess its conformity and, if need be, to the prescribed type-approval procedure. In addition, under Article 1(3) of the directive, cordless telephones — one of the two sorts of terminal sold by Mr Rouffeteau and Mr Badia — are treated as a matter of law as intended for connection to the public network and are therefore always subject to the relevant system.

31. It is scarcely necessary to point out that a different interpretation of the directive would conflict not only with the wording but also with the aims of the measure. One of the principal objectives of the directive is to ensure (in addition to the free movement of terminals) that the abovementioned essential requirements are satisfied. The method chosen in order to achieve that objective is the compulsory approval of equipment intended to be connected to public networks. If a trader could put non-approved terminals into circulation in the Community, merely declaring that they were intended for re-export to a non-member country, that would imply that equipment *consisting merely of ordinary terminals suitable for connection to the public network* could be offered for sale in shops in the Community, evading the verification of conformity with essential requirements provided for by the directive. For that reason as well, therefore, I consider that the 'simplified' procedure established by the directive must be confined only to equipment possessing *objectively distinctive technical and operating characteristics* which make it particularly suitable for use in private networks; on the other hand, that procedure may not be extended to ordinary terminal equipment whose sole distinctive characteristic is a declaration by the manufacturer or supplier that the equipment is intended for re-export to non-member countries.

32. It is clear from those observations that, even within the framework of Directive 91/263, equipment such as that forming the subject-matter of the main proceedings could never be marketed without prior type approval (or other equivalent certification provided for by that directive). As I have said, in this case the Court is not called upon to give a ruling regarding equipment intended, on account of its objective characteristics, to be used in private networks, but only regarding equipment which, from the

technical and operational point of view, is intended to be connected to public networks but is nevertheless supposed to be for re-export. The directive provides that equipment of that kind may not circulate in the Community without prior evidence, in the form of type approval or other equivalent certification, of its conformity with the essential requirements of personal safety (of users and employees) and proper functioning of the network, both laid down in detail in Article 4 of the directive. That applies particularly to equipment such as cordless telephones which, in so far as they use the radio frequency spectrum, are deemed as a matter of law to be intended to be connected to the public network and consequently require type approval.

33. I therefore consider that the system established by the directive provides no grounds for claiming that the aforesaid national legislation was incompatible with the principle of proportionality.

34. In the light of all the considerations developed up to this point, I consider the requirement of type approval in respect of terminals intended for re-export to be fully justified since it is necessary in order to satisfy imperative requirements which are wholly consistent with the aims of the Community order. It follows that neither the prohibition on marketing non-approved terminals, laid down in Decree No 85-712, nor the secondary prohibition on advertising such terminals, laid down in Article 8 of Law No 89-1008, in so far as they also apply to re-exported terminals, is incompatible with Article 30 of the Treaty.

(c) *Alternatively, if the legislation at issue were regarded as constituting a measure having equivalent effect which is prohibited by Article 30 of the Treaty, it would be necessary to make it clear that Article 30 is applicable only with respect to imports of goods from other Member States and not to imports from non-member countries*

35. Here it will suffice to note that, in accordance with the Treaty [17] and the case-law of the Court, [18] Article 30 may be relied on only to protect the free movement of goods 'between Member States'. Conversely, that provision may not be relied on where the national measure in question applies not to products imported from other Member States, but to products imported direct from

17 — Article 9(2).

18 — See the judgment in Case 96/75 *EMI Records* v *CBS Schallplatten* [1976] ECR 913.

non-member countries (or to products of domestic origin).

It follows that traders who, like Mr Rouffeteau and Mr Badia, are charged with selling (and advertising) terminals without type approval can rely on Article 30 of the Treaty to resist the application of the national legislation in question only if those terminals have been imported from another Member State; conversely, the national legislation, and the penalties for which it provides, are fully applicable if the traders have put up for sale terminals imported direct from non-member countries (or manufactured within the State).

It is of course for the national court to determine whether the offences with which the defendants are charged concern the marketing (and advertising) of terminal equipment imported from other Member States or from non-member countries.

Conclusion

36. In the light of the foregoing considerations, I propose that the question referred by the national court should be answered in the following terms:

Directive 88/301/EEC and Article 30 of the Treaty do not preclude the application of national rules, such as those laid down in France by Decree No 85-712 and by Law No 89-1008, which prohibit both the marketing and advertising of terminals which have not been granted type approval, without providing for a derogation from such prohibitions where the trader has clearly informed the purchaser that such equipment is intended for re-export and may not, for that reason, be used for connection to the national telecommunications network.