OPINION OF ADVOCATE GENERAL JACOBS
delivered on 26 January 1995 *

1. In this case the College van Beroep voor het Bedrijfsleven (Administrative Court for Trade and Industry) of the Netherlands has referred certain questions concerning the interpretation of Article 59 of the Treaty. The referring court seeks essentially to know whether the prohibition of the marketing practice known as 'cold calling' imposed pursuant to the Dutch Law of 30 October 1985 concerning Securities Transactions is compatible with the provisions of the Treaty on the free movement of services in so far as it prohibits a firm established in the Netherlands from approaching prospective clients established in other Member States.

2. Alpine Investments BV, a firm established in the Netherlands, provides financial services and specializes in commodities futures trading. It acts as 'introducing broker', that is to say, it receives orders from clients relating to transactions in the commodities futures markets and passes them for execution to brokers dealing in those markets within and outside the Community. It has three types of accounts with its clients: 'managed accounts', 'semi-managed accounts', and 'non-managed accounts'. In the case of a managed account, the firm is authorized by the client to effect transactions in the commodities futures market on his behalf on a discretionary basis. In the case of a semi-managed account, the firm informs the client of various opportunities for investment in the commodities futures market and it is up to the client to take a decision as to whether an investment will be made. In the case of a non-managed account, the firm offers no investment advice and only executes the client's instructions.

3. At the material time in the Netherlands, financial services were subject to the Law of 30 October 1985 concerning Securities Transactions (Wet Effectenhandel, WEH). [1] Article 6(1) of that law prohibits a person from acting as an intermediary in securities transactions without a licence. Article 6(2) and Article 6(3) lay down the conditions which must be fulfilled in order for a person to obtain a licence. Article 8(1) provides that, in special circumstances, the Minister of

* Original language: English.

1 — Stb. 1985, 570. That law was repealed on 15 June 1992 and was replaced by the Wet Toezicht Effectenverkeer (WTE), Stb. 1991, 141.

Finance ('the Minister') may grant an exemption from the prohibition laid down in Article 6(1). Article 8(2) states that, with a view to preventing undesirable developments in securities trading, conditions may be attached to an exemption.

4. On 6 September 1991, the Minister granted to Alpine Investments an exemption pursuant to Article 8 of the WEH which allowed Alpine Investments to place orders with Merrill Lynch Inc. By a decision of 12 November 1991, the Minister attached a condition to that exemption, effectively preventing Alpine Investments from cold calling, namely, approaching prospective clients by telephone or in person unless they had first expressly agreed in writing to be approached in such a manner and as long as that agreement had not been revoked by registered letter. Such agreement had to be evident from a dated statement signed by the client which was to be kept in the records of Alpine Investments. The statement had to be kept for five years after the most recent transaction had taken place or the relation between Alpine Investments and the client had ended.

5. Alpine Investments raised an administrative objection against the Minister's decision of 12 November 1991, but on 14 January 1992 the Minister withdrew the exemption that he had granted to Alpine Investments and granted a new exemption allowing it to place orders with Rodman & Renshaw Inc. That exemption was again subject to the condition that Alpine Investments was prohibited from approaching prospective clients by telephone or in person unless they had expressly agreed in writing to be approached in such a manner. On 13 February 1992 Alpine Investments raised an administrative objection against the Minister's decision of 14 January 1992.

6. It appears that a condition prohibiting cold calling similar to that imposed on Alpine Investments accompanied all exemptions granted after 1 October 1991 on the basis of Article 8 of the WEH. During 1991 the Minister received many complaints from investors claiming that, as a result of cold calling, they had entered into transactions which subsequently they regretted. As a result, the Minister decided to ban cold calling in general and announced that decision in a press release dated 1 October 1991.

7. On 29 April 1992, the Minister adopted a decision rejecting the administrative objections of Alpine Investments, which appealed against that decision to the referring court. In the main proceedings, Alpine Investments argued, *inter alia*, that the prohibition of cold calling was contrary to Article 59 of the Treaty. It prevented Alpine Investments from approaching prospective clients in other Member States and was a restriction on the

freedom to provide services which was not justified on the grounds of public policy, public security or public health. As a result of those arguments the following questions have been referred to the Court:

'(1) Must Article 59 of the EEC Treaty be interpreted as meaning that it also covers services which the provider offers by telephone from the Member State of his establishment to (potential) clients established in another Member State and therefore also provides from that Member State?

(2) Does Article 59 also apply to the provisions and/or restrictions which in the Member State of establishment of the provider of services govern the lawful exercise of the occupation or business concerned but do not apply — in any event not in the same way and to the same extent — to the exercise of that occupation or business in the Member State of establishment of (potential) recipients of the service in question and for that reason may constitute for the provider of services when offering his services to (potential) clients established in another Member State hindrances that do not apply to providers of similar services established in that other Member State?

If the answer to the second question is yes:

(3) (a) Can the concern to protect consumers and safeguard the reputation of the Netherlands securities trading sector which underlies a provision aimed at combating undesirable developments in the securities trading sector be regarded as imperative reasons of public interest justifying a hindrance such as that referred to in question (2)?

(3) (b) Is a proviso in an exemption banning cold calling to be regarded as objectively necessary to protect the aforementioned concern and as proportionate to the objective pursued?'

8. Written observations have been submitted by Alpine Investments, by the Governments of the Netherlands, Greece and the United Kingdom, and by the Commission. In

addi tion, the Belgian Government presented oral argument to the Court.

9. There can be no doubt that the activities of Alpine Investments fall within the scope of application of Article 60. That article defines as services those which are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. Alpine Investments offers financial services. As already stated, those include executing orders on the instructions of clients, advising clients and managing clients' accounts.

10. Although the contested prohibition of cold calling prohibits Alpine Investments from approaching clients by telephone and in person unless they have previously agreed to it in writing, it appears from the order for reference and from the first question referred that the national court is concerned especially with the prohibition of contacting clients by telephone.

11. It appears that Alpine Investments uses cold calling in order to market its services. In particular, it telephones prospective clients in other Member States in order to ask them if they are interested in receiving further information or to invite them to seminars where the services which it offers are explained. It states that no complaints have been made by anyone about the way in which it markets its services.

12. Before turning to the questions referred, it will be helpful to examine briefly the rules of Community legislation which might be relevant to cold calling.

13. The objective of Council Directive 93/22/EEC on investment services in the securities field [2] is to facilitate the freedom of establishment and the freedom to provide services for investment firms.

14. The Directive on Investment Services, even if applicable *ratione materiae*, does not apply to the present case since it had not been adopted at the material time. However, it is relevant because it shows the legal framework adopted by the Community in order to facilitate the freedom of establishment and the freedom to provide services for investment firms. It is notable that the directive does not harmonize the rules of the

2 — OJ 1993 L 141, p. 27.

Member States concerning the marketing of investments.

15. Under the directive, an investment firm may not carry on investment business unless it has received authorization by the competent authorities of its home Member State. [3] Once it has received that authorization, it may carry on investment business either by the establishment of a branch or by exercising the freedom to provide services throughout the Community. The host Member State may not make the carrying on of investment business in its territory subject to any authorization requirement or to any requirement to provide endowment capital or to any other measure having equivalent effect. [4]

16. The home Member State is responsible for ensuring that a firm complies at all times with the conditions which must be fulfilled in order for a firm to be granted authorization. [5] Each home Member State must draw up prudential rules which investment firms must observe at all times. The general principles of those rules are laid down in the directive. [6] The prudential supervision of an investment firm is the responsibility of the home Member State. [7]

17. Member States must draw up rules of conduct which investment firms must observe at all times. The content of those rules is laid down in general terms in the directive. [8] Article 11(2) states as follows:

'Without prejudice to any decisions to be taken in the context of the harmonization of the rules of conduct, their implementation and the supervision of compliance with them shall remain the responsibility of the Member State in which the service is provided.'

18. According to Article 13, the directive does not prevent investment firms authorized in other Member States from advertising their services through all available means of communication in their host Member States, subject to any rules governing the form and the content of such advertising adopted in the interest of the general good.

19. However, it is not entirely clear from the directive how responsibility is divided between the authorities of the home State and the authorities of the host State. In any event, it may not always be clear in a

3 — Article 3(1).
4 — Article 14(1) and (2).
5 — Article 8(1) and (2).
6 — Article 10.
7 — Article 8(3).

8 — Article 11(1).

particular case precisely where a particular service is provided.

20. On 20 December 1985, the Council adopted Directive 85/577/EEC concerning the protection of consumers in respect of contracts negotiated away from business premises, [9] the purpose of which is to protect consumers against unfair commercial practices in respect of doorstep selling. [10] The directive does not apply to contracts concluded by telephone or to 'contracts for securities'. [11] With regard to contracts which fall within its scope of application, the directive does not prohibit what might be described as cold calling at the doorstep, but gives the consumer the right of cancellation. It allows Member States to adopt more stringent requirements in order to protect consumers. [12]

21. In October 1993, the Commission submitted an amended proposal for a Council directive on the protection of consumers in respect of contracts negotiated at a distance (distance selling). [13] The proposed directive seeks to approximate the laws of the Member States concerning 'contracts negotiated at a distance between consumers and suppliers and solicitations with a view to the conclusion of such contracts and preparatory acts with a view to such contracts.' [14]

22. Article 4 would require Member States to take the measures necessary to protect consumers who have indicated that they do not wish to be solicited against such soliciting. The second paragraph of Article 4 states as follows:

'The means of communication listed below shall be used only with the prior consent of the consumer:

— facsimile machine (fax),

— electronic mail,

— telephone,

— automatic calling units.'

9 — OJ 1985 L 372, p. 31.
10 — Preamble, third recital.
11 — Article 3(2)(e).
12 — Article 8.
13 — COM(93) 396, OJ 1993 C 308, p. 18. Initial proposal COM(92) 11, OJ 1992 C 156, p. 14.
14 — Article 1.

Therefore, the proposed directive, as it stands, prohibits cold calling by telephone. It appears that the proposed directive applies to contracts concerning the supply of financial services, including the type of services provided by Alpine Investments. [15]

23. As the Commission points out, the above survey shows that, at present, Community legislation neither prohibits cold calling by telephone or in person nor prevents Member States from prohibiting it.

24. I turn now to examine the questions referred.

The first question

25. By the first question, the referring court seeks effectively to determine whether Article 59 applies to services which a person provides from the Member State of his establishment to persons established in other Member States. In my view, there is no doubt that that question should receive an affirmative answer.

26. Since the aim of Article 59 is to abolish restrictions on the freedom to provide services within the Community, its application presupposes the existence of a cross-border element. As the Court has stated, the services in question must be 'transfrontier in nature'. [16] Article 59 does not apply where all the elements of the activity in question are confined within a single Member State. [17]

27. A cross-border element exists where the provider and the recipient of services are established in different Member States. [18] Where that is the case, Article 59 applies irrespective of the Member State where the services are provided. That interpretation is supported by the language of Article 59, the first paragraph of which provides for the abolition of restrictions on the freedom to provide services 'in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended'.

28. That interpretation is also confirmed by the case-law of the Court which makes it clear that the provisions of the Treaty on the freedom to provide services apply in the following cases: where the provider of services moves to another Member State in order to

15 — See Articles 1, 2 and 12 of the proposed directive.

16 — Case 352/85 *Bond van Adverteerders* v *Netherlands State* [1988] ECR 2085, paragraph 13 of the judgment.

17 — Case C-198/89 *Commission* v *Greece* [1991] ECR I-727, paragraph 9 of the judgment; Case 52/79 *Procureur du Roi* v *Debauve* [1980] ECR 833, paragraph 9 and Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraphs 37 to 39.

18 — See Case C-17/92 *Distribuidores Cinematográficos* [1993] ECR I-2239, paragraph 11 of the judgment.

provide services; [19] where the recipient of services moves to another Member State in order to receive services; [20] where both the provider and the recipient are established in the same Member State but the provider moves to another Member State in order to offer his services; [21] and where neither the provider nor the recipient moves physically and services are provided by post or telecommunications, such as telephone, fax or electronic mail. [22]

29. Alpine Investments states that the services in issue in this case belong to the last category referred to above. For the purposes of the present case, it is not necessary in my view to determine precisely where the services are provided. A cross-border element exists since the provider and the recipient of the services are established in different Member States.

30. The Dutch Government claims that the contested prohibition of cold calling concerns purely internal situations. That argument is fallacious. The present case concerns the prohibition of cold calling to the extent that it prohibits Alpine Investments from contacting prospective customers in other Member States. In its observations relating to the second question referred, the Dutch Government itself accepts that that prohibition also applies to approaches by telephone from the Netherlands to persons established in other Member States.

31. The Dutch Government further claims that the great majority of futures transactions in the commodities markets take place in the Chicago commodities exchange, that is to say, outside the territory of the Community. That does not mean, however, that Article 59 is not applicable in the present case, where the use of a marketing technique within the Community is prohibited, and where a person established in one Member State is thereby prohibited from providing services to a client resident in another Member State.

32. The Government of the Netherlands and the Government of the United Kingdom refer to the judgment in *Keck and Mithouard* [23] and claim that the interpretation

19 — See e. g. Case 76/81 *Transporoute* v *Minister of Public Works* [1982] ECR 417.

20 — Joined Cases 286/82 and 26/83 *Luisi and Carbone* v *Ministero del Tresoro* [1984] ECR 377.

21 — See the cases on tourist guides: Case C-154/89 *Commission* v *France* [1991] ECR I-659; Case C-180/89 *Commission* v *Italy* [1991] ECR I-709 and Case C-198/89 *Commission* v *Greece*, cited in note .

22 — See e. g. Case C-76/90 *Säger* v *Dennemeyer* [1991] ECR I-4221. See also the 'Mediawet' cases: Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007; Case C-353/89 *Commission* v *Netherlands* [1991] ECR I-4069 and Case C-23/93 *TV10 SA* v *Commissariaat voor Media*, judgment of 5 October 1994.

23 — Joined Cases C-267/91 and C-268/91 [1993] ECR I-6097.

that the Court gave to Article 30 in that case should be transposed to Article 59. They argue that the disputed prohibition of cold calling would then not amount to a restriction on the freedom to provide services and conclude that the answer to the first question should be that Article 59 is not applicable in this case.

33. That reasoning seems to me to be based on a misunderstanding of the first question. As explained above, by that question the referring court merely asks whether Article 59 applies to services which the provider provides from the Member State of his establishment to persons resident in other Member States. It does not enquire as to whether the disputed prohibition of cold calling is a restriction on the freedom to provide services. That is the subject of the second question. It is in the context of that question that the arguments of the Netherlands Government and of the United Kingdom Government should be examined.

34. I conclude that the first question referred should be answered in the affirmative.

Second Question

35. By the second question, the referring court seeks effectively to determine whether the contested prohibition of cold calling is a restriction on the freedom to provide services within the meaning of Article 59.

36. In particular, it appears from the order for reference that the referring court seeks to determine two issues. First, it seeks to know whether the fact that the disputed prohibition is imposed by the Member State where the provider of services is established may preclude Article 59 from applying. Secondly, it seeks to know whether that prohibition is a restriction within the meaning of Article 59 by reason of the fact that the same prohibition is not imposed, or at least not to the same extent, by the Member States where the recipients of services are established on providers of services established in their territory.

37. With regard to the first issue, it should be noted that the provisions of the Treaty on the freedom to provide services impose obligations not only on the Member State of destination but also on the Member State of origin. The Court has held that the freedom to provide services may be relied on by an undertaking as against the State in which it is established, if the services are provided for

persons established in another Member State. [24] It follows that the disputed prohibition does not fall outside the scope of application of Article 59 by reason of the fact that it is imposed by the State where the provider of services is established.

38. With regard to the second issue, it should first be noted that the contested prohibition is non-discriminatory. It applies without discrimination to all providers of services established in the Netherlands. It applies irrespective of whether the prospective clients of Alpine Investments are resident in the Netherlands or in other Member States. Thus, it applies without discrimination as regards the recipients of services.

39. The fact that different Member States may impose different restrictions does not amount to discrimination, nor does it result in a situation incompatible with the Treaty. The prohibition on cold calling imposed by Dutch law, which applies equally to all persons subject to it, cannot be incompatible with the Treaty merely because other Member States may apply less strict rules to providers of services established in their territory. [25]

40. The question remains, however, whether the contested prohibition is a restriction on the freedom to provide services within the meaning of Article 59. Alpine Investments and the Commission argue that that question should be answered in the affirmative; the Government of the United Kingdom and the Government of the Netherlands take the contrary view.

41. Alpine Investments argues that since the contested prohibition applies to contacting prospective clients outside the Netherlands it restricts its freedom to provide services. It concludes that the second question should be answered to the effect that Article 59 precludes rules imposed by the Member State where the provider is established which seek to regulate the manner in which services are provided in other Member States, to the extent that those rules restrict the provision of transfrontier services.

42. The Government of the United Kingdom argues that the disputed prohibition is not a restriction on the freedom to provide services because it is generally applicable, it is non-discriminatory, and it does not have as its object or effect the provision of an advantage for the national market over providers of services from other Member States. The same reasoning is followed by the Government of the Netherlands.

43. Most of the cases on the provision of services decided by the Court so far concern

24 — Case C-18/93 *Corsica Ferries* [1994] ECR I-1783, paragraph 30 of the judgment; Case C-379/92 *Peralta* [1994] ECR I-3453, paragraph 40 and Case C-381/93 *Commission v France*, [1994] ECR I-5145, paragraph 14.

25 — See *Peralta*, cited in note, paragraph 48 of the judgment. See also Joined Cases 185 to 204/78 *Van Dam* [1979] ECR 2345, paragraph 10 and Case 223/86 *Pesca Valentia v Minister for Fisheries and Forestry* [1988] ECR 83, paragraph 18.

restrictions imposed by the Member State of destination. With regard to that situation, the case-law of the Court makes it clear that Article 59 is not concerned solely with restrictions which are discriminatory, that is to say, which discriminate against the provider of services on account of his nationality or on account of the fact that he is established in a Member State other than the one in which the service is provided; Article 59 also covers restrictions which are non-discriminatory. That was made clear in the judgment in *Säger* v *Dennemeyer*, where the Court stated as follows: [26]

'... Article 59 of the Treaty requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.

In particular, a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment and thereby deprive of all practical effectiveness the provisions of the Treaty whose object is, precisely, to guarantee the freedom to provide services. Such a restriction is all the less permissible where, ... unlike the situation governed by the third paragraph of Article 60 of the Treaty, the service is supplied without it being necessary for the person providing it to visit the territory of the Member State where it is provided.'

44. In *Schindler* [27] the Court confirmed that Article 59 covers non-discriminatory restrictions.

45. In my view, similar principles apply with regard to restrictions on the freedom to provide services imposed by the Member State where the provider of services is established. Rules of that State which are non-discriminatory, that is to say, which apply to all providers established in its territory and without distinction to domestic services or intra-Community services, may in certain circumstances constitute restrictions within the meaning of Article 59.

46. As Alpine Investments points out, Article 59 refers to the abolition of all restrictions on the freedom to provide services without distinguishing between discriminatory and non-discriminatory ones. Also, as

26 — *Säger*, cited in note, paragraphs 12 and 13. See also *Gouda and Netherlands*, cited in note 22.

27 — Case C-275/92 [1994] ECR I-1039.

shown above, the case-law of the Court makes it clear that Article 59 prohibits even non-discriminatory restrictions imposed by the Member State of destination. It would be incongruous if the opposite view were taken with regard to restrictions imposed by the Member State of origin. So far as possible the same principles should apply to all restrictions on the provision of services, whether imposed by the Member State of origin, by the Member State of the recipient of the service, or indeed by a third Member State which is neither that of the provider nor of the recipient of the service, if the service is provided there.

47. Whether a rule of the Member State of origin constitutes a restriction on the freedom to provide services should be determined by reference to a functional criterion, that is to say, whether it substantially impedes the ability of persons established in its territory to provide intra-Community services. It seems to me that that criterion is consonant with the notion of an internal market and more appropriate than the criterion of discrimination.

48. From the point of view of the realization of the internal market, what matters is not whether the rules of a Member State are discriminatory but whether they have an adverse effect on its establishment or functioning. The Court has held that the concept of the common market involves the elimination of all obstacles to intra-Community trade 'in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market'. [28] National rules, whether of the 'importing' or of the 'exporting' Member State, which substantially impede the exercise of the freedom to provide services, adversely affect the establishment and functioning of the internal market and therefore fall within the scope of the Treaty.

49. That view is supported by the recent judgment of the Court in *Commission* v *France*. [29] In that case, the Court held that the freedom to provide services precludes the application of any national legislation which has the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State. However, the Court did not state that national rules constitute a restriction on the freedom to provide services only where they make the provision of internal services more favourable than the provision of intra-Community ones. On the contrary, the Court declared in general terms that 'Article 59 precludes the application of any national legislation which without objective justification impedes a provider of services from actually exercising that freedom'. [30] The Court also stated that the freedom to provide services should be interpreted 'in the perspective of a single market in order to permit the realization of its objectives'. [31]

28 — Case 15/81 *Schul* v *Inspecteur der Invoerrechten en Accijnzen* [1982] ECR 1409, paragraph 33 of the judgment.

29 — Case C-381/93, cited in note 24.

30 — Paragraph 16 of the judgment.

31 — Paragraph 17 of the judgment.

50. The view that Article 59 covers non-discriminatory restrictions is consonant with the objectives of the Treaty; at the same time, it does not infringe the legitimate interests of the Member States since the fact that a national rule is a restriction on the freedom to provide services does not mean that it is incompatible with the Treaty. That will be the case only if it fails to satisfy certain conditions which, according to the case-law of the Court, are more strict in the case of discriminatory measures than in the case of non-discriminatory measures.

51. In this case, the contested prohibition is a restriction within the meaning of Article 59 because it applies not only to the provision of services within the territory of the Netherlands but also to the provision of intra-Community services. A Member State is free to regulate the marketing in its territory of services provided by persons established in that State. However, it does not have unlimited freedom to regulate the marketing of such services in the territory of other Member States. Rules of a Member State which restrict the marketing of services provided by persons established in that State in the territory of other Member States fall within the scope of Article 59 and cannot be compatible with Community law unless they are justified.

52. It is suggested however that the case-law of the Court on the free movement of goods should be applied by analogy, and that, according to that case-law, in the case of an 'exporting' Member State, only discriminatory restrictions come within the scope of the Treaty.

53. It is true that the Court has interpreted the notion of restrictions on exports of goods under Article 34 of the Treaty more narrowly than the notion of restrictions on imports under Article 30. Whereas even non-discriminatory rules may fall within the ambit of Article 30, the application of Article 34 requires the existence of discrimination in law or in fact. In *Groenveld* the Court held that Article 34: [32]

'concerns national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade in such a way as to provide a particular advantage for national production or for the domestic market of the State in question at the expense of the production or of the trade of other Member States.'

54. The same formula has been repeated in subsequent cases. [33] In *Oebel* the Court

32 — Case 15/79 *Groenveld* v *Produktschap voor Vee en Vlees* [1979] ECR 3409, paragraph 7 of the judgment.

33 — See Case 155/80 *Oebel* [1981] ECR 1993, paragraph 15 of the judgment; Case 172/82 *Fabricants Raffineurs d'Huile de Graissage* v *Inter-Huiles* [1983] ECR 555, paragraph 12 and Case C-47/90 *Delhaize et le Lion* [1992] ECR I-3669, paragraph 12.

held that Article 34 does not apply to rules: [34]

'which are part of economic and social policy and apply by virtue of objective criteria to all the undertakings in a particular industry which are established within the national territory, without leading to any difference in treatment whatsoever on the ground of the nationality of traders and without distinguishing between the domestic trade of the State in question and the export trade.'

55. It may be doubted however whether the case-law of the Court under Article 34 applies to rules of the exporting Member State concerning the marketing of goods. A Member State may prohibit traders established in its territory from using a marketing technique in order to sell their products in that State. However, it does not follow that it is entitled to prohibit them from using that marketing technique in order to sell their products in other Member States. Clearly, a trader cannot be required by the exporting Member State to abstain from using in another Member State a form of advertising which is prohibited in the exporting State but is permitted in the other Member State in order to market his products in the latter, unless there is a good reason for the prohibition.

56. In any event, whatever the position might be in relation to goods under Article 34, a restriction on marketing services in another Member State must be seen as a restriction on the freedom to provide services. As stated above, in this case the contested prohibition is a restriction within the scope of Article 59 because it applies not only to clients resident in the Netherlands but also to clients resident in other Member States.

57. The recent judgment of the Court in *Peralta* [35] does not contradict that view. In that case the Court was concerned with rules of Italian law under which all vessels irrespective of nationality were prohibited from discharging substances harmful to the marine environment in Italian territorial waters and internal maritime waters. Vessels flying the Italian flag were also prohibited from discharging such substances outside Italian territorial waters. Mr Peralta, an Italian national, was the master of a tanker flying the Italian flag which was specially equipped for the transport of chemicals. He was charged with ordering the discharge into the sea of flushing liquid containing caustic soda at a time when the vessel was outside Italian territorial waters. The Court rejected the argument that the difference in treatment between vessels flying the Italian flag and

34 — Case 155/80, cited in note 33, paragraph 16 of the judgment.

35 — Cited in note 24.

those flying the flags of other Member States was discrimination prohibited by the Treaty. It then examined the argument that the Italian legislation in issue gave rise to restrictions on the freedom to provide maritime transport services to other Member States, even if that legislation could not be held to be discriminatory. The Court rejected that argument, stating that: [36]

'... legislation like the Italian legislation, which prohibits the discharge of harmful chemicals at sea, applies objectively to all vessels without distinction, whether carrying products within Italy or to other Member States. It does not make any distinction regarding services for exported products and for products marketed in Italy. It does not afford any particular advantage to the domestic Italian market, to Italian transport operations or to Italian products.'

58. It does not follow from the judgment in *Peralta* that rules of a Member State which apply without distinction to all providers of services established in its territory and irrespective of whether the services are provided within national territory or in other Member States may never be regarded as restrictions within the meaning of Article 59. The rules in issue in *Peralta* can be distinguished from those in issue in the present case both with regard to their subject-matter and with regard to their effects. The rules in issue in *Peralta* did not regulate either the provision or the marketing of services. By contrast, in this case, the contested prohibition restricts the marketing of intra-Community services. Moreover, in *Peralta* the effect of the rules of the Member State of origin on the freedom to provide services was so remote, tenuous and indirect as hardly to constitute a restriction within the meaning of Article 59. That is not so in the present case where the contested prohibition directly restricts the ability of Alpine Investments to carry on business in other Member States.

59. The Government of the United Kingdom and the Government of the Netherlands also rely on the judgment in *Keck* [37] on the scope of Article 30 of the Treaty and submit that a similar view should be taken of the scope of Article 59 in the present case. In *Keck* the Court held that rules of the importing State restricting or prohibiting certain selling arrangements do not fall within the scope of Article 30 provided that they apply to all affected traders operating within the national territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States. It is argued that, similarly, Article 59 does not apply to non-discriminatory measures which affect the manner in which services are provided, such as the prohibition of cold calling in the present case.

36 — Paragraph 51 of the judgment.

37 — Cited at note 23.

60. While I accept that, in general, similar principles should apply to the interpretation of Articles 30 and 59, I do not find the reliance on *Keck* of assistance in the present case. In the first place, there are difficulties in determining the effect of the *Keck* judgment even in relation to Article 30. [38] Moreover, even if one were to accept that some analogy with *Keck* might be appropriate here, there is a significant difference between *Keck* and the present case. In *Keck*, the Court was concerned with rules of the importing State relating to selling arrangements for the sale of goods in the territory of that State. In the present case, the exporting State requires compliance with its own rules of marketing not only for the provision of services in its territory but also in the territory of other Member States.

61. There is a further reason why the principle laid down by the Court in *Keck* should not be applied in the present case. If it were accepted that that principle applies both to rules concerning selling arrangements imposed by the Member State of exportation and to those imposed by the Member State of importation, then it would follow that both sets of rules would fall outside the scope of application of Article 59, provided that they were non-discriminatory. A person exporting services would then need to comply with both sets of rules even if they were not objectively justified. That would render the freedom to provide services nugatory. Moreover those sets of rules might even impose contradictory requirements.

62. I conclude therefore that the contested prohibition of cold calling is a restriction on the freedom to provide services within the meaning of Article 59.

The third question

63. Before examining the third question, it is necessary to deal with a preliminary issue. With regard to restrictions on the freedom to provide services imposed by the Member State of destination, the case-law of the Court draws a distinction between restrictions which are discriminatory and those which are non-discriminatory.

64. Restrictions which are discriminatory are compatible with the Treaty only if they fall within the scope of an express derogation, such as that contained in Article 56. [39] Restrictions which are non-discriminatory may be compatible with the Treaty even if they do not benefit from an express derogation. The Court has accepted that the freedom to provide services may be restricted by

38 — See my Opinion in Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179.

39 — See *Gouda*, cited in note 22, paragraphs 10 and 11 of the judgment.

non-discriminatory rules of the Member State where the service is provided where the following conditions are satisfied: those rules are justified by imperative reasons of public interest; adequate protection of the public interest in question cannot be attained by less restrictive means; and the interest in question is not protected adequately by the law of the Member State where the provider of services is established. [40]

65. The issue whether the contested prohibition is justified by imperative reasons of public interest and whether that interest can be protected adequately by less restrictive rules is the subject-matter of the third question. The issue which must be examined at this stage is whether it can be argued that the interest in question can be adequately protected by the law of the Member State where the prospective client is established.

66. Alpine Investments argues that the Minister may not prohibit it from cold calling prospective clients in other Member States. In its view, when it contacts prospective clients in other Member States it must comply with the law of the State where the prospective client is established and not with the law of the Netherlands.

67. I do not find that argument persuasive. It is clear that the Member State from which the telephone call is made is better placed to regulate cold calling than the Member State of destination. Even if the Member State to which the telephone call is made prohibits cold calling, it is unable to stop telephone calls made from another Member State without the cooperation of the regulatory authorities of that State. Services rendered by means of telecommunication can more readily be controlled at the Member State of exportation, where the service provider is supervised, rather than at the Member State of importation. In a case such as the present, therefore, it is not correct to say that restrictions imposed by the Member State where the provider is established are compatible with the Treaty only if the public interest which they pursue cannot be adequately protected by the rules of the Member State of destination. Moreover, as will appear from the answer to the third question, the former Member State may have a legitimate interest in prohibiting the provision of services to another Member State, independently of any interest of the latter Member State.

68. I turn then to the third question, which is divided into two parts. The first part asks whether the concern to protect consumers and the concern to safeguard the reputation of the Netherlands securities markets, which are the underlying reasons for the contested prohibition, can be regarded as imperative reasons of public interest capable of justifying the imposition of restrictions on the free movement of services. The second part asks

40 — See *Säger*, cited in note 22, paragraph 15 of the judgment and see cases referred to there.

whether the contested prohibition of cold calling can be regarded as objectively necessary to protect investors and the integrity of the financial markets and whether it can be considered as proportionate to the objective pursued. I shall examine the two parts of the third question in turn.

69. In my view, there can be no doubt that the concern to protect consumers and the concern to safeguard the reputation of the Netherlands securities markets may justify the imposition of restrictions on the free movement of services.

70. The Court has recognized that consumer protection is an overriding reason relating to the public interest. [41] That is confirmed by Article 100a(3) of the Treaty which states that, in proposals for measures which have as their object the establishment and functioning of the internal market and which concern consumer protection, the Commission must take as a base a high level of protection.

71. Special considerations apply with regard to the protection of persons who invest in securities and commodities markets. It is generally acknowledged that investments in those markets involve a high element of risk and are susceptible to abuse. Because of the nature of the investment, the investor exercises little or no control over its value. In contrast to goods, the real value of the investment does not depend on its physical characteristics. It depends rather on a series of extraneous factors which the ordinary investor may neither determine nor influence. Those considerations apply in particular to investments in the commodities markets which are highly speculative and are considered particularly risky for the unsophisticated investor.

72. An investor in securities or in commodities markets is more dependent on the advice of an intermediary than, say, a person who invests in real property, both as regards the choice of investment which is suitable to his needs and as regards the appropriate time when an investment should be made. That is why all countries with developed financial markets have sought to regulate them by adopting rules concerning not only the issuers of investments but also the financial intermediaries.

73. As the Commission points out, the need to safeguard the integrity of the securities markets is closely linked with the need to

41 — See the insurance cases, Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraphs 30 to 33 of the judgment; Case 220/83 *Commission* v *France* [1986] ECR 3663, paragraph 20, and the 'Mediawet' cases, *Gouda*, cited in note 22, paragraph 14 and *Netherlands*, cited in note, paragraph 18.

protect investors. It is a fair assumption that if the law does not guarantee satisfactory investor protection, investors will lose confidence in the financial markets and, as a result, they will seek alternative forms of investment. The link between investor protection and the integrity of the financial markets is well illustrated by reference to the *travaux préparatoires* of the WEH and the Community harmonization programme on financial services.

74. It appears from the *travaux préparatoires* of the WEH that before its adoption the regulation of the financial services market in the Netherlands was less developed in comparison with other Member States and that a number of foreign firms were established in the Netherlands with a view to taking advantage of the lax regulation applicable there and to pursuing fraudulent activities. That is why, under Article 8 of the WEH, in issuing an exemption to a financial intermediary, the Minister has the discretion to attach conditions with a view to preventing undesirable developments in securities trading.

75. Moreover, the need to protect investors and the need to ensure the integrity of the financial markets are related objectives, as is apparent from the Community harmonization programme in the financial services sector.

76. That programme seeks to provide equivalent standards for the protection of investors throughout the Community, thus facilitating the interpenetration of national securities markets and ultimately the establishment of a European capital market. [42] Although the harmonization directives provide minimum rules, they seek to ensure a high level of investor protection. They recognize that ensuring investor confidence in the securities markets will promote the smooth operation of those markets. [43] By providing a regulatory framework they will encourage investment, and so enable the securities markets to perform their economic function, namely the efficient allocation of resources. [44]

77. Alpine Investments argues that, unlike the protection of Dutch investors, the protection of the investors of other Member States is not an imperative reason of public interest which may justify the imposition of restrictions on the freedom to provide services by the Netherlands authorities. That argument is erroneous, since unfair or abusive practices against foreign investors by financial intermediaries established in the Netherlands may well affect adversely the integrity of the Netherlands financial markets.

42 — See e. g. Council Directive 79/279/EEC coordinating the conditions for the admission of securities to official stock exchange listing (OJ 1979 L 66, p. 21), preamble, recital 1.

43 — See e. g. Council Directive 89/592/EEC coordinating regulations on insider trading (OJ 1989 L 334, p. 30), preamble, recitals 1-4.

44 — See Commission Recommendation 77/534/EEC of 25 July 1977 concerning a European code of conduct relating to transactions in transferable securities (OJ 1977 L 212, p. 37), Explanatory Memorandum.

78. I conclude therefore that the concern to protect investors and to safeguard the integrity of the Netherlands securities markets may justify the imposition of restrictions on the freedom to provide financial services.

79. I turn now to examine the second part of the third question in which, as we have seen, the referring court asks whether the contested prohibition of cold calling can be regarded as objectively necessary to protect investors and the integrity of the Netherlands financial market and whether it can be considered proportionate to those objectives.

80. According to the case-law, requirements imposed on providers of services must be such as to guarantee the achievement of the intended objective and must not go beyond what is necessary in order to achieve that objective. In other words, it must not be possible to obtain the same result by less restrictive rules. [45]

81. Alpine Investments argues that the contested prohibition does not meet the requirement of proportionality because there are other less restrictive means capable of attaining the same result. It refers to less strict prohibitions in force in the United Kingdom and in the United States.

82. In the United Kingdom, in particular, financial services are subject to the regulatory framework established by the Financial Services Act 1986. Under that Act, a person may not carry on investment business unless he has received authorization or unless he is an exempted person. A person may receive authorization by membership of a recognized self-regulating organization. One of those organizations is the Securities and Futures Authority (SFA). Alpine Investment refers to the Conduct of Business Rules of the SFA, under which a firm must establish and maintain compliance procedures designed to ensure that all employees and agents of the firm comply with the rules concerning unsolicited calls on private investors. The compliance procedures must include tape recording any unsolicited calls made to investors and keeping documentary records of any such calls at the time when they are made. Alpine Investments concludes that it is possible to protect investors by tape recording the telephone calls. It refers to similar rules adopted by the National Futures Association in the United States.

83. Alpine Investments also argues that, since the ban on cold calling applies in general to all firms, the conduct of the individual firm is not taken into account in imposing

45 — *Gouda*, cited in note 22, paragraph 15 of the judgment; Case C-154/89 *Commission* v *France*, cited in note 21, paragraph 15 and Case C-198/89 *Commission* v *Greece*, cited in note 17, paragraph 19.

the ban. It is therefore indiscriminate and imposes an unnecessary burden on firms which carry on legitimate activities.

84. I do not find those arguments persuasive. The reasons which led the Minister to impose the contested prohibition are explained in the order for reference. During 1991 the Minister received many complaints from people who, as a result of cold calling, had entered into transactions which they later regretted. As a consequence, the Minister took the view that cold calling was undesirable and decided as a matter of policy to ban it. In accordance with that policy, any exemptions issued under Article 8 of the WEH after October 1991 were accompanied by a prohibition similar to that imposed on Alpine Investments.

85. In my view, seen in the light of the reasons which led to it, the decision to ban cold calling is not disproportionate. Although the ban applies indiscriminately to all firms irrespective of their individual conduct, its objective is to restore and maintain investor confidence in the securities market which, in effect, will benefit all providers of services in that market. Moreover, if the Minister imposed a ban only on certain firms depending on their past conduct that would be more difficult and more expensive to administer, it might give rise to inequalities and might prove ineffective.

86. Nor is it correct to say that the prohibition of cold calling is disproportionate from the point of view of its effects. Alpine Investments is by no means prohibited from marketing its services. It is merely prohibited from contacting prospective clients by telephone or in person without their prior express agreement in writing. That is not an unduly restrictive obligation. First, it affects only new clients of Alpine Investments, since established clients will obviously have the opportunity to give their written consent to future approaches. Secondly, as I understand it, all that Alpine Investments has to do is to contact prospective clients by post asking them to respond in writing if they wish to be contacted in the future. That seems to me to be a marketing technique which is, on the one hand, inexpensive for the service provider and, on the other hand, unintrusive and simple for the prospective client.

87. From the point of view of the prospective client, the prohibition of cold calling has two additional safeguards. Since the service provider is required to approach prospective customers in writing, he is likely to explain in more detail and in clearer terms the type of services he offers. Also, the prospective client has more time to reflect on the information supplied and need not make a quick decision at a time when he is unprepared to do so, as would be the case if he had to respond over the telephone. I cannot see

how a person who seriously contemplates an investment in the commodities market and wishes to benefit from the services of Alpine Investments is harmed by the fact that it is unable to contact him in person or by telephone without his prior consent.

88. Nor do I find persuasive Alpine Investments' argument that the Conduct of Business Rules of the SFA in the United Kingdom impose a less strict prohibition. The fact that another Member State imposes less strict rules does not mean that the rules of the Netherlands infringe the principle of proportionality. That is made clear by the fact that harmonization directives in the field of consumer protection usually permit Member States to impose stricter or additional requirements. *A fortiori*, where no harmonization measures have been introduced, the rules of a Member State cannot be held contrary to the principle of proportionality merely because another Member State applies less strict rules. That is confirmed by the judgment in *Oosthoek*. [46] In that case Netherlands law prohibited the giving of free gifts as a means of sales promotion unless the consumption or use of the free gift was related to the product in respect of the purchase of which it was given. The Court found that, although the requirement of related consumption or use had not been incorporated in the laws of other Member States, it did not exceed what was necessary for the attainment of the objectives pursued.

89. As already stated, the Directive on Investment Services does not harmonize national rules concerning the marketing of investments. The preamble to the directive expressly states that 'the door-to-door selling of transferable securities should not be covered by this Directive and the regulation thereof should remain a matter for national provisions'. [47]

90. It is clear therefore that, in the absence of harmonization rules, each Member State enjoys some discretion in determining the level of investor protection in its territory. Otherwise, it would follow that, in the absence of harmonization rules, Member States would need to align their legislation with that of the Member State which imposed the least onerous requirements. That might have the effect of undermining, rather than promoting, investor confidence.

91. Whether restrictions imposed by national law on the use of a marketing technique satisfy the test of proportionality should be assessed *inter alia* by reference to the conditions prevailing in the national market and the reasons which led to its adoption. In my view, the contested prohibition

46 — Case 286/81 *Oosthoek's Uitgeversmaatschappij* [1982] ECR 4575. See also Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior and Publivia* [1991] ECR I-4151, paragraphs 16 and 17 of the judgment.

47 — Preamble, eighth recital.

does not infringe the principle of proportionality. It was introduced to meet abusive practices as a result of which investors had suffered financial loss; it was a reasonable response in view of the aim of protecting investors in markets in which they are especially vulnerable; and it does not prevent firms such as Alpine Investments from marketing their services but only from using a particular marketing technique.

Conclusion

92. I am accordingly of the opinion that the questions referred by the national court should be answered as follows:

(1) Article 59 of the Treaty must be interpreted as meaning that it applies where a person established in one Member State offers by telephone to potential clients in another Member State to provide services to them.

(2) Legislation of a Member State which prohibits persons established in its territory from making unsolicited telephone calls to potential clients in other Member States with a view to marketing their services is a restriction on the freedom to provide services.

(3) (a) The concern to protect investors and to safeguard the integrity of the financial markets may justify the imposition of restrictions on the freedom to provide services.

(3) (b) Article 59 does not preclude legislation which, in order to prevent abuses likely to harm investors, prohibits the practice of making unsolicited telephone calls to potential clients resident in other Member States with a view to offering them services related to investment in securities and commodities.