JUDGMENT OF THE COURT
10 May 1995 *

In Case C-384/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the College van Beroep voor het Bedrijfsleven for a preliminary ruling in the proceedings pending before that court between

Alpine Investments BV

and

Minister van Financiën

on the interpretation of Article 59 of the EEC Treaty,

THE COURT,

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

Advocate General: F. G. Jacobs,
Registrar: L. Hewlett, Administrator,

* Language of the case: Dutch.

after considering the written observations submitted on behalf of:

— Alpine Investments BV, by G. van der Wal and W. B. J. van Oberbeek, Advocaten,

— the Netherlands Government, by A. Bos, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent,

— the Greek Government, by V. Kontolaimos, Assistant Legal Adviser at the Legal Council of State, and V. Pelekou, legal representative at the Legal Council of State, acting as Agents,

— the United Kingdom, by J. D. Colahan, of the Treasury Solicitor's Department, acting as Agent, and P. Duffy, Barrister,

— the Commission of the European Communities, by B. Smulders and P. van Nuffel, of the Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of: Alpine Investments BV, the Netherlands Government, represented by J. S. Van den Oosterkamp, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent, the Belgian Government, represented by J. Devadder, Director of Administration at the Ministry of Foreign Affairs, acting as Agent, the Greek Government, the United Kingdom, represented by C. Vajda, Barrister, and the Commission of the European Communities at the hearing on 29 November 1994,

after hearing the Opinion of the Advocate General at the sitting on 26 January 1995,

gives the following

Judgment

1 By order of 28 April 1993, received at the Court on 6 August 1993, the College van Beroep voor het Bedrijfsleven (Administrative Court for Trade and Industry; hereinafter 'the Administrative Court') referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty several questions on the interpretation of Article 59 of the Treaty.

2 Those questions were raised in proceedings brought by Alpine Investments BV challenging the restriction imposed on it by the Netherlands Ministry of Finance prohibiting it from contacting individuals by telephone without their prior consent in writing in order to offer them various financial services (a practice known as 'cold calling').

3 Alpine Investments BV, the applicant in the main proceedings (hereinafter 'Alpine Investments'), is a company incorporated under Netherlands law and established in the Netherlands which specializes in commodities futures.

4 The parties to a commodities futures contract undertake to buy or sell a specified quantity of a commodity of a given quality at a price and date fixed at the time the contract is concluded. They do not, however, intend actually to take delivery of or to deliver the commodity but contract solely in the hope of profiting from price fluctuations between the time the contract is concluded and the month of delivery. This can be done by entering into a mirror-image transaction on the futures market before the beginning of the month of delivery.

5 Alpine Investments offers three types of service in relation to commodities futures contracts: portfolio management, investment advice and the transmission of clients' orders to brokers operating on commodities futures markets both within and outside the Community. It has clients not only in the Netherlands but also in Belgium, France and the United Kingdom. It is not however established anywhere outside the Netherlands.

6 At the time of the events which gave rise to the main proceedings, financial services were governed in the Netherlands by the Wet Effectenhandel (Law on Securities Transactions) of 30 October 1985. Article 6(1) of that law prohibited a person from acting as an intermediary in securities transactions without a licence. Article 8(1) empowered the Minister for Finance to grant an exemption from that prohibition in special circumstances. However, Article 8(2) provided that the exemption could 'be subject to restrictions and conditions with a view to preventing undesirable developments in securities trading'.

7 On 6 September 1991 the Minister for Finance, respondent in the main proceedings, granted Alpine Investments an exemption permitting it to place orders with a specified broker, Merrill Lynch Inc. The exemption required Alpine Investments to comply with any rules which might be issued by the Minister for Finance in the near future regarding its contacts with potential clients.

8 On 1 October 1991 the Minister for Finance decided to impose a general prohibition on financial intermediaries who offered investments in off-market commodities futures from cold calling potential clients.

9 According to the Netherlands Government, that decision was taken following numerous complaints received during 1991 by the Minister for Finance from investors who had made unfortunate investments in that sector. Since some of those complaints came from investors established in other Member States, he extended the prohibition to offers of services made to other Member States from the Netherlands, with a view to preserving the reputation of the Netherlands financial sector.

10 Those are the circumstances in which the Minister for Finance on 12 November 1991 prohibited Alpine Investments from contacting potential clients by telephone or in person unless those clients had first expressly authorized it in writing to contact them in such a manner.

11 Alpine Investments raised an administrative objection against the Minister's decision prohibiting it from cold calling. Subsequently, the exemption having been replaced on 14 January 1992 by another exemption allowing it to place orders with another broker, Rodham & Renshaw Inc., an exemption which also included the prohibition of cold calling, it raised a new administrative objection on 13 February 1992.

12 By decision of 29 April 1992, the Minster for Finance rejected Alpine Investment's administrative objection. On 26 May 1992 Alpine Investments appealed to the Administrative Court.

13 Alpine Investments pleaded in particular that the prohibition of cold calling was incompatible with Article 59 of the Treaty in so far as it concerned potential clients established in Member States other than the Netherlands. The Administrative

Court referred several questions on the interpretation of that provision to the Court of Justice:

'(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)?

(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?'

14 It should be noted as a preliminary point that, were it applicable to transactions on commodities futures markets, Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field (OJ 1993 L 141, p. 27) post-dates the events which gave rise to the main proceedings. Furthermore, Council Directive 85/577/EEC of 20 December 1985 concerning the protection of consumers in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31) applies neither to contracts concluded by telephone nor to contracts for securities (Article 3(2)(e)).

15 The questions referred to the Court must therefore be examined solely in the light of the Treaty provisions on the freedom to provide services. It is common ground that, since they were provided for remuneration, the services provided by Alpine Investments are services covered by Article 60 of the EEC Treaty.

16 The national court's first and second questions essentially ask whether the prohibition of cold calling falls within the scope of Article 59 of the Treaty. If so, its third question asks whether that prohibition may none the less be justified.

The first question

17 There are two aspects to the national court's first question.

18 First, it asks whether the fact that the services in question are just offers without, as yet, an identifiable recipient of the service precludes application of Article 59 of the Treaty.

19 The freedom to provide services would become illusory if national rules were at liberty to restrict offers of services. The prior existence of an identifiable recipient cannot therefore be a condition for application of the provisions on the freedom to provide services.

20 The second aspect of the question is whether Article 59 covers services which the provider offers by telephone to persons established in another Member State and which he provides without moving from the Member State in which he is established.

21 In this case, the offers of services are made by a provider established in one Member State to a potential recipient established in another Member State. It follows from the express terms of Article 59 that there is therefore a provision of services within the meaning of that provision.

22 The answer to the first question is therefore that, on a proper construction, Article 59 of the EEC Treaty covers services which the provider offers by telephone to potential recipients established in other Member States and provides without moving from the Member State in which he is established.

The second question

23 The national court's second question asks whether rules of a Member State which prohibit providers of services established in its territory from making unsolicited telephone calls to potential clients established in other Member States in order to offer their services constitute a restriction on freedom to provide services within the meaning of Article 59 of the Treaty.

24 The preliminary observation should be made that the prohibition at issue applies to the offer of cross-border services.

25 In order to reply to the national court's question, three points must be examined in turn.

26 First, it must be determined whether the prohibition against telephoning potential clients in another Member State without their prior consent can constitute a restriction on freedom to provide services. The national court draws the Court's attention to the fact that providers established in the Member States where the potential recipients reside are not necessarily subject to the same prohibition or in any event not on the same terms.

27 A prohibition such as that at issue in the main proceedings does not constitute a restriction on freedom to provide services within the meaning of Article 59 solely by virtue of the fact that other Member States apply less strict rules to providers of similar services established in their territory (see the judgment in Case C-379/92 *Peralta* [1994] ECR I-3453, paragraph 48).

28 However, such a prohibition deprives the operators concerned of a rapid and direct technique for marketing and for contacting potential clients in other Member States. It can therefore constitute a restriction on the freedom to provide cross-border services.

29 Secondly, it must be considered whether that conclusion may be affected by the fact that the prohibition at issue is imposed by the Member State in which the provider is established and not by the Member State in which the potential recipient is established.

30 The first paragraph of Article 59 of the Treaty prohibits restrictions on freedom to provide services within the Community in general. Consequently, that provision covers not only restrictions laid down by the State of destination but also those laid down by the State of origin. As the Court has frequently held, the right freely 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 (see Case C-18/93 *Corsica Ferries Italia* v *Corpo dei Piloti del Porto di Genova* [1994] ECR I-1783, paragraph 30; *Peralta*, cited above, paragraph 40, and Case C-381/93 *Commission* v *France* [1994] ECR I-5145, paragraph 14).

31 It follows that the prohibition of cold calling does not fall outside the scope of Article 59 of the Treaty simply because it is imposed by the State in which the provider of services is established.

32 Finally, certain arguments adduced by the Netherlands Government and the United Kingdom must be considered.

33 They submit that the prohibition at issue falls outside the scope of Article 59 of the Treaty because it is a generally applicable measure, it is not discriminatory and neither its object nor its effect is to put the national market at an advantage over

providers of services from other Member States. Since it affects only the way in which the services are offered, it is analogous to the non-discriminatory measures governing selling arrangements which, according to the decision in Joined Cases C-267 and 268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 16, do not fall within the scope of Article 30 of the Treaty.

34 Those arguments cannot be accepted.

35 Although a prohibition such as the one at issue in the main proceedings is general and non-discriminatory and neither its object nor its effect is to put the national market at an advantage over providers of services from other Member States, it can none the less, as has been held above (see paragraph 28), constitute a restriction on the freedom to provide cross-border services.

36 Such a prohibition is not analogous to the legislation concerning selling arrangements held in *Keck and Mithouard* to fall outside the scope of Article 30 of the Treaty.

37 According to that judgment, the application to products from other Member States of national provisions restricting or prohibiting, within the Member State of importation, certain selling arrangements is not such as to hinder trade between Member States so long as, first, those provisions apply to all relevant traders operating within the national territory and, secondly, they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. The reason is that the application of such provisions is not such as to

prevent access by the latter to the market of the Member State of importation or to impede such access more than it impedes access by domestic products.

38 A prohibition such as that at issue is imposed by the Member State in which the provider of services is established and affects not only offers made by him to addressees who are established in that State or move there in order to receive services but also offers made to potential recipients in another Member State. It therefore directly affects access to the market in services in the other Member States and is thus capable of hindering intra-Community trade in services.

39 The answer to the second question is therefore that rules of a Member State which prohibit providers of services established in its territory from making unsolicited telephone calls to potential clients established in other Member States in order to offer their services constitute a restriction on freedom to provide services within the meaning of Article 59 of the Treaty.

The third question

40 The national court's third question asks whether imperative reasons of public interest justify the prohibition of cold calling and whether that prohibition must be considered to be objectively necessary and proportionate to the objective pursued.

41 The Netherlands Government argues that the prohibition of cold calling in off-market commodities futures trading seeks both to safeguard the reputation of the Netherlands financial markets and to protect the investing public.

42 Financial markets play an important role in the financing of economic operators and, given the speculative nature and the complexity of commodities futures contracts, the smooth operation of financial markets is largely contingent on the confidence they inspire in investors. That confidence depends in particular on the existence of professional regulations serving to ensure the competence and trustworthiness of the financial intermediaries on whom investors are particularly reliant.

43 Although the protection of consumers in the other Member States is not, as such, a matter for the Netherlands authorities, the nature and extent of that protection does none the less have a direct effect on the good reputation of Netherlands financial services.

44 Maintaining the good reputation of the national financial sector may therefore constitute an imperative reason of public interest capable of justifying restrictions on the freedom to provide financial services.

45 As for the proportionality of the restriction at issue, it is settled case-law that requirements imposed on the providers of services must be appropriate to ensure achievement of the intended aim and must not go beyond that which is necessary in order to achieve that objective (see Case C-288/89 *Collectieve Antennevoorziening Gouda and Others* v *Commissariat voor de Media* [1991] ECR I-4007, paragraph 15).

46 As the Netherlands Government has justifiably submitted, in the case of cold calling the individual, generally caught unawares, is in a position neither to ascertain the risks inherent in the type of transactions offered to him nor to compare the quality and price of the caller's services with competitors' offers. Since the com-

modities futures market is highly speculative and barely comprehensible for non-expert investors, it was necessary to protect them from the most aggressive selling techniques.

47 Alpine Investments argues however that the Netherlands Government's prohibition of cold calling is not necessary because the Member State of the provider of services should rely on the controls imposed by the Member State of the recipient.

48 That argument must be rejected. The Member State from which the telephone call is made is best placed to regulate cold calling. Even if the receiving State wishes to prohibit cold calling or to make it subject to certain conditions, it is not in a position to prevent or control telephone calls from another Member State without the cooperation of the competent authorities of that State.

49 Consequently, the prohibition of cold calling by the Member State from which the telephone call is made, with a view to protecting investor confidence in the financial markets of that State, cannot be considered to be inappropriate to achieve the objective of securing the integrity of those markets.

50 Alpine Investments also argues that a general prohibition of telephone canvassing of potential clients is not necessary for the achievement of the objectives pursued

by the Netherlands authorities. Requiring broking firms to tape-record unsolicited telephone calls made by them would suffice to protect consumers effectively. Such rules have moreover been adopted in the United Kingdom by the Securities and Futures Authority.

51 That point of view cannot be accepted. As the Advocate General correctly states in point 88 of his Opinion, the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate and hence incompatible with Community law.

52 Alpine Investments argues finally that, since it is of a general nature, the prohibition of cold calling does not take into account the conduct of individual undertakings and accordingly imposes an unnecessary burden on undertakings which have never been the subject of complaints by consumers.

53 That argument must also be rejected. Limiting the prohibition of cold calling to certain undertakings because of their past conduct might not be sufficient to achieve the objective of restoring and maintaining investor confidence in the national securities markets in general.

54 In any event, the rules at issue are limited in scope. First, they prohibit only the contacting of potential clients by telephone or in person without their prior agreement in writing, while other techniques for making contact are still permitted. Next, the measure affects relations with potential clients but not with existing clients who may still give their written agreement to further calls. Finally, the prohibition of unsolicited telephone calls is limited to the sector in which abuses have been found, namely the commodities futures market.

55 In the light of the above, the prohibition of cold calling does not appear disproportionate to the objective which it pursues.

56 The answer to the third question is therefore that Article 59 does not preclude national rules which, in order to protect investor confidence in national financial markets, prohibit the practice of making unsolicited telephone calls to potential clients resident in other Member States to offer them services linked to investment in commodities futures.

Costs

57 The costs incurred by the Belgian, Netherlands and Greek Governments, the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the College van Beroep voor het Bedrijfsleven by order of 28 April 1993, hereby rules:

1. **On a proper construction, Article 59 of the EEC Treaty covers services which the provider offers by telephone to potential recipients established in other Member States and provides without moving from the Member State in which he is established.**

2. **Rules of a Member State which prohibit providers of services established in its territory from making unsolicited telephone calls to potential clients established in other Member States in order to offer their services constitute a restriction on freedom to provide services within the meaning of Article 59 of the Treaty.**

3. **Article 59 does not preclude national rules which, in order to protect investor confidence in national financial markets, prohibit the practice of making unsolicited telephone calls to potential clients resident in other Member States to offer them services linked to investment in commodities futures.**

Rodríguez Iglesias Schockweiler Kapteyn

Gulmann Mancini Moitinho de Almeida

Murray Edward Puissochet

Delivered in open court in Luxembourg on 10 May 1995.

R. Grass — Registrar

G. C. Rodríguez Iglesias — President