I — Introduction

1. This reference for a preliminary ruling concerns the question whether the commercial grant of credit by an undertaking having its registered office in a third country to residents of a Member State of the European Union falls within the scope of the free movement of capital or the freedom to provide services. It has to do in particular with whether it is lawful for the Member State concerned to require authorisation for such a grant of credit and to make authorisation subject to the precondition that the undertaking in the third country must be established in that Member State.

II — Legislative framework

A — Community law

1. The relevant provisions concerning the free movement of capital

2. Article 56(1) EC provides:

'[w]ithin the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited'.

3. The first sentence of Article 57(1) EC provides:

'[t]he provisions of Article 56 shall be without prejudice to the application to third countries of any restrictions which exist on 31 December 1993 under national or Community law adopted in respect of the movement of capital to or from third countries involving direct investment — including in real estate — establishment, the provision of financial services or the admission of securities to capital markets'.

1 — Original language: German.

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4. Article 58(1)(b) EC provides:

'the provisions of Article 56 shall be without prejudice to the right of Member States to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security'.

5. Article 58(3) EC provides:

'the measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 56'.


6. The introduction to the Nomenclature in Annex I to Directive 88/361 provides, in extract:

'the capital movements listed in this Nomenclature are taken to cover:

- all the operations necessary for the purposes of capital movements: conclusion and performance of the transaction and related transfers.

- operations to repay credits or loans.

This Nomenclature is not an exhaustive list for the notion of capital movements — whence a heading XIII — F. other capital movements — Miscellaneous ...

7. The classification under the Nomenclature includes the following:

'VIII. Financial loans and credits (not included under I, VII and XI)

A. Loans and credits granted by non-residents to residents'.

8. The definitions include:

'Financial loans and credits

This category also includes mortgage loans, consumer credit, ...'.


9. The reference to the legal basis reads as follows:

'... having regard to the Treaty establishing the European Community, and in particular the first and third sentences of Article 47(2) thereof ...'.

10. Recital (4) in the preamble reads:

'[t]his Directive constitutes the essential instrument for the achievement of the internal market ... from the point of view of ... the freedom to provide financial services, in the field of credit institutions, ...'.

11. Recital (18) reads:

'[t]here is a necessary link between the objective of this Directive and the liberal-

islation of capital movements being brought about by other Community legislation. In any case the measures regarding the liberalisation of banking services must be in harmony with the measures liberalising capital movements'.

12. The fourth sentence of Recital (19) in the preamble reads:

'[t]he branches of credit institutions authorised in third countries do not enjoy the freedom to provide services ... in Member States other than those in which they are established ...'.

13. Recital (65) in the preamble reads:

'[s]upervision of credit institutions on a consolidated basis must be aimed at, in particular, protecting the interests of the depositors of the said institutions and ensuring the stability of the financial system'.

14. The first sentence of Article 4 reads:

'Member States shall require credit institutions to obtain authorisation before commencing their activities'.

15. The activities subject to mutual recognition which are listed in Annex I include '[l]ending, including consumer credit'.

16. The first sentence of Paragraph 32(1) of the KWG provides:

'[a]nyone wishing to carry on banking activities or to provide financial services on a commercial basis or on a scale requiring operation as a business entity must have written authorisation from the Federal Office; ...'.

17. The first sentence of Paragraph 1(1) of the KWG reads:

'[c]redit institutions are undertakings which carry on banking activities on a commercial

1. Gesetz über das Kreditwesen (Law on Banking and Financial Dealings) ('KWG')

4 — BGBl. I p. 2776.
basis or on a scale requiring operation as a business entity'.

18. Paragraph 1(1)(2) of the KWG reads, in extract:

'[b]anking activities are ... (2) the granting of money loans and acceptance credits (lending)'.

19. Paragraph 6(2) provides:

'[t]he Federal Office for the Supervision of Financial Services shall counteract adverse occurrences in the banking and financial services sector which are capable of endangering the safety of the assets entrusted to institutions, impairing the proper conduct of banking activities or financial services or causing considerable damage to the national economy'.

20. The first sentence of Paragraph 33(1) of the KWG reads, in extract:

'[a]uthorisation shall be refused if ... (6) the institution does not have its central administration in the national territory; ...'.

21. In contrast to Paragraph 33(1)(1)(6) of the KWG, Paragraph 53 of the KWG permits branches of foreign institutions to pursue their activities without moving their central administration if the conditions set out in Paragraph 53(2) of the KWG are fulfilled. In the case of deposit-taking credit institutions and financial services undertakings established in another State of the European Economic Area, Paragraph 53(b) of the KWG provides privileged opportunities for access to the market in the Federal Republic.

22. In the case of States such as Switzerland, Paragraph 53(c) of the KWG makes relaxations in market access dependent upon an order from the Federal Ministry of Finance.

23. Paragraph 54 of the KWG makes it a criminal offence to carry on activities or to provide financial services without authorisation under Paragraph 32(1) of the KWG.
2. Instructions of the Bundesanstalt für Finanzdienstleistungsaufsicht [Federal Office for the Supervision of Financial Services] ('BaFin') of 12 April 2003 concerning the obligation to obtain authorisation under Paragraph 32(1) of the KWG

24. In a change to its administrative practice, BaFin now also deals with banking activities carried on by undertakings established outside Germany, if those activities are directed at the market in the national territory.

III — Facts and main proceedings

25. Fidium Finanz AG ('Fidium Finanz') is a company limited by shares and incorporated under Swiss law which has its registered office and central administration in St. Gallen. It essentially grants small-scale credits of EUR 2,500 or EUR 3,500 for which no credit report is obtained from the Schutzgemeinschaft für allgemeine Kreditsicherung (German central credit reporting agency; 'Schufa') before the credit is granted. Such a credit report is, however, customary where credit institutions established in Germany grant credits. At the material time, Fidium Finanz did not have the authorisation to carry on banking activities required by German law.

26. According to the order for reference, Fidium Finanz is not subject to the supervision of the Swiss Banking Commission in Switzerland. According to the report of the competent Canton of St. Gallen of 28 June 2004, cited in the order for reference, although Fidium Finanz does not have authorisation to grant credit under Swiss law, it does not require it, since it grants consumer credits exclusively to persons living outside Switzerland.

27. At the beginning of 2003, BaFin was made aware that Fidium Finanz was granting credit. It was offering loans in the aforementioned two amounts, inter alia, via the internet; the internet site was in German. Customers were able to download and complete the loan application documents and send them by post to Fidium Finanz, which then decided whether or not to accept the loan application. If the application was accepted, the credit amount was remitted to the customer by money order. The term of the loans was 40 months and the effective rate of interest in 2003 was, according to the information provided by Fidium Finanz, 13.94%. The second route to taking up the offers of credit involved credit intermediaries operating in Germany, who, under the company's own name, also advertised Fidium Finanz loans on the internet.

28. On 12 April 2003, BaFin published new instructions concerning the obligation to obtain authorisation for cross-border banking activities under Paragraph 32(1) of the KWG.
29. By decision of 22 August 2003, BaFin prohibited Fidium Finanz from carrying on lending activities, within the meaning of Paragraph 1(1)(2)(2) of the KWG, on a commercial basis or on a scale requiring operation as a business entity by granting loans of money to customers resident in the Federal Republic of Germany towards whom it directs its services.

30. By decision of 18 February 2004, BaFin dismissed the administrative appeal brought against that order on 1 September 2003. As a result, on 2 March 2004, Fidium Finanz brought before the Verwaltungsgericht Frankfurt am Main (Administrative Court, Frankfurt am Main) an action for the annulment of the decision adopted against it. It claims that, since the registered office of its company is in Switzerland and all its administrative activities are concentrated there, it does not carry on banking activities ‘in the national territory’, as Paragraph 32(2)(1) of the KWG requires in order for the authorisation condition to be applicable.

31. In the view of the Verwaltungsgericht, however, the action has no prospect of succeeding under national law, since Fidium Finanz is subject to the authorisation requirement under Paragraph 32(1) of the KWG. However, the situation may be different under Community law, which takes precedence.

IV — The questions referred

32. The Verwaltungsgericht Frankfurt am Main therefore referred the following questions to the Court of Justice for a preliminary ruling:

‘(1) Can an undertaking having its registered office in a country outside the European Union, in this case Switzerland, rely on the freedom of movement of capital under Article 56 EC in respect of the commercial grant of credit to residents of a Member State of the European Union, in this case the Federal Republic of Germany, as against that Member State and the measures taken by its authorities or courts, or are the preparation, provision and performance of such financial services covered solely by the freedom to provide services under Article 49 et seq. EC?

(2) Can an undertaking having its registered office in a country outside the European Union rely on the freedom of movement of capital under Article 56 EC where it grants loans commercially or predominantly to residents domiciled within the European Union and has its registered office in a country in which it is not subject, in relation to the taking up and conduct of that business activity, to the requirement of prior authorisation by a State authority of that country or the requirement of regular supervision of its business activity in a
manner which is customary in respect of credit institutions within the European Union, and in this particular case within the Federal Republic of Germany, or does reliance on freedom of movement of capital in such a case constitute misuse of the law?

Can such an undertaking be treated, in relation to the law of the European Union, in the same way as persons and undertakings established in the territory of the relevant Member State as regards the obligation to obtain authorisation even though it does not have its registered office in that Member State and also does not maintain a branch there?

Do rules which make the commercial grant of credit by an undertaking having its registered office in a country outside the European Union to residents within the European Union subject to authorisation being obtained beforehand from an authority of the relevant Member State of the European Union in which the borrower is domiciled interfere with the freedom of movement of capital under Article 56 EC?

In this respect is it relevant whether the unauthorised commercial grant of credit constitutes a criminal offence or merely an administrative one?

(4) Is the prior authorisation requirement referred to in Question 3 justified by Article 58(1)(b) EC, in particular as regards

- protecting borrowers from contractual and financial obligations towards persons whose reliability has not been checked beforehand,

- protecting this category of persons from undertakings or persons operating improperly with regard to their bookkeeping and their obligation under general rules to provide customers with advice and information,

- ensuring that the lending undertaking has adequate financial resources,

- protecting the capital market from the unmonitored grant of large-scale credits, and
— protecting the capital market and society as a whole from criminal practices as covered in particular by the provisions on combating money laundering and terrorism?

— have access to those personally responsible for the undertaking in the territory of the Member State, and

— ensure, or at least facilitate, payment of the claims of the undertaking's customers within the Member State?

V — The first question

33. By its first question, the referring court essentially wishes to ascertain whether an undertaking having its registered office in a third country can rely on the free movement of capital for the purposes of granting credit to residents of a Member State, or whether that activity falls within the scope solely of Article 49 EC, that is to say the freedom to provide services.

A — Main submissions of the parties

34. Fidium Finanz and the Commission take the view that the grant of credit comes within the scope of the free movement of capital. Both refer in this respect to the Nomenclature in Annex I to Directive 88/361.
35. In the view of Fidium Finanz, the grant of credit is expressly referred to as a capital movement in Heading VIII of Annex I to Directive 88/361, 'financial loans and credits'. In the Commission's submission the phrase 'operations to repay credits or loans' in the introduction to the Nomenclature does nothing to alter that fact, lending likewise being included since that list is not exhaustive.

36. Fidium Finanz further contends that, while there is a link between the grant of credit and the freedom to provide services, this does not preclude the applicability of Article 56 EC, since the overwhelming case-law of the Court in the field of financial services shows that the two fundamental freedoms apply in parallel.

37. On the other hand, BaFin and the German, Greek, Italian and Portuguese Governments and Ireland are of the opinion that Article 56 EC is not applicable. BaFin and the German Government rely in this regard, first of all, on the fact that a grant of credit is not in the nature of an investment. Furthermore, while the German and Greek Governments and BaFin concede that the authorisation requirement may have an indirect effect on capital movements, in this case the payment of the loan amount, they also argue that it follows from the case-law of the Court of Justice that Article 56 EC does not prohibit restrictions on movements of capital which merely result indirectly from restrictions on other fundamental freedoms, in this particular case the freedom to provide services.

38. Ireland submits that, while that case-law should no longer be taken into account, the 'principal aspect' criterion likewise rules out the application of the rules on movements of capital.

39. Moreover, the Italian, Greek and German Governments and BaFin refer to Directive 2000/12, which, by virtue of its legal basis, some of the recitals in its preamble and the list contained in Annex I, classifies the grant of credits as falling within the scope of the freedom to provide services, not the free movement of capital.

40. Finally, the German Government goes on to say that Article 49 EC is a provision within the meaning of Article 57(1) EC and that the free movement of capital in the field


of financial services is confined to the Member States, because the grant of credit at least also constitutes a service.

B — Assessment

41. By its first question, the referring court wishes to ascertain whether the grant of loans from a third State to a borrower in the European Union falls under the rules on the free movement of capital and/or those on the freedom to provide services.

42. As regards Article 49 EC et seq., that is to say the freedom to provide services, the Court of Justice, in Svensson and Gustavsson 8 and Parodi, 9 regarded loans as also constituting services. Consequently, while the subject-matter in question falls within the scope ratione materiae of the freedom to provide services, an undertaking such as Fidium Finanz cannot rely on that freedom, since its scope ratione personae does not extend to persons resident outside the Community. Moreover, the Agreement between the European Community and the Swiss Confederation 10 on the free movement of persons does not lead to a different conclusion.

43. However, it follows from the wording of Article 56(1) EC (‘... and between Member States and third countries ...’) that even an undertaking established outside the Community can rely on the free movement of capital. 11

44. The following examination must therefore focus on whether the subject-matter in question falls only within the scope ratione personae of Article 56(1) or whether it falls within its scope ratione materiae as well and the grant of credit can be classified as a capital movement.

45. The Treaty itself does not contain a legal definition of the term ‘movements of capital’. It is settled case-law, 12 however, that the Court interprets that term by reference to the Nomenclature in Annex I to Directive 88/361. Even though that directive is based on the then applicable Articles 69 and 70(1)

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8 — Judgment in Case C-484/93 (cited in footnote 5), paragraph 11.
9 — Judgment in Case C-222/95 (cited in footnote 5), paragraph 17.
10 — Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons (OJ) 2002 L 114, p. 6.
EEC, it still, after the entry into force of the Treaty of Maastricht, has indicative value for the purposes of defining the term movements of capital.

46. Heading VIII(A) of the Nomenclature in Annex I to Directive 88/361 refers to 'loans and credits granted by non-residents to residents'. Under the 'Explanatory Notes' at the end of the Nomenclature, these are defined as '[f]inancing of every kind granted by financial institutions ... includ[ing] ... consumer credit ...'. To begin with, therefore, an activity such as that of Fidium Finanz can be classified as a capital movement.

47. The introduction to the Nomenclature, however, refers only to 'operations to repay credits or loans' as constituting capital movements and would therefore suggest a division between the conclusion of contracts for the provision of a financial service, which would come under the freedom to provide services — which is not applicable here — and the performance of such transactions as part of the free movement of capital.

48. The fact that such a split of a single economic process is not intended, however, is clear from the further statement in the introduction to the Nomenclature that capital movements cover 'all the operations necessary for the purposes of capital movements: conclusion and performance of the transaction and related transfers'.

49. This is also clear from the wording of Heading X, which departs from that of Heading VIII. Heading X refers only to 'transfers in performance of insurance contracts'. It might be inferred from this that capital movements in this field are therefore confined solely to the act of transfer, to the exclusion of the insurance transaction on which that act is based.

50. However, it follows from the different wording in Heading VIII(A) that, at least as far as loans are concerned, the Community legislature did not intend to split an economic process for the purposes of its legal definition.

51. That conclusion is supported by the case-law of the Court, which, on the basis of the non-exhaustive nature of the Nomenclature, states that the free movement of capital also covers other transactions additional to those expressly listed. Accordingly, the free movement of capital must apply a
fortiori to the grant of credits, in particular because credits are expressly referred to in the Nomenclature in Annex I, although the introduction to the Nomenclature refers only to operations to repay credits or loans.

52. Not even the findings of the Court in Luisi and Carbone\(^{14}\) contradict that interpretation. In that case, the Court held that movements of capital are 'financial operations essentially concerned with the investment of the funds in question rather than remuneration for a service'. However, the grant of loans is by nature a form of investment, in so far as such a transaction usually yields profit from interest.\(^{15}\) Moreover, payment of the value of the loan after it has been granted likewise does not constitute remuneration for a service for the purposes of the free movement of payments, but is itself a movement of capital.

53. It must now be examined in detail whether the rules on the free movement of capital are applicable to the grant of credit. Four different fundamental approaches to this issue can be found in the existing case-law of the Court.

54. The first line of case-law comes from Svensson and Gustavsson\(^{16}\) and Parodi,\(^{17}\) both of which concern provisions constituting an obstacle to the grant of credit by banks, and from Commission v Italy.\(^{18}\) Those judgments indicate that the current Articles 49 EC and 56 EC should be applied in parallel in the field of financial services. According to those judgments, therefore, the rules on the free movement of capital are to be taken into account alongside those governing the freedom to provide services.

55. The Court takes a second, different line in Safir\(^{19}\) and Ambry.\(^{20}\) In the judgments in those cases, it applies the freedom to provide services as the sole criterion. Although the questions referred in those two cases related both to Article 49 EC and to Article 56 EC, it expressly left unanswered the question 'whether such a rule is also contrary to Article 73b (now Article 56 EC)'. At first sight, this could be seen as a rejection of the applicability of the rules on the free movement of capital.\(^{21}\)

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14 — Judgment in Joined Cases 286/82 and 26/83 (cited in footnote 6), paragraph 21.
16 — Judgment in Case C-484/93 (cited in footnote 5), paragraph 10 et seq.
17 — Judgment in Case C-222/95 (cited in footnote 5), paragraphs 14 and 17.
18 — Judgment in Case C-279/00 Commission v Italy [2002] ECR I-1425, paragraph 37 et seq.
56. However, a closer analysis of the judgments in *Safir* and *Ambry*, in particular their wording ('it is not necessary to determine'), shows that the Court certainly did not intend to rule out the application of Article 56 EC.  

57. There is also the fact, in the context of *Safir*, that the question was framed in relation to the current Article 56 EC only as an alternative ('or') to the rules on the freedom to provide services. Since the Court, in interpreting Article 49 EC, had already concluded that the national measure was incompatible with that very provision, there was no need for any further findings on the free movement of capital. Consequently, that case-law cannot be interpreted as rejecting the applicability of Article 56 EC.

58. The same is true of *Ambry*. Here, although the question was framed cumulatively ('and'), the national measure was, once again, first found to be incompatible with Article 49 EC. Here too, therefore, further findings by the Court were not essential for the purposes of enabling the national court to give judgment in the proceedings it had stayed.

59. Consequently, the judgments referred to in the foregoing points likewise do not preclude the applicability of the rules on the free movement of capital.

60. In *Sandoz* (concerning the treatment of loans concluded outside the national territory) and *Reisch*, the Court interpreted only the current Article 56 EC, without making any further findings on Article 49 EC, the questions referred having been confined to the provisions on the free movement of capital. Under that case-law too, therefore, Article 56 EC et seq. can be assumed to be applicable to the grant of credit.

61. Only the judgment in *Bachmann* and a number of Opinions which refer to it could be relied on in support of the argument that the rules on the free movement of capital are not applicable. There, the Court and the relevant Advocates General have stated that, in the event that the freedom to provide services and the free movement of capital are both potentially

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22 — See Bröhmer, in: Callies/Ruffert, *Kommentar des EUV/EGV*, Art. 56, points 30 et seq.
23 — Judgment in Case C-118/96 (cited in footnote 19), paragraph 19.
24 — Judgment in Case C-410/96 (cited in footnote 20), paragraph 18.
27 — Judgment in Case C-204/90 (cited in footnote 7), footnote 34.
28 — See, for example, the Opinions of Advocate General Elmer in Case C-484/93 (judgment cited in footnote 5), point 8 et seq., Advocate General Tesauro in Case C-118/96 (judgment cited in footnote 19), point 17, and Advocate General Geelhoed in Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 (judgment cited in footnote 12), point 62 et seq.
applicable, they are not in favour of account being taken of the latter if there is only an indirect infringement of Article 56 EC.

62. It should be pointed out in this regard, first of all, that for the purposes of deciding under which fundamental freedom a situation should be classified, the criterion of indirect adverse effect or indirect infringement is not sufficiently clear-cut and is too vague. However, even the case-law of the Court no longer requires that that criterion be used, the Court not having relied on it since the judgment in *Bachmann*. The same is true, moreover, of the ‘principal aspect’ criterion, which is used for the same purpose. Once again, therefore, this line of case-law at least does not preclude reliance on Article 56 EC.

63. It can therefore be concluded that the relevant case-law of the Court supports the applicability of the rules on the free movement of capital to a situation such as that in the main proceedings.

64. It remains to be examined whether reliance on Article 56 EC might be precluded by the provisions of Directive 2000/12. It is true that that directive is not applicable to the situation in question in these proceedings; however, in view of its close connection with the economic activity at issue here, it must be taken into account.

65. As is clear from Annex I, the directive regulates, inter alia, ‘lending, including consumer credit’. As the legal basis for the directive, that is to say Article 47(2) EC, and recitals (14) and (19) in its preamble show, the directive classifies credit as falling within the scope of the freedom to provide services.

66. That fact must now be considered from the point of view of any impact it might have on the applicability of Article 56 EC.

67. While the choice for a provision of secondary law of a legal basis which expresses an attribution to a particular fundamental freedom may be significant for the purposes of classifying credit by reference to the fundamental freedom concerned, this does not mean that such a legislative measure is capable of restricting the scope of that or another fundamental freedom.

29 — For example, Ohler, *Europäische Kapital- und Zahlungswirtschaft, Kommentar zu den Art. 56 bis 60 EGV*, p. 103, point 141; Frenz, *Handbuch Europarecht, Vol. 1, Europäische Grundfreiheiten*, p. 1049, point 2784 et seq.

30 — Title IV of the directive, which governs relations with third countries, does not contain any relevant provisions on the grant to borrowers in a Member State of loans by creditors in third countries not represented by a branch or subsidiary in the Community.
68. Nor was that the intention of the Community legislature, as recital (18) in the preamble to Directive 2000/12 and the aforementioned Nomenclature in Annex I to Directive 88/361 show. According to these, the Community legislature classifies the grant of loans in secondary law as falling within the scope of both the free movement of capital and the freedom to provide services. Directive 2000/12 therefore supports the applicability of Article 56(1) EC for two reasons.

69. It is also necessary to consider the view that the free movement of capital is applicable only to ‘asset transactions’ or an ‘asset transfer’ comparable with economic activity. Even if one were to share that view, this does not mean that the grant of credit is automatically excluded from the free movement of capital. The grant of credit does of course involve a transaction in respect of assets; it is, as was also expressly submitted at the hearing, a movement of capital. What else it is can, in view of the particular nature of the free movement of capital, be left unanswered. That said, it should be pointed out, for the sake of completeness, that there are other financial services which do not involve any movement of capital, such as those consisting exclusively in consultancy activities.

70. It should also be pointed out in this connection that primary law contains express rules concerning the relationship between the free movement of capital and the freedom to provide services. Under Article 50 EC, the free movement of capital takes precedence over the freedom to provide services. It is that relationship of general rule to special rule underpinning primary law which comes into play in a situation such as that in the main proceedings. This means that, even where the economic activity of credit undertakings would, if considered in isolation, fall within the scope of the freedom to provide services, it falls in many respects exclusively within the scope of the free movement of capital, which takes precedence.

71. That relationship of general rule to special rule also applies to third countries. This follows from the fact that, while the Treaty does lay down specific rules governing relations with third countries (Articles 57 EC, 59 EC and 60 EC), it contains no special provision on the rule of precedence. The Member States, as authors of the Treaties, evidently did not wish to provide for any derogation in this regard.

72. Furthermore, as far as the particular measure adopted by the Member State is concerned, the free movement of capital must also remain applicable where the important factor is not the objectives it pursues but the effects it produces. In the main proceedings, those effects extend, inter alia, to the grant of credit. What particular
degree of effect the measure has, for example whether it affects only specific categories of persons, or whether it is direct, is irrelevant.

73. Furthermore, during the procedure before the Court, it was submitted that the free movement of capital covers only material measures. There is no support for this narrow interpretation in primary law. On the contrary, it follows from the Treaty that subjective measures, such as the supervision of financial institutions, are also capable of falling within the scope of the free movement of capital. Otherwise, the exception in Article 58(1)(b) EC would be superfluous.

74. Finally, Article 57(1) EC (in so far as it relates to ‘Community law ... including ... the provision of financial services...’) in conjunction with Article 49 EC likewise does not support any other conclusion. If reliance on Article 56 EC in relation to undertakings in third countries were automatically to be ruled out whenever another fundamental freedom is involved because of the subject-matter in question, the guarantees provided by the free movement of capital would be meaningless.

75. It follows from the foregoing that an undertaking having its registered office outside the European Union, more specifically in the Swiss Confederation, can rely on the free movement of capital for the purposes of granting credit to residents of a Member State.

VI — Second question

76. By its second question, the referring court wishes to ascertain first of all, whether the fact that an undertaking chooses to have its registered office in a third country exclusively in order to grant credit to persons resident in Member States represents an abuse of rights because the undertaking does not require authorisation for that commercial activity in the third country. The question also asks whether the relevant Community law is to be interpreted as making it impossible for the undertaking to be treated in the same way as domestic undertakings in relation to the authorisation requirement.

A — Main submissions of the parties

77. With respect to the first part of the question, Fidium Finanz alone takes the view that it has not acted in abuse of its rights and
refers in this regard to the case-law of the Court of Justice\textsuperscript{31} to the effect that the choice of a registered office in a country with less stringent requirements concerning the taking up of a commercial activity than those in the target country does not in itself constitute an abuse of rights but merely the exercise of a fundamental freedom.

78. On the other hand, BaFin and the German, Greek and Italian Governments and Ireland take the view in the alternative that, in the circumstances described in the order for reference, reliance on Article 56 EC must be regarded as an abuse of rights. In their submission, it follows from the settled case-law of the Court\textsuperscript{32} that abusive reliance on Community law is not permitted. The Italian Government also refers in this regard to recital (9) in the preamble to Directive 2000/12. According to the Portuguese Government, there is no abuse of rights for the simple reason that no right has arisen under Article 56 EC. The Commission is of the opinion that, in view of the fourth and fifth questions, this question does not require an answer.

B — Assessment

80. In the context of the first part of the second question, it must be examined whether conduct on the part of an undertaking such as that of Fidium Finanz must be regarded as abusive reliance on Article 56(1) EC and, if so, what legal consequences attach to acts classified as such under Community law.

81. It follows from the settled case-law of the Court that abusive reliance on the fundamental freedoms, namely the freedom of establishment and the freedom to provide services, is not permitted.\textsuperscript{33} According to the case-law cited, this also applies to reliance on the corresponding secondary law.

79. Only BaFin and the Italian and Portuguese Governments have commented on the second part of the second question. In their view, Community law does not preclude equal treatment with respect to the authorisation requirement. The Commission refers to its observations on the fourth question.

\textsuperscript{31} — Judgment in Case C-212/97 Centros [1999] ECR I-1459, paragraph 27 et seq.

\textsuperscript{32} — Judgments in Case C-212/97 (cited in footnote 31), paragraph 24, and in Case C-23/93 TV10 [1994] ECR I-4795, paragraph 21.

\textsuperscript{33} — See, inter alia, the judgments in Case C-212/97 (cited in footnote 31), paragraph 24, Case C-367/96 Kefalas and Others [1998] ECR I-2845, paragraph 20, Case C-206/94 Paletta [1996] ECR I-2357, paragraph 24 and Case C-23/93 (cited in footnote 32), paragraph 21.
82. National courts may take account of abuse on the part of the person concerned in order, where appropriate, to deny him the benefit of the provisions of Community law on which he seeks to rely.  

83. This reference for a preliminary ruling has its origin in a situation in which an undertaking is established in a third country but its commercial activity consists almost exclusively in the grant of credit to residents of a particular Member State. Because of the cross-border nature of its business, that undertaking is not subject to supervision by the national authorities under the law of the third country concerned, that is to say, in this case, the Swiss Confederation. On the basis of Article 56 EC, Fidium Finanz contests the authorisation requirement in the host Member State. According to the information held by the referring court, there is substantial evidence to show that the registered office of the undertaking was chosen with a view to avoiding supervision both in the State where it is established and in the Member State in which the commercial activity actually takes place. The referring court therefore considers that the link to any abusive practice is to be found in the circumvention of national provisions of the Member State.

84. The question is whether this precludes reliance on Article 56 EC. That said, Article 56 EC can be successfully relied on only in so far as the Member States (may) adopt unjustified restrictions on the free movement of capital.

85. In the area of freedom to provide services, the Court held in this regard, in TJ10, 35 Versicherungen 36 and van Binsbergen, 37 that a Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom to provide services for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that State.

86. If the case-law on Article 49 EC is transposed to Article 56 EC, the reliance by an undertaking in the same situation as Fidium Finanz on the free movement of capital might therefore be ruled out.

87. However, a different picture emerges from the case-law on the freedom of establishment. In the context of Article 43 EC, the Court has held that the formation of a company in a Member State with less stringent requirements in respect of the

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34 — Judgments in Case C-373/97 Diamantis [2000] ECR I-1705, paragraph 34 and Case C-206/94 (cited in footnote 33), paragraph 25.
35 — Judgment in Case C-23/93 (cited in footnote 32), paragraph 20 et seq.
taking up of an activity solely in order to be able to set up a branch in a second Member State in which stricter regulations apply under Article 43 et seq. EC does not in itself constitute abuse.

88. This is also true if the company carries on the entirety of its commercial activity in the country where the branch is established and was therefore formed in the first Member State for the sole purpose of benefiting from the — more favourable — legislation applicable there and circumventing the more stringent provisions in the country in which the branch is established. 38

89. As far as the initial formation of companies is concerned, the circumvention of national provisions does not therefore constitute abuse. On the basis of the case-law on the freedom of establishment, reliance on Article 56 EC in this instance would not necessarily be ruled out.

90. It is therefore necessary to ascertain which criteria must be applied in order to determine whether there is abuse in the context of the free movement of capital. In contrast to the case-law concerning the freedom to provide services, there is no danger here that another fundamental freedom (in that case, the aforementioned freedom of establishment) will be circumvented. 39 In contrast to the judgment in Centros, the circumvention or possibility of it is not already present in the provision of Community law relied upon, in that case, the aforementioned freedom of establishment.

91. The judgment in Centros shows that the two lines of case-law, that concerning the freedom to provide services and that concerning the freedom of establishment, do not contradict each other. In the context of Article 43 EC, the Court has not withdrawn the circumvention of national provisions from potential allegations of abuse generally, but only because the freedom of establishment is specifically intended to enable companies having their registered office in the Community to pursue activities in other Member States through a branch. 40

92. In other words, circumvention constitutes abuse only if it lies outside the objective of the provision which is relied upon. 41

38 — Judgments in Case C-167/01 Inspire Art [2003] ECR I-10155, paragraphs 95, 96 and 98 and Case C-212/97 (cited in footnote 31), paragraphs 18, 27 and 29.

39 — See in this regard the judgments in Case 205/84 (cited in footnote 36), paragraph 22, and Case 33/74 (cited in footnote 37), paragraph 13.

40 — Judgment in Case C-212/97 (cited in footnote 31), paragraph 26.

41 — See also to this effect Karayannis, 'L'abus de droits découlant de l'ordre juridique communautaire', Cahiers de droit européen 1999, Vol 1/2, p. 531.
93. That criterion has also been applied and expanded upon in two more recent decisions of the Court. According to those decisions, evidence of an abusive practice requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved. Secondly, it requires a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it or the intention to circumvent national law, especially tax law.

94. It must now be examined whether that part of the above case-law which relates to questions of secondary law and concerns fraudulent reliance on Community law for the purposes of acquiring subjective rights or abusive reliance on such rights can be applied in these proceedings.

95. As regards the applicability of that case-law to matters of primary law, it should be pointed out here that, while the findings of the Court were made in relation to secondary law, they were formulated in general terms and therefore extend beyond the situations at issue in the proceedings concerned.

96. Moreover, the fact that we are considering the subject-matter of this case in the context of a different category of abuse, namely acquisition by fraudulent means, does not mean that the findings of the Court cannot be relied on. On the one hand, circumvention of a provision which imposes an obligation and by definition entails the fraudulent acquisition of an unforeseen advantage. On the other hand, the Court treats both categories of abuse in the same way, since, in cases involving the fraudulent acquisition of a subjective right, it also refers to its case-law on circumvention and vice versa. The Court treats the former category and the category under consideration, the circumvention of national provisions by reliance on Community law, under the heading of abuse.

97. The decisions of the Court cited above can therefore be relied on in these proceedings. Evidence of abuse accordingly requires an objective and a subjective element.

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43 — See also in this regard the judgment in Case C-446/03 Marks & Spencer [2005] ECR I-10837, paragraph 57, and the case-law cited there.
44 — See also to this effect Dennis Weber, Abuse of Law, Legal Issues of Economic Integration, 2004, pp. 43, 51 and 54.
45 — Judgments in Case C-212/97 (cited in footnote 31), paragraph 24, and Case C-367/96 (cited in footnote 33), paragraph 20; see also Zimmermann, Das Rechtsmissbrauchsverbot im Recht der Europäischen Gemeinschaften, p. 185 et seq.
46 — On the different categories of abuse, see Lagondet, ‘L’abus de droit dans la jurisprudence communautaire’, Journal des tribunaux 2003, No 95, p. 8 et seq.
98. Under the division of responsibilities in the preliminary ruling procedure under Article 234 EC, it is for the national court to establish the presence of those two elements.\(^\text{47}\)

99. With regard to the objective evidence — as referred to in *Centros* — of failure to achieve the purpose of the provision relied upon, it is for the national court to examine, by reference to the specific facts of the case, whether, on an overall assessment, the objective conduct of Fidium Finanz supports the conclusion that reliance on the free movement of capital must be denied. In so doing, the national court must take account of the objectives of the free movement of capital. One such objective which is essential is to facilitate international financial services.

100. Consequently, the use of different levels of regulation in legislation governing supervision and the grant in a Member State of credit from a third country does not in itself constitute an abusive use of the free movement of capital.

101. With regard to the subjective condition, the national court must examine whether Fidium Finanz intended to obtain an advantage from the Community rules by creating artificially the relevant conditions for obtaining it, or whether Fidium Finanz intended to circumvent the law of the Member State concerned, that is to say, in particular, the law on supervision in banking and financial dealings.

102. The answer to the first part of the question must therefore be that an undertaking having its registered office in a third country in which it is not subject to supervision cannot rely on Article 56 EC in order to grant credit to residents of a Member State if both of the cumulative preconditions for abuse are fulfilled, which is a matter for the national court to determine.

103. As the order for reference shows, there is a direct connection between the first and second parts of the second question. In the second part, which concerns the possibility of equal treatment, the national court refers to the legal consequences of abusive conduct, as established in the judgment in *TV10*. Since the second part of the second question adds nothing to the content of the first part, but concerns the level of justification, I would refer the Court, mutatis mutandis, to my comments on the fourth and fifth questions.

\(^{47}\) — Judgments in Case C-515/03 (cited in footnote 42), paragraph 40, and Case C-110/99 (cited in footnote 42), paragraph 54.
VII — The third question

104. By its third question, the referring court wishes to ascertain whether the requirement of authorisation for the grant of credit constitutes a restriction on the free movement of capital and whether the nature of the penalty imposed for unauthorised activity is relevant in this regard.

A — Main submissions of the parties

105. On the first part of the third question, Fidium Finanz and the Commission take the view that the authorisation requirement satisfies the conditions for the existence of a restriction within the meaning of Article 56 EC, since it obstructs the grant of credit from a third country to a Member State. In the alternative, BaFin takes the same view.

106. The Italian, Greek and Portuguese Governments and Ireland, on the other hand, do not consider there to be a restriction. With reference to their observations on the first question, the Italian Government and Ireland point out that only the provision of the service, not the transfer of capital per se, is restricted.

B — Assessment

107. With respect to the second part of the question, Fidium Finanz, BaFin and the Commission alone point out that unauthorised activity does not have to be classified as a criminal offence or an administrative offence in order for the requirement of prior authorisation to constitute a restriction.

108. In the context of the first part of the third question, it must be clarified whether the requirement to obtain prior authorisation to grant credit is to be regarded as a restriction within the meaning of Article 56(1) EC.

109. In this regard, it must be pointed out first of all that the authorisation requirement, as defined by the national legislation in conjunction with the amended administrative practice of BaFin, applies in the same way to undertakings established in Germany and to undertakings from third countries. However, this does not mean that there cannot be an infringement. As is clear from
the wording of Article 56(1) EC ('all restrictions') and the case-law of the Court, the free movement of capital is formulated as a general prohibition on restrictions which goes beyond a mere prohibition on discrimination.

110. It therefore remains to be examined, secondly, whether a restriction exists in practice. The authorisation requirement prevents an undertaking established in a third country from granting credit to persons residing in Germany without official authorisation. In accordance with judgments in Konle, Reisch and Salzmann, this in itself indicates the existence of a restriction. In those cases, the Court held that the mere existence of a requirement to obtain authorisation before the free movement of capital is exercised at all constitutes a restriction.

111. This is confirmed by the judgment in Parodi. In that case, the Court regarded the requirement to obtain authorisation in the host State for the grant of loans from other Member States as a restriction on the relevant fundamental freedom. Since the Second Banking Directive introducing the 'European Passport' was not yet applicable to the intra-Community situation at issue in that case, that situation was the same as, and can therefore be transposed to, that which currently exists between third countries and Member States.

112. In these proceedings, there is the further complicating fact that, under the provisions of the national (that is to say, German) legislation, an undertaking can obtain authorisation only if it has its central administration or at least a branch in Germany.

113. In order to be able to grant credit in Germany at all, an undertaking from a third country would therefore have to establish a physical presence there. This would entail considerable additional expenditure and might deter economic operators from pursuing such business. A restriction therefore exists.

114. The answer to the first part of the third question must therefore be that the authorisation requirement constitutes a restriction on the free movement of capital.


52 — Judgment in Case C-222/95 (cited in footnote 5), paragraph 19.

115. The second part of the third question concerns the nature of the penalty for unauthorised activity, that is to say the classification of the infringement as an administrative offence or a criminal offence, and the bearing of that classification on the assessment as to whether that infringement constitutes a restriction on the free movement of capital.

116. I would refer in this regard to the case-law of the Court to the effect that a restriction on the freedom of movement exists even if failure to comply with an authorisation requirement attracts no penalty. The same must certainly be true therefore where, as in this case, infringement of the authorisation requirement does attract a penalty of some kind. Penalties make the infringement even more serious. The nature of the penalty, that is to say whether the offence is criminal or administrative, is therefore irrelevant and has no bearing on the existence of a restriction within the meaning of Article 56 EC.

A — Main submissions of the parties

118. Fidium Finanz alone takes the view that the restriction resulting from the aforementioned authorisation requirement cannot be justified by Article 58(1)(b) EC. Fidium Finanz refers in this regard to the only conceivable head of justification under that provision, the 'supervision of financial institutions'. In its submission, however, such legislation on the supervision of banking and financial dealings is justified only if it is appropriate and necessary to the attainment of the objectives pursued by the supervision in question. However, the authorisation requirement is not an appropriate means of attaining those objectives.

119. As far as the objective of protecting investors is concerned, supervision is unjustified if only because the undertaking at issue merely grants credit to customers; it does not take deposits from them. There is consequently no risk to investors’ capital.

120. With regard to the objective of ensuring the efficiency of the banking and
financial dealings sector, it contends, the grant of loans does indeed pose a risk. However, that risk has nothing to do with where the credit is granted, since it derives from the fact that financial institutions which grant loans to private customers often have to rely on external capital to finance their operations. Accordingly, if large numbers of debtors default on their loans, the financing credit institutions are also affected. However, as their registered office is often not in the same place as that where the credit is granted, the risk affects a different capital market. Consequently, imposing the authorisation requirement in the place where the loan is granted is not an appropriate means of attaining the objective of supervision.

121. Moreover, Fidium Finance argues, the authorisation requirement is not under any circumstances necessary in order to attain those objectives. It follows from the case-law of the Court\(^\text{55}\) that, in this case, a notification system would be a more moderate but equally effective means of ensuring the supervision of financial institutions.

122. On the other hand, BaFin, the German, Italian, Greek and Portuguese Governments and Ireland and the Commission take the view that the authorisation requirement is in any event justified under Article 58(1)(b) EC. BaFin and the German Government refer in this regard, first of all, to the case-law of the Court\(^\text{56}\) to the effect that authorisation requirements applicable to insurance undertakings are capable of being justified. The same is true of the grant of credit.

123. BaFin, the German Government and the Commission further support their argument by reference to Directive 2000/12, which, in the field of its application, subjects the activity of credit institutions to authorisation by the Member States. Since the grant of credit by a financial institution such as Fidium Finanz entails similar risks, the reasons for the authorisation requirement under the directive, that is to say protection of investors and protection of the financial markets, are equally valid in these proceedings.

124. Furthermore, they submit, it follows from the case-law of the Court\(^\text{57}\) that a mere declaration requirement, as a less drastic necessary measure, does not always ensure the requisite protection of legal interests. Consequently, in the view of BaFin and the German Government, prior authorisation may in some cases be justified.

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56 — Judgment in Case 205/84 (cited in footnote 36), paragraph 46.

57 — Judgment in Case C-302/97 (cited in footnote 49), paragraph 45 et seq.
125. The Greek Government and Ireland further submit that, since harmonised Community provisions are not applicable, the Member State in which the service is provided may adopt the measures of supervision necessary, including the requirement of prior authorisation.

B — Assessment

126. In order for it to be possible even to consider Article 58(1)(b) EC as a potential justification for the authorisation requirement, it would have to apply to third countries. These are not expressly referred to in Article 58 EC. However, since Article 58(3) refers to Article 56 EC and Article 56 does also apply to 'third countries', Article 58 EC is applicable to third countries, that is to say, in this case, the Swiss Confederation. It would be so only if it were suitable for achieving the objective pursued by the legislature and that objective could not be achieved by measures less restrictive on the free movement of capital.

127. The potential head of justification appears in the first part of Article 58(1)(b) EC. According to its wording ('requisite measures to prevent infringements of national laws and regulations, in particular in the field of ... supervision of financial institutions'), justification is subject to the fulfilment of four conditions. Those conditions will be examined below.

128. Since the rules of the KWG, as national provisions, constitute domestic legislation, the first condition is fulfilled. Secondly, they must also serve to ensure the supervision of financial institutions. As is clear from the abovementioned Paragraph 1(1)(1) and (2) in conjunction with Paragraph 6(2) of the KWG, the rules of the KWG are intended to ensure the supervision of financial institutions within the meaning of Article 58(1)(b) EC, which means that this condition too is fulfilled. Thirdly, Article 58(1)(b) EC requires that infringements be prevented. That is the very purpose of an authorisation requirement. The third condition is therefore fulfilled as well.

129. It remains to be examined, in the context of the fourth and final condition, whether an authorisation requirement can also be regarded as a 'requisite measure'. It would be so only if it were suitable for achieving the objective pursued by the legislature and that objective could not be achieved by measures less restrictive on the free movement of capital.
130. At this point, therefore, it is necessary to determine what objectives are pursued by the rules on supervision.

131. Those objectives can be inferred from the list which the referring court sets out in the fourth question. The items listed in subparagraphs 1 to 3 are aimed at the protection of borrowers. Subparagraphs 4 to 6 are aimed at protecting the capital market per se. Those two objectives are therefore consistent with the objectives typically pursued by legislation on the supervision of financial dealings such as the KWG. ⁵⁹

132. It is therefore appropriate, first of all, to consider the suitability of the authorisation for the purposes of protecting borrowers. The view might be taken in this regard that customers do not need to be protected at all because a financial institution such as Fidium Finanz merely grants credit, but does not take deposits from customers and thus does not directly expose external assets to risk. Much the same view is taken by the Court in Parodi, ⁶⁰ in which it distinguishes between the grant of loans and the lodging of funds in terms of the degree of risk to the customer.

133. However, it is clear from the facts of the main proceedings that the offer not to carry out a credit check aims to attract financially weak customers for whom it is particularly important that the credit transaction should proceed without a hitch.

134. There is also the fact that customers run risks which go beyond the direct loss of assets, such the possibility that they may enter into further financial commitments with the credit institution. This is particularly true if part of the credit is granted via the internet and there is therefore no-one subject to national supervision who could be called to account in the event of inappropriate advice and information. An authorisation requirement, on the other hand, constitutes a suitable means of pursuing the objective of protecting borrowers.

135. Furthermore, supervision must also be suitable for the purposes of attaining the second objective, protection of the capital market.

136. At first sight, it might be difficult to say that this is the case, because the risk to the capital market stems in part from the fact that undertakings which grant credit themselves seek refinancing from other financial institutions. If a large number of debtors

⁶⁰ — Judgment in Case C-222/95 (cited in footnote 5), paragraph 29.
default, the refinancing institutions are also affected. However, the latter may also be operating on other capital markets in the same way as the borrowers.

137. However, it cannot be concluded from this that there is no need for supervision in the State where the borrower is resident. On the one hand, it is equally possible that the refinancing institution in question is also established there. On the other hand, even if that is not the case, the credit institution itself will certainly be affected if large numbers of debtors default. Even if the credit institution is not established in the State where the borrower is resident, default by debtors will, at least, have negative repercussions in terms of the business activities it pursues there. Finally, the place of business is the most sensible basis for deciding where supervision should be effected. Supervision would be entirely impossible if it could be evaded by recourse to the argument that any refinancing institutions affected are established elsewhere.

138. What is more, legislation on the supervision of banking and financial dealings also serves to prevent money laundering. The unsupervised pursuit of business in the credit sector entails in itself a risk of money laundering, since both the grant and repayment of credit can obscure the origins of the funds. The authorisation requirement is therefore in some cases a suitable means of protecting the capital market.

139. The fact that the authorisation requirement and the possibility of supervision which it provides are a suitable means of attaining the objectives of protecting customers and protecting the capital market is also illustrated by the provisions of Directive 2000/12.

140. Article 4 of that directive makes the taking up of the business of credit institutions subject to prior authorisation, which entails the supervision of those institutions. Recital (65) in the preamble to Directive 2000/12 gives protection of the interests of depositors and ensuring the stability of the financial system as the reasons for the supervision of those institutions.

141. It is true that, in accordance with Article 1(1) of Directive 2000/12, institutions such as Fidium Finanz, which only grant loans, do not constitute 'credit institutions' within the meaning of Article 4 of the directive since they do not receive deposits. However, the aforementioned reasons for the authorisation requirement applicable to credit institutions are equally valid in a situation such as that in the main proceedings because of the comparable risks associated with the grant of credit alone.

142. However, the authorisation requirement would also have to be necessary. This condition, additional to that of suitability,
requires that there should be not be a more moderate but equally effective means of achieving the objectives pursued.

143. The case-law of the Court in the field of the free movement of capital might indicate that the condition of necessity is not satisfied in this case. According to that case-law, a notification system is essentially preferable to a system of prior authorisation because it is a means which has a less adverse effect on the free movement of capital.

144. In the context of currency exports, the Court takes the view that an appropriate notification system is sufficient since, unlike authorisation, it does not have the effect of suspending the export of coins, banknotes, etc.

145. However, a more moderate means must be employed only if it is equally effective for the purposes of attaining the objective sought. Thus, the Court has also held, in matters relating to the acquisition of real property, which is relevant to the movement of capital, that a declaration procedure is not in itself always sufficient for the purposes of attaining the objectives pursued and an authorisation procedure may therefore also be necessary.

146. It is therefore necessary to examine the conditions under which authorisation is necessary. According to the aforementioned case-law relating to property transaction, it is certainly not necessary where the objective to be attained, from the point of view of the national authorities, consists solely in the acquisition of information, as in the case of currency exports.

147. However, the requirement of authorisation for the grant of credit goes beyond a mere need for information on the part of the national authorities. It is intended to enable those authorities, if necessary, to adopt and enforce effective measures against the undertaking, which, in extremis, may even include the refusal or withdrawal of authorisation.

148. After all, in the case of the grant of loans, a system of retrospective declarations does not offer the same security as prior authorisation. The loan transactions carried out before an inspection is conducted may have already given rise to operations which are difficult to retrace and even to infringements of the law.

61 — Judgments in Case C-300/01 (cited in footnote 51), paragraph 50, Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 (cited in footnote 12), paragraph 37, Case C-302/97 (cited in footnote 49), paragraph 44, and Joined Cases C-163/94, C-165/94 and C-250/94 (cited in footnote 55), paragraph 27.


63 — Judgment in Case C-452/01 (cited in footnote 11), paragraph 45; Case C-300/01 (cited in footnote 51), paragraph 49, and in Case C-302/97 (cited in footnote 49), paragraph 46.

64 — Judgment in Case C-302/97 (cited in footnote 49), paragraph 45.
Furthermore, in order for authorisation to be necessary, it must, according to the judgment in *Bordessa*, also be based on objective criteria which are known in advance and which allow all persons affected by a measure of that type to have a legal remedy available to them.  

The relevant provisions of the KWG are based on objective criteria which are known in advance. The undefined legal terms contained in the criteria for the applicability of the authorisation requirement set out in Paragraph 32(1) of the KWG are defined in Paragraph 1 of the KWG. As regards the criterion 'in the national territory', the instructions issued by BaFin make it clear exactly which persons fall into that category. Moreover, Paragraph 33(1)(1) of the KWG provides that refusal of authorisation is not at the discretion of the authorities, but is a binding decision ('shall be refused'). Finally, provision is also made for the possibility of obtaining legal redress against a rejection.

Any remaining individual cases of inequity are covered by Paragraph 2(4) of the KWG, which provides for the possibility of exemption from the authorisation requirement in Paragraph 32(1) of the KWG for undertakings which, because of the nature of the business which they pursue, do not require supervision.

The interim conclusion must therefore be that the authorisation requirement is to be classified as both suitable and necessary for the purposes of attaining the objectives of protecting customers and protecting the capital market. It is therefore 'requisite' within the meaning of Article 58(1)(b) EC.

Finally, the documents before the Court do not show that the main proceedings involve arbitrary discrimination or a disguised restriction within the meaning of Article 58(3) EC. What they do show is that, in the application of the authorisation requirement, undertakings in third countries are treated in the same way as domestic undertakings for the purposes of the legislation on the supervision of banking and financial dealings.

The answer to the fourth question must therefore be that the requirement of prior authorisation for the grant of credit by an undertaking having its registered office in a third country to residents of the European Union is justified by Article 58(1)(b) EC.

By its fifth question, the referring court wishes to ascertain whether an authorisation requirement permissible per se — as
described in the third question — is also justified under Article 58(1)(b) EC where the grant of the authorisation is subject to the condition that the undertaking should have its central administration or at least a branch in the Member State concerned.

A — Main submissions of the parties

156. Fidium Finanz takes the view that making the grant of authorisation subject to the condition that the central administration or a branch should be situated in the Member State concerned is disproportionate and therefore unjustified under Article 58(1)(b) EC. In support of its view, Fidium Finanz refers to the judgment of the Court in Commission v Italy. It submits that, because of the way in which authorisation is granted, as described above, the financial institution applying for authorisation is forced to become 'a national'. However, this is tantamount to a negation of the free movement of capital. Finally, the not inconsiderable costs associated with setting up an establishment likewise support the argument that the legislation is disproportionate.

157. On the other hand, BaFin, the German, Italian, Greek and Portuguese Governments and Ireland and the Commission take the view that the requirement of a permanent physical presence in the Member State as a precondition for obtaining authorisation is justified by Article 58(1)(b) EC. BaFin and the German and Italian Governments and Ireland submit that, in the absence of any possibility of investigation or intervention in third countries, effective supervision of undertakings from those countries can be ensured only by a physical presence in the Member State in which the undertaking operates.

158. In the opinion of the German and Greek Governments, Directive 2000/12 also assumes that an undertaking must have a registered office in one of the Member States in order to be able to obtain authorisation.

159. Ireland further submits that, while a physical presence in the Member State concerned is not generally necessary for the purposes of supervision, it is in any event required where the undertaking is not subject to supervision in the third country.

B — Assessment

160. As in the context of the fourth question, here too it is necessary to examine whether the requirement in question is justified under Article 58(1)(b) EC. This case is concerned not only with whether prior authorisation is permissible per se, which we
have concluded it is, but also with the specific basis on which it is granted. It follows from Paragraphs 33(1)(6) and 53 of the KWG that the award of authorisation for the grant of credit is subject to the mandatory condition that the central administration or at least a branch of the credit institution should be situated in the Member State concerned. An undertaking established exclusively in a third country would therefore be required to establish a physical presence in the Member State in order to be able to carry on its business there.

161. With respect to the fundamental applicability of Article 58(1)(b) EC to third countries and the relevant head of justification in Article 58(1) EC, I refer to my observations concerning the fourth question.

162. The requirement of a physical presence is also intended to ‘prevent infringements of national law ... in the field of ... the ... supervision of financial institutions’, since it derives from the same legislation as the authorisation requirement and simply gives practical expression to that requirement.

163. It is therefore necessary to examine whether physical presence is a ‘requisite measure’ within the meaning of Article 58(1)(b) EC.

164. There is no doubt here that the requirement of a physical presence is suitable for the purposes of attaining the objectives in question. As the answer to the fourth question shows, the authorisation requirement itself already serves to protect customers and the capital market. This applies a fortiori to the necessity of a physical presence. For that requirement makes supervision easier for the Member State towards which the activity is directed, for example by making it possible to carry out on-the-spot or unannounced inspections, or by better guaranteeing the settlement of claims made by the undertaking’s customers.

165. The question is, however, whether the obligation concerning establishment is also necessary. This would be the case only in the absence of any less radical but equally effective measures for protecting customers and the capital market. Prior authorisation in itself has a not inconsiderable adverse effect on the free movement of capital. As my comments on the third question show, that effect is reinforced by the requirement of a physical presence, since undertakings from third countries are exposed to additional financial burdens.

166. Thus, the Court held, in Ospelt and Schlössle Weissenberg, concerning the free movement of capital, that, from the point of view...
view of proportionality, the requirement of permanent residence in the place of business to which the award of prior authorisation for the acquisition of agricultural and forestry land is linked goes beyond what is necessary in order to attain the objectives pursued.

167. The Court has also delivered similar decisions in the field of the freedom to provide services. Thus, for example, the requirement of establishment in a Member State as a precondition for obtaining authorisation to carry out biomedical analyses from another Member State, intended to ensure supervision, was held to be disproportionate. The requirement of establishment in a Member State as a precondition for pursuing brokering activities there, also intended to ensure supervision, was likewise regarded by the Court as being unjustified.

168. That case-law on Article 49 EC can also be relied upon for the purposes of assessing the grant of credit in the light of the free movement of capital, because the grant of credit, as explained above, essentially constitutes the provision of a service.

169. First of all, it can therefore be inferred from the case-law cited that the obligation to have a physical presence is probably unnecessary for the purposes of attaining the objectives pursued by the legislation. For a definitive assessment, however, the judgments cited must be analysed more closely with regard to the situations at issue in those cases.

170. While the judgment in Ospelt and Schlössle Weissenberg is not very helpful in this regard, the facts of that case being different in essential respects, the aforementioned case-law on Article 49 EC exhibits two characteristics which are decisive for the purposes of the answer to the question under consideration.

171. First of all, in contrast to this case, Ospelt and Schlössle Weissenberg concerned an intra-Community situation. Furthermore, the Court justified its findings, inter alia, by reference to the fact that comparable supervision was already ensured by the competent authorities in the Member State of origin. The situation in this case, however, is fundamentally different. As explained above, the undertaking here is not subject to similar supervision in the country of origin, that is to say the Swiss Confederation.

172. In the light of those essential differences between these proceedings and those in the cases cited, the assessment carried out in those judgments cannot automatically be transposed to this case.

69 — Judgment in Case C-101/94 (cited in footnote 66), paragraph 16 et seq.
173. Rather, it is necessary to examine what bearing the fact that an undertaking is established in a third country which moreover does not undertake any supervision has on these proceedings. If the circumstances outlined were to show that, without the requirement of a physical presence, there would be no measures which would effectively ensure general supervision, this would indicate that the German measures are lawful.

174. With respect to what, if any, measures are in place, a distinction is generally to be drawn between inspections at the undertaking's registered office and inspections in the country in which the activity is pursued.

175. As regards supervision in the country where the registered office is situated, there are no effective measures in evidence in this case. There is no possibility of independent on-the-spot checks being carried out by the authorities of the Member States in the Swiss Confederation as there are no international agreements to that effect. Nor can there be any expectation of checks being carried out by the authorities of the third country under the heading of mutual administrative assistance, since the third country did not actually carry out supervision of cross-border activities during the period material to these proceedings.

176. As regards supervision in the Member State towards which the commercial activity is directed, that is to say in Germany, it is appropriate first of all to consider the settlement of claims made against the undertaking by its customers. That task can be carried out without a physical presence in the Community. As the Court held in its judgment in *Commission v Italy*, the provision of financial guarantees in the Member State concerned may be sufficient in this regard.

177. It therefore remains to be examined whether effective checks in the Member State in which the activity is pursued are also possible without establishment in that State.

178. One possible solution, drawn from the judgment in *Versicherungen*, might be an obligation on the undertaking to submit any necessary commercial documents, balance sheets, accounts, business plans and so forth to the competent authority for inspection.

179. However, as the Court went on to say in that judgment, those documents must be 'sent from the State of establishment and
180. The recognition by the Court that that obligation to submit documents is an effective, yet more moderate, means of ensuring supervision therefore presupposed, in Versicherungen, that there should be a minimum degree of cooperation between the authorities of the State of establishment and those of the Member State towards which the activity is actually directed.

181. However, as I have already explained at several points, such cooperation probably does not exist in this case. It would therefore be the responsibility of the undertaking subject to supervision and not for the authorities of the State of establishment to compile the documents for inspection and to submit them to the authorities of the State in which the activity is pursued.

182. In the absence of any form of State involvement in the country of origin, the authorities of the Member State concerned would not be in a position, in the material circumstances, to ascertain the completeness and/or probity of the documents, which precludes effective supervision on the basis of material made available.

183. Consequently, the fact that the undertaking is established in a third country in which no checks are carried out leads to a conclusion, in these proceedings, different from that reached in the judgments of the Court relating to Article 49 EC. In this case, any obligation to submit commercial documents would not therefore constitute a more moderate but equally effective means of attaining the legislative objectives pursued by the Member State concerned.

184. Since there are therefore no more moderate but equally effective methods of supervision available, it must be concluded that the requirement of a physical presence is to be classified as a suitable and necessary means and therefore constitutes a 'requisite measure' within the meaning of Article 58(1)(b) EC.

185. The answer to the fifth question must therefore be that the formulation of an authorisation requirement permissible per se — as described in the third question — to obtain which it is mandatory for the undertaking to have its central administration or at least a branch in the Member State concerned, is justified under Article 58(1)(b) EC.
X — Conclusion

186. In the light of the foregoing, I propose that the Court should answer the questions referred as follows:

(1) An undertaking having its registered office in a country outside the European Union, in this case the Swiss Confederation, can rely on the free movement of capital under Article 56 EC in respect of the commercial grant of credit to residents of a Member State of the European Union, in this case the Federal Republic of Germany, as against that Member State and the measures taken by its authorities or courts.

(2) An undertaking having its registered office in a third country in which it is not subject to supervision cannot rely on Article 56 EC in respect of the grant of credit to residents of a Member State if the objective and subjective preconditions for abuse are fulfilled. Whether that is the case in the main proceedings is a matter for the national court to determine.

(3) An authorisation requirement constitutes a restriction on the free movement of capital. It is immaterial in this regard whether the unauthorised commercial grant of credit constitutes a criminal or an administrative offence.
(4) Article 58(1)(b) EC is to be interpreted as meaning that a prior authorisation requirement for the grant of credit to residents of the European Union by an undertaking having its registered office in a third country in which it is not subject to supervision is permissible, and that the formulation of an authorisation requirement permissible per se, to obtain which it is mandatory for the undertaking granting credit to have its central administration or at least a branch in the Member State concerned, is justified.