OPINION OF ADVOCATE GENERAL LENZ

delivered on 19 March 1996 *

A — Introduction

1. This action is brought by the Commission against the Italian Republic for failure to fulfil its obligations under the Treaty, on the ground of the enactment of Law No 1 of 2 January 1991 regulating the exercise of the activity of dealing in securities and the organization of the securities market (hereinafter 'the Law'), [1] which it considers to be in breach of Articles 52 and 59 of the Treaty.

2. The subject-matter regulated indisputably falls within the material scope of Council Directives 93/22/EEC of 10 May 1993 on investment services in the securities field [2] and 93/6/EEC of 15 March 1993 on the capital adequacy of investments firms and credit institutions, [3] but as their temporal scope commences only after the material period for the present proceedings, [4] they are not relevant to the decision in the present case.

3. The Commission's attention was drawn to the contested legislation by a number of complaints from traders who considered that their business activity was obstructed by the Law.

4. The Law prescribes that securities dealers who are not banks [5] must, in order to obtain authorization, *inter alia* be constituted in the form of a share company or partnership limited by shares, the registered office must be

* Original language: German.

1 — *Gazzetta Ufficiale della Repubblica Italiana*, 4 January 1991, No 3.

2 — OJ 1993 L 141, p. 27.

3 — OJ 1993 L 141, p. 1.

4 — Under Article 31 of Directive 93/22 the Member States were to adopt the necessary laws, regulations and administrative provisions by 1 July 1995, and these had to enter into force by 31 December 1995. See also Article 12 of Directive 93/6, which refers to Article 31(2) of Directive 93/22.

5 — According to the Commission, the restrictions do not apply to banks or to finance companies of which at least 90% is controlled by banks. See Decreto Legislativo No 385 of 1 September 1985, *Gazzetta Ufficiale della Repubblica Italiana* No 230, 30 September 1993, Ordinary Supplement.

in Italy, and the firm's name must include the description '*società di intermediazione mobiliare*' [6] (hereinafter 'SIM').

5. As a result of those absolute conditions for authorization, securities dealers from other Member States are prevented from operating in the Italian market through a branch or agency. They are also prohibited from providing trans-frontier services without changing location. Transactions on the initiative of natural and legal persons from other Member States are — according to the Commission — forbidden.

6. The *Commission* submits that the restriction has a very wide-ranging effect, since the definition of the securities transactions concerned in Article 1(1) of the Law is very broad. It regards the Law as a protectionist measure. Breaches of the Law are penalized by the nullity of the transaction and the threat of criminal penalties.

7. The Commission expressly indicates that it does not wish to be understood as demanding the automatic and unconditional recognition of the authorization of securities dealers from other Member States. It does, on the other hand, criticize the absolute nature of the restriction. It submits that there is an obligation in Community law, deriving from Articles 52 and 59 of the EC Treaty, to take into account, in the context of the authorization procedure, the factual and legal circumstances applicable to securities dealers of other Member States. In certain cases they have a subjective right to authorization. The Member State must provide for a procedure, with legal protection, in the framework of which recognition may take place.

8. The *Italian Government* does not dispute the factual circumstances adduced by the Commission nor the consequences flowing from them. It submits, however, that the enactment of the Law serves the protection of general interests, such as the protection of investors and the stability of the capital market, and is therefore justified. Stability and transparency of the markets are also acknowledged as deserving protection in the statute of the European Central Bank, for example, and, applying Article 36 of the Treaty by analogy, should also be accepted within the scope of Articles 52 and 59.

9. It submits that because of the specific nature of the sector there is a need for prior

6 — Company or partnership dealing in securities.

harmonization before recognition, and that was also accepted in the Commission's White Book on the implementation of the internal market. [7] Because of the special features of the market and the interests to be protected, only equivalent rules could be recognized. Without common minimum rules even partial recognition is not possible, since the whole regulatory context is material. In that respect the direct applicability of Articles 52 and 59 comes up against its limits. Moreover, if the Commission's view was correct, the directives which have been adopted would be superfluous.

10. The Commission asks the Court to:

(1) declare that, by restricting dealing in securities by dealers who are not banks to firms whose registered office is in Italy and which satisfy further conditions which non-Italian companies are not able to satisfy (in particular the inclusion of the words '*Società di intermediazione mobiliare*' in the firm's name), and by failing to provide for a suitable procedure in which account may be taken in relation to dealers from other Member States of compliance with the requirements of the Italian legislation on dealing in securities or with equivalent requirements of the legislation of the Member State of origin while avoiding duplication of requirements, the Italian Republic has failed to fulfil its obligations under Article 52 of the EC Treaty;

(2) declare that, by restricting dealing in securities to dealers whose registered office is in Italy and requiring compliance with all the Italian legislation by dealers other than banks from other Member States who wish to provide services on a cross-frontier basis, without taking account of situations in which those provisions do not satisfy the criteria of indispensability, proportionality and the prevention of duplication of requirements with regard to the legislation of the Member State of origin, the Italian Republic has failed to fulfil its obligations under Article 59 of the EC Treaty;

(3) order the Italian Republic to pay the costs.

11. The Italian Republic asks the Court to:

(1) dismiss the application;

7 — Commission White Book addressed to the European Council, 'Completion of the Internal Market', June 1985.

(2) order the Commission to pay the costs.

12. I shall come back to details of the facts and the submissions of the parties in my discussion of the legal position.

B — Opinion

I — *Preliminary observation*

13. The matter regulated by the contested law lies in the border area of freedom of establishment, freedom to provide services and free movement of capital. Common to those freedoms is the fact that they are fundamental freedoms of Community law. While the basic provisions of the Treaty on freedom of establishment and freedom to provide services were directly applicable, according to the Court's case-law, [8] even before the expiry of the transitional period, the position with free movement of capital is in principle different. Here the Court has recognized in principle that the Council has the prerogative of making decisions. [9]

14. It is appropriate to keep the matters separate, as the Treaty provides for exceptions to the general rules on both freedom of establishment and freedom to provide services, with respect to the movement of capital. [10]

15. The second paragraph of Article 52 provides:

'Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings ... under the conditions laid down for its own nationals by the law of the country where such establishment is effected, *subject to the provisions of the Chapter relating to capital*'. [11]

16. Article 61(2) provides:

'The liberalization of banking and insurance services connected with movements of

8 — Judgments in Case 2/74 *Reyners* v *Belgium* [1974] ECR 631 and Case 33/74 *Van Binsbergen* v *Bedrijfsvereniging Metaalnijverheid* [1974] ECR 1299.

9 — Judgment in Case 203/80 *Casati* [1981] ECR 2595.

10 — See the judgment in Case 267/86 *Van Eycke* v *ASPA* [1988] ECR 4769, paragraph 22 et seq.

11 — My emphasis.

capital shall be effected in step with the progressive liberalization of movement of capital.'

17. Those provisions of the Treaty suggest that freedom of establishment and freedom to provide services are to a certain extent accessory to the liberalization of movement of capital. The question thus arises to what extent the general rules on freedom of establishment and freedom to provide services, as characterized by the case-law of the Court of Justice, may be applicable in view of the reservations in the Treaty. In particular, the question is to what extent the respective degree of liberalization of movement of capital sets a limit to the applicability of freedom of establishment and freedom to provide services. [12]

18. In order to determine any reciprocal effects there may be between free movement of capital on the one hand and freedom of establishment and freedom to provide services on the other, one must first examine the extent of the liberalization of movement of capital which has been achieved and any effect it has on the sphere of activity of the operators affected by the Italian law.

19. Although the original version of Article 3(c) of the EEC Treaty already spoke of 'the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital' as an aim of the Community, it was not until the Single European Act of 1987 that free movement of capital was equated with the other fundamental freedoms, in the second paragraph of Article 8a of the Treaty. That provision states that the internal market is to comprise 'an area without internal frontiers in which the free movement of goods, persons, services and *capital* is ensured'. [13] The requirement in the first paragraph of Article 8a of the progressive establishment of the internal market by 31 December 1992 set a time-limit for the implementation of the necessary measures. The 'movement of capital directive' 88/361/EEC [14] repealed all the earlier directives on Article 67 [15] and brought free movement of capital into effect on expiry of the transposition period on 1 July 1990. [16] The provisions on free movement of capital and payments inserted into the EC Treaty by the Treaty on European Union [17] (Articles 73b

12 — *Van Eycke*, cited in note 10, paragraph 23 et seq.

13 — My emphasis.

14 — Council Directive of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5).

15 — Ibid., Article 9.

16 — Ibid., Article 6.

17 — Treaty on European Union of 7 February 1992 (OJ C 224 of 31.8.1992).

to 73g) are based on the principles set out in Directive 88/361.

20. Directive 88/361 contains in its Annex I, which is based on Article 1 of the directive, a non-exhaustive [18] nomenclature classifying the matter regulated or liberalized. For clarification, I shall quote extracts from the annex.

21. The introductory section states, for example:

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

...

— access for the economic operator to all the financial techniques available on the market approached for the purpose of carrying out the operation in question. For example, the concept of acquisition of securities and other financial instruments covers not only spot transactions but also all the dealing techniques available: forward transactions, transactions carrying an option or warrant, swaps against other assets, etc. ...

...'.

Further on in the Annex:

'III — OPERATIONS IN SECURITIES NORMALLY DEALT IN ON THE CAPITAL MARKET (not included under I, IV and V)

(a) *Shares and other securities of a participating nature.*

(b) *Bonds.*

18 — See the last paragraph of the first section of Annex I.

A — Transactions in securities on the capital market

1. Acquisition by non-residents of domestic securities dealt in on a stock exchange.

2. Acquisition by residents of foreign securities dealt in on a stock exchange.

3. Acquisition by non-residents of domestic securities not dealt in on a stock exchange.

4. Acquisition by residents of foreign securities not dealt in on a stock exchange.

B — Admission of securities to the capital market

(i) *Introduction on a stock exchange.*

(ii) *Issue and placing on a capital market.*

1. Admission of domestic securities to a foreign capital market.

2. Admission of foreign securities to the domestic capital market.'

22. Finally, heading V reads:

'V — OPERATIONS IN SECURITIES AND OTHER INSTRUMENTS NORMALLY DEALT IN ON THE MONEY MARKET

A — Transactions in securities and other instruments on the money market

1. ...

2. ...

B — Admission of securities and other instruments to the money market

(i) ...

(ii) ...'.

23. The above classification makes it clear that the things traded by securities dealers were already liberalized before the enactment of the Law. That finding is confirmed by the list of instruments in the Annex to Directive 93/22 on services in the securities field, which reads:

'SECTION B

Instruments

1. (a) Transferable securities.

(b) Units in collective investment undertakings.

2. Money-market instruments.

3. Financial-futures contracts, including equivalent cash-settled instruments.

4. Forward interest-rate agreements (FRAs).

5. Interest-rate, currency and equity swaps.

6. Options to acquire or dispose of any instruments falling within this section of the Annex, including equivalent cash-settled instruments. This category includes in particular options on currency and on interest rates.'

24. It follows from the above that no restrictions of the scope of the rules on freedom of establishment and freedom to provide services are to be effected by the provisions on movement of capital with respect to the subject of the present case. That is all the more so in that the focus of this action for failure to fulfil Treaty obligations is on *whether* securities dealers from other Member States can pursue their business activity, the type of deals thus being of only subordinate importance. There is therefore no obstacle to an examination of the principles of freedom of establishment and freedom to provide services.

II — *Freedom of establishment*

25. The Commission's application complaining of an infringement by the Italian legislature of the Community rules on freedom of establishment and freedom to provide services is a mixture of attack and anticipation of the Italian Government's defence submissions, known from the pre-litigation procedure. The Commission's argument on Article 52 of the Treaty can essentially be summarized as follows:

The Commission regards it as in breach of Article 52 that foreign securities dealers must, to be able to operate on the Italian market, set up an Italian company with a prescribed corporate form and designation. Since the seat of a company determines its nationality for the purposes of Community law, that means that foreign securities dealers are compelled to assume another nationality, since they cannot pursue their activity through a branch or agency. That constitutes discrimination contrary to Community law. Foreign securities dealers are faced with a duplication of conditions for access to their occupation, by having to incur the trouble and expense of setting up a firm both in their home State and in Italy. That duplication, even though caused by rules which are applicable without distinction, constitutes a breach of Article 52 of the Treaty.

26. In order to prevent duplication of conditions for access, there is, according to the Commission, an obligation under Community law to carry out an examination of the equivalence of the conditions already complied with in the other Member State, which could for example take place within the framework of an authorization procedure. An authorization procedure as such raises no problems. Italian securities dealers too are subject to an authorization procedure and continuous monitoring by the competent supervisory bodies. [19] In examining the conditions for authorization, it cannot be required that they should be identical to the conditions applicable to Italian companies, but only that they should be equivalent. An examination of equivalence is also actually possible, since the systems in the individual States are effectively comparable. The Italian Government has not asserted that the Italian

19 — Consob — Commissione Nazionale per le Società e la Borsa.

system is *better* than that of other Member States, so that the individual details of the various systems are not necessarily material. That an examination of comparability in the sector in question can be done is moreover shown by a series of provisions in the Italian legal system, which the Commission refers to and discusses in detail.

27. Among those provisions it mentions Article 20(8) of the Law on recognition of the foreign official securities market, Articles 1(2) and 7(2)(b) of the Decree of 8 February 1988 on access by dealers established abroad to the telematic market for State loans, for whom a comparable control to that for Italian nationals is prescribed. The Commission further gives examples from pension funds administration and from provisions relating to the banking and credit sector, and remarks that no differences of principle between that sector and the activity of dealing in securities are apparent. Finally, the Commission refers to the proposed legislation submitted to the Commission by the Italian Government following the pre-litigation procedure with a view to eliminating the infringement of the Treaty, which would in itself be proof that an examination of comparability is possible.

28. The Commission does not accept the Italian Government's submission in its defence that the contested provisions concerning the corporate form, company seat and the obligation to use a specified trading name are justified under Article 56 of the Treaty. It argues that the Italian Government has not shown that the aims of the provisions, such as stability and transparency, satisfy the conditions for an exception on the grounds of public policy and public security. Such an exception presupposes a genuine danger to the public interest.

29. Informing the public about the activities of securities dealers could, in the Commission's view, perfectly well be done by a reference in the firm's name to the authorization of the securities dealer, and therefore need not go as far as prescribed by the Italian law. The exception, relied upon by the Italian Government, is to be interpreted restrictively, as a matter of principle. The principle of proportionality is also to be observed here, so that reliance on the exception fails in the present case.

30. The *Italian Government* adopts the position that the contested provisions of Law No 1 of 1991 are justified in the public economic interest. The company seat requirement serves the protection of investors and the stability of the markets. Certain conditions, as for example the provision of capital or compliance with prohibitions on participation, could be controlled only in the case of a company with its seat in Italy. If authorization were given to a secondary establishment of a foreign company, it would not be possible to guarantee all the circumstances regarded as material by the Italian legislature.

31. With regard to the argument as to checking equivalence in the context of an authorization procedure, the Italian Government adopts the view that there is more to it than the recognition of titles and diplomas. Continuous supervision must be ensured. Until a procedure for cooperation between the supervisory authorities of the Member States is institutionalized, that supervision is impossible. Production of documents and information is not sufficient. Moreover, it cannot be presumed that the systems of the other Member States are equivalent *per se*. There are different methods for calculation of capital cover, for instance. That was also reflected in the discussions on the adoption of Directive 93/6 on the capital adequacy of investments firms and credit institutions.

32. In the Italian Government's opinion, the Commission wishes to set up an obligation of recognition, which is not, however, required as such as a matter of Community law. As to the provisions mentioned by the Commission on the recognition of certain conditions from other European States for access to the market, the Italian Government counters that the examples mentioned by the Commission concern only parts of the market and relate to the regulated market; there are fundamental differences between the various sectors.

33. Freedom of establishment under Article 52 of the EC Treaty includes the abolition of restrictions on the setting up of agencies and branches by nationals — natural and legal persons — of any Member State established in the territory of any Member State.

34. Article 53, unchanged since the conclusion of the EEC Treaty, prescribes that Member States may not introduce any new restrictions in their territory on the establishment of nationals of other Member States. [20] The general opinion is that since the end of the transitional period that 'standstill obligation' has been subsumed into the more extensive prohibition of restrictions in the directly applicable Article 52 of the Treaty. In any event, however, Article 53 is an indication that newly enacted rules of Member States which may have restrictive effects must be examined especially carefully with respect to their restrictive effect.

35. Under Article 56, provisions laid down by law, regulation or administrative action providing for special treatment for foreigners are justified, in the context of freedom of establishment, only on grounds of public policy, public security or public health. That '*ordre public*' clause of Community law, which in principle is to be interpreted narrowly, relates expressly to 'special treatment', in other words to provisions which have discriminatory effect, for a clearly defined and strictly limited purpose. [21]

20 — Judgment in Case 48/75 *Royer* [1976] ECR 497, paragraph 74.

21 — Public order, public security and public health.

36. For provisions of Member States which are applicable without distinction, there is expressly no justification rule in the Treaty. Nevertheless, provisions which are applicable without distinction — one need only mention the wide field of provisions regulating professions [22] — can also have restrictive effects. [23] Such legal or administrative provisions are then compatible with Community law only if they are justified by imperative reasons of the public interest and are suitable and necessary for attaining the aim pursued, that is, proportionate. [24] A generalization of the provisions which are in principle lawful or unlawful in Community law is therefore not possible. It is thus necessary to examine the specific rules in their regulatory context in each case.

37. The law at issue, Law No 1 of 1991, is a law applicable without distinction, for whose examination from the point of view of Community law the evaluation process described above is to be used. Although applicable without distinction, the law largely has the effect of an absolute prohibition of the activity of foreign securities dealers on the Italian market.

38. The Commission informed the Court at the hearing that Law No 1 of 1991 was a completely new regulation of a previously largely unregulated field. In view of the Member States' standstill obligation and the Community-law prohibition of restrictions, such abruptly introduced rules, subsequent in time to the liberalization of capital services, appear especially problematic. That impression is reinforced by the fact that the Law was enacted at a time when at political level the creation of an economic and currency union was being worked towards. [25]

39. Whether the provisions of the Law are justified in the public interest thus requires closer consideration.

40. If one makes a European comparison of the relevant subject-matter, it is noticeable that in almost all the Member States laws or regulations were adopted in the late 1980s or early 1990s. In a period of less than ten years the legislatures of the Member States of the European Communities evidently recognized a need for regulation, even if the

22 — On the Member States' freedom to regulate, see, for instance, the judgments in Case C-61/89 *Bouchoucha* [1990] ECR I-3551, paragraph 12; Case C-340/89 *Vlassopoulou* [1991] ECR I-2357, paragraph 9; and Case C-104/91 *Aguirre Borrell and Others* [1992] ECR I-3003, paragraphs 5 and 7.

23 — See *Vlassopoulou*, cited in note 22, paragraph 15, and *Aguirre Borrell*, cited in note 22, paragraph 10.

24 — See the judgments in Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32, and Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37.

25 — Observation of the Commission at the hearing: This was just before the Maastricht Treaty and its Article 73b.

resulting legislation is not necessarily endowed with the same far-reaching consequences as the Italian law.

41. That objective appearance may be attributed factually to circumstances in the finance sector which are characterized by swift development and innovation. A very instructive description of the changes in the sector and the spread of new instruments is the Opinion of the Economic and Social Committee of 25 October 1995 on derivatives. [26] It can be seen from that Opinion that the total volume of derivatives traded over-the-counter — securities dealt in by the dealers regulated by the Italian Law No 1 of 1991 — increased more than tenfold from 1986 to 1992. [27] That those are instruments which make up a significant part of the business of the dealers in securities is shown by a reference in the Opinion [28] to the annex to the investment services directive, [29] Section B. [30]

42. The Opinion explicitly mentions:

'— Financial-futures contracts, including equivalent cash-settled instruments;

— forward interest-rate agreements (FRAs);

— interest-rate, currency and equity swaps; and

— options to acquire or dispose of any of the financial instruments referred to above, including equivalent cash-settled instruments. This category includes in particular options on currency and on interest rates.'

43. The own-initiative Opinion is addressed *inter alia* to the European Parliament and the Parliaments of the Member States [31] and is

26 — OJ 1996 C 18, p. 1.
27 — Ibid., table on p. 4.
28 — Ibid., point 1.1.3.
29 — Directive 93/22, cited above.
30 — The section is set out in full in point 23 above.

31 — See the references to addressees in the introduction.

intended essentially to contribute to clarification and the removal of fears resulting from lack of knowledge with respect to those financial instruments. [32]

44. Derivatives may be described, according to the Opinion, as 'financial instruments which allow investors to cover themselves against an adverse variation or benefit from an anticipated variation in the price of an "underlying" asset, such as shares, commodities, stock indices, exchange rates or interest rates'. [33] They are called 'derivatives' because their price trends depend on those of their underlying asset. [34] The value of these instruments appears in the 'off balance sheet items of credit institutions and investment firms'. [35]

45. The attention of the Economic and Social Committee is directed in the Opinion to the risks associated with those transactions. The study also shows, however, that the dangers arising from deals with these instruments are by no means radically new, [36] nor greater in money terms than those in other sectors. [37] In addition, existing weaknesses in the system are pointed out. [38] The Opinion permits the conclusion that the financial instruments described are capable of making the financial transactions of the economic operators concerned less uncertain [39] and that they thereby respond to a real economic need. [40]

46. The 'protection of investors, stability of the markets and transparency of dealing', which the Italian Government invokes, are indisputably worth protecting. The question is only whether the contested provision is suitable for pursuing those aims, and if so, whether it is proportionate.

47. One may ask whether risk management in relation to the transactions mentioned can be brought about by statutory provisions at all. There are in the Opinion of the Economic and Social Committee a number of indications which allow the conclusion that the essential risks ought to be limited and controlled by internal control systems. [41]

32 — See point 3.6.3. of the Opinion.
33 — Ibid., point 1.1.1.
34 — Ibid., point 1.1.2.
35 — Ibid., introduction, p. 1.
36 — Ibid., point 1.5.3.
37 — Ibid., point 3.0.4.
38 — Ibid., point 1.5.3.5.
39 — Ibid., points 1.5.1. and 1.5.2.
40 — Ibid., point 1.5.2.
41 — Ibid., point 1.5.3.5.

48. I add that it is possible for certain control procedures to be prescribed by law, but that rules of that type are different in principle from the rules challenged in the present case, the effect of which is like closing off the market.

49. Institutionalized supervision by supervisory authorities established for that purpose is *one* of the means of guaranteeing protection of the interests mentioned above. It is not in dispute that the sector is subject in Italy to supervision by Consob. [42] Securities dealers further require authorization, in order to operate on the Italian market. The requirement for authorization is neutral as a matter of Community law. [43] To obtain authorization, certain conditions must be satisfied, such as appropriate capital cover for the undertaking or the professional and personal suitability of the responsible persons. Such provisions, which serve the protection of investors, must also be complied with by a foreign economic operator, in order to operate on the Italian market through a branch. [44]

50. In the case of the authorization of foreign economic operators who are already established in another Member State and may well already have gone through an authorization procedure there, it must be noted, however, that fulfilment of the conditions corresponding to the requirements for authorization is to be recognized. With regard to authorization to carry on a profession, there is a duty in Community law to make a comparative examination of training, qualifications or professional experience obtained in another Member State. [45]

51. If fulfilment of all the requirements for authorization under the law of the Member State, or of ones identical to them, were required, that would indeed amount to a duplication or multiplication of the conditions of authorization for any economic operator active in more than one Member State, and hence to the maintenance of internal frontiers, which the Treaty aims to abolish.

52. The Italian Government's objection that the obligation to carry out a comparative examination would make uniform regulation by means of directives superfluous does not hold. While in the absence of harmonization it is ultimately the rules of the Member State alone which form the criterion, and there is merely a duty on the part of the Member State to examine for comparability and accept things done in the context of the legal system of another Member State in the person of an applicant for authorization, that

42 — See note 19.

43 — *Vlassopoulou* (cited in note 22), paragraphs 8, 9 and 16.

44 — *Gebhard* (cited in note 24), paragraphs 35 and 36.

45 — *Vlassopoulou*, paragraph 15 et seq.; *Aguirre Borrell*, cited above, paragraph 12; *Gebhard*, paragraph 38; and Case C-164/94 *Aranitis* [1996] ECR I-135, paragraph 31.

type of check becomes superfluous once a harmonization measure has been adopted: then the conditions satisfied by virtue of the law in another Member State count as equivalent, which moreover precludes the subjection of the branch establishment to an authorization procedure in the Member State. [46]

53. The Community-law obligations, deriving from directly applicable Treaty provisions, of partial recognition of things done in another Member State are thus not comparable with the effects of a harmonization directive, such as Directive 93/22, which has a scope going beyond the law of the Treaty. As a result of the harmonization rule, a substantial simplification occurs. The Italian Government's objection must therefore be rejected.

54. The question arises whether the condition imposed on securities dealers in addition to the requirement of authorization, namely to be established in the *form* of a share company or partnership, can stand up in Community law.

55. It could be argued as justification for that condition that the corporate form entails certain duties of publication or requires a minimum capital provision, for example, which serves the protection of investors. The measure's suitability for pursuing the desired aim thus cannot be dismissed altogether. The question is, however, whether the intensity of the measure is also necessary.

56. In my opinion it is not. Were capital cover or publicity requirements to prove indispensable, that requirement could be imposed by law on potential foreign securities dealers, and could be checked both in the authorization procedure and in the course of continuing supervision by the authorities. Linking it with a particular corporate form is thus unnecessary.

57. It must next be examined whether it is necessary in the interests of the aims pursued that the company has its *registered office* in the territory of the Italian State. If one assumes that the authorization procedure is appropriate, necessary and proportionate to the pursuit of the legitimate aims, authorization must then relate subjectively to a natural or legal person. That form of control is undoubtedly easier if the person is established in the territory of the Member State. That element can also be fulfilled by a branch or agency, so that the requirement of a registered office in the narrower sense is not in itself necessary. Presence in the territory is sufficient for the undertaking to be covered.

46 — See Directive 93/22.

58. Whether the requirement of a representation in the territory for exercise of the economic activity is justified need not be examined in the context of freedom of establishment, but will, however, be raised again in the context of freedom to provide services.

59. With respect to the aim of stability of markets, it is not evident why they should be endangered to a greater extent by transactions by foreign securities dealers authorized and established in the territory than by national companies. The desired transparency is in my opinion also not capable of justifying the registered office requirement, since the obligations of publicity which are regarded as important apply in the same way to all securities dealers operating in the territory, whatever the legal form in which they operate, and that is controlled by the authorities in the context of authorization and continuing supervision.

60. Finally, the question arises whether the compulsory requirement that securities dealers operating in Italian territory must use a specified *trading name* (*società di intermediazione mobiliare*, SIM) is compatible with Community law. That provision is subordinate to the choice of a specified corporate form with a registered office in Italy. It nevertheless has an independent character, since it reinforces the requirement of setting up an Italian company under certain regulated conditions. The designation '*società di intermediazione mobiliare*' serves to inform the public and explains the object of the company and the type of business carried on. That obligation to provide information may be classified under protection of investors.

61. As the Commission has rightly observed, that aim could equally well be attained by an indication in the trading name that the undertaking is authorized in Italy as a dealer in securities, which would be substantially less severe means than the strict imposition by law of the designation as SIM.

62. The requirement to use the description '*società di intermediazione mobiliare*' in the trading name of the dealer in securities must therefore be assessed as disproportionate.

63. In conclusion, the provisions of Law No 1 of 1991 enacted in the public interest, in so far as they have been challenged by the Commission, are to be regarded as inappropriate or disproportionate for attaining the aim pursued, so that they are not compatible with Article 52 of the Treaty.

III — *Freedom to provide services*

64. The *Commission's* view is that Law No 1 of 1991 infringes not only the principles of freedom of establishment but also those of freedom to provide services. The requirement of a registered office is quite simply the negation of the freedom to provide services. An establishment is not necessary for the provision of the services. Italian legislation may not insist that *all* the conditions prescribed by Italian law must be observed in the case of cross-frontier transactions.

65. In the Commission's opinion, the protection of investors and the stability of markets are admittedly to be recognized in principle as protected interests, but the Italian Government has not shown why all the rules of the Law must necessarily be applied. The Commission considers that only some of the rules are justified. In so far as the Italian rules are indispensable, they could be imposed on providers of services in an authorization procedure, whose criteria would have to be objective, realistic, proportionate and transparent. That partial subjection of foreign securities dealers to the national rules of law of a Member State and to the Member State's system of supervision is possible. As an example the Commission mentions participation in a guarantee fund. In any event, the necessary safeguards could be ensured by less severe measures than a requirement of establishment.

66. The Commission submits that the arguments it put forward to refute the arguments used by the Italian Government to justify the measure in the context of freedom of establishment must apply *a fortiori* in the context of freedom to provide services.

67. Finally, in so far as the Italian Government demands equal treatment with other Member States which have enacted laws of comparable content, the Commission counters that the provisions adopted to regulate the sector are less restrictive [47] than the Italian ones, or that the Member States submitted draft laws [48] for the transposition of Directives 93/6 and 93/22, enactment of which avoided a possible breach of the Treaty.

68. The *Italian Government* holds to its position that the requirement of a registered office is indispensable. Cross-frontier provisions of services are by no means less dangerous than transactions originating with dealers established in Italy. The provisions enacted in the public interest must certainly apply in the context of freedom to provide services. That is also the case in order to counteract circumventions of Italian law by an establishment abroad.

47 — The United Kingdom, Spain, France and Germany.
48 — Belgium.

69. It argues that until the cooperation of the Member States' supervisory authorities is institutionalized, effective supervision and provision of sanctions is not ensured.

70. The services concerned as a rule in this context are services by correspondence, that is, neither the provider nor the recipient of the services has to cross a frontier in order to implement the transaction. The cross-frontier exchange of data is done by means of telecommunications. The financial services market is positively predestined for that sort of procedure.

71. The Opinion, referred to above, of the Economic and Social Committee states that, according to Forex data, almost half (49%) of foreign currency transactions consist of very short-term positions (between 30 minutes and five hours). [49]

72. The question whether such services by correspondence are services within the meaning of the Treaty and hence come under Article 59 received an affirmative answer in *Alpine Investments* [50] with respect to the soliciting of clients by telephone. The Court held: '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.' [51]

73. That statement may be applied fully to the present case. It may even be intensified further if one refers not only to *offers* of services but to services. [52]

74. The analytical structure of the principles of freedom to provide services is parallel to that of the principles of freedom of establishment. Article 62 contains a standstill obligation [53] comparable to that in Article 53 of the Treaty, but which is generally considered, since the end of the transitional period, not to have any effect going beyond the prohibition of restrictions deriving from the directly applicable Article 59. That standstill obligation, which was not repealed in any of the Treaty revisions since conclusion of the EEC Treaty, is nevertheless an indication of the special care, required by Community law, which the legislature of a Member State must exercise when enacting provisions which

49 — See point 1.4.3 of the Opinion.

50 — Judgment in Case C-384/93 *Alpine Investments* v *Minister van Financiën* [1995] ECR I-1141.

51 — Ibid., paragraph 21.

52 — Other services by correspondence which have already been treated by the Court as services within the meaning of the Treaty: television broadcasts, judgment in Case 352/85 *Bond van Adverteerders* v *Netherlands* [1988] ECR 2085; cable television, judgment in Case C-23/93 *TV10* v *Commissariaat voor de Media* [1994] ECR I-4795; insurance contracts, judgment in Case 205/84 *Commission* v *Germany* [1986] ECR 3755; advising on patents, judgment in Case C-76/90 *Säger* v *Dennemeyer* [1991] ECR I-4221; and lotteries, judgment in Case C-275/92 *Customs and Excise* v *Schindler* [1994] ECR I-1039.

53 — See the *Royer* judgment, cited in note 20, paragraph 74.

may potentially restrict the freedom to provide services.

75. Exceptions to the prohibition of discrimination, which essentially forms the content of freedom to provide services, are permissible only in the context of the public policy (*ordre public*) clause of Article 56, via Article 66. Since the present case concerns rules which are applicable without distinction, however, there is no need for further discussion of that exception.

76. The settled case-law of the Court is that in view of the particular characteristics of certain provisions of services, specific requirements, applicable without distinction, imposed on the provider of services are not to be regarded as incompatible with the Treaty if they result from the application of rules governing those types of activities. [54] 'However, as a fundamental principle of the Treaty, the freedom to provide services may be limited only by rules which are justified by imperative reasons relating to the public interest and which apply to all persons or undertakings pursuing an activity in the State of destination, in so far as that interest is not protected by the rules to which the person providing the services is subject in the Member State in which he is established. In particular, those requirements must be objectively necessary in order to ensure compliance with professional rules and to guarantee the protection of the recipient of services and they must not exceed what is necessary to attain those objectives.' [55]

77. Before examining whether imperative reasons of the public interest within the meaning of the above case-law are capable of justifying the provisions challenged by the Commission, the nature of the criticized restrictions must first be defined. Subjecting potential providers of services to an authorization procedure certainly has a restrictive effect, but is not in itself objected to by the Commission and may as such be consistent with Community law. [56] It is only certain details of the conditions of authorization, which have been discussed in my observations on freedom of establishment, [57] which are criticized by the Commission.

78. Of decisive importance for the provision of services is the Italian legislation's requirement as to registered office, which is in practice the negation of the freedom to provide services. [58] 'It has the result of depriving Article 59 of the Treaty of all effectiveness, a provision whose very purpose is to abolish restrictions on the freedom to provide services of persons who are not established in

54 — See the judgments in *Säger*, cited in note 52, paragraph 15, and *Commission* v *Germany*, cited in note 52, paragraph 27.

55 — Judgment in *Säger*, cited in note 52, paragraph 15.

56 — Judgment in Case 279/80 *Webb* [1981] ECR 3305, paragraph 19.

57 — Corporate form and trading name.

58 — See the judgment in *Commission* v *Germany*, cited in note 52, paragraph 52.

the State in which the service is to be provided... If such a requirement is to be accepted, it must be shown that it constitutes a condition which is *indispensable* for attaining the objective pursued.' [59]

79. It must therefore be examined whether the requirement of a registered office is an *indispensable* condition for ensuring the protection of investors and the stability of markets, the protected interests put forward by the Italian Government.

(a) Protection of investors

80. The protection of investors has several aspects. To begin with, there are objective safeguards, such as the capital reserves of the company providing the service. Then there are subjective elements, as for instance the professional qualifications and probity of the responsible persons. Finally, the legal order relevant for the transaction may be of importance, with respect, for example, to whether or not certain consumer protection rules are applicable. The first two elements, the objective and personal safeguards, may be made conditions of authorization in the framework of the authorization procedure, with account having to be taken of any conditions which have already been satisfied in the State of origin. [60]

81. It is different with general consumer protection legislation. The various rules cannot simply be exported or imported. The Italian Government argues in this connection that transactions with foreign business partners on the initiative of operators established in Italian territory are possible because those operators submit of their own accord to the protection of the Italian legal system.

82. Before losing the way in speculations as to whether consumer protection rules could be applicable and if so which ones, I consider it useful to delimit the class of potential business partners. The Economic and Social Committee's Opinion on derivatives, already cited more than once, [61] describes the players on the market for the instruments examined in the study as follows: [62]

59 — Ibid., my emphasis.

60 — Judgment in Joined Cases 110/78 and 111/78 *Ministère Public* v *Van Wesemael* [1979] ECR 35, paragraph 39, and paragraph 3 of the operative part; judgment in *Webb*, cited in note 56, paragraphs 17, 20 and 21, and paragraph 2 of the operative part.

61 — See note 26.

62 — Point 1.3 of the Opinion.

'These fall into two main categories: middlemen and end users.

... Middlemen (banks, investment firms) act either for third parties, in which case they are merely brokers and undertake no risks themselves, or on their own account as counterparties. The two roles may be performed simultaneously.' [63]

The Opinion then says:

'The main end users [64] are:

— Banks or financial middlemen using derivatives as part of their asset management activities;

— Institutional investors, investment funds, insurance companies, pension funds, ...;

— Industrial and commercial companies;

— States and local authorities. Many States and international organizations use derivatives, as do British, French and American local authorities.' [65]

83. Apart from the fact that the business deals in question are such that it is not always clear which of the contracting parties is the provider of the services and which the recipient, [66] they are always economic operators or organizations who are familiar with the sector and are not defenceless before the bargaining power of the financial institutions.

84. The consumer who deserves protection, in the person of the private saver, does not occur in deals of this type. In that respect the present case is quite different from Case C-384/93, [67] for instance, where any private customer could potentially by a telephone call become the recipient of the services of the finance company. The facts of Case 205/84 [68] are not comparable with the present case either. That case concerned potential insured persons as parties to contracts, who could in that capacity be subjects

63 — Point 1.3.1 of the Opinion.

64 — A footnote at this point states: 'This list is a guide'.

65 — Point 1.3.2 of the Opinion.

66 — See the passage quoted in point 82 above, 'The two roles may be performed simultaneously'.

67 — *Alpine Investments*, cited in note 50.

68 — *Commission* v *Germany*, cited in note 52.

of protective laws. Finally, this is also not a situation such as in Case C-106/91, [69] which concerned the question whether an auditor who personally moves to the host State to provide services must also maintain business premises there.

85. In transactions regulated by the contested provisions, the assessment of risk is in principle a matter for the various operators involved in the transaction. Assessment of the soundness and solvency of the business partner cannot be substituted by any rule of law.

86. In conclusion, I consider that neither the protection of investors in general nor the protection of consumers in particular constitutes a justification for the requirement as to registered office. That requirement is neither appropriate nor necessary to effect an improvement of protection of investors. The registered office requirement would moreover also be disproportionate, since it offers no more safeguards than the requirement of authorization. It therefore remains to examine whether the aim of protection of 'stability of markets' is capable of justifying the requirement.

69 — Case C-106/91 *Ramrath* [1992] ECR I-3351.

(b) Stability of markets

87. With respect to the risk content of financial transactions which may in certain circumstances be liable to endanger the stability of the markets, I regard it as elemental to start from the fact that in the legislative estimation of the Italian legislature the risk does not really originate in the service's crossing of a frontier. According to the undisputed submissions of the Commission, cross-frontier securities services on the initiative of an operator established in Italian territory are permissible. It is only the reversal of the roles of the parties as to offer and acceptance in concluding the contract for the services that brings about the nullity of the transaction and is regarded as a criminal offence. I am unable to see how the transaction could become more risky depending on which of the parties to the deal, this side or that side of the frontier, initiates the transaction.

88. When the Italian Government argues that the registered office requirement must be maintained until the cooperation of the Member States' supervisory authorities is institutionalized, that argument is based on the legitimate requirement of continuous

supervision of the sector. Supervision by the authorities is, however, different in principle from the prevention of business operations altogether.

89. Until a uniform framework for the continuing cooperation of the supervisory authorities is established, the individual Member State cannot be denied the right to extend its supervisory law to transactions which touch its territory. The subjection of foreign providers of services to the requirement of authorization is necessary and appropriate to achieve that aim. The legal and factual situation is in my opinion close to that of Case 205/84. [70] In that case the defendant Government argued that the necessary supervision of the insurance sector could not be carried out without an authorization procedure for insurers which made it possible 'to investigate the undertaking before it commences its activities, to monitor those activities continuously and to withdraw the authorization in the event of serious and repeated infringements'. [71] The Court did not reject that argument, and acknowledged that 'in the present state of Community law, it is for the State in which the service is to be provided to grant and withdraw that authorization'. [72] That legal assessment can be applied to the present case.

90. The special conditions of authorization deriving from Community law were formulated by the Court as follows:

'It should however be emphasized that the authorization must be granted on request to any undertaking established in another Member State which meets the conditions laid down by the legislation of the State in which the service is provided, that those conditions may not duplicate equivalent statutory conditions which have already been satisfied in the State in which the undertaking is established and that the supervisory authority of the State in which the service is provided must take into account supervision and verifications which have already been carried out in the Member State of establishment.' [73]

91. Following the harmonization by Directive 93/22 there will be a substantial simplification of the provision of services, in that authorization in the home Member State will then apply throughout the Community. [74]

92. As far as continuous supervision of the transactions effected is concerned, it must be acknowledged that the supervisory authority of the State in which the service is provided does not have access at all times to an undertaking established in another Member State.

70 — *Commission* v *Germany*, cited in note 52.
71 — Ibid., paragraph 43.
72 — Ibid., paragraph 46.
73 — Ibid., paragraph 47.
74 — See the eighth recital in the preamble to and Article 14 of the Directive.

But it is in the nature of deals in the sector in question that even in purely internal business, supervision of all transactions is impossible. The operators in the sector also undeniably have 'know-how' which deserves protection, as is very clearly expressed in the Opinion of the Economic and Social Committee, [75] and which precludes too fine-meshed a supervision law.

93. In order nevertheless to minimize any risks and hence ensure the stability of the markets as far as possible, internal controls are widely favoured as a suitable safeguard, and that assessment is expressly echoed in the enlightening Opinion of the Economic and Social Committee. [76] If, then, internal controls combined with official supervision are likely to create optimum conditions for the stability of the markets, maintenance of the registered office requirement for foreign providers of services is disproportionate, even if it could in practice make supervision by the authorities easier. Considerations of an administrative nature can in no case justify the exclusion by a Member State of the exercise of one of the fundamental freedoms guaranteed by the Treaty. [77]

94. Finally, for the sake of completeness, I will address the Italian Government's argument that the requirement of a registered office must be maintained in order to counteract possible circumventions of Italian law.

95. The Court has often over the years had occasion in various contexts to express a position on problems of circumvention of the law or of abuses which become possible only because of Community law. That 'case-law on the avoidance of national rules' is reviewed in my Opinion in Case C-23/93 *TV10*, [78] and to repeat that in detail here would be excessive. That case-law, which must apply to the present case too, leads to the conclusion that in the event of an evident evasion of its law a Member State is entitled to apply the rules in force for providers of services established in its territory also to an operator established in another Member State.

96. The danger of circumvention of the Member State's law consequently does not entitle a Member State to grant authorization for commercial operation at the outset only to providers of services who are established in the territory of that Member State. The registered-office requirement can therefore

75 — Point 3.2.4.1 of the Opinion.

76 — See point 1.5.3.5, second paragraph; point 2.1.4; point 2.2.2, second indent; point 2.2.3; point 3.0.8; point 3.0.9; point 3.4.2; and point 3.4.3.

77 — See to this effect *Commission* v *Germany*, cited in note 52, paragraph 54.

78 — Opinion of 16 June 1994 in Case C-23/93 *TV10* v *Commissariaat voor de Media* [1994] ECR I-4795, at I-4797, point 50 et seq.

also not be justified by reference to the risk of circumvention of the law.

97. In conclusion, the arguments adduced by the Italian Government to justify the requirement of a registered office laid down in Law No 1 of 1991 for dealers in securities cannot be accepted as imperative reasons of the public interest which could not be ensured by other, less restrictive means.

C — Conclusion

98. In the light of the above considerations, I propose that the Court rule as follows:

(1) The Italian Republic, by restricting by Law No 1 of 1991 the activity of dealers in securities, other than banks, to companies or firms whose registered office is in Italy, and who must in addition satisfy requirements which non-Italian companies cannot satisfy, and by omitting to provide for a procedure in which securities dealers from other Member States can obtain authorization by showing that they have satisfied equivalent requirements, has failed to fulfil its obligations under Article 52 of the EC Treaty.

(2) The Italian Republic, by restricting the activity of dealing in securities, by dealers other than banks, to companies whose registered office is in Italy, has also failed to fulfil its obligations under Article 59 of the EC Treaty.

(3) The Italian Republic is ordered to pay the costs.