Conclusions
OPINION OF ADVOCATE GENERAL
ALBER
delivered on 30 January 2003 (1)

Case C-167/01

Kamer van Koophandel en Fabrieken voor Amsterdam
v
Inspire Art Ltd

(Reference for a preliminary ruling from the Kantongerecht te Amsterdam)

((Free movement – Freedom of establishment – Company incorporated under the laws of one Member State and having its registered office there – Company establishing a branch in another Member State in order to carry on its activities entirely or almost entirely in that Member State – Form of registration in the commercial register – Justification))

I ? Introduction

1. The Kantongerecht te Amsterdam (Amsterdam Cantonal Court) has referred two questions to the Court for a preliminary ruling concerning the interpretation of Articles 43 and 48 EC and the conditions of justification under Article 46 EC. These questions arise in a dispute between the Kamer van Koophandel en Fabrieken voor Amsterdam and Inspire Art Ltd. Inspire Art Ltd was formed under the law of the United Kingdom, and the dispute concerns principally whether the entry relating to its Netherlands branch in the Netherlands commercial register must be supplemented by the words formally foreign company. The Dutch Wet op de formeel buitenlandse vennootschappen (Law on formally foreign companies, hereinafter WFBV) provides that these supplementary words must appear in the commercial register and must be used in the course of business. The Kantongerecht asks whether this is compatible with freedom of establishment. There are other, connected legal obligations which may also restrict freedom of establishment, such as minimum capital requirements, personal joint and several liability of directors and other formal requirements.

II ? Legal framework

2. Articles 1 to 5 of the WFBV (2) provide as follows. Article 1For the purposes of this Law, a formally foreign company is a capital company established 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.Article 2

1. When applying for registration in the commercial register, the persons authorised to carry on business on behalf of a formally foreign company must state that the company falls within the definition in Article 1 and must lodge at the commercial register a copy of the document establishing the company and, if contained in a separate document, a copy of the company's

statutes, in each case in Dutch, French, German or English and certified either officially or by a person authorised to carry on business on the company's behalf. The application must also identify the register in which and the number under which the company is registered, and must also state the date on which it was first registered. The application must also state the name, personal details (in the case of a natural person) and residence of a sole shareholder in the company, or a shareholder who is a party to a marriage which owns all the shares in the company, whereby there is to be disregarded any shares held by the company itself or by any of its subsidiaries. The persons authorised to carry on business on behalf of a formally foreign company must notify any change in the details registered in the commercial register pursuant to this Law, stating the date on which the change took effect. The acts which this provision requires to be done may not be done by an agent.
2. The commercial register referred to in paragraph 1 is the commercial register maintained by the Chamber of Industry and Commerce authorised to do so by Articles 6 and 7 of the Law on the commercial register 1996.Article 3
1. The company's full name, legal form, seat and place of the branch of the undertaking of which it forms part, and, where applicable law requires it to be registered, the register in which and the number under which the company is registered and the date of first registration, are to be stated on all documents, printed matter and notices to which a formally foreign company is party or produces, except telegrams and advertisements. They must also state the number under which the company is registered in the commercial register and that the company is a formally foreign company. No document, printed matter or notice may include a false statement to the effect that the undertaking is owned by a Netherlands legal person.
2. If the company's share capital is stated, there must be stated the amount of its nominal capital and how much thereof has been paid up.
3. If the business of the company continues to be carried on after the company has been dissolved, the words, in liquidation must appear after the company's name.Article 4
1. A formally foreign company's nominal capital and the amount thereof which has been paid up must be at least the minimum amount stated in Article 178(2) of Book II of the Burgerlijk Wetboek (Civil Code) as in force at the time the company first came within the definition in Article 1.
2. As of the time the company first comes within the definition in Article 1, its share capital must be at least the amount provided for in (1) above.
3. Where the persons authorised to carry on the company's business provide details pursuant to Article 2(1), they shall also lodge in the commercial register referred to in that provision a copy of a declaration by a registered accountant or a consultant accountant [two types of auditor] that the company fulfils the requirements of paragraphs (1) and (2) above. The second and third sentences of Article 204a(2) of Book II of the Burgerlijk Wetboek apply *mutatis mutandis*. The declaration must relate to a point in time not more than five months before the date on which the company first came within the definition in Article 1.
4. The persons authorised to carry on the company's business shall be jointly and severally liable with the company in respect of all transactions the company enters into while they carry on the company's business before the requirements in Article 2(1) to (3) are fulfilled or in any other period in which paragraph (1) above is not fulfilled or the company's share capital is below the amount stated in paragraph (1) above because of distributions to shareholders or the company's purchase of its own shares.
5. Paragraphs (1) to (4) above shall not apply to companies which are subject to the law of a Member State of the European Union or a party to the Treaty relating to the European Economic Area of 2 May 1992 and 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, in respect of 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).Article 5

1. Notwithstanding paragraph (2) below, Article 10 of Book II of the Burgerlijk Wetboek shall apply *mutatis mutandis* to formally foreign companies. The obligations imposed by that provision shall attach to the persons authorised to carry on the company's business.
2. The persons authorised to carry on the company's business shall produce annual accounts and an annual report annually, within five months after the end of the company's financial year, except where this period is extended, for no longer than six months, by enabling resolution made for special cause. Title 9 of Book II of the Burgerlijk Wetboek shall apply *mutatis mutandis* to the annual accounts, annual report and other information, save that publication in accordance with Article 394 of this Book shall be effected by lodging in the commercial register referred to in Article 2(2) above.
3. Paragraph (2) shall not apply to companies which are subject to the law of a Member State of the European Union or a party to the Treaty relating to the European Economic Area of 2 May 1992 and both 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) and the Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54(3)(g) of the Treaty on consolidated accounts (OJ 1983 L 193, p. 1).
4. Before 1 April in each calendar year, the persons authorised to carry on the company's business shall lodge in the commercial register proof of registration in the register in which the company is registered in accordance with applicable law. The document concerned shall have been issued not more than four weeks prior to lodging.
III ? Facts and questions referred
3. Inspire Art Ltd is a limited liability company formed under English law. Its registered office is in Folkestone in the United Kingdom. The company's activity is carried on entirely in the Netherlands. There is no intention to commence business in the United Kingdom.
4. The company was formed in the United Kingdom in order to take advantage of the benefits offered by English law, in comparison with Netherlands law, in relation to the setting up and maintenance of companies. According to the national court, which relied on averments by Inspire Art Ltd, the benefits are that, under English law, there is no rule requiring shares to be fully paid up in an amount of EUR 18 000, formation is considerably quicker, no checks need to be carried out in advance of formation and the applicable provisions regarding the amendment of company statutes / articles of association, share transfers and publication are less rigorous.
5. According to the findings of the national court, Inspire Art Ltd falls within the definition in Article 1 of the WFBV and is therefore to be registered in the commercial register as a formally foreign company. The question arises as to whether this registration requirement is compatible with the provisions relating to freedom of establishment.
6. The national court considers that the provisions of the WFBV constitute restrictions on the freedom of establishment of the Netherlands branch, in the sense that the director of Inspire Art Ltd is personally liable if he registers the company and engages in activities without complying with the particular provisions of the WFBV.
7. The Kantongerecht states that the provisions of the WFBV are not imposed on companies incorporated under English law which also carry on activities in a country other than the Netherlands, whose head office is established in the United Kingdom or where there is otherwise some real connection with the United Kingdom that is not merely nugatory.
8. The national court also points out that the Netherlands provisions were enacted for the purpose of restraining the use of foreign companies for purely Netherlands undertakings by imposing additional obligations under the WFBV on formally foreign companies. In this connection it refers to Articles 2 to 5 of the WFBV, cited above. The legislature intended these provisions to protect persons dealing with the company and to safeguard them against loss.
9. For those reasons, the Kantongerecht Amsterdam refers the following questions to the Court for preliminary ruling:
(1) Is (the new) Article 43 in conjunction with Article 48 of the Treaty establishing the European Community 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 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 of the Treaty, it is held that the provisions of the Wet op de formeel buitenlandse vennootschappen are incompatible with them, must Article 46 of the Treaty be interpreted as meaning that the said Articles 43 and 48 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?

IV ? Submissions of the parties

A ?*Incompatibility with the Treaty (the first question)* 1. Submissions that the Treaty has been infringed

10. Inspire Art Ltd, the United Kingdom Government and the Commission are of the view that the WFBV infringes the freedom of establishment. At the least, it makes establishment in the Netherlands less attractive.

11. The Commission's first submission is concerned with whether the rules relating to freedom of establishment were applicable to the present type of case. It concludes that they were. With reference to the judgments in *Centros* (3) and *Segers*, (4) it submits that a company is entitled to exercise the freedom of establishment where it has been formed in one Member State for the sole purpose of establishing a branch in another Member State where it would principally, or even exclusively, carry on its business. According to those judgments, it is irrelevant that the sole purpose of forming the company in the Member State concerned is the evasion of statutory provisions in the other Member State. The case-law cited shows that this was not an abuse, but merely the exercise of the freedom of establishment guaranteed by the Treaty. Inspire Art Ltd and the United Kingdom Government have made similar submissions.

12. The Commission also submits that applying the *de facto* company seat principle would not preclude reliance on the provisions relating to freedom of establishment. According to this theory, a company is subject to the statutory provisions of the State of its *de facto* seat. Where its *de facto* seat is depends on where the company's management or central control is situated.

13. The Commission and Inspire Art Ltd submit that the WFBV was in any event not an application of the *de facto* company seat principle. Article 1 of the WFBV was linked instead to the company's activity. With reference to the *travaux préparatoires*, they submit that the WFBV applies the international private law concept of exceptional connecting factors, which results in the application of some of the mandatory rules of the recipient State. However, the connecting factor in Article 1 of the WFBV is actual activity, which does not correspond to any of the criteria laid down in Article 48 EC and therefore infringes the freedom of establishment.

14. Inspire Art Ltd interprets the WFBV in the same way. It emphasises that the present dispute arose because Dutch law applied the law of the country of formation to a company as a matter of principle. That is the only thing enabling Netherlands nationals to form foreign companies for the purpose of carrying on business entirely, or almost entirely, in the Netherlands. It appears from the *travaux préparatoires* for the WFBV that the legislature had intended to address precisely this problem. Its purpose was to combat this practice, which it regarded as an abuse, by applying Netherlands company law to such companies. The justification given by the legislature was creditor protection. It followed that the WFBV was not to be regarded as an application of the *de facto* company seat principle.

15. Inspire Art Ltd also argues that the WFBV merely alters the existing Netherlands conflict of laws rules (according to which the legal status of a company depends on its country of

establishment) in such a way that certain mandatory provisions of Dutch company law apply to formally foreign companies (companies that do not carry on any, or any significant, activity outside the Netherlands). It also applies additional requirements as regards registration and information appearing on documents.

16. The Commission also submits that a Member State is not entitled to rely on the *de facto* company seat principle in order to deny a company lawfully formed under the laws of a Member State its right to freedom of establishment.

17. Inspire Art Ltd, the United Kingdom Government and the Commission consider that the fact that the WFBV makes establishment less attractive is enough to constitute a restriction on the freedom of establishment. Indeed, according to the *travaux préparatoires*, the WFBV's objective is to attack the practice of establishing companies abroad with the intention of subsequently carrying on business exclusively in the Netherlands.

18. In addition, Inspire Art Ltd submits that the fact that provisions additional to those of the country of formation were applicable is sufficient to constitute a restriction on the freedom of establishment, since it makes the exercise of that freedom less attractive.

19. The United Kingdom Government argues that the possibility of establishing branches in other Member States is of fundamental importance for the functioning of the common market. It considers *Centros* to be fully applicable to the present case.

20. Inspire Art Ltd and the Commission make the following additional submissions as regards the individual provisions.

21. The Commission considers that Article 2(1) of the WFBV is incompatible with Article 2 of the Eleventh Directive 89/666/EEC (5) and Articles 43 EC and 48 EC as regards the declaration that the company comes within the definition in Article 1, the information relating to the initial registration in a foreign commercial register and the information relating to a sole shareholder. The Eleventh Directive does not require this declaration or that information. It follows that the obligation to provide them infringes the freedom of establishment. On the other hand, the Commission considers that the other provisions in Article 2(1) (identification of the foreign commercial register, statement of the company's registered number and lodging of a certified copy of its founding documents and its statute in Dutch, French, English or German) are compatible with the Eleventh Directive and the freedom of establishment.

22. It also considers Article 4(3) of the WFBV (submission of auditor's declaration) to be incompatible with Article 2 of the Eleventh Directive and Articles 43 EC and 48 EC. Such a declaration is not specified in the exhaustive list in Article 2 of the Directive.

23. On the other hand, the Commission considers that the obligation laid down in Article 5(4) to submit an annual certification of registration in a foreign commercial register is compatible with the Eleventh Directive and Articles 43 EC and 48 EC.

24. The Commission submits that the questions referred should be reformulated and, on the basis of the judgment in *Dias*, (6) that those provisions of the WFBV that do not relate to registration as such should be disregarded from the assessment. Specifically, it submits that Articles 3 and 6 of the WFBV as well as Article 4(1), (2) and (4) of the WFBV should be disregarded. Apart from that, it suggests that Article 5(1) and (2) of the WFBV do not apply, because the exception in Article 5(3) does.

2. Submissions that the Treaty has not been infringed

25. By contrast, the Kamer van Koophandel and the German, Italian, Netherlands and Austrian Governments submit that the WFBV is compatible with the provisions relating to freedom of establishment, or correspond to the company law Directives (in particular the First, Second, Fourth, Seventh, Eleventh and Twelfth Directives) (7) or constitute a non-discriminatory application of the provisions applicable to capital companies formed under Netherlands law.

26. The Italian Government submits that Inspire Art Ltd could not rely on the provisions relating to freedom of establishment. It did not carry out any activity in the country of its establishment, and its establishment in the Netherlands was therefore to be regarded as its initial establishment and not as the establishment of a branch.

27. The German Government's submissions are to the same effect. It takes the view that Articles 43 EC and 48 EC were not intended to benefit brass plate companies which do not carry on any activity in the country of their registered office. Articles 43 EC and 48 EC are rather predicated on the case of undertakings that carry on business in their home country. It considers that the judgment in *Centros* was therefore unsatisfactory, since it held that it was sufficient for a company to be properly established in accordance with the laws of a Member State, and that it was unnecessary for it to carry on business in that State. For that reason it submits that national laws to counter brass plate companies are lawful. The Austrian Government is effectively of the same opinion.
28. The Italian Government draws a distinction between freedom of establishment of natural persons on the one hand and of legal persons on the other. It argues that the reason for, and the limits on, recognition of a foreign company derive from the activities the company intends to carry on. A legal person is recognised within the framework of a specific legal system. The extent to which other legal systems recognise the company depend on the equivalence of the conditions implied on the company by the State of its formation and the receiving State. To that extent, Member States are entitled to require compliance with additional provisions, in order to ensure equivalence with companies formed under their own laws.
29. The Kamer van Koophandel and the Netherlands Government argue that the WFBV does not restrict freedom of establishment. By contrast with *Centros*, in the present case formally foreign companies were not refused registration. Instead, the present case concerned provisions relating solely to the conduct of formally foreign companies, not their formation or recognition.
30. The Kamer van Koophandel and the Netherlands Government confirm that, in principle, Netherlands law determines which law applies by reference to a company's registered office. They refer to Article 2 of the Wet conflictenrecht corporaties (Law on international private law for legal persons), (8) and to Article 6 of that Law which provide that it applies without prejudice to the WFBV. Netherlands private law determines applicable law irrespective of any business activity in the country of formation. In principle, this does not depend on the company's *de facto* seat.
31. Because of the continually increasing number of pseudo-foreign, principally English law or Delaware companies which have no actual connection to their country of formation, the Netherlands Government took certain limited measures in the WFBV in order to protect creditors' interests, combat fraud, protect the revenue and prevent abuse of foreign company status. The Kamer van Koophandel adds that a strikingly large number of such companies have become insolvent and that creditors have had virtually no chance of limiting their losses.
32. In this connection the Kamer van Koophandel refers to the preamble to the WFBV which indicates that the law is intended to ensure the application of certain provisions of Netherlands company law to foreign legal persons who carry on their business entirely, or almost entirely, in the Netherlands and are foreign companies purely as a matter of form. It is intended to prevent fraudulent use of foreign companies and to protect creditors.
33. The Kamer van Koophandel and the Netherlands Government argue that the measures in the WFBV are not discriminatory. They merely apply mandatory provisions of Netherlands company law which also apply to all companies formed under Netherlands law.
34. As regards the individual provisions of the WFBV, the Kamer von Koophandel and the Netherlands Government have made the following submissions.
35. The obligations laid down in Article 2 of the WFBV (namely, to declare that the company is a formally foreign company within the meaning of Article 1, to lodge a certified copy of the company's founding documents and, as the case may be, its statute in Dutch, French, English or German, to identify the relevant foreign commercial register and to state the date of first registration) corresponds to those in Article 2(2)(b) and Article 4 of the Eleventh Directive and Article 2(2)(c) in conjunction with Article 2(1)(c) of the Eleventh Directive. The Netherlands Government adds that the remaining requirements (name, personal details and residence of a sole shareholder) correspond to requirements applicable to Netherlands companies.
36. According to the Netherlands Government, that also applies to directors' joint and several

liability (Article 4(4) of the WFBV). The Netherlands Civil Code (Articles 2:69(2) and 2:180(2)) apply the same rule as regards liability in relation to companies formed under Netherlands law.
37. Likewise, the obligations in Article 3 of the WFBV correspond to obligations applicable to Netherlands capital companies under the Civil Code (Article 2:75(1) and (2) and Article 2:186; 1996 Circular relating to the commercial register). Specifically, those are the obligations relating to the name under which the company carries on business. Apart from that, the requirements of Article 3 correspond both to those in Article 4 of the First Directive (which apply to limited liability companies established under English law by virtue of the Act of Accession) and to those in Article 6 of the Eleventh Directive.
38. Nor do Article 4(1) to (3) of the WFBV impose any obligations beyond those imposed on capital companies under the Netherlands Civil Code (Article 2:178 and 2:204a(2)). On the other hand, directors' joint and several liability under Article 4(4) of the WFBV applies only to directors of formally foreign companies. Article 4(5) of the WFBV refers to the Second Directive, proving that the of the WFBV is compatible with Community law.
39. As regards Article 5 of the WFBV, the Netherlands Government submits that it corresponds to the provisions relating to annual accounts in Book 2, Title 9, of the Netherlands Civil Code. In any event, it corresponds to the relevant provisions in the Fourth and Seventh Directives. The obligation in Article 5(4) of the WFBV corresponds to Article 2(2)(c) of the Eleventh Directive. The Netherlands Government also refers to Article 5(3) of the WFBV, which also refers to Community law, thereby confirming its compatibility with Community law.
40. Notwithstanding their comprehensive submissions on the individual provisions of the WFBV, the Kamer van Koophandel and the Netherlands Government agree with the Commission that the questions referred are too broad. The effect of the judgment in *Dias* (9) is that the Court has to confine its examination to the parts of the WFBV relating to registration in the commercial register. Those are sentences 1 to 3 of Article 2(1) (registration as a formally foreign company), Article 4(4) (directors' joint and several liability) and Article 4(1) to (3) (auditor's certification, minimum capital and share capital, and directors' joint and several liability therefor). All the other provisions are irrelevant to the present dispute and the Court should therefore disregard them.
41. The Kamer van Koophandel and the German and Netherlands Governments also rely on the judgment in *Daily Mail and General Trust*. (10) In that judgment, the Court recognised that, as regards the connecting factor which determines the law applicable to a company, the private international law rules in the legal systems of the Member States vary. It held that the provisions relating to freedom of establishment do not overlap with those rules. The WFBV merely supplements other rules of Netherlands law relating to the link to a company's registered office (Article 2 of the Wet conflictenrecht corporaties) by applying certain mandatory rules of Netherlands company law to companies which carry on business only in the Netherlands and do not have any real connection with the country in which they have been formed. It follows that the WFBV merely links a company to the place where it actually carries on business. On the basis of *Daily Mail*, the provisions are therefore to be regarded as compatible with freedom of establishment.
42. The Kamer van Koophandel and the German Government also argue that, since the judgment in *Daily Mail*, there has been no company law directive harmonising connecting factors. Thus, that judgment still applies.
43. The Kamer van Koophandel and the Dutch Government also argue that the EC first acquired competence in private international law by the Treaty of Amsterdam. However, even after the enactment of Article 65 EC, Article 293 EC provides that specified company law matters are to be regulated by agreement between the Member States. This demonstrates that private international law is still accorded a special position.
44. The Netherlands Government argues that Member States are still authorised to apply the establishment principle in the manner in which the Wet conflictenrecht corporaties and the WFBV apply it. There is nothing in the rules on freedom of establishment to preclude this. According to *Centros*, (11) the Member States are authorised to take measures to prevent abuse of the

fundamental freedoms. The Netherlands Government considers the WFBV to be such a measure.
45. The German Government also regards the WFBV as a measure to prevent the abuse of freedom of establishment and evasion of more stringent domestic legislation. In *Centros*, the Court expressly recognised the right of Member States to enact such measures. (12)
46. The Netherlands Government also considers this approach to be consistent with the judgment in *Segers*. (13) It accepts that the mere exercise of a freedom granted by the Treaty does not constitute abuse. However, the WFBV does not refuse recognition to companies formed under foreign law. It merely prevents companies from avoiding the mandatory rules of the Member State in which they conduct their business. The Netherlands Government is of the view that if the sole purpose of a company's actions is to evade the provisions relating to company formation, that constitutes abuse which can legitimately be attacked by means of the WFBV, at least as Community law currently stands.
47. The Netherlands Government considers that the obligations imposed by the WFBV are principally administrative in nature. Equivalent obligations are imposed on all companies formed under Netherlands law.
48. The Netherlands Government argues that the Eleventh Directive achieves only partial harmonisation. Member States are still entitled to legislate outside its scope.
49. However, even on the assumption that freedom of establishment is infringed, the infringement is *de minimis* in any event and thus compatible with Community law. The other fundamental freedoms have also been interpreted in the case-law as permitting infringements of less than a certain gravity. (14)
B ?*Justification (the second question)* 1. Submissions that there is no justification
50. Inspire Art Ltd, the United Kingdom Government and the Commission consider that there is no justification for the rules in the WFBV.
51. Inspire Art Ltd, the United Kingdom Government and the Commission consider there to be no justification under Article 46 EC. They accept that it follows from *Centros* (15) that the improper exercise of the freedom of establishment is not protected. However, the fact that a company does not carry on any business in the country in which it was formed is not enough to constitute abuse. The authorities and the courts have to consider in each individual case whether there is such justification for restricting the freedom of establishment. A general statutory provision such as the WFBV does not satisfy this requirement.
52. In any event, in *Centros* it was recognised that there could be a restriction at most for the purpose of maintaining the effectiveness of provisions concerning the exercise of particular commercial activities. By contrast, the question arising in Inspire Art Ltd's case simply concerned freedom of establishment generally and compliance with Netherlands company law (for example as regards minimum capital). As was held in *Centros*, the fact that one used the more favourable rules of another Member State constituted not on abuse but precisely the exercise of freedom of establishment.
53. According to Inspire Art Ltd, Article 46 EC can be applied only if there is an actual threat to public order. In addition, Inspire Art Ltd, the United Kingdom Government and the Commission argue that in *Centros* the Court held that in principle creditor protection did not fall within the exception contained in Article 46 EC. (16)
54. Finally, Inspire Art Ltd, the United Kingdom Government and the Commission consider that the WFBV is not justified by any imperative requirements in the general interest. Although protecting creditors is a general interest, Articles 2, 4 and 5 of the WFBV are not suitable for conferring such protection.
55. Inspire Art Ltd and the Commission argue, first, that the company's name indicates it is governed by English law, and therefore creditors cannot be deceived. The Fourth and the Eleventh Directives guarantee a minimum transparency of annual accounts and of shareholders' identities. Creditors have a certain responsibility for their own actions. If they are not satisfied by the protection conferred by English law, they can either demand additional security or decline to conclude contracts with a company governed by foreign law.

56. The United Kingdom Government and the Commission also argue that the WFBV would not have applied if Inspire Art Ltd had carried out even a minimal amount of activity in another Member State. Yet the risk to creditors is no less in that case than it is where the activity is carried on entirely in the Netherlands.
57. Inspire Art Ltd argues that the minimum capital requirements do not confer any protection on creditors. For example, even under Netherlands law the minimum capital could be laid out as a loan immediately after it was paid up and the company registered. In that event, it would not be available to creditors. Thus, those provisions of the WFBV are not even suitable for achieving their intended purpose of creditor protection.
58. Moreover, Inspire Art Ltd and the Commission consider the rules on directors' joint and several liability to be discriminatory. Under Article 4(4) of the WFBV, directors incur such liability even where the minimum capital is reduced to below the legal limit after registration in the commercial register. By contrast, the directors of a limited liability company formed under Netherlands law (a BV) are not subject to that stringent liability. Moreover, by contrast with the rules relating to Dutch companies, the circle of persons to whom such liability attaches is widened so as to include persons who *de facto* carry on the company's business.
59. The Commission considers Article 4(1), (2) and (4) of the WFBV to be disproportionate, since Inspire Art Ltd uses a name identifying it as an English company. The Fourth and Eleventh Directives also ensure creditors sufficient transparency.
60. Inspire Art Ltd and the United Kingdom Government effectively take the same view. The United Kingdom Government adds that Member States are not authorised to impose on branches of foreign companies requirements that go beyond the harmonised creditor protection conferred by the Fourth and Eleventh Directives at Community law level.
61. Furthermore, it is possible to conceive of less restrictive measures. Thus, for example, one could make it possible in law for public creditors to obtain the necessary guarantees from the branches. (17)
62. The United Kingdom Government also considers the WFBV's rules on accounting and annual accounts to be unnecessary. English law lays down adequate annual accounts rules for limited liability companies. Moreover, the provisions concerned infringe the Eleventh Directive, according to which the States in which a branch has its seat are not entitled to demand specified information.
2. Submissions that there is justification
63. By contrast, the Kamer van Koophandel and the German, Netherlands and Austrian Governments consider the WFBV to be justified in any event, and indeed not only under Article 46 EC but also by imperative requirements in the general interest.
64. The purpose of the WFBV is to prevent fraud. This has been recognised as a legitimate justification in both *Centros* and *Segers*. (18) Moreover, the WFBV protects creditors, and this has also been recognised in the case-law to be a ground of justification. (19) Another purpose of the WFBV is to protect the revenue, and the case-law has also approved this as ground of justification. (20) Finally, it protects the integrity of trade. This is also a legitimate ground of justification. (21)
65. The Austrian Government argues that registration of such brass plate companies has a warning function. The information is important for potential contracting partners to enable them to decide whether they want to transact with the company concerned. The judgment in *Centros* expressly recognises the need for commerce to have such information. (22)
66. The Kamer van Koophandel and the Netherlands Government make similar submissions. The requirement in Article 2(1) of the WFBV to disclose the first registration in a foreign commercial register discloses to third parties the point in time at which the company came into existence, how long it has been carrying on business and whether it has an established market position. Other legal consequences are also linked to this date, for example the acquisition of legal capacities.
67. Disclosure that the company is a formally foreign company enables third parties to take cognisance of that fact and to take it into account when assessing the company's reliability. The fact that the company is governed by foreign law is also important for the competent public authorities.

68. That a third party has an interest in knowing that a company has only one shareholder (see Article 3 of the WFBV) is expressly recognised in Article 3 of the Twelfth Directive.
69. The principal purpose of Article 4 of the WFBV is to protect creditors. Article 6 of the Second Directive expressly recognises the importance of minimum capital requirements in respect of companies falling within its scope. Minimum capital requirements are intended primarily to reinforce the financial soundness of the companies concerned in order to ensure better protection of public and private creditors. More generally, they are intended to safeguard creditors against the risk of fraudulent bankruptcy resulting from the formation of companies whose initial capitalisation is inadequate.
70. Finally, imposing joint and several liability on the directors is simply an appropriate sanction for breaches of the WFBV. In any event, directors of a Netherlands company are subject to similar liability. It is not unknown in Community law, as is shown by Article 51 of the Proposal for a Regulation relating to a European company. Moreover, Article 4(1) of the Second Directive authorises Member States to enact suitable provisions imposing liability where it is not possible to dissolve the company.
71. The Kamer van Koophandel submits that the WFBV is not discriminatory. Rather, its effect is to apply the rules which apply to companies formed under Netherlands law to foreign companies. Those rules are the Civil Code, the Law relating to the commercial register 1996 and the Order relating to the commercial register 1996.
72. The Kamer van Koophandel and the Austrian Government argue that the measures are suitable for achieving their intended purposes. They contribute to informing a company's creditors that the company is subject to foreign law. They also ensure that creditors have the protection they could have expected had they been dealing with a company formed under Netherlands law.
73. For those reasons, the Austrian Government considers the minimum capital provisions to be suitable and proportionate. The Second Directive has itself confirmed the importance of minimum capital for public companies. Admittedly, there is no similar rule for limited liability companies. However, every Member State except Ireland and the Untied Kingdom has rules regarding the minimum capital such companies are required to have. The requirement for a share capital provides more security than personal liability of shareholders, who often have nothing to contribute where the company is bankrupt.
74. The WFBV's requirements to keep accounts and to produce and publish annual accounts confer necessary and effective protection on creditors. The Fourth Directive lays down only minimum requirements. Because of the many discretions it gives to the Member States, the Member States have a discernible interest in prescribing the application of the measures by which they transpose the directive to all companies carrying on business within their respective territories.
75. According to the Kamer van Koophandel, the measures do not go beyond what is necessary to attain their objective. A failure to observe the WFBV results not in refusal to recognise a foreign company but in liability of its directors. In this connection, the Kamer van Koophandel observes that the fact that a company does not (or ceases to) comply with the minimum capital requirements is a significant indication of a risk of abuse or fraud.
V ? Analysis
76. Do the facts of the present case justify a departure from the rules laid down in *Centros*? This is the question into which the present reference for a preliminary ruling ultimately resolves.
77. The facts of the present case differ from *Centros* in that Netherlands law does not refuse registration of a branch, but does require disclosure that it is a formally foreign company and attaches various legal consequences to its registration as such. The question thus arises as to whether and, if so, to what extent this difference leads to a different conclusion in law from that in *Centros* as regards the compatibility of the rules with those relating to freedom of establishment.
78. The basic positions which the parties have adopted may be summarised as follows. Some are of the view that the WFBV is an unjustified restriction on freedom of establishment, since its effect is to apply Netherlands company law (in particular minimum capital requirements) to foreign

companies. The others are of the view that the WFBV does not restrict freedom of establishment, since the foreign companies concerned have no real connection with the country in which they are formed, and there are only certain additional preconditions for carrying on their business. In any event, any restriction is justified on grounds of creditor protection and prevention of abuse of freedom of establishment.

A ? Applicability of the provisions relating to freedom of establishment

79. Before discussing the individual arguments, I must make two observations which relate to the scope of application of the provisions relating to freedom of establishment and which are based on the judgments in *Segers* and *Centros*.

80. The first is that the Treaty does not provide that carrying on business in the country of formation is a condition of entitlement to establish branches in other Member States. (23) The fact that a company does not carry on any business in the country of its formation does not deprive it of its right to rely on the freedom of establishment.

81. Second, provided they are lawful, the reasons why a company is formed abroad are immaterial. Even if the sole purpose of formation is to avoid the rules relating to the setting-up and operation of companies in the Member State in which it is intended to carry on business, the right to rely on the rules relating to freedom of establishment is not thereby excluded. (24)

82. In my opinion, the questions in the reference from the Kantongerecht Amsterdam for preliminary ruling and the facts of the main proceedings do not provide any reason for departing from the established case-law. Moreover, that case-law was not called into question in the judgments in *Daily Mail* (25) and *Überseering*. (26)

83. It may be that the definition in *Segers* and *Centros* of the scope of application of Articles 43 EC and 48 EC is unsatisfactory for one or the other of them, since it may lead to the disapplication of national provisions that are regarded as important and right. None the less, it serves to realise freedom of establishment within the internal market as guaranteed by the Treaty.

B ? Restrictions on freedom of establishment

84. What must next be considered is whether the WFBV restricts freedom of establishment.

1. The relevant provisions of the Wet op de formeel buitenlandse vennootschappen

85. It needs to be considered first which provisions of the WFBV are the subject of the reference for preliminary ruling. The national court referred to Articles 2 to 5 of the WFBV, and in particular to the facts that a formally foreign company has to register as such in the commercial register (Article 2), that it must provide specified details on all documents it issues (Article 3) and that the nominal capital and the proportion of it paid up must be at least the minimum specified for companies formed under Netherlands law (Article 4). It also referred to the provisions relating to the production and publication of annual accounts and an annual report. It regarded the imposition of personal joint and several liability on directors for failure to comply with the obligations under the WFBV as a restriction on freedom of establishment. On the basis of this description, one could interpret the reference for preliminary ruling as concerning specifically the designation of a formally foreign company as such (Articles 2 and 3), the minimum paid up capital (Article 4(1) to (3)) and directors' personal liability (Article 4(4)).

86. However, the Kamer van Koophandel, the Netherlands Government, the United Kingdom Government and the Commission have submitted that the assessment should be restricted to the provisions relating to the company's registration in the commercial register. They are of the opinion that the questions ought to be considered against the background of the main proceedings. Since those proceedings concerned only registration in the commercial register, they argue that Articles 3 and 6 of the WFBV in particular are to be disregarded in the present proceedings. The Kamer van Koophandel and the Netherlands Government submit that parts of Articles 2 and 5 should also be excluded from consideration.

87. According to the case-law cited by those parties, (27) the national court, which alone has direct knowledge of the facts of the case, is in the best position to assess, having regard to the particular features of the case, whether a preliminary ruling is necessary to enable it to give judgment. Consequently, where the questions submitted by a national court concern the interpretation of a

provision of Community law, the Court is, in principle, bound to give a ruling. Nevertheless, in order to determine whether it has jurisdiction, the Court of Justice must examine the conditions in which the case has been referred to it by the national court. The reason is that it regards its function as being, to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions. In view of that task, the Court considers that it cannot give a preliminary ruling on a question raised in a national court where ... the interpretation of Community law ... sought by the national court bears no relation to the actual nature of the case or to the subject-matter of the main action. (28)

88. The parties are clearly correct that the main proceedings concern the question as to whether Inspire Art Ltd is to be registered in the commercial register as a formally foreign company. However, such registration has certain legal consequences, which are laid down in Articles 2 to 5 of the WFBV. Those legal consequences are not severable from registration as a formally foreign company, which is the only circumstance in which they arise. The question as to what minimum paid up capital Inspire Art Ltd must have, how it is to designate itself in its letters and whether its directors may incur personal joint and several liability in certain circumstances depends directly on whether or not it is required to register as a formally foreign company. Thus, Articles 2, 3 and 4 of the WFBV are to be taken into account in the present proceedings and it does not appear correct to examine the question of registration without taking into account its legal necessary consequences.

89. There is no basis in the present proceedings for supposing that the dispute is contrived or that the Court is being asked to deliver an advisory opinion on a hypothetical question of no importance for the main proceedings.

90. It is, however, another question what provisions of the WFBV are in fact applicable to Inspire Art Ltd, for example, whether the exceptions in Article 4(5) and Article 5(3) of the WFBV are applicable. That question is for the national court to decide and is not to be considered in the context of the reference for a preliminary ruling.

91. It follows that the subject of the reference for a preliminary ruling is to be taken to be Articles 2 to 5 of the WFBV. In accordance with the case-law cited above, there must be considered in particular the points emphasised by the national court, namely registration of the formally foreign company as such, its designation on documents, minimum paid up capital and directors' personal joint and several liability.

92. It follows that the question discussed by some of the parties as to whether the WFBV is compatible with various directives relating to the harmonisation of company law need not be considered. The reason is that all the parties considered that the provisions relied on by the national court did not fall within the scope of those directives.

2. Whether there is a restriction on freedom of establishment

93. Article 43 EC in conjunction with Article 48 EC confers on 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 the right to establish and operate agencies, branches or subsidiaries in other Member States in accordance with the laws the recipient country applies to its own nationals.

94. The Court has consistently held that it follows directly from that that such companies have the right to carry on their activity in a different Member State, notwithstanding 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 natural persons. (29) In *Überseering* the Court drew the further conclusion that a necessary precondition for the exercise of the freedom of establishment is the recognition of those companies by any Member State in which they wish to establish themselves. (30)

95. The Netherlands Government considers the WFBV to be compatible with this case-law. By contrast with *Centros*, Inspire Art Ltd is not refused recognition by the Netherlands legal system. The WFBV merely imposes some additional obligations on it, which the Netherlands Government classifies as administrative.

96. These so-called administrative obligations amount to the application of the Netherlands rules on companies' minimum capital and the imposition on directors of joint and several liability for the company's debts where there is a failure to comply with the WFBV. In that sense one could say that the obligations under the WFBV are imposed on the management or administrators of the company, as the Kamer van Koophandel submits. However, that does not mean that they are administrative burdens regulating merely how the company's activity is conducted. The payment up of a specified minimum amount of capital affects the company's formation. Netherlands law confirms this. The provisions relating to minimum capital appear in Article 178 of the Civil Code, that is to say within the General Provisions relating to the Formation of Limited Liability Companies.
97. The effect of the WFBV is to apply the provisions of Netherlands company law regarded as mandatory ? in particular relating to minimum capital ? to companies formed under the law of a different Member State and having their registered office in the country of their formation but carrying on their business entirely, or almost entirely, within the Netherlands.
98. That is indeed what the Netherlands legislature intended. This is shown by the preamble to the WFBV, by the numerous references mentioned above in the submissions of the Kamer van Koophandel and the Netherlands Government to the Netherlands Civil Code and the rules relating to the commercial register, and by the *travaux préparatoires* to the WFBV on which a number of the parties relied. The purpose of the WFBV was to discourage the use of foreign companies, in particular those formed under English law or the law of Delaware, which had been increasing continually. (31) According to the Kamer van Koophandel, many of those companies (whose activities in the Netherlands were conducted solely through a branch) had become insolvent. For that reason, it was intended to deprive companies whose activities were carried on entirely, or almost entirely, within the Netherlands of the advantages they intended to obtain by forming a company in a foreign jurisdiction. Specifically, the effect intended was that they should be subject to the provisions of Netherlands company law relating to minimum capital and creditor protection. (32)
99. The effect of treating a branch as a first office is tantamount to refusal to recognise companies established under foreign law. The effect of the WFBV is that in order to form a branch it is necessary to satisfy the requirements imposed on the formation of a limited liability company in the Netherlands. The WFBV thus negates the effect of the foreign law by which the company has already come into existence.
100. Paying up minimum capital and directors' liability depend in principle on the law of the jurisdiction in which the company is formed; in the case of Inspire Art Ltd, that is English law. The requirements imposed by the WFBV supersede those rules. To that extent, the WFBV restricts freedom of establishment. That freedom includes the right of a national to form a company in a Member State whose company law affords him the greatest freedom and thereafter to establish branches in a different Member State. This effect of the WFBV is incompatible with *Centros* (33) and *Überseering*. (34) The effect of Netherlands law is to deny companies formed under English law the recognition Community law requires.
101. The reason for the incomplete recognition of the rules of the country of formation is always stated to be that the company has no real connection to its country of formation. That consideration played a defining role for the WFBV, as the *travaux préparatoires* and Article 1 of the WFBV demonstrate. As regards Inspire Art Ltd, it is stated that the company does not carry on any activity in the United Kingdom but operates exclusively in the Netherlands, as was intended when it was formed. The national court itself states that its conclusion would be different if Inspire Art Ltd carried on a certain amount of activity in any other State.
102. As is apparent in particular from the Kamer van Koophandel's submissions, the effect of the WFBV is to link the application of certain rules to the facts that the legal person has no real connection to the country in which it was formed and that it carries on its activity entirely, or almost entirely, within the Netherlands. Although all the parties have repeatedly emphasised with reference to Article 2 of the Wet conflictenrecht corporaties, that Netherlands law is based not on

the *de facto* company seat principle (which is the prevailing view for example in German case-law and literature) but instead on the establishment principle, the WFBV has exactly the same effect as the application of the *de facto* company seat principle. It does not recognise the existence of a foreign company without further ado.

103. According to the existing case-law, exercising the right to establish a branch does not depend on whether any activity is carried on in the country of formation (as was stated at the start of this legal analysis). Exactly this reasoning led the Court to conclude in its judgment in *Überseering* that the legal consequence of the company seat principle, namely that a company which moves its *de facto* seat has to reincorporate in order to maintain its legal personality, is incompatible with the freedom of establishment. The requirement of reincorporation in a second Member State is tantamount to outright negation of freedom of establishment. (35) What was decided in *Überseering* in respect of a deemed transfer of the principal place of business must also apply for the establishment of a branch.

104. I do not see any reason in the present case for departing from this case-law. Though many may find them unsatisfactory, the results are ultimately the consequences of the current stage of development of Community law. The Treaty confers freedom of establishment, including the right to establish branches, subject only to the exception in Article 46 EC. To date, the Member States have not been able to reach agreement on harmonising their rules relating to minimum capital requirements for limited liability companies. Both Article 44 EC and Article 293 EC entitle them to harmonise those rules. The Second Directive harmonises them in relation to public companies. (36) Allowing the application of minimum capital rules regarded as mandatory to foreign companies such as Inspire Art Ltd would undermine the freedom of establishment conferred by the Treaty, including the freedom to establish branches (secondary freedom of establishment). Such an interpretation of Articles 43 EC and 48 EC is incompatible with the Treaty.

105. As against the case-law referred to above, it has been submitted that in *Daily Mail* the Court recognised that the different Member States applied different private international law provisions for determining the law to which a company was subject. It expressly held that the rules on freedom of establishment did not result in an approximation of those provisions of the Member States' private international law. On that basis, some insist that the Member States must be entitled to take steps at least against brass plate companies having no real connection to the country in which they were formed.

106. In its judgment in *Daily Mail*, what the Court actually held was that the Treaty, regards the differences in national legislation concerning the required connecting factor and the question whether ? and if so how ? the registered office or real head office of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the right of establishment but must be dealt with by future legislation or conventions. (37) However, in its judgment in *Überseering*, the Court expressly stated that that passage in its judgment in *Daily Mail* did not recognise the Member States as having the power to subject the exercise of the freedom of establishment to compliance with domestic company law. (38) Yet that is precisely the effect of the WFBV. It subjects the exercise of the freedom to establish branches to compliance with the minimum capital rules of Netherlands company law. For that reason, the judgment in *Daily Mail* and the freedom of Member States to lay down their own private international law do not gainsay my conclusion.

107. Although the WFBV's provisions relating to minimum capital and directors' liability are thus incompatible with the Treaty provisions relating to freedom of establishment, it is none the less appropriate to consider briefly the other features the national court highlighted, namely registration in the commercial register of formally foreign companies as such and the corresponding requirement relating to designation in documents. At the oral hearing, Inspire Art Ltd and the United Kingdom Government submitted that such registration stigmatised the companies concerned.

108. According to the Government's Explanatory Memorandum on the draft of the WFBV, the function of registration as a formally foreign company is to make it clear to third parties who

transact with the company that the company was not formed under Netherlands law but has no real connection to the country in which it was formed, instead carrying on its activity entirely, or almost entirely, in the Netherlands. Third parties should have full knowledge of these circumstances when deciding whether to transact with the company. (39)

109. Thus the function of registration is to act as a warning. Given the Netherlands legislature's general assumption that such companies are less creditworthy and the consequential application of the provisions of Netherlands law relating to minimum capital and other creditor protection measures to such companies, it may be assumed that the designation formally foreign company is intended to make it more difficult, or at least less attractive, to carry on business. As understandable as this motive might be, at the current stage of development of Community law, the absence of harmonisation in this area means that this constitutes a restriction on freedom of establishment. The same applies as regards the designation formally foreign company on documents.

110. It follows that the first question is to be answered as follows: Articles 43 EC and 48 EC are to be interpreted as precluding the application of domestic law which is more stringent than the law of the State in which the branch is established to the establishment of branches of a company set up in another Member State with the aim of securing the advantages that offers over incorporation under the law of the Member State in which the branch is located, given that the law of the State in which the branch is located imposes stricter rules than those applying in the country of formation to formation and payment for shares, and given that that aim is inferred from the fact that the company carries on its activities entirely or almost entirely in the country in which the branch is located and, furthermore, does not have any real connection with the country in which it was formed.

C ? Justification for the restriction

111. The next question is as to whether these restrictions on freedom of establishment are to be regarded as justified. Article 46 EC provides that freedom of establishment may be restricted by laws, regulation and administrative provisions laying down different rules for foreign nationals on the ground of public order, safety or health. Moreover, the Court has consistently held that Community law may not be relied upon for improper or fraudulent purposes. (40) The Court has also recognised that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty are lawful provided that they fulfil the following conditions. They must be applied in a non-discriminatory manner, they must be justified by imperative requirements in the general 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. (41)

112. As appears from the *travaux préparatoires*, the WFBV's principal objective is to protect creditors of foreign companies. The Netherlands Government also relies on its ancillary objectives of preventing abuse of freedom of establishment, combating fraud, protecting the revenue and safeguarding the integrity of trade.

1. Justification under Article 46 EC

113. Article 46 EC does not expressly mention creditor protection. Moreover, the Court has consistently held that the protection of economic interests does not fall within the concept of public order or safety. (42) For that reason, there is no justification available under Article 46 EC.

114. The same applies as regards protecting the revenue and safeguarding the integrity of trade.

2. Justification of combating abuse of freedom of establishment

115. As is emphasised principally by the Kamer van Koophandel and the Netherlands Government, the WFBV is also intended to prevent abuse consisting of conducting activity through a foreign company. Too many of such companies had become insolvent due to the inadequacy of their initial capitalisation.

116. It is true that the Court has prevented individuals from improperly or fraudulently taking advantage of the fundamental freedoms in the Treaty. (43) It has also recognised the right of Member States to take measures designed to prevent abuse. (44)

117. However, it has always stated that the lawfulness of such measures depends on the existence of an *actual* basis for concluding there to have been abuse *in the individual case*. It has rejected *abstract, general* assessment under a *statutory provision*, and has indeed emphasised that such an assessment is inadequate. (45)
118. It has also held that the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. (46)
119. The refusal to recognise Inspire Art Ltd's branch results from applying the WFBV, which makes a general, abstract assessment of taking advantage of the possibility of forming a company in one Member State in order to carry on business entirely, or almost entirely, through branches in other Member States. However, according to the case-law the simple exercise of the freedom of establishment does not constitute abuse.
120. This conclusion is consistent with the judgment in *TV 10*, (47) on which the Netherlands Government relied at the oral hearing. The decision in that reference for a preliminary ruling likewise turned on its own facts. The Commissariaat voor de Media refused to recognise TV 10 (the plaintiff in the main proceedings) as a foreign broadcaster for the purposes of the Mediawet (Law on the Media), since although it broadcast radio and television programmes in the Netherlands, it was established in Luxembourg, and it was obvious that the purpose for establishing it in Luxembourg was to avoid the application of Netherlands law. Thus, the decision in that case also turned on its particular facts. Moreover, in its judgment the Court referred to its existing case-law, according to which Article 49 EC does not deprive a Member State of the right to take measures to prevent the exercise by a person providing services in an individual case whose activity was entirely or principally directed towards the territory of that Member State of the fundamental freedoms guaranteed by the Treaty for the purpose of avoiding the professional regulations which would be applicable to him if he were established within the Member State concerned. (48) However, it is still necessary to decide by reference to the circumstances of the individual case, albeit against the background of such provisions. The general, abstract possibility of abuse is not sufficient to justify restrictions on freedom to provide services and freedom of establishment.
121. At the oral hearing, the Netherlands Government also referred to *Commission* v *France*, (49) but again this case does not gainsay the case-law cited above. Admittedly, it concerned a decree which imposed a general, abstract restriction on free movement of capital. However, in its judgment the Court did not consider the question as to whether such a restriction could in principle be enacted in a decree. All it held was that the measure was disproportionate and thus infringed the Treaty. The question arising in the present case was accordingly not the subject of the judgment.
122. At the oral hearing the German Government's representative asked the Court to state in the present case, in the light of the judgments in *Centros* and *Überseering*, how Member States could combat the formation of brass plate companies suspected of being an abuse of freedom of establishment.
123. Such a request to the Court is surprising: it ought rather to be addressed to the Member States. It is not for the Court to tell the Member States what steps they may lawfully take to prevent any exercise of the rights conferred by the Treaty which constitutes, or is suspected of being, abuse. In *Centros* and *Überseering* the Court stated that it was in principle lawful to take measures preventing abuse of rights conferred by the Treaty. According to Article 220 EC, the Court is competent to interpret the provisions of the Treaty. For that reason, in the present case (as in *Centros* and *Überseering*) the Court is confined to describing the limits of the rights which Articles 43 EC and 48 EC confer on citizens of the Union and undertakings. It is for the Member States to draw from those limits such conclusions as may be desirable or necessary.
124. Given that there was no other basis suggested for considering there to have been any abuse, prevention of abuse does not justify the restrictions which the WFBV imposes on freedom of

establishment.
3. Justification by other imperative requirements in the general interest
125. There remains to be considered whether the WFBV is justified by any other imperative requirements in the general interest.
126. The Netherlands Government has relied on four imperative requirements in the general interest, namely creditor protection, protection of the revenue, prevention of fraud and prevention of abuse. Prevention of abuse has already been discussed. The other three grounds concern the protection of the company's public and private creditors. It follows that they can be considered together under the heading of creditor protection.
127. The Court has recognised that in principle creditor protection may constitute an imperative requirement in the general interest. (50) The Court has consistently held that if a restriction on freedom of establishment is to be justified on that basis, it must fulfil the following conditions: the restriction must be applied in a non-discriminatory manner, it must be suitable for securing the attainment of the objective which it pursues and it must not go beyond what is necessary in order to attain its objective. (51)
(a) Discrimination
128. According to the submissions of the Kamer van Koophandel and the Netherlands Government in particular, the effect of the WFBV is that companies incorporated under foreign law are treated in the same way as companies incorporated under Netherlands law. Both are required to satisfy certain provisions of Netherlands company law regarded as mandatory. At the oral hearing the German Government added that the WFBV creates identical conditions of competition for undertakings.
129. However, in at least one respect the WFBV imposes conditions in excess of those imposed on companies formed under Netherlands law. There is no equivalent in Netherlands law to Article 4(4) of the WFBV imposing liability on directors if a company's capital falls below the minimum *after* the company has been incorporated and registered in the commercial register. This is apparent from the Netherlands Government's Explanatory Memorandum to the draft of the WFBV. (52)
130. Article 2:180(2) of the Civil Code imposes personal joint and several liability on directors of companies incorporated in the Netherlands only in respect of the period *prior* to incorporation and registration. Article 4(4) of the WFBV imposes liability in that case as well. In addition, however, it imposes personal joint and several liability where the capital falls below the minimum. If this happens to a company incorporated in the Netherlands after incorporation and registration, it may be dissolved by the court (see Article 2:185 of the Civil Code). The directors do not incur any liability in that situation.
131. Because Netherlands law applies the incorporation principle, a foreign company cannot be dissolved by such a decision of a Netherlands court. Its existence is determined by the law of the country in which it is incorporated. For that reason, in Article 4(4) of the WFBV the Netherlands legislature has imposed liability on directors as a suitable alternative for formally foreign companies to the sanction imposed on companies incorporated under Netherlands law. (53)
132. This difference in treatment of Netherlands and foreign companies at once refutes the proposition that the effect of the WFBV is to put foreign companies in the same position as companies incorporated under Netherlands law.
133. Admittedly, the reason given for the difference in treatment is the limits on the ability of Netherlands law to affect the existence of companies incorporated under foreign law, and it has been submitted that this is an objective reason for the difference in treatment.
134. However, it must be observed that even where a company incorporated under Netherlands law is dissolved by the court, the company's directors are not liable for the company's debts. The personal joint and several liability which the WFBV imposes on directors is fundamentally out of place in the current system of limiting liability to company capital, and can be enforced only in very exceptional circumstances.
135. Admittedly, the WFBV does not impose liability on directors automatically. It requires to be

established by the court in each individual case. (54) However, the explanatory note to Article 2 of the WFBV indicates that the legislature intended the sanction under Article 4(4) of the WFBV, which also applies to failure to comply with the obligations under Article 2 of the WFBV (in other words prior to registration in the commercial register), to have a deterrent effect. The purpose of the WFBV is to deter economic participants from acting through formally foreign companies. It was intended to impose a sanction that would have an even greater deterrent effect than a criminal penalty. (55)

136. That demonstrates that the Netherlands Government did not view Article 4(4) of the WFBV as an extraordinary measure that could be taken in order to impose liability in similar circumstances on those responsible for carrying on the business of a company incorporated under Netherlands law. Instead, the provision was intended to have a greater deterrent effect than criminal penalties. That the imposition of personal liability for the company's transactions is a suitable means of attaining this objective needs no further explanation.

137. These considerations are sufficient in themselves to justify a finding that the Netherlands legislature deliberately provided a more severe sanction for foreign companies than it provided for Netherlands companies in comparable situations. It follows that the rules relating to directors' liability discriminates on the ground of nationality. A company's registered office 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. (56) Therefore, in so far as it imposes personal joint and several liability on directors for breaches of the minimum capital requirement, Article 4(4) of the WFBV is incompatible with the freedom of establishment protected by Articles 43 EC and 48 EC.

138. Contrary to the German Government's submissions, the WFBV does not create identical conditions of competition. Admittedly, the effect of applying the WFBV is that Netherlands company law is applied to all companies whose activity is carried on entirely, or almost entirely, within the Netherlands. However, that eliminates competition between the different systems of the Member States. Yet at the present stage of development of Community law there is no reason for restricting the freedom of citizens of the Union to incorporate their companies under the legal system most suitable for their particular plans.

139. The provisions relating to directors' joint and several liability serve *inter alia* to enforce the minimum capital requirements (Article 4(1) to (3) of the WFBV). At least in so far as they relate to brass plate companies formed under English law, the problems the WFBV was intended to address arise because (as has already been mentioned a number of times) the Member States have not yet been able to agree on harmonisation of the rules relating to minimum capital requirements on limited liability companies or on more effective measures for protecting creditors. As long as the law remains in this state, there is no reason for interpreting the Treaty provisions relating to freedom of establishment in such a way as to restrict competition between the different legal systems.

140. As an interim conclusion, it is to be held that the WFBV discriminates against foreign companies and is therefore an unjustified restriction on freedom of establishment.

(b) Suitability

141. It is also doubtful whether the WFBV is suitable for ensuring consumer protection. Admittedly, those who argue that it is are correct in pointing out that by means of the Second Directive and Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), (57) Community law has recognised that minimum capital requirements are a means of ensuring adequate capitalisation. (58) Where a company's minimum capital has been paid up, then at least at the time of incorporation that amount is available to creditors.

142. However, in his Opinion in *Centros*, Advocate General La Pergola expressed doubts as to the efficacy of this device. (59) That there is no single correct view on the issue is also demonstrated by the various degrees of importance which the company law of different Member States attaches to minimum capital (as shown by the different amounts required to be paid up). English and Irish law do not give minimum capital any importance at all. Finally, reference is to be made to the report of the Winter Group. This report (named after Jaap Winter, chairman of the Committee of

Experts that produced it) was delivered to the Commission only recently, and explains that the concept of minimum capital is generally seen as one of the cornerstones of safeguarding creditor protection and shareholders' interests. However, the Committee of Experts concluded that minimum capital rules fulfil only one function. They deter individuals from light-headedly forming companies. By contrast, they confer only limited protection on creditors against ill-considered capital investment, and do not confer any protection at all where capital is used to write off losses. Creditors and shareholders would be better protected if an adequate solvency test were developed. (60)

143. In *Centros* the Court held that the Danish minimum capital provisions were in any event not such as to attain the objective of protecting creditors, since, if the company had conducted business in the United Kingdom, its branch would have been registered in Denmark, even though Danish creditors might have been equally exposed to risk. (61)

144. The present case appears comparable to that one. The national court has even expressly held that the WFBV would not be applicable to Inspire Art Ltd if it carried on any commercial activity in a country other than the Netherlands. It is not apparent that more assets would be available to creditors in that case. It follows that this restriction is not such as to attain the objective of protecting creditors.

145. There is also significant doubt as to whether registration of a formally foreign company as such and the requirements as regards how its name must appear on documents are suitable for protecting creditors. Disclosure of the fact that the company does not carry on any business outside the Netherlands does not increase or safeguard the capital available in respect of liabilities to creditors.

146. For these reasons, the provisions relating to minimum capital, registration as a formally foreign company and the company's name are not to be regarded as suitable for securing the attainment of the intended objective of protecting creditors. On that basis too, it is to be held that the restriction on freedom of establishment is not justified.

(c) Proportionality

147. Finally, the restrictions imposed by the WFBV would be justified only if there were no less restrictive means of attaining the objective of creditor protection.

148. It is doubtful whether the provisions relating to registration of a formally foreign company as such in the commercial register and to how the company's name is to appear on documents which it issues are necessary. Inspire Art Ltd was registered in the commercial register as a limited liability company governed by English law. It uses the word limited in its name in the course of its business. The market is thus made aware that it is not a company incorporated under Netherlands law. Any additional warning given by the designation formally foreign company appears unnecessary for safeguarding the interests of the company's creditors or for safeguarding the integrity of trade. To that extent, the rules are disproportionate.

149. Moreover, a company governed by English law is subject to the Fourth and Eleventh Directives. The creditors of Inspire Art Ltd are able to rely on the protection conferred by those provisions. (62)

150. It should moreover be recalled that, as regards protection of public creditors, the Court has already decided that instead of insisting on compliance with minimum capital requirements it is possible to obtain equivalent guarantees. (63) This is also possible in relation to private creditors. Thus, there is a less restrictive means available than that enacted in the WFBV. For that reason too the restrictions on freedom of establishment imposed by the WFBV are to be regarded as disproportionate.

151. Finally, there is one other point which suggests that the WFBV is disproportionate. The Law applies to companies which carry on their activities entirely, or almost entirely, within the Netherlands. However, it contains no rules for determining whether that condition is satisfied. If 10%, or 15%, or even 20% or more of activity is carried on outside the Netherlands, is activity still almost entirely within the Netherlands? The absence of a definition creates uncertainty as to

whether the WFBV is applicable to any particular company. A measure that is uncertain to such an extent cannot be a suitable measure for safeguarding creditor protection. That is particularly so given that its applicability to a particular company can vary without this necessarily being apparent from the commercial register, as is clear from the Government's Explanatory Memorandum to the draft of the WFBV. (64)

152. A similar uncertainty exists as regards directors' personal, unlimited joint and several liability. It arises whenever the company's capital falls below the statutory minimum.

153. Admittedly, these two provisions ensure that the applicable provision is always the one more favourable to creditors. However, particularly for company directors, they create an almost incalculable risk. Particularly because of their unforeseeable consequences for directors, the rules appear disproportionate.

154. The answer to be given to the second question is that neither Article 46 EC, nor combating abuse, nor imperative requirements in the general interest justify the restrictions on freedom of establishment in Articles 2 to 5 of the Wet op de formeel buitenlandse vennootschappen.

VI ? Conclusion

155. On the basis of the foregoing considerations, it is suggested that the questions referred be answered as follows:

(1) Articles 43 EC and 48 EC must be interpreted as precluding the application of national legal provisions which subject the creation of subsidiaries by a company ? which was itself founded in another Member State on account of the advantages offered by that arrangement in comparison with an undertaking established under the law of the State in which the subsidiary is situated, which imposes stricter requirements on the constitution of companies and the paying up of capital than the State of foundation, and the purpose of which can be deduced from the fact that the company carries out its business entirely or almost entirely in the State in which the subsidiary is situated without having any real link to the State of foundation ? to the stricter law of the State in which the subsidiary is established.

(2) Neither Article 46 EC, nor combating abuse, nor imperative requirements in the general interest justify the restrictions on freedom of establishment contained in Articles 2 to 5 of the Wet op de formeel buitenlandse vennootschappen.

1 – Original language: German.

2 – Wet van 17 december 1997, houdende regels met betrekking tot naar buitenlands recht opgerichte, rechtspersoonlijkheid bezittende kaptiaalvennootschappen die hun werksaamheid geheel of negenoeg geheel in Nederland verrichten en geen werkelijke band hebben met de staat naar welks recht zij zijn opgericht (Wet op de formeel buitenlandse vennootschappen), *Staatsblad* 1997, 697.

3 – Case C-212/97 [1999] ECR I-1459, in particular paragraphs 16 to 18.

4 – Case 79/85 [1986] ECR 2375, in particular paragraph 16.

5 – Council Directive 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).

6 – Case C-343/90 [1992] ECR I-4673, paragraphs 18 to 20. It also relies on Case C-18/93 *Corsica Ferries* [1994] ECR I-1783, paragraph 14, Case C-83/91 *Meilicke* [1992] ECR I-4871, Case C-297/93 *Grau-Hupka* [1994] ECR I-5535, paragraph 19, and Case C-143/94 *Furlanis* [1995] ECR I-3633, paragraph 12.

7 – 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); 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, in respect of 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); 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); 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); Eleventh Council Directive 89/666 EEC (cited above, footnote 5); and Twelfth Council Company Law Directive 89/667/EEC of 21 December 1989 on single-member private limited liability companies (OJ 1989 L 195, p. 40).

8 – .*Staatsblad* 1997, 699.

9 – Cited above, footnote 6.

10 – Case 81/87 [1988] ECR 5483.

11 – Cited above, footnote 3. The Netherlands Government referred in particular to paragraph 24 of the judgment.

12 – It referred to paragraph 18 of the judgment.

13 – Cited above, footnote 4.

14 – In this connection, it referred to Case C-69/88 *Krantz* [1990] ECR I-583, paragraph 11, and Case C-379/92 *Peralta* [1994] ECR I-3453, paragraph 24.

15 – The Commission referred in particular to paragraph 24 of the judgment (cited above, footnote 3).

16 – The Commission referred to paragraph 34 of the judgment.

17 – In this connection, the United Kingdom Government referred to paragraph 37 of the judgment in *Centros* (cited above, footnote 3).

18 – They referred to paragraph 38 of the judgment in *Centros* (cited above, footnote 3) and to paragraph 17 of the judgment in *Segers* (cited above, footnote 4).

19 – They referred to Case 205/84 *Commission* v *Germany* [1986] ECR 3755, Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and Others* [1991] ECR I-4007, Case C-204/90 *Bachmann* [1992] ECR I-249, and Case C-3/95 *Reisebüro Broede* [1996] ECR I-6511.

20 – .*Bachmann* (cited above, footnote 19).

21 – They referred to Case C-384/93 *Alpine Investments* [1995] ECR I-1141.

22 – The Austrian Government referred to paragraph 36 of the judgment (cited above, footnote 3).

23 – .*Segers* (cited above, footnote 4), paragraph 16; *Centros* (cited above, footnote 3), paragraph 17.

24 – .*Centros* (cited above, footnote 3), paragraph 18. The fact that such a purpose is immaterial is also recognised in the law relating to freedom to provide services, see, for example, Case C-23/93 *TV 10* [1994] ECR I-4795, paragraph 15.

25 – Cited above, footnote 10.

26 – Case C-208/00 *Überseering* [2002] ECR I-9919.

27 – See the references in footnote 6.

28 – .*Dias* (cited above, footnote 6), paragraphs 14 to 18.

29 – .*Segers* (cited above, footnote 4), paragraph 13; *Centros* (cited above, footnote 3), paragraph 20; *Überseering* (cited above, footnote 26), paragraph 57.

30 – .*Überseering* (cited above, footnote 26), paragraph 59. Incidentally, it is also possible to deduce this from the judgment in *Centros* (cited above, footnote 3), paragraph 21.

31 – See the discussion in *Memorie van Toelichting*, Tweede Kamer der Staten-General, Vergaderjaar 1994/95, promulgated on 19 April 1995, No 24139, No 3, p. 2, published on the Netherlands Parliament's website at www.tweede-kamer.nl.

32 – .*Memorie van Toelichting* (cited above, footnote 31), p. 3.

33 – Cited above, footnote 3, paragraph 27.

34 – Cited above, footnote 26, paragraph 59.

35 – .*Überseering* (cited above, footnote 26), paragraph 81.

36 – Cited above, footnote 7.

37 – .*Daily Mail* (cited above, footnote 10), paragraph 23.

38 – .*Überseering* (cited above, footnote 26), paragraph 72.

39 – .*Memorie van Toelichting* (cited above, footnote 31), p. 6, last paragraph, and p. 7, at the top.
40 – .*Centros* (cited above, footnote 3), paragraph 24, with further references.
41 – Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32, Case C-55/94 *Gebhard*[1995] ECR I-4165, paragraph 37, and *Centros* (cited above, footnote 3), paragraph 34.
42 – .*Centros* (cited above, footnote 3), paragraph 34.
43 – .*Centros* (cited above, footnote 3), paragraph 24, with further references.
44 – .*Segers* (cited above, footnote 4), paragraph 17; *Centros* (cited above, footnote 3), paragraph 24, with further references.
45 – .*Centros* (cited above, footnote 3), paragraph 25; *Überseering* (cited above, footnote 26), paragraph 92 (in certain circumstances and subject to certain conditions).
46 – .*Centros* (cited above, footnote 3), paragraph 27.
47 – Cited above, footnote 24.
48 –
49 – Case C-483/99 [2002] ECR I-4781.
50 – .*Centros* (cited above, footnote 3), paragraphs 32 ff.
51 – .*Centros* (cited above, footnote 3), paragraph 34.
52 – .*Memorie van Toelichting* (cited above, footnote 31), p. 9.
53 – See the discussion in *Memorie van Toelichting* (cited above, footnote 31), p. 9.
54 – See the discussion in *Memorie van Toelichting* (cited above, footnote 31), p. 9, last paragraph.
55 – See the discussion in *Memorie van Toelichting* (cited above, footnote 31), p. 7, relating to Article 2.
56 – .*Centros* (cited above, footnote 3), paragraph 20, with further references.
57 – OJ 2001 L 294, p. 1.
58 – See the 4th recital to the Second Directive and the 13th recital to Regulation (EC) No 2157/2001.
59 – .*Centros* (cited above, footnote 3), at point 21 of his Opinion.
60 – See the discussion in the Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe dated 4 November 2002, summary on p. 14 and details on pp. 82 ff, in particular p. 87, published on the Commission's website at www.europa.eu.int/comm/internal_market/en/company/company /modern.
61 – .*Centros* (cited above, footnote 3), paragraph 35.
62 – See the consideration of this point in *Centros* (cited above, footnote 3), paragraph 36.
63 – .*Centros* (cited above, footnote 3), paragraph 37.
64 – .*Memorie van Toelichting* (cited above, footnote 31), p. 6, relating to Article 1.