OPINION OF ADVOCATE GENERAL TIZZANO
delivered on 25 March 2004 [1]

1. In the present case the Court is asked to clarify whether national rules of a Member State prohibiting the remuneration of 'sight' current accounts in euros constitute restrictions on the freedom of establishment prohibited by Article 43 EC in so far as they apply to the subsidiary formed in that Member State by a legal person from another Member State.

I — Legal background

Community law

2. The present case essentially involves the provisions of the Treaty on the freedom of establishment, in particular Article 43 EC.

3. It is also appropriate to mention Directive 2000/12/EC, [2] which is not directly relevant to the answer to the questions raised by the court of reference but was cited several times in the course of the proceedings before the Court.

4. I would recall first that the directive completely recodifies the rules on the freedom of establishment and the freedom to provide services in the banking sector, which were introduced in various earlier directives implementing Article 43 EC et seq.

5. The directive lays down in particular that only credit institutions authorised by the competent authority of a Member State may engage in the business of taking deposits or other repayable funds from the public (Articles 1, 3 and 4); it also provides that those institutions that are legal persons and meet a series of harmonised requirements [3] may engage in the banking activities covered

1 — Original language: Italian.

2 — Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (hereinafter 'Directive 2000/12' or the 'directive'; OJ 2000 L 126, p. 1).

3 — Especially with regard to: initial capital (Article 5), requirements for persons responsible for management and location of the head office (Article 6), suitability of shareholders and members holding a qualifying participation (Article 7) and programme of operations (Article 8).

by the authorisation not only in the State that has authorised them and in which they have their head office but also in any other Member State via a branch without legal personality or by way of the provision of services, in accordance with a system of mutual recognition of authorisations (Article 18).

National law

6. Article L.312-3 of the *code monétaire et financier (partie législative)* (the French monetary and financial code, hereinafter the 'monetary code') lays down rules for the remuneration of 'sight' accounts or accounts for less than five years and provides as follows:

'Notwithstanding any provisions to the contrary, it shall be prohibited for any credit establishment which receives funds from the public for sight accounts or accounts for less than five years, by any means whatever, to pay remuneration on those funds exceeding that fixed by [regulation of the committee for banking and financial regulation or] [4] the minister responsible for the economy'. [5]

7. By Regulation No 86-13, the committee for banking and financial regulation (hereinafter the 'committee for banking regulation' or the 'committee') [6] prohibited the remuneration of sight accounts. [7]

8. The prohibition applies to sight current accounts in euros held by persons resident in France.

II — Facts and procedure

9. In 2002 Société CaixaBank France (hereinafter 'CaixaBank France'), a French subsidiary of the Spanish company Caixa Holding, notified the committee for banking regulation of its intention to market a 'sight' current account bearing interest at 2% on balances of EUR 1 500 or more.

10. By a decision of 16 April 2002, the committee prohibited CaixaBank France from concluding new contracts for interest-bearing 'sight' accounts in the name of

4 — Article 46 of Law No 2003-706 of 1 August 2003 (published in the *Journal Officiel* of 2 August 2003) deleted the words shown in square brackets from Article L.312-3; at the same time, however, Article 47 of that law bestowed permanent validity on the regulations of the committee for banking regulation. Hence, no substantial change occurred in the legal framework relevant to the case in point, as the French Government expressly confirmed in reply to a question put to it by the Court.

5 — Unofficial translation.

6 — See footnote 4.

7 — Decision No 92-13 of that committee extended the prohibition to deposit-taking carried out in France by the branches of banks with their head office in another Member State.

persons resident in France and at the same time ordered it to rescind the remuneration clauses in existing contracts.

11. The company appealed against that decision to the Conseil d'État (French Council of State), primarily on the ground that the prohibition on remunerating the 'sight' accounts of residents conflicted with the provisions of the Treaty on the freedom of establishment.

12. Recognising the significance of the issue, the Conseil d'État stayed proceedings and submitted the following questions to the Court of Justice for a preliminary ruling:

'1. As Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 is silent on the point, does the prohibition by a Member State of banking institutions duly established in its territory from remunerating sight accounts and other repayable funds constitute an obstacle to freedom of establishment?

2. If the answer to the first question is in the affirmative, what kind of reasons of public interest might in an appropriate case be relied on to justify such an obstacle?'

13. CaixaBank France, BNP Paribas and other French banks that in the meanwhile have intervened in the case in the main proceedings, the French Government and the Commission have submitted observations to the Court.

III — Legal assessment

The first question

14. The positions of the parties with regard to this question can be summarised as follows.

15. CaixaBank and the Commission contend essentially that the application of the disputed measure is an obstacle to the effective and profitable pursuit of banking business prohibited by Article 43 EC as interpreted by Community case-law, especially in the *Kraus*,[8] *Gebhard*[9] and *Pfeiffer Großhandel*[10] cases, and put forward a number of arguments which I shall consider as necessary below.

8 — Judgment in Case C-19/92 *Kraus* [1993] ECR I-1663.

9 — Judgment in Case C-55/94 *Gebhard* [1995] ECR I-4165.

10 — Judgment in Case C-255/97 *Pfeiffer Großhandel* [1999] ECR I-2835.

16. In addition, the Commission considers that the compatibility of the French regulations with the Treaty should also be assessed as regards their possible application to the branches of credit institutions established in another Member State. It contends that from this point of view also the regulations infringe Community law in that they incorporate an infringement of the harmonised regime laid down for branches by Directive 2000/12.

17. According to France and the intervening French banks, by contrast, Article 43 EC as interpreted by the Court [11] essentially requires the country in which a person is established to accord to nationals of other Member States the same treatment as it accords to its own nationals as regards the taking-up and pursuit of activities as a self-employed person, prohibiting all forms of discrimination based on the nationality of Community citizens, whether that discrimination be direct or only indirect and covert.

18. In any event, they maintain that national measures that are applicable without distinction could constitute a restriction on the freedom of establishment only where they related to the taking-up of an occupation but not where they merely regulated the conditions for pursuing that occupation, as in the present case. [12]

19. The restrictive effects of a measure such as that involved in the present case are, they contend, in any case too uncertain and indirect to be regarded as a restriction on the freedom of establishment in violation of the Treaty.

20. On the strength of those considerations, I shall now set out my assessment of the case.

(a) Premiss

21. I note first that the Conseil d'État asks the Court whether the Treaty prevents the application of the disputed measure to a French subsidiary of a bank originally established in another Member State. The point at issue therefore relates to the exercise of the freedom of movement by establishing a company with autonomous legal personality, in other words a subsidiary.

11 — See the judgments in Cases 197/84 *Steinhauser* [1985] ECR 1819, C-111/91 *Commission* v *Luxembourg* [1993] ECR I-817, and C-168/91 *Konstantinidis* [1993] ECR I-1191.

12 — The banks base their argument on the judgments in Cases C-415/93 *Bosman and Others* [1995] ECR I-4921 and C-190/98 *Graf* [2000] ECR I-493 regarding workers, and Cases C-384/93 *Alpine Investments* [1995] ECR I-1141, C-98/01 *Commission* v *United Kingdom* [2003] ECR I-4641 and C-463/00 *Commission* v *Spain* [2003] ECR I-4581, *'Golden shares'* regarding the freedom of movement of services and capital respectively.

22. The Court must confine its reply to this issue. Unlike the Commission (see paragraph 16 above), I do not consider that the subject-matter of the question can be broadened to include the possible application of the measure at issue to a bank intending to engage in banking activities in France via a branch. Not only is that hypothesis not the subject of the question from the national court, it is not relevant for resolving the dispute before it.

(b) The concept of restriction on the freedom of establishment

23. Having clarified that point and moving on to the substance of the question, I note first of all that although the measure in question does not have regulation of the *taking-up of banking business* as its *subject-matter*, it probably has a significant *effect on the economic conditions for* pursuing *those activities*, and in this regard the parties are to some extent in agreement. The measure precludes an important banking product, such as a deposit in a 'sight' current account, from producing interest, thus on the one hand making competition between banks for this type of product more difficult but on the other hand, and in parallel, making it possible to keep basic banking services free, which otherwise are potentially loss-making.

24. The parties differ essentially with regard to whether, by virtue of its effects, such a measure can be described as a restriction on the freedom of establishment when applied to the subsidiary of a credit institution originally established in another Member State.

25. Indeed, CaixaBank France and the Commission point out that, at least with the *Kraus* and *Gebhard* judgments, a broad interpretation of the freedom of movement within the internal market appears to have found its place in case-law. In their view, on that interpretation, any national measure that is liable to hamper or to render less attractive the exercise by Community nationals of fundamental freedoms guaranteed by the Treaty is therefore prohibited, even if it applies without discrimination on grounds of nationality. [13]

26. They contend that a similar dissuasive effect would essentially occur whenever a particular national measure reduced the profitability of an economic activity, thus also making its pursuit less attractive even under arrangements for the mutual recognition of establishment.

27. CaixaBank France further argues that, even in the absence of Community harmonisation of the conditions for engaging in a

13 — See *Kraus*, paragraph 32, and *Gebhard*, paragraph 37.

particular economic activity, a Member State wishing to adopt or maintain a given method of regulating that activity *by that very act* restricts the freedom of establishment of persons from another Member State in which more permissive legislation obtains.

28. The French banks, for their part, have raised doubts as to the true meaning of those judgments: they contend that, if read against the background of the circumstances of the cases from which they derived, those judgments essentially do no more than criticise discriminatory measures that *impinge directly on the taking-up* of an economic activity as a self-employed person.

29. For my part, I observe that the case-law of the Court on the freedom of establishment and, more generally, the freedom of movement of persons economically active in the internal market is not without ambiguity and therefore lends itself, as in this case, to different and even conflicting interpretations. In order to ascertain which of the possible readings of Article 43 EC is to be preferred it is therefore necessary to examine that case-law, but not without first briefly examining the wording of the Treaty.

30. As is well known, Article 43 EC consists of two paragraphs. The first prohibits 'restrictions on the freedom of establishment', setting that prohibition 'within the framework of the provisions set out below'.

31. The second paragraph, in defining the framework within which the prohibition applies, makes clear that the 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'.

32. The traditional Community case-law tended to recognise in the principle of national treatment the essence of the freedom of establishment, [14] broadly equating the prohibition on restrictions under the first paragraph of Article 43 EC to the prohibition on direct or indirect discrimination as regards the conditions for taking up and pursuing economic activities provided for in the second paragraph.

33. However, beginning with the *Kraus* judgment, which dealt with a German measure imposing certain formalities for recognising the legality of a foreign educational qualification, the Court appears to have applied a stricter test than that of

14 — See to that effect, among many others, the judgments in Cases 71/76 *Thieffry* [1977] ECR 765, paragraph 19, and *Steinhauser*, cited above, paragraph 14.

national treatment, essentially recognising that even non-discriminatory measures can constitute a restriction on the freedom of establishment.

34. In the assessment made by the Court in that judgment, the effect of a national measure in discouraging the exercise of the freedom of establishment by Community nationals assumes an importance that even goes beyond possible discrimination.

35. In that context the Court does not appear to require that the national measure in question have *direct effects on the taking-up* of an economic activity for it to be classified as a restriction in contravention of the Treaty; the measure at issue would already constitute a significant obstacle within the meaning of Article 52 of the Treaty (now Article 43 EC) by reason of its potential adverse repercussions on the *economic attractiveness of pursuing* certain occupations. [15]

36. I should point out, however, that the judgment delivered in the *Kraus* case also lends itself to another reading, because the adoption of a similar but much more rigorous test could in reality have been dictated by the circumstances of the actual case rather than being the result of a general interpretative choice.

37. If one wished to accede to this different interpretative viewpoint, the Court's approach in the *Kraus* case was the obvious reaction to the penalising stance of the German regulations towards a person who had obtained a university qualification abroad, in that it required that, in order to have that qualification legally recognised, the person in question should complete formalities that were not required for educational qualifications obtained in Germany.

38. The same could be said of the subsequent *Gebhard* judgment and the more recent *Mac Quen* [16] and *Payroll Data Services* [17] judgments, in which it was a question of assessing the compatibility with the Treaty of national measures that directly restricted access to a regulated profession by means that were potentially discriminatory.

15 — See in particular paragraphs 21 and 22, which I reproduce below: '21. ... the holder of a diploma such as that in question in the main proceedings may find himself in an advantageous position in the pursuit of his professional activity in so far as through possession of that diploma, he can obtain *higher remuneration or more rapid advancement* or, in the course of his career, access to certain specific posts reserved to persons with particularly high qualifications. 22. Similarly, the possibility of using academic titles awarded abroad and supplementing national diplomas required for access to a profession *greatly facilitates* establishment as an independent practitioner and, in any event, *the pursuit* of a corresponding professional *activity*.' My italics.

16 — Judgment in Case C-108/96 *Mac Quen* [2001] ECR I-837.

17 — Judgment in Case C-79/01 *Payroll Data Services* [2002] ECR I-8923.

39. It is true, however, that on such occasions the Court has recourse to a rather broad concept of restriction, using the term to cover all 'national measures *liable to* hinder or *make less attractive the exercise of fundamental freedoms* guaranteed by the Treaty'. [18]

40. The same formula is used in the *Pfeiffer Großhandel* judgment of 1999. [19] In that case, however, in contrast to the precedents I have just mentioned, the Court appears to take the concept to its logical extreme, classifying a national measure whose effects on the movement of persons were quite plainly anything but immediate and direct as a restriction on the freedom of establishment.

41. On that occasion, the Court had been asked to rule on the compatibility with the Treaty of the Austrian regulations to safeguard trade names against the risk of confusion. In particular, the Court discussed the prohibition on the subsidiary of a German undertaking from using a trade name already used in Germany by the parent company, which was substantially similar to the trade name of an Austrian competitor.

42. The measure in question did not relate to the taking-up of an economic activity — food distribution — which as such remained open to any operator, national or foreign. Moreover, it was not liable to discriminate, either directly or indirectly, against a person making use of the freedom of establishment by treating him in a worse manner than persons originally established in that State.

43. Nevertheless, the Court classified the Austrian regulations as a restriction on the freedom of establishment — albeit then holding it to be justified by the need to safeguard industrial property — in that it forced the German undertaking and its Austrian subsidiary 'to adjust the presentation of the businesses they operate according to the place of establishment'. [20]

44. In the light of such a precedent, it could be maintained, as CaixaBank France essentially does, that any national measure that reduces the profit margin on a particular economic activity — thereby making it less attractive, even indirectly, to exercise the freedom of establishment — constitutes a restriction on the freedom of establishment.

18 — See *Gebhard*, paragraph 37; emphasis added.

19 — Cited above in footnote 10.

20 — The *Pfeiffer Großhandel* judgment, cited above, paragraph 20.

45. Furthermore, if *every* national provision that can make the exercise of the freedom of movement less attractive in the sense I have just described is prohibited as a matter of principle, it could indeed be held that, in the absence of the harmonisation of national legislation on the pursuit of a given economic activity, the State that enforces the most severe legislation automatically creates an impediment to the freedom of establishment of persons from other Member States.

46. It could therefore be deduced, with regard to the present case, that, by obliging the CaixaBank group to adopt different commercial strategies for its French subsidiary on the one hand and for its subsidiaries and branches operating in the remaining Member States on the other, the French measure in question for that very reason creates a restriction on the freedom of establishment in violation of Article 43 EC.

47. In numerous other judgments, however, the Court does not apply such a strict test but merely classifies as prohibited restrictions on the freedom of movement of persons national measures that *directly impede* the taking-up of an economic activity or are *by nature* substantially *discriminatory* because they do not ensure equal conditions both in law and in fact as regards the taking-up and pursuit of an economic activity.

48. It is worth recalling the judgments in *Alpine Investments* of 1995,[21] *Perfili* of 1996,[22] *Futura Participations* of 1997[23] and *Metallgesellschaft* of 2001[24] in this connection.

49. In particular, in the *Alpine Investments* judgment the accent was placed on the criterion of the *direct impediment to access.*

50. That case involved a national regulation prohibiting financial market operators established in the Netherlands from using the telephone, and in particular 'cold calling',[25] to contact potential customers, either in the national territory or in the territory of other Member States.

51. According to the Court, although such a prohibition was applicable without distinction it could nevertheless 'constitute a restriction on the freedom to provide cross-border services' in that it 'deprive[d] the operators concerned of a rapid and direct technique for marketing and for contacting potential clients in other Member States'.[26]

21 — Cited above in footnote 12.

22 — Case C-177/94 *Perfili* [1996] ECR I-161.

23 — Case C-250/95 *Futura Participations* [1997] ECR I-2471.

24 — Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727.

25 — The use of the telephone to offer services to potential customers without their having granted prior authorisation.

26 — *Alpine Investments*, paragraph 28.

52. In response to an objection based on the possible application by analogy of the well-known *Keck and Mithouard* judgment (with which I shall deal at greater length in paragraph 70 et seq.), the Court also emphasised that 'a prohibition such as that at issue [was] imposed by the Member State in which the provider of services [was] established and affect[ed] not only offers made by him to addressees who [were] established in that State or move[d] there in order to receive services but also offers made to potential recipients in another Member State'. According to the Court, it followed that the prohibition '*directly affect[ed] access to the market in services in the other Member States*' and was thus 'capable of hindering intra-Community trade in services'. [27]

53. By adding this further specification, the Court therefore appears to have made it clear that, in order for a national measure applied without distinction to constitute an obstacle to the freedom to provide services, it must directly affect access to the market in services in the other Member States. On the other hand, the fact that 'other Member States apply less strict rules to providers of similar services established in their territory' is not a sufficient reason for that purpose. [28]

54. Indications similar to those that emerge from the *Alpine Investments* judgment can also be deduced, in my opinion, from the judgments in *Bosman* (1995), [29] *Semeraro Casa* (1996), [30] *SETTG* (1997), [31] *Zenatti* (1999) [32] and *Graf* (2000). [33]

55. It is particularly useful to dwell for a moment on the last judgment mentioned, which was delivered by the Court in plenary session. It related to the compatibility with the Treaty of national measures that potentially impeded the decision of a worker to leave one job in order to accept another, possibly in a different Member State, because they provided that in such cases the worker was not entitled to compensation on termination of employment, thus reducing the economic attractiveness of the transfer.

56. The Court rejected the argument that such a measure was an obstacle to the freedom of movement of persons within the internal market. Recalling instead the precedent of the *Alpine Investments* judgment, it stated the principle that 'provisions which, even if they are applicable without distinction, preclude or deter a national of a Member State from ... exercis[ing] his right to freedom of movement' constitute a

27 — Paragraph 38; my italics.

28 — Paragraph 27. Previous judgments to the same effect were delivered in Case 1/78 *Kenny* [1978] ECR 1489, paragraph 18, Joined Cases 185/78 to 204/78 *Van Dam en Zonen and Others* [1979] ECR 2345, paragraph 10, Joined Cases C-251/90 and C-252/90 *Wood and Cowie* [1992] ECR I-2873, paragraph 19, Case C-379/92 *Peralta* [1994] ECR I-3453, paragraph 48, and *Perfili*, cited above, paragraph 17.

29 — Cited above in footnote 12.

30 — Joined Cases C-418/93 to C-421/93, C-460/93 to C-462/93, C-464/93, C-9/94 to C-11/94, C-14/94, C-15/94, C-23/94, C-24/94 and C-332/94 *Semeraro Casa and Others* [1996] ECR I-2975.

31 — Case C-398/95 *SETTG* [1997] ECR I-3091.

32 — Case C-67/98 *Zenatti* [1999] ECR I-7289.

33 — Cited above in footnote 12.

restriction on that freedom, which is prohibited as a matter of principle by the Treaty, only if they '*affect access* of workers to the labour market'.[34] This does not happen, however, if the restrictive effect depends on an 'event [that] is too uncertain and indirect'.[35]

57. On that premiss, I can now attempt to sketch the thread of the analysis made thus far, beginning by repeating the observation I made above that the cited case-law is difficult to reduce to a consistent whole and hence, as in this case, lends itself to opposing assessments.

58. In an effort to unravel the case-law, I observe first of all that I find it difficult to describe national measures that regulate the pursuit of an economic activity *without directly affecting access to that activity* and *without discriminating* either in law or in fact between national and foreign operators as restrictions contrary to the Treaty *for the sole reason that they reduce* the *economic attractiveness* of pursuing that activity.

59. Such an interpretation, which it would seem possible to deduce to some extent from the *Pfeiffer Großhandel* judgment cited above, would end up firstly contradicting the system of powers set out in the Treaty.

60. It is acknowledged that the provisions on establishment did not grant the Community general powers to regulate economic activities as a self-employed person. On the contrary, they left in place the State powers in that regard, merely prohibiting discrimination and obstacles to establishment and creating defined Community powers to harmonise national legislation (Article 57(1) and (2) of the Treaty, now Article 47(1) and (2) EC).

61. Hence, where such harmonisation has not taken place, the Member States remain as a matter of principle competent to regulate the pursuit of economic activities, by means of non-discriminatory measures.

34 — *Graf*, paragraph 23. Emphasis added. Unlike the Italian version, neither the French text nor the other language versions has the adverb 'directly'; in fact, the French text reads 'pour être aptes à constituer de telles entraves, il faut qu'elles conditionnent l'accès des travailleurs au marché du travail'. It is worth recalling that in applying that criterion to the case in question the Court emphasised in particular that 'legislation of the kind at issue in the main proceedings [was] not such as to preclude or deter a worker from ending his contract of employment in order to take a job with another employer, because the entitlement to compensation on termination of employment [was] not dependent on the worker's choosing whether or not to stay with his current employer but on a future and hypothetical event, namely the subsequent termination of his contract without such termination being at his own initiative or attributable to him' (paragraph 24).

35 — Paragraph 25. In the case in question, according to the Court, the loss of entitlement to compensation on termination of employment was 'too uncertain and indirect a possibility for legislation to be capable of being regarded as liable to hinder freedom of movement for workers where it [did] not attach to termination of a contract of employment by the worker himself the same consequence as it attache[d] to termination which was not at his initiative or [was] not attributable to him'.

62. Secondly, that interpretation would permit economic operators — both national and foreign — to abuse Article 43 EC in order to oppose any national measure that, solely because it regulated the conditions for pursuing an economic activity, could in the final analysis narrow profit margins and hence reduce the attractiveness of pursuing that particular economic activity.

63. However, that would be tantamount to bending the Treaty to a purpose for which it was not intended: that is to say, not in order to create an internal market in which conditions are similar to those of a single market and where operators can move freely, but in order to establish a market without rules. Or rather, a market in which rules are prohibited as a matter of principle, except for those necessary and proportionate to meeting imperative requirements in the public interest.

64. For that reason I do not consider that this is the road to take.

65. By contrast, I consider it appropriate to exploit the various interpretative indications present in Community case-law, according to which national measures may 'hamper or ... render less attractive the exercise of freedoms guaranteed by the Treaty' — and thus constitute restrictions on those freedoms — only when certain conditions apply, even though in abstract terms they are likely to affect the freedom of movement of persons.

66. In particular, I consider that *where the principle of non-discrimination is respected* — and hence the conditions for the *taking-up and pursuit* of an economic activity are equal *both in law and in fact* — a national measure cannot be described as a restriction on the freedom of movement of persons unless, in the light of its purpose and effects, the measure in question *directly affects market access.*

67. Pointers to that effect can be derived, directly or indirectly, from a large part of the case-law examined above,[36] and emerge particularly forcefully from the *Alpine Investments* and *Graf* judgments,[37] in which the Court was asked to interpret laws bearing on the movement of workers and the provision of services but expounded a general principle applicable to the entire sector of the freedom of movement of persons, including the freedom of establishment.

36 — In paragraph 48 et seq.

37 — See paragraph 55 et seq. above.

68. In my opinion, the interpretational approach I have outlined also makes it possible to reconcile the objective of merging the different national markets into a single common market with the continuation of Member States' general powers to regulate economic activities.

69. Furthermore, it also seems to me that, as the French Government and the intervening banks have rightly stated, the assessment criterion that I have proposed makes it possible for the considerable development in the case-law on the movement of goods that has taken place over the last 10 years to be taken into account in the field of the freedom of movement of persons.

70. I would point out that in the *Keck and Mithouard* judgment of 1993 [38] and in subsequent case-law that has now become established the Court ruled that the application to products from other Member States of national provisions prohibiting certain selling arrangements does not constitute a hindrance to trade between Member States within the meaning of Article 28 EC so long as those provisions apply to all traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. [39]

71. The Court goes on to say that this is so because, provided those conditions are fulfilled, the application of such rules '*is not by nature such as to prevent the access* [of products from another Member State] *to the market or to impede access any more than it impedes the access of domestic products*'. [40]

72. The rationale of the *Keck and Mithouard* judgment therefore lies in the dual criterion of *access to the market* and *discrimination*: any national measure that prevents the access of products from another Member State to the market or impedes the access of such products any more than it impedes the access of national products constitutes an obstacle to the freedom of movement of goods. [41]

73. In short, upon close inspection, on the basis of the *Keck and Mithouard* judgment the case-law on goods establishes a test of the same tenor as that subsequently applied with regard to the freedom of movement of

38 — In Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

39 — *Keck and Mithouard*, paragraph 16.

40 — *Keck and Mithouard*, paragraph 17. Emphasis added.

41 — Among many others, see to this effect *Keck and Mithouard*, paragraph 17, and the judgments in Case C-292/92 *Hünermund and Others* [1993] ECR I-6787, paragraph 21, Joined Cases C-401/92 and C-402/92 *Boermans* [1994] ECR I-2199, paragraph 12, Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179, paragraph 21, Case C-391/92 *Commission* v *Greece* [1995] ECR I-1621, paragraph 13, Case C-254/98 *TK-Heimdienst* [2000] ECR I-151, paragraph 26, Case C-405/98 *Gourmet International Products* [2001] ECR I-1795, paragraph 18. See, to the same effect, the Opinion of Advocate General Fennelly in Case C-190/98 *Graf*, cited above, paragraph 19. Most recently, see the judgment in Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, paragraph 67 et seq.

persons in the *Alpine Investments* [42] and *Graf* [43] judgments.

74. Furthermore, a similar test — which as we have seen is broadly confirmed in the majority of the rulings on the movement of persons delivered over the last decade [44] — does not in any way conflict with the approach developed by the Court in the *Kraus* and *Gebhard* judgments.

75. Indeed, it merely specifies the scope of the concept of restriction propounded in those judgments, without calling the spirit of that concept into question. The tightening-up that I have proposed above (in paragraph 66) is aimed solely at ensuring that too vague a formulation of that concept does not give rise to distorted readings of the freedom of movement of persons that lead to measures being classified as restrictions whose effects on the exercise of that freedom are merely hypothetical or entirely uncertain and indirect.

76. I therefore feel able to conclude that, from a general point of view, as regards the freedom of establishment, national rules of a Member State regulating the pursuit of economic activities constitute restrictions contrary to the Treaty if they are such as to place the operator exercising that freedom in conditions of law or of fact that are worse than those of an operator established in the said State or if, by reason of their objective or effects, they directly affect access to the market.

(c) Classification of the disputed measure

77. Let us now move on to assess more closely the relevant French measure in the present case, that is to say the application of the prohibition on remunerating 'sight' current accounts to a subsidiary of a foreign credit institution such as CaixaBank France.

78. In the light of the criterion I have just enunciated in general terms, verification of the lawfulness of that measure must be conducted in accordance with the following logic. First and foremost, it is necessary to ask whether it is *discriminatory in law*, or whether it is *intended to regulate access* to banking activities. If that is not the case, it is necessary to establish whether it nevertheless places those subsidiaries in a *less favourable*

42 — See paragraph 49 et seq. above.

43 — See paragraph 55 et seq. above.

44 — See paragraph 44 et seq. above. In addition, for an approach compatible with that set out in the text, see the judgments in Cases C-208/00 *Überseering* [2002] ECR I-9919, paragraph 78 et seq. (complete denial of access), C-436/00 *X and Y* [2002] ECR I-10829, paragraphs 36 and 37 (indirect discrimination), and C-243/01 *Gambelli and Others* [2003] ECR I-13031, paragraph 48 (indirect discrimination).

de facto position by comparison with competitors traditionally established and operating in the French market; or finally whether in any case it constitutes a *direct obstacle to access* to the banking market in view of its *effects*.

79. I wish to observe first that the supposition that the measure is discriminatory in law can definitely be dismissed — and on this point I believe the parties are broadly in agreement — because from a formal point of view the measure does not place foreign operators in a less favourable position than nationals as regards the conditions for engaging in banking activities.

80. As to the second point, it is just as easy to rule out the hypothesis that the measure in question is *intended* to regulate access to banking activities.

81. Indeed, it is a fact that access to banking activities is subject to the granting of authorisation by the competent national authority, as provided for in Directive 2000/12. [45] The conditions for such authorisation are laid down by the Member States in implementation of the harmonised criteria set out in the same directive, and relate to the possession of a given legal form, a given share capital, certain requirements for the integrity of shareholders with a significant holding, etc. (see paragraph 5 and footnote 3 above).

82. None of these conditions is altered by the regulations on the remuneration of 'sight' current accounts, as those regulations merely affect a method of engaging in banking activities by an establishment in possession of the necessary authorisation.

83. That leaves the two further points set out in paragraph 77 above, namely whether the measure in question is liable to place the French subsidiaries of foreign banks in a less favourable de facto position than credit institutions originally established in France and is therefore discriminatory *in substance*, or whether in any case, because of its effects, it may directly affect access to the banking market.

84. To my way of thinking, the outcome of such an assessment depends on the effects that the measure in question may actually produce in the French banking market. It is therefore necessary to carry out a factual assessment, which must as a matter of principle be left to the national court. [46]

45 — See paragraph 5 above.

46 — Among many others, see the judgments in Cases C-107/98 *Teckal* [1999] ECR I-8121, paragraphs 29 and 31, C-318/98 *Fornasar and Others* [2000] ECR I-4785, paragraph 32, and C-421/01 *Traunfellner* [2003] ECR I-11941, paragraph 21.

85. To that end, the national court should ask itself whether it is true, as asserted in essence by CaixaBank France and the Commission, that the national measure in question prevents the subsidiaries of foreign banks from competing effectively, as regards the taking of deposits from the public, with banks traditionally established in French territory that have an extensive branch network, or whether, in contrast, there are other significant ways of competing in that market, as maintained by the French Government and the French banks.

86. In particular, it will be necessary to ascertain whether other forms of deposit that can be freely remunerated and by means of which banks can compete *effectively* among themselves for the public's deposits are easily available in the French banking market.

87. If that is not the case, the subsidiary of a foreign bank could not easily raise capital by taking deposits and would be forced to turn to the interbank market to finance its banking activities. It would therefore ultimately have to bear higher costs than banks traditionally established in France, which enjoy an advantageous position in the market for the public's deposits by virtue of their large branch networks.

88. It would then have to be concluded that the measure in question was such as to place the subsidiaries of foreign banks in a *less favourable de facto situation* than French banks and thus constituted a restriction on the freedom of establishment prohibited by the Treaty.

89. Moreover, in such circumstances, given the prohibition on offering remunerated 'sight' accounts in the market, those banks would be deprived of the only effective means of acquiring customers in the French market. From this it would therefore have to be concluded that, given its effects, the measure in question was also liable to *impede directly the access* of the subsidiaries of foreign banks *to the French market*, thereby leading, from this viewpoint as well, to a restriction on the freedom of establishment within the meaning of Article 43 EC. [47]

(d) Conclusions

90. I therefore conclude by proposing that the Court reply to the first question sub-

47 — In the hypothetical case presented, the effect of the prohibition on remunerating current accounts would be somewhat similar to that of the prohibition on 'cold calling' examined in the *Alpine Investments* judgment (see paragraph 50 et seq. above). In that case, as we have seen, it was deemed that the prohibition could 'constitute a restriction on the freedom to provide cross-border services' in that it 'deprive [d] the operators concerned of a rapid and direct technique for marketing and for contacting potential clients in other Member States' (paragraph 28).

mitted to it by the French Conseil d'État that national rules of a Member State regulating the pursuit of an economic activity constitute restrictions on the freedom of establishment prohibited as a matter of principle by Article 43 EC if they are such as to place the operator exercising that freedom in less favourable conditions of law and of fact than an operator established in the said State or otherwise directly affect access to the market.

91. A national measure such as the prohibition on remunerating 'sight' accounts in euros constitutes a restriction on the freedom of establishment prohibited by Article 43 EC if its application deprives the subsidiaries of foreign banks of the possibility of competing effectively, as regards the taking of deposits from the public, with banks traditionally established in the national territory that have an extensive branch network.

92. It is for the national court to make that assessment, ascertaining in particular whether other forms of deposit that can be freely remunerated are easily available in the French banking market and by means of which banks can compete effectively in that market.

The second question

93. In its second question the court of reference asks whether there are reasons of public interest that may justify a restriction on the freedom of establishment such as that which may derive from application of the national measure in question.

94. I acknowledge that, within the framework of the division of jurisdiction between the Community judicature and national courts, it is not for the Court but for the court of reference — if it considers that the national measure at issue should be regarded as a restriction on the freedom of establishment within the meaning of Article 43 EC — to determine whether that restriction is justified or not. [48]

95. It is an established principle, however, that when giving a preliminary ruling the Court may, where appropriate, provide clarification and indicate interpretative criteria designed to give the national court guidance in the judgment it is required to make. [49]

48 — Judgments in Cases C-424/97 *Haim* [2000] ECR I-5123, paragraph 58, and *Payroll Data Services*, cited above, paragraph 29.

49 — Ibid.

96. In this regard it must be pointed out to the national court primarily that, in accordance with constant case-law, national measures that restrict the freedom of movement of persons but which apply to any person or undertaking pursuing an activity in the territory of the host Member State can be justified if they meet overriding requirements of public interest, provided they are suitable for securing the attainment of the objective which they pursue and do not go beyond what is necessary in order to attain that objective. [50]

97. France and the intervening French banks maintain, in essence, that the measure in question is justified by the overriding requirement to protect consumers and in addition is an expression of important economic policy choices by the French Government.

98. As regards in particular the protection of consumers, abolition of the prohibition at issue would, in their opinion, greatly increase the cost of managing current accounts. As a consequence, they contend, banks would have to charge consumers for banking services that are currently provided free of charge, including the issue of cheques and cash withdrawals at cash dispensers.

99. Furthermore, in their view, the prohibition on the remuneration of 'sight' current accounts is, as stated above, an expression of a precise economic policy choice aimed at encouraging medium- and long-term saving, not least in order to curb inflation.

100. According to CaixaBank France and the Commission, such requirements are not such as to justify the measure in question. In any case, in their view it does not conform with the principle of proportionality.

101. For my part, I note that both the encouragement of saving and protection of the consumer are objectives worthy of protection and the disputed measure does indeed appear to be an appropriate means of attaining them. However, I believe that the instrument chosen by the French legislature goes beyond what is necessary in order to attain them, for the reasons which I shall now describe.

102. As to the encouragement of long-term saving, to me it seems frankly improbable that the only practical means is a pure and

50 — Judgments in *Kraus*, paragraph 32, *Gebhard*, paragraph 37, Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 34, *Pfeiffer Großhandel*, paragraph 19, *Haim*, paragraph 57, and *Payroll Data Services*, paragraph 28.

simple prohibition on the remuneration of short-term savings. Measures such as the setting of a maximum ceiling on interest rates on 'sight' accounts or the creation of incentives for medium- and long-term investments would appear, at least prima facie, to be entirely adequate alternatives.

103. As to consumer protection, I am inclined to agree with CaixaBank France, which argues that the need to protect consumers by keeping basic banking services free could be adequately safeguarded by less restrictive means.

104. Indeed, I too consider that it could be sufficient, for that purpose, to require banking establishments to offer consumers who request it a non-interest-bearing 'sight' account accompanied by free basic banking services while permitting such establishments also to offer remunerated sight accounts linked, if necessary, to fee-paying banking services.

105. That having been said, I must repeat, however, that it is not for the Court to express a final opinion in this regard, because it is for the national court to determine whether the conditions laid down in Community legislation (recalled in paragraph 96 above) are met in the case before that court.

106. It cannot be ruled out that in that context circumstances will emerge or arguments will be put forward that can be relied upon to justify a measure such as that at issue in the case before the national court. As matters stand, however, I repeat that it seems to me that the measure in question cannot be considered to be justified by overriding requirements of public interest such as consumer protection or the encouragement of saving because it goes beyond what is necessary to attain such objectives.

107. I therefore propose that the Court reply to the second question submitted by the French Conseil d'État that, if national measures such as those at issue constitute a restriction on the freedom of establishment within the meaning of Article 43 EC, it must be held — on the basis of the facts presented to the Court — that such a restriction is not justified by the pursuit of the overriding requirements of public interest invoked in the present case, specifically consumer protection and the encouragement of saving.

IV — Conclusion

108. In the light of all the foregoing, I propose that the Court reply as follows to the questions submitted by the French Conseil d'État:

(1) National rules of a Member State regulating the pursuit of an economic activity constitute restrictions on the freedom of establishment prohibited as a matter of principle by Article 43 EC if they are such as to place the operator exercising that freedom in less favourable conditions of law and of fact than an operator established in that State or otherwise directly affect access to the market.

A national measure such as the prohibition on the remuneration of 'sight' accounts in euros constitutes a restriction on the freedom of establishment prohibited by Article 43 EC if its application deprives the subsidiaries of foreign banks of the possibility of competing effectively, as regards the taking of deposits from the public, with banks traditionally established in the national territory that have an extensive branch network.

It is for the national court to make that assessment, ascertaining in particular whether other forms of deposit that can be freely remunerated are easily available in the French banking market and by means of which banks can compete effectively in that market.

(2) If national measures such as those at issue constitute a restriction on the freedom of establishment within the meaning of Article 43 EC, it must be held — on the basis of the facts presented to the Court — that such a restriction is not justified by the pursuit of the overriding requirements of public interest invoked in the present case, specifically consumer protection and the encouragement of saving.