OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 15 March 1989 *

Mr President,
Members of the Court,

1. It is said that no-one can be both a judge and a party. That adage would appear to underlie the questions referred by the President of the Tribunal de Commerce de Bruxelles, for the purpose of those questions is to ascertain whether Community law prohibits the delegation by a Member State of the technical testing of certain products to an undertaking which is competing on the market in those products, when such testing is a condition which must, in practice, be satisfied in order for the products to be sold within the territory of the State concerned. In other words, can the State appoint a trader to decide, by means of a technical type-approval procedure, whether products offered by other traders may compete with his own?

2. More particularly, this case concerns the power granted in Belgium to the Régie des Télégraphes et des Téléphones to make the connection to the telecommunications network which it operates of any equipment not supplied by it subject to its approval. The RTT is, under the Law of 19 July 1930 [1] which established it, a 'civil person' operating 'the telegraph and telephone service with and without wires . . . in the public interest'. [2] It is managed by the Minister 'responsible for telegraphs and telephones.' [3] The Law of 19 October 1930 [4] gave the RTT the monopoly to operate the telecommunications network and provided that the RTT alone had 'the right to establish and operate telegraph and telephone lines and offices for communications by the public'. [5] Article 13 of the Ministerial Order of 20 September 1978 [6] provides: 'Unless authorized by the RTT in writing, a subscriber shall not connect any . . . apparatus . . . to the equipment which he is permitted to use'; Article 91 of that Ministerial Order provides that the RTT is to 'determine the disposition of the subscriber's circuits and their technical characteristics'. Any equipment connected to those circuits must be 'supplied or approved' by the RTT. In practice the RTT authorizes the connection of equipment not supplied by it only where it is of a type that has been approved by the RTT.

3. The main dispute concerns the offer for sale at very competitive prices in the shops of GB-Inno-BM SA (hereinafter referred to as 'GB') of non-approved telephones from outside the EEC. The RTT is not challenging the sale of such equipment in principle but the fact that the shop's customers were not informed by the seller that the equipment had not been approved and that the customers were therefore barred from connecting it to the network. The RTT has brought an action before the Tribunal de Commerce de Bruxelles for an order under the Law on Commercial

* Original language: French.

1 — *Moniteur Belge* of 2 August 1930.

2 — Article 1.

3 — Article 3.

4 — *Moniteur Belge* of 20 and 21 October 1930.

5 — Article 1.

6 — *Moniteur Belge* of 29 September 1978.

Practices of 14 July 1971 for the termination of that commercial practice which allegedly harmed its 'professional interests'. The arguments relied upon by GB in its defence in those proceedings raised the problem whether the RTT's situation was compatible with Community law. GB asserts that it cannot be criticized for offering for sale the equipment without informing potential purchasers that the equipment is not of an approved type because the conditions governing the grant of the approval are objectively contrary to the Treaty of Rome, in particular Article 86, on the ground that the RTT is at one and the same time the holder of the power to grant approvals and a competitor on the market for the equipment that it approves. The national court has therefore made an order referring to the Court of Justice three questions on the interpretation of Article 30 and Article 86 of the EEC Treaty for a preliminary ruling.

4. Those questions have been referred at a time when the need to develop the common market in telecommunications within the Community is the focus of increasing attention, as is shown by a number of acts adopted by the Council and the Commission. Recent acts include, in particular, the Council Resolution of 30 June 1988 [7] which states that the 'major policy goals in the telecommunications policy' include that of developing a common market on which telecommunications administrations and other suppliers can 'compete on an equal footing'. That Resolution states that to that end the following are particularly appropriate:

— 'clear separation of regulatory and operational duties, with due regard for the situation in each individual Member State;

— application of the relevant rules of the Treaty, notably competition rules, to telecommunications administrations and private providers'. [8]

There was an earlier Commission Directive of 16 May 1988 on competition in the markets in telecommunications terminal equipment. [9] It provides that with effect from 1 July 1989, the drawing up of the 'technical specifications and type-approval procedures which are used for terminal equipment', the monitoring of their application and the grant of type-approvals is to be entrusted to a body independent of public or private undertakings offering goods and/or services in the telecommunications sector. [10]

5. It is thus clear that the Community institutions are examining the question of the entity managing the national telecommunications network acting in two capacities, both as authority for approving terminals and as vendor of equipment. However, the approach adopted in Directive 88/301 has not been taken into account in this case. That directive, which,

7 — Resolution on the development of the Common Market for telecommunications services and equipment up to 1992 (OJ 1988 C 257, p. 1).

8 — Ibid, p. 2, objective 5.

9 — Commission Directive 88/301/EEC (OJ 1988 L 131, p. 73).

10 — Articles 5 and 6.

moreover, is the subject of an action for annulment before the Court of Justice, [11] is in any event applicable only with effect from 1 July 1989 to the point at issue here. Although Belgium is at present preparing a draft law on the creation of an independent approval authority, on the lines of what has recently been decided by the Netherlands legislature, [12] it is only on the basis of the RTT's present status and taking into account Community law as it now stands that this case falls to be examined.

6. Before beginning the legal discussion proper, one point should be made clear. The telephones at issue in the main action are simple terminals, combined listening and speaking devices like those normally used by any telephone subscriber. They are sold in Belgium in what may be called the market for 'second telephones'. When the RTT provides a line to a subscriber, it also provides a 'first telephone'. The 'first telephones' are manufactured by companies in implementation of contracts concluded by the RTT and in conformity with general conditions setting out the RTT's technical requirements. Those telephones are supplied to the RTT and are exclusively distributed by the RTT to its subscribers. As regards the first telephone, therefore, there is no competition and the RTT has a monopoly. On the other hand, for other telephones, there is in principle a free market. There is no commercial monopoly. As well as the RTT, any other company can, therefore, offer telephones for sale on that market. Thus it is for such second telephones that the question as to the need for approval arises in the main action.

11 — Case 202/88 *France* v *Commission*

12 — *Le Monde* of 3 January 1989.

7. The Court is first requested by the order for reference to examine whether a situation such as that at issue is compatible with Article 30 of the Treaty.

8. The Commission has expressed the opinion that powers such as those held by the RTT should, from the point of view of the principle of the free movement of goods, be considered first in the light of Article 37 of the Treaty. That article concerns national monopolies of a commercial character and applies more specifically, according to the Commission, to a situation such as that of the RTT than the general provisions of Article 30.

9. It is necessary first to ascertain how a monopoly such as that held by the RTT, that is, the exclusive right 'to establish and operate telegraph and telephone lines and offices for communications by the public' [13] may be affected by Article 37. In the Court's judgment in Case 41/83 *Italy* v *Commission*, [14] the activity consisting of managing public telecommunications installations and making them available to users upon payment of rental was expressly classified as the provision of services. In the judgments in *Sacchi* [15] and *Amélioration de l'Elevage* [16] it was held that Article 37 applies to trade in goods and does not cover a monopoly for the provision of services. But according to the same judgments an undertaking having a monopoly for the provision of certain services may contravene

13 — The abovementioned Law of 13 October 1930, Article 1

14 — Case 41/83 [1985] ECR 873.

15 — Case 155/73 [1974] ECR 409.

16 — Case 271/81 [1983] ECR 2057.

the principle of the free movement of goods in so far as its monopoly results in discrimination in favour of national products. In that case, Article 37 applies to the undertaking concerned.

10. Does a monopoly for the provision of services such as that held by the RTT involve detailed organizational arrangements that result in discrimination to the detriment of imported telephones? More particularly, does an organizational arrangement such as the exclusive power to examine whether telephone equipment is suitable for connection to the network to which the monopoly relates result in such discrimination? I think not. The obligation to have equipment approved, which is an essential prerequisite for selling the equipment, is not specific to imported products, it also applies to domestic products. Moreover, it applies in the same way to domestic products and to products imported from another Member State. The technical specifications governing approval are the same, whatever the origin of the products. The type-approval procedure is the same, and the fee payable for submitting a type of equipment to this procedure does not vary according to whether or not the equipment is manufactured in Belgium. I therefore consider that the legal provisions governing approval are not intrinsically discriminatory. There is no legal obstacle to prevent imported products from obtaining the approval which is required in respect of any equipment that is to be connected to the network, whatever its origin.

11. In order to analyse, with regard to Article 37, the situation of a body holding a telecommunications monopoly which also holds an exclusive power to grant type-approvals, such as the power in this case, the Commission has suggested that three exclusive rights forming part of powers of the monopoly should be distinguished: First, the exclusive right of approval proper, second, the right to authorize connections, and third, the power to check that the provisions relating to authorization and approval have been complied with. But even if the power of approval is broken down in this way, from a legal point of view, no discriminatory factors are discernible.

12. Having regard to the method applied by the Court in the *Amélioration de l'Elevage* judgment, [17] the view must be taken that in the absence of any organizational rules that are objectively discriminatory, there is no basis for holding that a national monopoly contravenes the provisions of Article 37. However, it seems to me that the answer to the question whether a procedure for the technical approval of telephones does not, as such, infringe the principle of the free movement of goods presupposes an examination of Article 30 to check whether that procedure has an effect equivalent to a quantitative restriction on imports. Following that diversion via Article 37, we return, so to speak, to the basic article concerned.

13. As has been seen, the line of reasoning put forward by the RTT and that put forward by the Commission have converged on two significant points which in fact could not seriously be disputed. First, it is clear that the procedure for the approval of telephones, which applies without distinction to domestic and imported equipment, must by

17 — Cited above.

its very existence have a restrictive effect on imports because equipment sold in one Member State cannot in practice be sold on the territory of the State where approval is required if such approval is not obtained. Second, it is obvious that in the present state of the technical diversity of public telecommunications networks set up in the Member States, the need to preserve the proper operation of a national network may justify, in those States, checks on whether other equipment offered to the public is suitable to be connected to the network without any adverse effects for the network itself, its users and the employees responsible for its maintenance. This is certainly an imperative requirement in the public interest that may be related in particular to the protection of users as consumers of services, but which to my mind also and primarily reflects a concern to protect the telecommunications network itself, because of the multiplicity of interests regarding matters of strategy, public policy, public safety and public health which depend on its proper operation.

14. The Commission specifically mentioned in this regard the 'essential requirements' provided for by Council Directive 86/361/EEC of 24 July 1986 on the initial stage of the mutual recognition of type-approval for telecommunications terminal equipment. [18] The purpose of that directive is, according to Article 1, the implementation by the Member States of 'the mutual recognition of the results of tests of conformity with common conformity specifications for mass-produced telecommunications terminal equipment'. Its provisions do not apply in the present instance because no common specifications have yet been laid down in the Community for the telecommunications networks in question here. It may, however, be noted that the said specifications must meet certain 'essential requirements' which, according to Article 2(17) are 'at present':

— user safety;

— safety of employees of network operators;

— protection of public telecommunications networks from harm;

— interworking of terminal equipment 'in justified cases'.

There is thus a legislative 'echo' to the analysis which underlines certain imperative requirements which make it necessary to check that equipment to be connected to the network is compatible with the network.

15. Where such requirements apply, any obstacles to importation that could result from implementing those requirements must, in accordance with the now settled case-law of the Court, be accepted in so far as they are necessary. But precisely as regards assessment whether the obstacles resulting in this instance from a procedure for approval as set up in the case of the

18 — OJ 1986 L 217, p. 21.

RTT are necessary, differences have emerged between the RTT's analysis and the view put forward by the Commission. The RTT believes that the arrangements under that procedure are strictly geared to safeguarding the interests in question. The Commission, however, takes the view that certain aspects of the procedure go too far and are disproportionate to what is necessary for the actual protection of the aforementioned interests.

16. In support of its view, the Commission has undertaken an actually somewhat surprising examination of the detail of the technical specifications laid down by the RTT as a condition for the grant of approval. The Commission's aim is to show that some of those specifications are more restrictive than is necessary for the protection of interests which are acknowledged to be legitimate. However, it is not a matter for the Court, in these proceedings for a preliminary ruling, to carry out an assessment of the merits of those technical specifications. The national court has not asked this Court to undertake such an examination. It would appear that the national court has asked questions not regarding the content of the technical specifications applied by the RTT, but regarding the legal situation resulting from the fact that the Belgian legislation leaves to the discretion of that entity both the formulation of those specifications and the ensuring of compliance therewith. But the fact that this Court is not required to examine how far the technical specifications are relevant does not mean that those specifications should not be subject to any examination at all. I consider, however, that the said examination should take place at national level in a context that I shall seek to define below.

17. At first sight, the legal aspects of the procedure for type-approval applied by the RTT would not appear to be subject to the prohibition laid down in Article 30. If safeguarding the functioning of the network is accepted as an imperative requirement, it does not appear unreasonable to give the entity responsible for operating the network, and hence for its proper functioning, the task of laying down the technical specifications that must be met in order for a telephone to be regarded as compatible, and also the task of applying those specifications by means of the type-approval procedure. Nor does it seem disproportionate to require that any costs incurred by reason of damage caused to the network as a result of the connection of any non-approved equipment must be borne by the subscriber who made such a connection. In those circumstances, if, like me, one regards such provisions as not unreasonably hindering imports because they are suited to the protection of the general interests in question, the fact that the holder of the authority to grant approval is at the same time a seller of equipment similar to that which must be submitted to it for approval can hardly in itself be regarded as directly increasing the hindrances. If a power to grant approval, entailing certain specific procedural arrangements, is held not to fall within the prohibition under Article 30, it is difficult to see how the allocation of that power to one entity rather than another, without any change in those procedural arrangements, should in itself cause that prohibition to apply. It is hard to see because I cannot discern what real, identifiable intensification of barriers to imports results merely from the choice of the holder of that power.

18. What I mean, in essence, is that once it is accepted, for the purposes of Article 30,

that certain interests are worthy of protection, and that certain specific legal measures are suited to that protection, the sole factor of the legal or economic status of the entity responsible for implementing those legal measures cannot, in principle, lead to the conclusion that the measures are measures having equivalent effect. It is not possible, without proceeding on the basis of a presumption, to hold that the identity of the holder of a legal power, regardless of the manner in which that power is exercised, is on its own constitutive of a measure having equivalent effect. In the Court's case-law on measures having equivalent effect, a finding of the existence of restrictions on imports is not made on the basis of presumptions but on the basis of measures, acts and conduct.

19. It is interesting to observe that in the judgment in Case 21/84 *Commission* v *France* [19] on the type-approval of postal franking machines, the Court held that the practice of systematically refusing approval to franking machines from the United Kingdom was contrary to Article 30 when in that instance the holder of the power of approval was the French postal authorities. It was thus not the presumption that those authorities had from the outset been concerned to protect national products in exercising their power of approval which, for the Court, justified the finding that there had been a failure to comply with obligations under Article 30 but the acts which actually gave effect to that desire to hinder imports, in that instance repeated unjustified refusals to grant approval.

20. It is thus not the allocation of the power of approval to the RTT which appears to me capable of falling under Article 30 but perhaps the exercise of that power. While the fact that the RTT itself lays down the technical specifications to which approval is subject is not in itself contrary to Article 30, the fact that the content of the specifications actually laid down was not strictly aimed at ensuring compatibility with the network means that it is no longer possible to rely on an imperative requirement. The same applies if it were to appear that approval was refused for reasons other than non-compliance with appropriate technical specifications.

21. As the present case concerns restrictions on a fundamental principle of the Treaty, that of the free movement of goods, I consider it appropriate to set out certain indispensable conditions for a review by a national court as to whether they are necessary. That is, in my view, in accordance with the views laid down by the Court in its judgment in Case 178/84 *Commission* v *Germany* [20] regarding the ban on the marketing in Germany of beer containing additives. The Court stated that 'it must be open to traders to challenge

19 — Case 21/84 [1985] ECR 1355.

20 — Case 178/84 [1987] ECR 1227.

before the courts an unjustified failure to grant authorization' to use certain additives. [21]

That view, expressed regarding the implementation of the principle of the free movement of goods, is to be compared with the judgment in *Heylens* in which the Court stated:

'where in a Member State access to an occupation as an employed person is dependent upon the possession of a national diploma or a foreign diploma recognized as equivalent thereto, the principle of the free movement of workers laid down in Article 48 of the Treaty requires that it must be possible for a decision refusing to recognize the equivalence of a diploma granted to a worker who is a national of another Member State by that Member State to be made the subject of judicial proceedings in which its legality under Community law can be reviewed, and for the person concerned to ascertain the reasons for the decision'. [22]

I consider that in a situation where the practical effect of the refusal of approval is to deny access to the domestic market to telephones imported from another Member State, Article 30 entails requirements similar to those referred to in that judgment.

22. It therefore seems to me that the Court could rule that the legislation of a Member State which allocates to the public entity operating the telecommunications network and selling equipment the power to grant approval to telephones which it has not supplied which would enable them to be connected to the network and which provides that the costs entailed by the connection of a non-approved appliance are to be borne by the person who made that connection is not contrary to the Treaty provisions on the free movement of goods where that legislation makes provision for an appeal to the courts against a decision refusing approval for equipment imported from another Member State in so far as that appeal allows for a review of the compatibility with Community law of the reasons for the refusal notified to the trader concerned.

23. Such a reply would not, it seems, lead to disruption for the legal systems of the Member States. While in most of them the situation regarding the approval of telephones is similar to that in Belgium in so far as the entity holding the power of approval is not truly distinct from the body holding the monopoly for operating the telecommunications network, most of them also allow for a review of the legality of refusal of approval which includes a check on reasons related to non-compliance with technical specifications which may include the commissioning of experts' reports. New measures will have to be introduced only in Member States where review of legality does not extend to the merits of reasons relating to technical assessments, that is to say, apparently, Italy, Ireland and Luxembourg. It may be assumed that recourse to experts would enable the national courts concerned to extend their

21 — Paragraph 46.

22 — Case 222/86 [1987] ECR 4097, paragraph 17.

review to technical reasons for refusal of approval which, on the face of it, should not give rise to major problems.

24. In its written observations the Commission suggested the inclusion amongst the relevant materials for the analysis of Community law in replying to the national court's questions, certain provisions of Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations. [23] It pointed out that the technical specifications currently applied by RTT for the approval of telephones, laid down on 21 April 1987, had not been communicated in advance as provided for by Article 8(1) of that directive under which the Member States must communicate to the Commission 'any draft technical regulation, except where such technical regulation merely transposes the full text of an international or European standard'; they must also let the Commission have 'a brief statement of the grounds which make the enactment of such a technical regulation necessary'. The Commission is immediately to notify the other Member States of any draft it receives. Under Article 8(2), the Member State forwarding the draft must 'take . . . into account as far as possible' any comments by the Commission and the other Member States. Moreover, under Article 9(1) the Member State concerned must postpone for six months the adoption of the draft technical regulation if the Commission or another Member State delivers 'a detailed opinion . . . to the effect that the measure envisaged must be amended in order to eliminate or reduce any barriers which it might create to the free movement of goods'. The adoption must be postponed for 12 months, pursuant to Article 9(2), if the Commission 'gives notice of its intention of proposing or adopting a directive on the subject'.

25. The Commission refers to the Court's case-law on the direct effect of directives and on the notification of State aid projects and states that technical regulations laid down in a Member State after the expiry of the period referred to in Article 12 of the directive, without compliance with the prior notification procedure under the directive, cannot be relied on in a dispute between that State and an individual.

26. The RTT does not deny that it failed to communicate its draft technical specifications to the Commission in advance. But at the hearing it pointed out that the failure to notify the draft should not render those specifications inapplicable in so far as the directive does not lay down any substantive rules but only procedural rules and the non-compliance with those rules does not constitute a breach of a substantive rule of Community law. It is only the actual content of those specifications that might constitute such a breach.

27. I would merely observe in this respect that that directive was not in any way raised before the national court and that the latter's questions make no mention of it, referring solely to Articles 30 and 86 of the Treaty. I am therefore somewhat hesitant with regard to the need for the Court in the context of these proceedings, to rule on the

23 — OJ 1983 L 109, p. 8.

inapplicability of technical rules which were not notified in the manner prescribed by the directive. The Commission's argument that technical rules which had not been notified in advance are inapplicable seems to me debatable. Such inapplicability is not specifically provided for in the directive which merely requires draft rules not to be implemented before the expiry of certain periods. There is a marked contrast between that and the rules on notification of aid projects under Article 93(3) of the Treaty which expressly provides that aid projects cannot be implemented before a decision is adopted pursuant to Article 93(2) by the Commission or, where appropriate, the Council. It should moreover be noted that State aid is in principle, pursuant to Article 92 of the Treaty, incompatible with the common market subject to derogations provided for by the Treaty itself. In the field of the technical regulations covered by the directive, such technical rules are not in principle incompatible with Community law. Any incompatibility is bound up with the substance of those rules.

28. There may therefore be scope for some dispute regarding the interpretation of Directive 83/189. The discussion on that point was broached only in an incidental and less than exhaustive manner in these proceedings and, as I have pointed out, the national court did not refer any question on this matter. In those circumstances I consider that it is neither necessary nor even appropriate to take account of that directive here.

29. The next point is the discussion concerning the compatibility of the RTT's position as holder of the power of approval with Article 86 of the Treaty. The national court's question on this point asks, in essence, whether the grant by a Member State to the holder of a monopoly for the operation of the telecommunications network of the exclusive right to give the necessary approval to telephones which it has not supplied for such telephones to be connected to the network to be authorized and to lay down the technical specifications to which approval is subject is contrary to Article 86 in so far as the holder of that monopoly is also a seller on the market of the telephones subject to its approval.

30. As was quite rightly pointed out by the Commission, assessment of compatibility with Article 86 of State measures will make it necessary to widen the legal scope of the analysis. Article 86 is addressed to undertakings and not to States and cannot apply directly to these measures. It is therefore on the basis of the Court's case-law on the interpretation of Article 90 of the Treaty in conjunction with Article 86 that some basis for a reply must be sought. In the judgment in *Inno* v *ATAB* the Court held that:

'While it is true that Article 86 is directed at undertakings, none the less it is also true that the Treaty imposes a duty on Member States not to adopt or maintain in force any measure which could deprive that provision of its effectiveness' [24]

24 — Case 13/77 [1977] ECR 2115, paragraph 31.

and that:

'the fact that an undertaking to which a Member State grants exclusive rights has a monopoly is not as such incompatible with Article 86'. [26]

'Article 90 provides that, in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary *inter alia* to the rules provided for in Articles 85 to 94'. [25]

That means that the grant of an exclusive right to a public undertaking is not, as a matter of principle, a measure contrary to Article 86 within the meaning of the decision in *Inno*. Such an allocation could be regarded as a measure contrary to Article 86 only in so far as it was directly and actually linked to an abuse of a dominant position. According to the judgment in the *Nouvelles Frontières* case [27] it would be contrary to a Member State's obligation not to adopt or maintain in force any measure which would deprive Article 85 of the Treaty of its effectiveness if it were to require or favour the adoption of agreements, decisions or concerted practices contrary to Article 85 or to reinforce the effects thereof. It seems to me that those words may be transposed to the field of Article 86 in the sense that Member States cannot, by granting an exclusive right, require or favour an abuse of a dominant position or reinforce the effects thereof.

31. Those dicta are relevant in the present case in so far as the RTT is undeniably a public undertaking holding, by virtue of the will of the State, certain exclusive rights. Its rights include those which form part of its monopoly for the operation of the telecommunications network. The exclusive rights granted to the RTT include precisely the power of approval of telephones not supplied by it.

32. In examining the basis for the answer to the question whether the allocation to a public undertaking operating the telecommunications network and selling telephones of an exclusive right such as the power to approve telephones sold by its competitors is contrary to the obligations of the Member States under Article 90(1) of the Treaty, account must be taken of clarification specifically made in another decision of the Court. In *Sacchi* the Court held that

33. It is not a matter for the Court in these proceedings for a preliminary ruling to examine whether or not the situation at issue is to be regarded as constituting an abuse of a dominant position. The Court must interpret the relevant provisions of the Treaty with regard to the legal characteristics referred to by the national court in its questions. It will then be for that court to apply those provisions as thus interpreted to the specific situation of the RTT.

25 — Paragraph 32

26 — Case 155/73, cited above, paragraph 14

27 — Joined Cases 209/84 to 213/84 *Ministère public* v *Asjes* [1986] ECR 1425.

34. It is, therefore, now necessary to ascertain whether the grant of an exclusive right such as that at issue is liable to require or to favour an abuse of a dominant position or to reinforce the effects thereof. The Commission and Inno consider that the answer to that question must be affirmative. I do not agree.

35. The first remark prompted by the Commission's view may appear to be based on a somewhat formal concern for legal logic but in fact it seeks to clarify some confusion in the reference to the concept of abuse of a dominant position. Is the Commission not putting forward an argument where the grant of an exclusive right such as that at issue here constitutes at one and the same time a component of the dominant position and an abuse of that position. It is true that the Commission does not formally found the dominant position of an undertaking such as the RTT on the allocation of the power of approval. It relies on other factors, namely the fact of holding a monopoly for the operation of the national public telephone network and, consecutively, preferential access to all users of the public network. It thus avoids relying twice in its arguments on the power of approval. On the basis of the Court's case-law, however, I consider that such a power cannot be precluded as a constituent element of a dominant position. In the Court's judgment in the *General Motors* case [28] it was held that the delegation by a Member State to a vehicle manufacturer or its authorized agent in the form of a legal monopoly of the duty governed by public law which consists in carrying out the technical inspection of vehicles before they are used on the public highway, when combined with the freedom of the manufacturer or agent to fix the price for its service, leads to the creation of a dominant position. Similarly in the judgment in the *British Leyland* case [29] the Court held that a manufacturer which, in a Member State, enjoys a monopoly as a result of the applicable rules for the issue of the certificates of conformity which are required for the registration of vehicles bearing its trademark must, having regard to the position of economic dependence in which retailers are thus placed, be regarded as occupying a dominant position in the market of services indispensable for those retailers.

36. If it is considered that the requirement of type-approval for telephones leads to the existence of a market for services which are in fact indispensable to traders interested in marketing telephones, it seems fairly clear to me that the grant to the public undertaking holding the monopoly for the operation of the telecommunications network of the exclusive legal power to grant approval may confer on it a dominant position on that market. But I also consider that by virtue of its position as a seller of telephones, the exclusive right of that public undertaking to grant approval might contribute to conferring on it a dominant position on another market directly relevant here, namely that for the sale of telephones.

37. From such a finding, it becomes clear that if the Commission's analysis of the

28 — Case 26/75 [1975] ECR 1367.

29 — Case 226/84 [1986] ECR 3263.

grant of the power of approval in a situation such as that of the RTT as requiring or favouring an abuse of a dominant position is accepted, that presupposes that the grant of that power be to some extent regarded at the same time as constituting a dominant position and an abuse of such a position. We are getting here to the flaw in the Commission's reasoning which is running together two concepts which in the case-law are distinct.

38. According to the judgment in *Hoffmann-La Roche*, an undertaking enjoys a dominant position when it is in a position of economic strength which:

'enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers'. [30]

In that same judgment the Court defined abuse of a dominant position as:

'an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition'. [31]

It seems to me that those definitions reveal a distinction between the dominant position, understood as a situation allowing for the possibility of hindering the maintenance of competition, and the abuse of that position, which must consist of conduct which in fact hinders maintenance of competition.

39. Academic writers are also, in their analysis of the legal rules regarding abuse of a dominant position, at pains to point out that under those rules it is not the dominant position as such which is prohibited but its abuse. Mr Stoufflet and Mr Chaput have written: 'the fact that an undertaking occupies a dominant position is not . . . unlawful in itself. Article 86 prohibits only the abuse of such a situation'. [32] That distinction between the dominant position and its abuse is drawn more clearly in the case-law of the Court in so far as it has held that a requirement for the existence of an abuse is abusive conduct by the undertaking in question, actions, substantive deeds or legal acts. On the other hand the aptitude to have a certain conduct or to commit acts constituting an abuse is not itself an abuse.

30 — Case 85/76 [1979] ECR 461, paragraph 38

31 — Paragraph 91.

32 — Jurisclasseur de droit international public, Communauté économique européenne, fascicule 164 G, No 198.

40. In *General Motors* and *British Leyland*, cited above, the Court did not hold that the fact that the manufacturers in question enjoyed, by virtue of rights conferred by the State, the exclusive right to check the conformity of vehicles bearing their trademarks constituted an abuse; but the Court did point out that the use made of that power, in particular the requirement of disproportionate fees for such a service in comparison with the economic value of the service provided, might constitute such an abuse. [33] Its view was thus clearly that the fact of holding, on an exclusive basis, a power of approval of an administrative nature did not constitute in those instances an abuse of a dominant position but the manner in which that power was exercised might possibly be regarded as constituting such an abuse.

41. Guidance is also to be found in the judgment in the *Nouvelles Frontières* case even though that case related to the compatibility of a procedure laid down under national legislation with Article 85, not Article 86. The Court held that a decision taken by the State on the approval of air tariffs could be contrary to the Treaty in so far as the tariffs thus approved were 'the result of an agreement, a decision by an association of undertakings or a concerted practice contrary to Article 85'; [34] that meant, once again, that it was not the approval procedure as such which raised a problem of compatibility with the Treaty but the actual circumstances in which the power of approval was exercised in a given case.

42. In the light of those observations drawn from the case-law, it seems that the fact of giving a public undertaking such as the RTT the exclusive power to approve telephones in order to check their compatibility with the network is not contrary to Articles 90 and 86 of the Treaty even it is possible that the exercise of that power may lead to abuses of a dominant position. A State's delegation of a power of approval, only the misuse of which could lead to an abuse of a dominant position, does not seem to me in itself to constitute such an abuse.

43. It must certainly be recognized that in a situation where the power of approval in question is granted to a public undertaking which itself competes on the market for telephones, the chances, as it were, of misuse of that power of approval may apparently increase. But must it automatically be concluded that by virtue of that increase the very grant of that power becomes an abuse of a dominant position? I do not think so because it seems to me important that the distinction between the dominant position and abuse thereof be preserved and in that respect the concept of abuse of a dominant position covers only conduct or positive action without embracing the mere possibility of such conduct or such action.

33 — Case 26/75 and Case 226/84, cited above.

34 — Joined Cases 209 to 213/84, cited above, paragraph 77.

44. It must, moreover, be recognized that from the point of view of a liberal view of the law, the assimilation of the mere possibility of prohibited conduct to such conduct is problematical. Such assimilation would signify passing from a repressive scheme of rules, where proof of the prohibited conduct must be adduced, to a preventive scheme of rules where the presumption that there will be such conduct suffices. I do not consider that to be acceptable. I therefore consider that the answer to be given should be that the grant to an undertaking such as the RTT of a power of approval of equipment not supplied or sold by it is not in itself contrary to Article 90 and Article 86 of the Treaty but that the exercise of the power of approval by that undertaking with a purpose other than that of checking compatibility with the network could lead to an abuse of a dominant position prohibited by Article 86 of the Treaty if the conditions referred to in that article, particularly regarding the actual existence of a dominant position on a given market and the effect on trade between Member States, are met.

45. I do not believe that it is necessary to add to the answer to be given with regard to Articles 86 and 90 of the Treaty express provisos regarding the existence of a right of appeal to the courts against refusal of approval. If the Court accepts my suggestions regarding the answer in the context of the free movement of goods, such provisos would to a large extent be superfluous. If the Court does not accept those suggestions it is unlikely that it would consider such provisos necessary with regard to Articles 86 and 90. Moreover, it seems to me that review of the exercise of the power of approval should form part of the assessment to be carried out on the basis of all the facts of the case by the national court before which an abuse of a dominant position has been alleged into the existence of such an abuse. It is perhaps expedient to point out that those facts should include the taking account of the technical inadequacy of the approval criteria and the unjustified nature of decisions refusing approval. In practice, depending on the particularities of the national systems, it might be appropriate for the national court to order experts' reports and, where appropriate, to refer preliminary questions to the administrative courts where they have exclusive jurisdiction to assess the legality of administrative decisions and where, specifically, approval and technical specifications are in the form of such decisions.

46. In conclusion I propose that the Court rule as follows:

(1) The legislation of a Member State which grants to a public undertaking which operates the national telecommunications network and sells equipment an exclusive right which consists of a power to grant approval to equipment not supplied or sold by it in order to check, on the basis of technical specifications drawn up by it, whether that equipment can be connected to the network and provides that the costs caused by the connection of non-approved equipment

are to be borne by the person who carried out that connection is not contrary to the provisions of the EEC Treaty on the free movement of goods in so far as it provides for the possibility of appeal to the courts against a decision refusing approval of equipment from another Member State and that appeal makes it possible to check, from the point of view of Community law, the reasons for the refusal notified to the trader concerned.

(2) Such legislation is also not contrary to Articles 90 and 86 of the EEC Treaty but the exercise by the public undertaking of the power of approval for a purpose other than that of checking the technical compatibility of the equipment with the network may result in an abuse of dominant position prohibited by Article 86 if all the conditions laid down by that article are met; it is for the national court before which an allegation of such an abuse is made to assess, on the basis of all the facts, including the possibly inappropriate nature of the technical specifications and the possibly unjustified nature of decisions refusing approvals, whether there is an abuse.