JUDGMENT OF THE COURT

30 September 2003 *

In Case C-167/01,

REFERENCE to the Court under Article 234 EC by the Kantongerecht te Amsterdam (Netherlands) for a preliminary ruling in the proceedings pending before that court between

Kamer van Koophandel en Fabrieken voor Amsterdam

and

Inspire Art Ltd,

on the interpretation of Articles 43 EC, 46 EC and 48 EC,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissochet, M. Wathelet (Rapporteur), R. Schintgen and C.W.A. Timmermans (Presidents of Chambers),

* Language of the case: Dutch.

C. Gulmann, D.A.O. Edward, A. La Pergola, P. Jann, V. Skouris, F. Macken, N. Colneric, S. von Bahr, J.N. Cunha Rodrigues and A. Rosas, Judges,

Advocate General: S. Alber,

Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Kamer van Koophandel en Fabrieken voor Amsterdam, by C.J.J.C. van Nispen, advocaat,

— Inspire Art Ltd, by M.E. van Wissen and G. van der Wal, advocaten,

— the Netherlands Government. by H.G. Sevenster, acting as Agent,

— the German Government, by B. Muttelsee-Schön and A. Dittrich, acting as Agents,

— the Italian Government, by I.M. Braguglia, acting as Agent, and by M. Fiorilli, Avvocato dello Stato,

— the Austrian Government, by H. Dossi, acting as Agent,

— the United Kingdom Government, by R. Magrill, acting as Agent, and J. Stratford, Barrister,

— the Commission of the European Communities, by C. Schmidt and C. van der Hauwaert, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Kamer van Koophandel en Fabrieken voor Amsterdam, represented by R. Hermans and E. Pijnacker Hordijk, advocaten, of Inspire Art Ltd, represented by G. van der Wal, of the Netherlands Government, represented by J.G.M. van Bakel, acting as Agent, of the German Government, represented by A. Dittrich, of the United Kingdom Government, represented by J. Stratford, and of the Commission, represented by C. Schmidt and H. van Lier, acting as Agent, at the hearing on 26 November 2002,

after hearing the Opinion of the Advocate General at the sitting on 30 January 2003,

gives the following

Judgment

1 By order of 5 February 2001, received at the Court on 19 April 2001, the Kantongerecht te Amsterdam (Amsterdam Cantonal Court) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Articles 43 EC, 46 EC and 48 EC.

2 Those questions were raised in proceedings between the Kamer van Koophandel en Fabrieken voor Amsterdam (Amsterdam Chamber of Commerce and Industry), Netherlands ('the Chamber of Commerce') and Inspire Art Ltd, a company governed by the law of England and Wales ('Inspire Art'), concerning the obligation imposed on Inspire Art's branch in the Netherlands to record, with its registration in the Dutch commercial register, its description as a 'formeel buitenlandse vennootschap' (formally foreign company) and to use that description in its business dealings, such obligations being imposed by the Wet op de Formeel Buitenlandse Vennootschappen (Law on Formally Foreign Companies) of 17 December 1997 (*Staatsblad* 1997 No 697, 'the WFBV').

I — The legal framework

The relevant provisions of Community law

3 The first paragraph of Article 43 EC provides:

'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.'

4 Article 48 EC extends entitlement to freedom of establishment, subject to the same conditions as those laid down for individuals who are nationals of the Member States, to 'companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community'.

5 Article 46 EC permits the Member States to restrict the freedom of establishment of foreign nationals by adopting 'provisions laid down by law, regulation or administrative action', in so far as such provisions are justified 'on grounds of public policy, public security or public health'.

6 Article 44(2)(g) EC empowers the Council of the European Union, for the purpose of giving effect to freedom of establishment, to coordinate 'to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 48 of the EC Treaty with a view to making such safeguards equivalent throughout the Community.'

7 Various directives have in that manner been adopted by the Council on that basis ('company-law directives') and, in particular, the following directives referred to in the dispute in the main proceedings.

8 The First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (OJ, English Special Edition 1968 (I), p. 41, 'the First Directive'), applies to companies with share capital. It provides for three measures calculated to protect the interests of other persons dealing with those companies: the opening of a file containing certain obligatory information for each company registered in the relevant commercial register, harmonisation of the national rules on the validity and enforceability of obligations entered into in the name of the company (including companies being formed) and the drawing up of a list exhaustively setting out the cases entailing the nullity of a company.

9 The Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with regard to the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ 1977 L 26, p. 1, 'the Second Directive'), specifies the information which must mandatorily be given in the statutes or the instrument of incorporation of public limited companies and the minimum amount of share capital required for such companies and it provides for harmonised rules concerning contributions to assets, paying up of shares, the nominal value of shares and the distribution of dividends to shareholders.

10 The Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11, 'the Fourth Directive') applies to companies limited by shares. It harmonises national provisions relating to the drawing up of the annual accounts of undertakings, their content, structure and publication.

11 The Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts (OJ 1983 L 193, p. 1, 'the Seventh Directive') pursues the same objective as the Fourth Directive with regard to the drawing up of consolidated accounts.

12 The Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State (OJ 1989 L 395, p. 36, 'the Eleventh Directive') concerns the branches of partnerships and companies with share capital.

13 According to the third recital in the preamble to the Eleventh Directive, that act was adopted in consideration of the fact that 'the opening of a branch, like the creation of a subsidiary, is one of the possibilities currently open to companies in the exercise of their right of establishment in another Member State'.

14 The fourth recital in the preamble to that directive recognises that 'in respect of branches the lack of coordination, in particular concerning disclosure, gives rise to some disparities, in the protection of shareholders and third parties, between companies which operate in other Member States by opening branches and those which operate there by creating subsidiaries'.

15 According to the fifth recital in the preamble to that directive 'in this field the differences in the laws of the Member States may interfere with the exercise of the right of establishment... [and] it is therefore necessary to eliminate such differences in order to safeguard, inter alia, the exercise of that right'.

16 The 12th recital in the preamble states that the Eleventh Directive in no way affects the disclosure requirements for branches under other provisions of, for example, employment law on the workers' right to information and tax law, or for statistical purposes.

17 Article 2(1) of the Eleventh Directive provides a list of the information which must be disclosed in the Member State in which the branch is established, namely:

'(a) the address of the branch;

(b) the activities of the branch;

(c) the register in which the company file mentioned in Article 3 of Council Directive 68/151/EEC is kept, together with the registration number in that register;

(d) the name and legal form of the company and the name of the branch if that is different from the name of the company;

(e) the appointment, termination of office and particulars of the persons who are authorised to represent the company in dealings with third parties and in legal proceedings:

— as a company organ constituted pursuant to law or as members of any such organ, in accordance with the disclosure by the company as provided for in Article 2(1)(d) of Directive 68/151/EEC,

— as permanent representatives of the company for the activities of the branch, with an indication of the extent of their powers;

(f) the winding-up of the company, the appointment of liquidators, particulars concerning them and their powers and the termination of the liquidation in accordance with disclosure by the company as provided for in Article 2(1)(h), (j) and (k) of Directive 68/151/EEC,

— insolvency proceedings, arrangements, compositions, or any analogous proceedings to which the company is subject;

(g) the accounting documents in accordance with Article 3;

(h) the closure of the branch.'

18 Furthermore, Article 2(2) of the Eleventh Directive permits the Member State in which the branch has been opened to provide for additional disclosure requirements concerning the following:

'(a) the signature of the persons referred to in paragraph 1(e) and (f) of this Article;

(b) the instruments of constitution and the memorandum and articles of association if they are contained in a separate instrument in accordance with Article 2(1)(a), (b) and (c) of Directive 68/151/EEC, together with amendments to those documents;

(c) an attestation from the register referred to in paragraph 1(c) of this Article relating to the existence of the company;

(d) an indication of the securities on the company's property situated in that Member State, provided such disclosure relates to the validity of those securities.'

19 Article 4 of the Eleventh Directive provides that the Member State in which the branch has been opened may stipulate that another official language of the Community must be used and that the translation of the documents published must be certified, in particular in respect of the publication referred to in Article 2(2)(b) of that directive.

20 Article 6 of the Eleventh Directive provides that the Member States are to prescribe that letters and order forms used by a branch are to state, in addition to the information prescribed by Article 4 of the First Directive, the register in which the file in respect of the branch is kept together with the number of the branch in that register.

21 Finally, Article 12 of the Eleventh Directive requires the Member States to provide for appropriate penalties for failure to comply with the disclosure requirements laid down by that directive in respect of branches in the host State.

The relevant provisions of national law

22 Article 1 of the WFBV defines a 'formally foreign company' as 'a capital company formed under laws other than those of the Netherlands and having legal personality, which carries on its activities entirely or almost entirely in the Netherlands and also does not have any real connection with the State within which the law under which the company was formed applies...'.

23 Articles 2 to 5 of the WFBV impose on formally foreign companies various obligations concerning the company's registration in the commercial register, an

indication of that status in all the documents produced by it, the minimum share capital and the drawing-up, production and publication of the annual documents. The WFBV also provides for penalties in case of non-compliance with those provisions.

24 In particular, Article 2 of the WFBV requires a company falling within the definition of a formally foreign company to be registered as such in the commercial register of the host State. An authentic copy in Dutch, French, German or English, or a copy certified by a director, of the instrument constituting the company must also be filed in the commercial register of the host State, and a copy of the memorandum and articles of association if they are contained in a separate instrument. The date of the first registration of that company, the national register in which and the number under which it is registered must also appear in the commercial register and, in the case of companies with a single member, certain information concerning that sole shareholder.

25 Article 4(4) provides for directors to be jointly and severally liable with the company for legal acts carried out in the name of the company during their directorship until the requirement of registration in the commercial register has been fulfilled.

26 Pursuant to Article 3 of the WFBV, all documents and notices in which a formally foreign company appears or which it produces, except telegrams and advertisements, must state the company's full name, legal form, registered office and chief place of business, and the registration number, the date of first registration and the register in which it is required to be registered under the legislation applicable to it. That article also requires it to be indicated that the company is formally foreign and prohibits the making of statements in documents or publications which give the false impression that the undertaking belongs to a Netherlands legal person.

27 Pursuant to Article 4(1) of the WFBV, the subscribed capital of a formally foreign company must be at least equal to the minimum amount required of Netherlands limited companies by Article 2:178 of the Burgerlijke Wetboek (Netherlands Civil Code, 'the BW'), which was EUR 18 000 on 1 September 2000 (*Staatsblad* 2000, N 322). The paid-up share capital must be at least equal to the minimum capital (Article 4(2) of the WFBV, referring back to Article 2:178 of the BW). In order to ensure that formally foreign companies fulfil those conditions, an auditor's certificate must be filed in the commercial register (Article 4(3) of the WFBV).

28 Until the conditions relating to capital and paid-up share capital have been satisfied, the directors are jointly and severally liable with the company for all legal acts carried out during their directorship which are binding on the company. The directors of a formally foreign company are likewise jointly and severally responsible for the company's acts if the capital subscribed and paid up falls below the minimum required, having originally satisfied the minimum capital requirement. The directors' joint and several liability lasts only so long as the company's status is that of a formally foreign company (Article 4(4) of the WFBV).

29 Nevertheless, Article 4(5) of the WFBV states that the minimum capital provisions do not apply to a company governed by the law of a Member State or of a Member State of the European Economic Area ('the E.E.A.') to which the Second Directive is applicable.

30 Article 5(1) and (2) of the WFBV requires the directors of formally foreign companies to keep accounts and hold them for seven years. Directors must produce annual accounts and an annual report. Those documents must be published by being lodged in the commercial register and must satisfy the conditions laid down in Title 9 of Book 2 of the BW, which makes it possible to be sure that they are consistent with the annual documents produced by Netherlands companies.

31 Directors are additionally bound to lodge in the commercial register before 1 April each year proof of registration in the register determined by the law applicable to the company (Article 5(4) of the WFBV). For the application of the WFBV persons responsible for the day-to-day management of the company are treated in the same way as directors, in accordance with Article 7 of that law.

32 Articles 2:249 and 2:260 of the BW are applicable by analogy to formally foreign companies. Those articles provide for the joint and several liability of directors and auditors for damage caused to others by the publication of misleading annual documents or interim figures.

33 Article 5(3) of the WFBV provides, however, that the obligations under Article 5(1) and (2) of the WFBV relating to accounts and annual documents are not to apply to companies governed by the law of a Member State or by the law of a Member State of the E.E.A. and falling within the ambit of the Fourth and/or the Seventh Directive.

II — The dispute in the main proceedings and the questions referred for a preliminary ruling

34 Inspire Art was formed on 28 July 2000 in the legal form of a private company limited by shares under the law of England and Wales and it has its registered office at Folkestone (United Kingdom). Its sole director, whose domicile is in The Hague (Netherlands), is authorised to act alone and independently in the name of the company. The company, which carries on activity under the business name 'Inspire Art Ltd' in the sphere of dealing in *objets d'art*, began trading on 17 August 2000 and has a branch in Amsterdam.

35 Inspire Art is registered in the commercial register of the Chamber of Commerce without any indication of the fact that it is a formally foreign company within the meaning of Article 1 of the WFBV.

36 Taking the view that that indication was mandatory on the ground that Inspire Art traded exclusively in the Netherlands, the Chamber of Commerce applied to the Kantongerecht te Amsterdam on 30 October 2000 for an order that there should be added to that company's registration in the commercial register the statement that it is a formally foreign company, in accordance with Article 1 of the WFBV, which would entail other obligations laid down by law, set out in paragraphs 22 to 33 above.

37 Inspire Art denies that its registration is incomplete, primarily because the company does not meet the conditions set out in Article 1 of the WFBV. As a secondary point, if the Kantongerecht were to decide that it met those conditions, it maintained that the WFBV was contrary to Community law, and to Articles 43 EC and 48 EC in particular.

38 In its order of 5 February 2001 the Kantongerecht held that Inspire Art was a formally foreign company within the meaning of Article 1 of the WFBV.

39 As regards the compatibility of the WFBV with Community law, it decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1. Are Articles 43 EC and 48 EC to be interpreted as precluding the Netherlands, pursuant to the Wet op de formeel buitenlandse vennootschappen of 17 December 1997, from attaching additional conditions, such as those laid down in Articles 2 to 5 of that law, to the establishment in the

Netherlands of a branch of a company which has been set up in the United Kingdom with the sole aim of securing the advantages which that offers compared to incorporation under Netherlands law, given that Netherlands law imposes stricter rules than those applying in the United Kingdom with regard to the setting-up of companies and payment for shares, and given that the Netherlands law infers that aim from the fact that the company carries on its activities entirely or almost entirely in the Netherlands and, furthermore, does not have any real connection with the State in which the law under which it was formed applies?

2. If, on a proper construction of those articles, it is held that the provisions of the Wet op de formeel buitenlandse vennootschappen are incompatible with them, must Article 46 EC be interpreted as meaning that the said Articles 43 EC and 48 EC do not affect the applicability of the Netherlands rules laid down in that law, on the ground that the provisions in question are justified for the reasons stated by the Netherlands legislature?'

III — Preliminary observations

40 The Chamber of Commerce, the Netherlands Government and the Commission of the European Communities are of the view that the questions were too broadly framed by the national court. Since the dispute in the main proceedings concerned only the registration of a company in the commercial register, the Court must confine its analysis exclusively to the provisions of national law relating to that point.

41 Consequently they suggest that the Court should exclude from consideration Articles 3 and 6 of the WFBV entirely, and also various parts of Articles 2, 4 and 5 of that law (more specifically the end of Article 2(1), Article 2(2), Article 4(1), (2), (4) and (5), and Article 5(1) and (2) of that law).

42 In this connection, settled case-law makes it clear that the procedure provided for by Article 234 EC is an instrument for cooperation between the Court of Justice and the national courts (see, inter alia, Case C-343/90 *Lourenço Dias* [1992] ECR I-4673, paragraph 14).

43 In the context of that cooperation, the national court before which the dispute has been brought, which alone has direct knowledge of the facts of the case in the main proceedings and must assume responsibility for the subsequent judicial decision, is in the best position to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (*Lourenço Dias*, cited above, paragraph 15, and Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 18).

44 Consequently, where the question submitted by the national court concerns the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (*Lourenço Dias*, paragraph 16; Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59; Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38, and *Canal Satélite Digital*, cited above, paragraph 18).

45 It is nevertheless equally settled case-law that the Court considers that it may, if need be, examine the circumstances in which the case was referred to it by the national court, in order to assess whether it has jurisdiction (Case 244/80 *Foglia* [1981] ECR 3045, paragraph 21, and *Canal Satélite Digital*, paragraph 19). The spirit of cooperation which must prevail in preliminary ruling proceedings requires the national court for its part to have regard to the function entrusted to

the Court of Justice, which is to contribute to the administration of justice in the Member States and not to give opinions on general or hypothetical questions (see, *inter alia*, *Foglia*, cited above, paragraphs 18 and 20; *Lourenço Dias*, paragraph 17; *Bosman*, cited above, paragraph 60, and Case C-451/99 *Cura Anlagen* [2002] ECR I-3193, paragraph 26).

46 Moreover, in order to enable the Court to give a useful interpretation of Community law, it is essential for the national court to explain why it considers that an answer to its questions is necessary for resolving the dispute (see, inter alia, *Foglia*, paragraph 17).

47 With that information in its possession, the Court will then be in a position to ascertain whether the interpretation of Community law which is sought is related to the actual nature and subject-matter of the main proceedings. If it should appear that the question raised is manifestly irrelevant for the purposes of deciding the case, the Court must declare that there is no need to proceed to judgment (*Lourenço Dias*, paragraph 20).

48 Having regard to the foregoing, the Court must consider whether the questions referred by the national court in this case are relevant to resolution of the dispute.

49 Although the issue at the heart of the dispute in the main proceedings is whether or not Inspire Art must be registered as a formally foreign company in the business register, the fact remains that that registration automatically and inextricably entails a number of legal consequences provided for by Articles 2 to 5 of the WFBV.

50 The national court has thus considered that the question of compatibility with Articles 43 EC, 46 EC and 48 EC arose more particularly in respect of certain of the obligations provided for by Articles 2 to 5 of the WFBV, namely, those relating to registration as a formally foreign company, the indication of that status in all documents produced by the company, the minimum capital required and the personal liability of the directors as joint and several debtors when the company's share capital has never reached or has fallen below the minimum amount of capital required by law.

51 In order to provide the national court with a helpful answer, within the meaning of the case-law referred to above, it is in consequence necessary to examine all those provisions, having regard to freedom of establishment as guaranteed by the EC Treaty, and also to the company-law directives.

Consideration of the questions referred

52 By those questions, which may appropriately be considered together, the national court seeks in substance to ascertain:

— whether Articles 43 EC and 48 EC must be interpreted as precluding legislation of a Member State, such as the WFBV, which attaches additional conditions, such as those laid down in Articles 2 to 5 of that law, to the establishment in that Member State of a company formed under the law of another Member State with the sole aim of securing certain advantages compared with companies formed under the law of the Member State of establishment which imposes stricter rules than those imposed by the law of the Member State of formation with regard to the setting-up of companies and paying-up of shares;

— whether the fact that the law of the Member State of establishment infers that aim from the circumstance of that company's carrying on its activities entirely or almost entirely in that latter Member State and of its having no genuine connection with the State in accordance with the law of which it was formed makes any difference to the Court's analysis of that question;

— and whether, if an affirmative answer is given to one or other of those questions, a national law such as the WFBV may be justified under Article 46 EC or by overriding reasons relating to the public interest.

53 In the first place, Article 5(1) and (2) of the WFBV, mentioned in the questions referred for a preliminary ruling, concerns the keeping and filing of the annual accounts of formally foreign companies. Article 5(3) of the WFBV provides, however, that the obligations laid down in those subparagraphs are not to apply to companies governed by the law of another Member State and to which the Fourth Directive, inter alia, applies. Inspire Art is covered by that exception, since it is governed by the law of England and Wales and since it falls within the scope *ratione personæ* of the Fourth Directive.

54 There is therefore no longer any need for the Court to consider whether a provision such as Article 5 of the WFBV is compatible with Community law.

55 Secondly, several of the provisions of the WFBV fall within the scope of the Eleventh Directive, since that concerns disclosure requirements in respect of branches opened in a Member State by companies covered by the First Directive and governed by the law of another Member State.

56 In that connection, first, as the Commission observes, some of the obligations imposed by the WFBV concern the implementation in domestic law of the disclosure requirements laid down by the Eleventh Directive.

57 Those are, more specifically, the provisions requiring: an entry in the business register of the host Member State showing registration in a foreign business register, and the number under which the company is registered in that register (Article 2(1) of the WFBV and Article 2(1)(c) of the Eleventh Directive), filing in the Netherlands business register of a certified copy of the document creating the company and of its memorandum and articles of association in Dutch, French, English or German (Article 2(1) of the WFBV and Articles 2(2)(b) and 4 of the Eleventh Directive), and the filing every year in that business register of a certificate of registration in the foreign business register (Article 5(4) of the WFBV and Article 2(2)(c) of the Eleventh Directive).

58 Those provisions, the compatibility of which with the Eleventh Directive has not been called into question, cannot be regarded as constituting any impediment to freedom of establishment.

59 Nevertheless, even if the various disclosure measures referred to at paragraph 57 above are compatible with Community law, that does not automatically mean that the sanctions attached by the WFBV to non-compliance with those disclosure measures must also be compatible with Community law.

60 Article 4(4) of the WFBV provides for directors to be jointly and severally liable with the company for legal acts adopted in the name of the company during their directorship for so long as the requirements concerning disclosure in the business register have not been met.

61 It is true that Article 12 of the Eleventh Directive requires the Member States to provide for appropriate penalties where branches of companies fail to make the required disclosures in the host Member State.

62 The Court has consistently held that where a Community regulation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 10 EC requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law. For that purpose, while the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalised in conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive (Case 68/88 *Commission* v *Greece* [1989] ECR 2965, paragraphs 23 and 24; Case C-326/88 *Hansen* [1990] ECR I-2911, paragraph 17; Case C-36/94 *Siesse* [1995] ECR I-3573, paragraph 20, and Case C-177/95 *Ebony Maritime and Loten Navigation* [1997] ECR I-1111, paragraph 35).

63 It is for the national court, which alone has jurisdiction to interpret domestic law, to establish whether the penalty provided for by Article 4(4) of the WFBV satisfies those conditions and, in particular, whether it does not put formally foreign companies at a disadvantage in comparison with Netherlands companies where there is an infringement of the disclosure requirements referred to in paragraph 56 above.

64 If the national court reaches the conclusion that Article 4(4) of the WFBV treats formally foreign companies differently from national companies, it must be concluded that that provision is contrary to Community law.

65 On the other hand, the list set out in Article 2 of the Eleventh Directive does not include the other disclosure obligations provided for by the WFBV, namely, recording in the commercial register the fact that the company is formally foreign (Articles 1 and 2(1) of the WFBV), recording in the business register of the host Member State the date of first registration in the foreign business register and information relating to sole members (Article 2(1) of the WFBV), and the compulsory filing of an auditor's certificate to the effect that the company satisfies the conditions as to minimum capital, subscribed capital and paid-up share capital (Article 4(3) of the WFBV). Similarly, mention of the company's status of a formally foreign company on all documents it produces (Article 3 of the WFBV) is not included in Article 6 of the Eleventh Directive.

66 It is therefore necessary to consider, with regard to those obligations, whether the harmonisation brought about by the Eleventh Directive, and more particularly Articles 2 and 6 thereof, is exhaustive.

67 The Eleventh Directive was adopted on the basis of Article 54(3)(g) of the EC Treaty (now, after amendment, Article 44(2)(g) EC) which provides that the Council and Commission are to carry out the duties devolving on them under that article 'by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 58 with a view to making such safeguards equivalent throughout the Community'.

68 Furthermore, it follows from the fourth and fifth recitals in the preamble to the Directive that the differences in respect of branches between the laws of the Member States, especially as regards disclosure, may interfere with the exercise of the right of establishment and must therefore be eliminated.

69 It follows that, without affecting the information obligations imposed on branches under social or tax law, or in the field of statistics, harmonisation of the disclosure to be made by branches, as brought about by the Eleventh Directive, is exhaustive, for only in that case can it attain the objective it pursues.

70 It must likewise be pointed out that Article 2(1) of the Eleventh Directive is exhaustive in formulation. Moreover, Article 2(2) contains a list of optional measures imposing disclosure requirements on branches, a measure which can have no *raison d'être* unless the Member States are unable to provide for disclosure measures for branches other than those laid down in the text of that directive.

71 In consequence, the various disclosure measures provided for by the WFBV and referred to in paragraph 65 above are contrary to the Eleventh Directive.

72 It must therefore be concluded on this point that it is contrary to Article 2 of the Eleventh Directive for national legislation such as the WFBV to impose on the branch of a company formed in accordance with the laws of another Member State disclosure obligations not provided for by that directive.

73 Thirdly, several of the provisions of the WFBV do not fall within the scope of the Eleventh Directive. Those are the rules relating to the minimum capital required, both at the time of registration and for so long as a formally foreign company exists, and those relating to the penalty attaching to non-compliance with the obligations laid down by the WFBV, namely, the joint and several liability of the directors with the company (Article 4(1) and (2) of the WFBV). Those provisions must therefore be considered in the light of Articles 43 EC and 48 EC.

The existence of an impediment to freedom of establishment

Observations submitted to the Court

74 The Chamber of Commerce and the Netherlands, German, Italian and Austrian Governments are of the view that application of provisions such as those of the WFBV is not contrary to Articles 43 EC and 48 EC.

75 In the first place, the rules laid down by the WFBV concern neither the formation of companies under the law of another Member State nor their registration (and consequently their recognition). The validity of those companies is in fact recognised and they are not refused registration, with the result that freedom of establishment is not compromised.

76 They submit that the considerations of the Court in Case C-212/97 *Centros* [1999] ECR I-1459 are therefore irrelevant to the present case, because the latter is concerned solely with the rule governing registration of foreign companies without affecting the Member States' freedom to lay down conditions for the carrying on of certain trades, professions or businesses.

77 The Netherlands Government maintains that for companies formed under the law of another Member State and intending to carry on their activities in the Netherlands, the system of incorporation applied in the Netherlands is extremely liberal. In accordance with that principle, as formulated in Article 2 of the Wet conflictenrecht corporaties (the Law concerning the rules on conflict of laws applicable to legal persons) of 17 December 1997 ('the rules-of-conflict Law'), 'a company which, by virtue of its contract or instrument of incorporation, has, at the time of its formation, its registered office or, failing that, the centre of its external operations in the State under the law of which it was formed, shall be governed by the law of that State'.

78 The Netherlands Government submits that the existence of companies validly formed under the law of another Member State is recognised without further formality in the Netherlands. Those companies are subject to the law of the State of formation; it is as a rule important that those companies should carry on some activity in that State.

79 It has however become apparent that that very accommodating system has in practice led to increased use of foreign companies for ends which the Netherlands legislature had not covered or even foreseen. More and more frequently companies that carry on their activity principally or even exclusively on the Netherlands market are formed abroad with the aim of evading the overriding requirements of Netherlands company law.

80 In order to tackle that development, Article 6 of the rules-of-conflict Law has established a limited exception to that liberal regime, by providing that 'this law is without prejudice to the provisions of the [WFBV]'.

81 Next, the Chamber of Commerce and the Netherlands, German, Italian and Austrian Governments observe that the provisions of the WFBV do not concern freedom of establishment but are confined to imposing on companies with share capital formed under a law other than that of the Netherlands a limited number of additional obligations relating to the exercise of their business activities and the running of the company, with a view to ensuring that others are clearly informed that companies such as Inspire Art are formally foreign companies and that they are in addition given the same guarantees — by means of the filing of certain documents and certificates — when concluding contracts with those companies as they have when concluding contracts with Netherlands companies.

82 In their opinion, those conditions are non-discriminatory since they correspond to the mandatory rules of Netherlands company law applicable to limited-liability companies formed in the Netherlands. Moreover, the purpose of those conditions, which must be satisfied by Netherlands companies as well as by formally

foreign companies, is to safeguard non-economic interests — recognised at Community level — concerning the protection of consumers and creditors.

83 Maintaining that the WFBV is applicable under private international law, the Chamber of Commerce and the Netherlands, German and Austrian Governments refer to the judgment in Case 81/87 *Daily Mail and General Trust* [1988] ECR 5483 and the relevant case-law. In their submission, in that case the Court held that Articles 43 EC and 48 EC did not constitute a restriction on the powers of the Member States to determine the relevant factor connecting a company to their national legal order. They infer from that judgment that those articles do not preclude the adoption under private international law of rules applying to companies falling in part within the scope of Netherlands law. In that context, the WFBV does no more than attach significance to the place in which the company carries on its activities, in addition to the connecting factor of the 'place of incorporation and registration'.

84 In addition, the German and Austrian Governments have asserted that as a matter of principle the purpose of Articles 43 EC and 48 EC, as regards freedom to set up branches, is to enable undertakings carrying on activities in one Member State to achieve growth in another Member State, which is not so in the case of 'brass-plate companies'.

85 The German and Austrian Governments question whether, with regard to formally foreign companies, branches ought not actually to be regarded as principal establishments and whether there ought not to be applied to them the principles of freedom of primary establishment. Following the same reasoning, the Italian Government maintains that the fact that a company established in one Member State has never carried on any activity in that State means that it cannot be considered to be a branch when it carries on activity in another Member State. By placing the sole centre of its activities in a State other than that to which it formally belongs, such a company must be considered to be primarily established in that first State.

86 Finally, the Netherlands, German and Italian Governments observe that in its case-law the Court has recognised that a Member State is entitled to take measures designed to prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law (*Centros*, paragraph 24, and the case-law cited therein). Whether or not there is any improper use must be determined taking into account, in particular, the objectives pursued by the provisions of Community law in question (Case C-206/94 *Paletta* [1996] ECR I-2357, paragraph 25).

87 Those Governments argue that, according to the judgments in Case 79/85 *Segers* [1986] ECR 2375, paragraph 16, and *Centros*, paragraph 29, the fact that a company has been formed in one Member State but carries on all its activities through its branch established in another Member State does not constitute a sufficient reason for denying the persons concerned the right to freedom of establishment by pleading abuse, deceit and/or the unacceptable evasion of national laws.

88 Nevertheless, in this case those Governments submit that, without refusing to recognise a company formed under the law of another Member State or preventing the registration of a branch, the WFBV does no more than provide for a few limited preventive measures and penalties where a company evades the overriding rules of company law applicable in the Member State in which all the activities are carried on.

89 In consequence, where, as in the main proceedings, a company goes beyond merely exercising its right to freedom of establishment and where it was formed in another Member State for the purpose of circumventing the body of rules applying to the formation and running of companies in the Member State in

which it carries on all its activities, those Governments maintain that the result of allowing that company to rely on freedom of establishment would be an unacceptable evasion of national law. Adoption of measures such as those set out in the WFBV is therefore justified as Community law now stands.

90 By contrast, in the view of Inspire Art, the United Kingdom Government and the Commission the provisions of the WFBV constitute interference with the freedom of establishment guaranteed by Articles 43 EC and 48 EC, in that they impose on formally foreign companies obligations which render the right of establishment markedly less attractive for those companies. That indeed is the stated purpose of those provisions.

91 Inspire Art, the United Kingdom Government and the Commission submit that the rules on freedom of establishment are applicable to a situation such as that concerned in the main proceedings. Referring to *Segers* and to *Centros*, they argue that a company may also rely on freedom of establishment where it was formed in one Member State for the sole purpose of being able to establish itself in another Member State where it carries on the essential part, or even all, of its activities. It is immaterial that the company was formed in the first Member State solely in order to avoid the statutory provisions of the second Member State. According to that case-law, there is no abuse, merely the exercise of the freedom of establishment guaranteed by the Treaty.

92 The United Kingdom Government and the Commission maintain that Article 1 of the WFBV takes account of the place where the company's activity is carried on in order to attach to it a number of provisions mandatory in the host Member State. Use of actual activity as a connecting factor, which does not correspond to any yardstick provided for in Article 48 EC, interferes with freedom of establishment inasmuch as it makes the exercise of that freedom less attractive to companies formed abroad which intend subsequently to carry on activity in the Netherlands, on the ground that other rules have been held to be applicable, in addition to those of the State of formation.

93 Inspire Art argues for a similar interpretation of the WFBV. It states that although under the national legislation companies are as a rule governed by the law of the State in which they were formed, the Netherlands legislature sought to counter the formation, which it regarded as improper, of companies under foreign laws with the aim of carrying on activity exclusively or principally in the Netherlands by declaring that the provisions of Netherlands company law were applicable to those companies. The legislature justified that regime by invoking the protection of creditors. It follows that the WFBV cannot be seen as an application of the real head office theory according to which a company is governed by the law of the Member State in which it has its actual head office.

94 Lastly, the United Kingdom Government notes that it is of fundamental importance to the operation of the common market that it should be possible to set up secondary establishments in other Member States. It submits that in the circumstances of the case *Centros* is fully applicable.

The Court's answer

95 The Court has held that it is immaterial, having regard to the application of the rules on freedom of establishment, that the company was formed in one Member State only for the purpose of establishing itself in a second Member State, where its main, or indeed entire, business is to be conducted (*Segers*, paragraph 16, and *Centros*, paragraph 17). The reasons for which a company chooses to be formed in a particular Member State are, save in the case of fraud, irrelevant with regard to application of the rules on freedom of establishment (*Centros*, paragraph 18).

96 The Court has also held that the fact that the company was formed in a particular Member State for the sole purpose of enjoying the benefit of more favourable legislation does not constitute abuse even if that company conducts its activities entirely or mainly in that second State (*Segers*, paragraph 16, and *Centros*, paragraph 18).

97 It follows that those companies are entitled to carry on their business in another Member State through a branch, and that the location of their registered office, central administration or principal place of business serves as the connecting factor with the legal system of a particular Member State in the same way as does nationality in the case of a natural person (Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 18; *Segers*, paragraph 13, and *Centros*, paragraph 20.

98 Thus, in the main proceedings, the fact that Inspire Art was formed in the United Kingdom for the purpose of circumventing Netherlands company law which lays down stricter rules with regard in particular to minimum capital and the paying-up of shares does not mean that that company's establishment of a branch in the Netherlands is not covered by freedom of establishment as provided for by Articles 43 EC and 48 EC. As the Court held in *Centros* (paragraph 18), the question of the application of those articles is different from the question whether or not a Member State may adopt measures in order to prevent attempts by certain of its nationals improperly to evade domestic legislation by having recourse to the possibilities offered by the Treaty.

99 The argument that freedom of establishment is not in any way infringed by the WFBV inasmuch as foreign companies are fully recognised in the Netherlands and are not refused registration in that Member State's business register, that law having the effect simply of laying down a number of additional obligations classified as 'administrative', cannot be accepted.

100 The effect of the WFBV is, in fact, that the Netherlands company-law rules on minimum capital and directors' liability are applied mandatorily to foreign companies such as Inspire Art when they carry on their activities exclusively, or almost exclusively, in the Netherlands.

101 Creation of a branch in the Netherlands by companies of that kind is therefore subject to certain rules provided for by that State in respect of the formation of a limited-liability company. The legislation at issue in the case in the main proceedings, which requires the branch of such a company formed in accordance with the legislation of a Member State to comply with the rules of the State of establishment on share capital and directors' liability, has the effect of impeding the exercise by those companies of the freedom of establishment conferred by the Treaty.

102 The last issue for consideration concerns the arguments based on the judgment in *Daily Mail and General Trust*, namely, that the Member States remain free to determine the law applicable to a company since the rules relating to freedom of establishment have not led to harmonisation of the provisions of the private international law of the Member States. In this respect it is argued that the Member States retain the right to take action against 'brass-plate companies', that classification being in the circumstances of the case inferred from the lack of any real connection with the State of formation.

103 It must be stressed that, unlike the case at issue in the main proceedings, *Daily Mail and General Trust* concerned relations between a company and the Member State under the laws of which it had been incorporated in a situation where the company wished to transfer its actual centre of administration to another Member State whilst retaining its legal personality in the State of incorporation. In the main proceedings the national court has asked the Court of Justice whether the legislation of the State where a company actually carries on its activities applies to that company when it was formed under the law of another Member State (Case C-208/00 *Überseering* [2002] ECR I-9919, paragraph 62).

104 It follows from the foregoing that the provisions of the WFBV relating to minimum capital (both at the time of formation and during the life of the company) and to directors' liability constitute restrictions on freedom of establishment as guaranteed by Articles 43 EC and 48 EC.

105 It must therefore be concluded that Articles 43 EC and 48 EC preclude national legislation such as the WFBV which imposes on the exercise of freedom of secondary establishment in that State by a company formed in accordance with the law of another Member State certain conditions provided for in domestic law in respect of company formation relating to minimum capital and directors' liability. The reasons for which the company was formed in that other Member State, and the fact that it carries on its activities exclusively or almost exclusively in the Member State of establishment, do not deprive it of the right to invoke the freedom of establishment guaranteed by the Treaty, save where abuse is established on a case-by-case basis.

Whether there is any justification

106 As a preliminary point, there can be no justification for the disclosure provisions of the WFBV, which have been found to be contrary to the Eleventh Directive (see paragraphs 71 and 72 above). As a result, only the arguments concerning the provisions of the WFBV relating to minimum capital and directors' liability will be considered below.

107 Given that those rules constitute an impediment to freedom of establishment, it must be considered whether they can be justified on one of the grounds set out in Article 46 EC or, failing that, by an overriding reason relating to the public interest.

Observations submitted to the Court

108 According to the Chamber of Commerce and the Netherlands, German and Austrian Governments, the provisions of the WFBV are justified both by Article 46 EC and by overriding reasons relating to the public interest.

109 They maintain that the purpose of the WFBV is to counter fraud, protect creditors and ensure that tax inspections are effective and that business dealings are fair. Those aims have been recognised in the Court's decisions to be legitimate sources of justification.

110 According to the Chamber of Commerce and the Netherlands, German and Austrian Governments, the rule in Article 4 of the WFBV concerning minimum capital, its paying-up and its maintenance serves to protect creditors and others. Thus, the importance of minimum capital is expressly recognised in Article 6 of the Second Directive. The purpose of the rules on minimum capital is above all to strengthen the financial capacity of companies and thus to provide greater protection of private and public creditors. In a general way they help to protect all creditors against the risk of fraudulent insolvency connected to the formation of companies which have insufficient capital from the outset.

111 The Netherlands Government submits that directors' liability constitutes an appropriate sanction for non-compliance with the provisions of the WFBV. In the absence of Community harmonisation measures, the Member States enjoy a wide margin of discretion in determining the penalties to be applied in the case of non-compliance with their national rules (Case C-265/95 *Commission* v *France* [1997] ECR I-6959, paragraph 33). The choice of that penalty is on the one hand motivated by the wish to apply the same rule as that laid down for directors of a Netherlands company. Nor is it unknown to Community law, as may be seen from Article 51 of Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) (OJ 2001 L 294, p. 1).

112 On the other hand, the Netherlands Government maintains that, since directors are responsible for the proper conduct of company matters, it is to be expected that they should incur liability if the company does not comply with the provisions of the WFBV.

113 Finally, Article 4(1) of the Second Directive permits the Member States to adopt suitable liability rules in respect of obligations entered into by the company or in its name, where the company cannot be wound up.

114 The Chamber of Commerce adds that the provisions of the WFBV are not discriminatory. In its view, they lead instead to the application to foreign companies of the rules applicable to companies governed by Netherlands law.

115 The Netherlands Government submits that the provisions of the WFBV concerning minimum capital and directors' liability are appropriate for the

purpose of attaining the sought-after objective. In this regard it emphasises the point that that assessment cannot be made without taking into account the fundamental and central objective of the WFBV, namely, to combat improper use of foreign companies and abuse of freedom of establishment.

116 In addition, the Austrian Government observes that the rules on minimum capital are an appropriate and proportionate means, as is recognised by Community law. As regards joint-stock companies, the Second Directive itself established the importance of minimum capital. There is however no such rule for limited-liability companies. Nevertheless, all the Member States, except Ireland and the United Kingdom of Great Britain and Northern Ireland, have rules on the minimum capital to be guaranteed by those companies. Unlike members' personal liability, which would frequently be of no use in the event of compulsory liquidation, company capital offers greater security.

117 The Chamber of Commerce submits that those measures do not go beyond what is necessary if the objective pursued is to be attained. Non-compliance with the obligations imposed by the WFBV does not result in refusal to recognise the foreign company but only in the joint and several liability of its directors. In that regard the Chamber of Commerce maintains that the fact that a company does not satisfy, or no longer satisfies, the rules on minimum capital is clear evidence that there is a risk of abuse or fraud, where moreover that company has no real connection to its State of formation.

118 Inspire Art, the United Kingdom Government and the Commission put forward the opposite argument and are of the view that the provisions of the WFBV are not justified.

119 In the first place, there is no justification for the WFBV to be found in Article 46 EC.

120 As regards abuse of the law, it follows from *Centros* that the mere fact that a company does not carry on any activity in the State of formation cannot constitute such abuse. It is instead for the national authorities and courts to establish in every case whether the conditions on which such a restriction might be justified have been satisfied. Legislation as general as the WFBV does not meet that condition.

121 In their submission, *Centros* recognised that it was possible for a Member State to restrict freedom of establishment where it pleaded non-compliance with provisions concerning the carrying on of certain trades, professions or businesses. That is not so in the circumstances of this case. So far as Inspire Art is concerned, the issue is not regulation of the conduct of its activities in the Netherlands but whether or not the rules of Netherlands company law, such as those on minimum capital, must be observed on setting up a secondary establishment in the Netherlands. The Court held in that judgment that taking advantage of the more favourable rules of another Member State cannot, in itself, constitute an abuse of the right of establishment but is a right inherent in the exercise of freedom of establishment.

122 Inspire Art, the United Kingdom Government and the Commission also note that the Court held in *Centros* that the protection of creditors does not in theory fall within the ambit of the system of derogations under Article 46 EC.

123 Nor, in their submission, can the provisions of the WFBV concerning minimum capital and directors' liability be justified by the imperative public-interest requirement of protection of creditors, because those provisions are not such as to guarantee that protection.

124 In that context, Inspire Art and the Commission observe that the company holds itself out as a company governed by the law of England and Wales and that creditors cannot therefore be deceived on that subject.

125 Furthermore, creditors must take some measure of responsibility for their own actions. If the assurances given them by the law of England and Wales do not satisfy them, they can either insist on additional security or refuse to conclude contracts with a company governed by foreign law.

126 The United Kingdom Government and the Commission maintain that the WFBV would not have been applicable if Inspire Art had carried out even minor activity in another Member State. In that case the risk run by creditors would, however, have been as great as it would have been if the activities were carried out in the Netherlands exclusively, or indeed greater.

127 According to Inspire Art, the minimum capital requirements do not guarantee any protection for creditors. Thus, the minimum capital might, for example, be

converted into a loan immediately once it had been contributed and the company registered, even if the company was governed by Netherlands law. It would not therefore satisfy the creditors. Consequently, the provisions of the WFBV concerning minimum capital are not such as to achieve the intended purpose of protecting creditors.

128 Inspire Art and the Commission maintain that the rules on the joint and several liability of directors are discriminatory. Article 4(4) of the WFBV makes them jointly and severally liable where, after the company has been registered in the business register, minimum capital falls below the limit set. By contrast, the directors of a limited liability company governed by Netherlands law are not subject to that strict liability. Moreover, as opposed to companies governed by Netherlands law, the circle of potentially liable persons is extended to those who actually conduct the company's activities.

129 Inspire Art, the United Kingdom Government and the Commission submit that the provisions of Article 4(1), (2) and (4) of the WFBV are disproportionate because Inspire Art holds itself out as a company governed by the law of England and Wales.

130 Furthermore, less radical measures could in their view be envisaged. For example, as the Court has acknowledged in *Centros*, it could be made possible in law for public creditors to obtain the necessary guarantees from those foreign establishments, in so far as they feel that they are insufficiently protected by the company law of the State of formation.

The Court's answer

131 It must first of all be stated that none of the arguments put forward by the Netherlands Government with a view to justifying the legislation at issue in the main proceedings falls within the ambit of Article 46 EC.

132 The justifications put forward by the Netherlands Government, namely, the aims of protecting creditors, combating improper recourse to freedom of establishment, and protecting both effective tax inspections and fairness in business dealings, fall therefore to be evaluated by reference to overriding reasons related to the public interest.

133 It must be borne in mind that, according to the Court's case-law, national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must, if they are to be justified, fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the public interest; they must be suitable for securing the attainment of the objective which they pursue, and they must not go beyond what is necessary in order to attain it (see, in particular, Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32; Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37, and *Centros*, paragraph 34).

134 In consequence, it is necessary to consider whether those conditions are fulfilled by provisions relating to minimum capital such as those at issue in the main proceedings.

135 First, with regard to protection of creditors, and there being no need for the Court to consider whether the rules on minimum share capital constitute in themselves an appropriate protection measure, it is clear that Inspire Art holds itself out as a company governed by the law of England and Wales and not as a Netherlands company. Its potential creditors are put on sufficient notice that it is covered by legislation other than that regulating the formation in the Netherlands of limited liability companies and, in particular, laying down rules in respect of minimum capital and directors' liability. They can also refer, as the Court pointed out in *Centros*, paragraph 36, to certain rules of Community law which protect them, such as the Fourth and Eleventh Directives.

136 Second, with regard to combating improper recourse to freedom of establishment, it must be borne in mind that a Member State is entitled to take measures designed to prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law (*Centros*, paragraph 24, and the decisions cited therein).

137 However, while in this case Inspire Art was formed under the company law of a Member State, in the case in point the United Kingdom, for the purpose in particular of evading the application of Netherlands company law, which was considered to be more severe, the fact remains that the provisions of the Treaty on freedom of establishment are intended specifically to enable companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community to pursue activities in other Member States through an agency, branch or subsidiary (*Centros*, paragraph 26).

138 That being so, as the Court confirmed in paragraph 27 of *Centros*, the fact that a national of a Member State who wishes to set up a company can choose to do so in the Member State the company-law rules of which seem to him the least restrictive and then set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty.

139 In addition, it is clear from settled case-law (*Segers*, paragraph 16, and *Centros*, paragraph 29) that the fact that a company does not conduct any business in the Member State in which it has its registered office and pursues its activities only or principally in the Member State where its branch is established is not sufficient to prove the existence of abuse or fraudulent conduct which would entitle the latter Member State to deny that company the benefit of the provisions of Community law relating to the right of establishment.

140 Last, as regards possible justification of the WFBV on grounds of protection of fairness in business dealings and the efficiency of tax inspections, it is clear that neither the Chamber of Commerce nor the Netherlands Government has adduced any evidence to prove that the measure in question satisfies the criteria of efficacy, proportionality and non-discrimination mentioned in paragraph 132 above.

141 To the extent that the provisions concerning minium capital are incompatible with freedom of establishment, as guaranteed by the Treaty, the same must necessarily be true of the penalties attached to non-compliance with those obligations, that is to say, the personal joint and several liability of directors where the amount of capital does not reach the minimum provided for by the national legislation or where during the company's activities it falls below that amount.

142 The answer to be given to the second question referred by the national court must therefore be that the impediment to the freedom of establishment guaranteed by the Treaty constituted by provisions of national law, such as those at issue, relating to minimum capital and the personal joint and several liability of directors cannot be justified under Article 46 EC, or on grounds of protecting creditors, or combating improper recourse to freedom of establishment or safeguarding fairness in business dealings or the efficiency of tax inspections.

143 In light of all the foregoing considerations, the answers to be given to the questions referred for a preliminary ruling must be:

— It is contrary to Article 2 of the Eleventh Directive for national legislation such as the WFBV to impose on the branch of a company formed in accordance with the laws of another Member State disclosure obligations not provided for by that directive.

— It is contrary to Articles 43 EC and 48 EC for national legislation such as the WFBV to impose on the exercise of freedom of secondary establishment in that State by a company formed in accordance with the law of another Member State certain conditions provided for in domestic company law in respect of company formation relating to minimum capital and directors' liability. The reasons for which the company was formed in that other Member State, and the fact that it carries on its activities exclusively or almost exclusively in the Member State of establishment, do not deprive it of the right to invoke the freedom of establishment guaranteed by the EC Treaty, save where the existence of an abuse is established on a case-by-case basis.

Costs

144 The costs incurred by the Netherlands, German, Italian, Austrian and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Kantongerecht te Amsterdam by order of 5 February 2001, hereby rules:

1. It is contrary to Article 2 of the Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State for national legislation such as the Wet op de Formeel Buitenlandse Vennootschappen (Law on Formally Foreign Companies) of 17 December 1997 to impose on the branch of a company formed in accordance with the laws of another Member State disclosure obligations not provided for by that directive.

2. **It is contrary to Articles 43 EC and 48 EC for national legislation such as the Wet op de Formeel Buitenlandse Vennootschappen to impose on the exercise of freedom of secondary establishment in that State by a company formed in accordance with the law of another Member State certain conditions provided for in domestic company law in respect of company formation relating to minimum capital and directors' liability. The reasons for which the company was formed in that other Member State, and the fact that it carries on its activities exclusively or almost exclusively in the Member State of establishment, do not deprive it of the right to invoke the freedom of establishment guaranteed by the EC Treaty, save where the existence of an abuse is established on a case-by-case basis.**

Rodríguez Iglesias	Puissochet	Wathelet
Schintgen	Timmermans	Gulmann
Edward	La Pergola	Jann
Skouris	Macken	Colneric
von Bahr	Cunha Rodrigues	Rosas

Delivered in open court in Luxembourg on 30 September 2003.

R. Grass — Registrar

G.C. Rodríguez Iglesias — President