

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)

(Articles 43 EC, 46 EC and 48 EC — Company formed in one Member State and carrying on its activities in another Member State — Application of the company law of the Member State of establishment intended to protect the interests of others)

Opinion of Advocate General Alber delivered on 30 January 2003 I-10159
Judgment of the Court, 30 September 2003 I-10195

Summary of the Judgment

1. *Member States — Obligations — Obligation to penalise infringements of Community law — Scope*
(Art. 10 EC)

2. *Freedom of movement for persons — Freedom of establishment — Companies — Directive 89/666 — Disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State — Mandatory and optional disclosure requirements — National legislation introducing disclosure requirements not provided for by the directive — Not permissible (Council Directive 89/666, Art. 2)*
3. *Freedom of movement for persons — Freedom of establishment — Company formed in accordance with the law of a Member State in which it has its registered office but in which it conducts no business — Establishment of a branch in another Member State subjected to conditions relating to minimum capital and directors' liability — Not permissible — Possibility of adoption by Member States of measures to combat fraud — Limits (Arts 43 EC and 48 EC)*

1. Where a Community regulation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 10 EC requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law.

which, in any event, make the penalty effective, proportionate and dissuasive.

(see para. 62)

For that purpose, while the choice of penalties remains within their discretion, the Member States must ensure in particular that infringements of Community law are penalised in conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and

2. It is contrary to Article 2 of the Eleventh Directive 89/666 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State, which contains a list of the information which must be disclosed in the Member State in which the branch is established and a list of optional measures imposing disclosure requirements, for national legislation to impose on the branch of a company formed in accordance with the laws of another Member State disclosure obligations not provided for by that directive, such as recording in the commercial register the fact that

the company is formally foreign, recording in the business register of the host Member State the date of first registration in the foreign business register and information relating to sole members, the compulsory filing of an auditor's certificate to the effect that the company satisfies the conditions as to minimum capital, subscribed capital and paid-up share capital or mention of the company's status of a formally foreign company on all documents it produces.

Without affecting the information obligations imposed on branches under social or tax law, or in the field of statistics, harmonisation of the disclosure to be made by branches, as brought about by the Eleventh Directive, is exhausted.

(see paras 65, 69-70, 72, 143, operative part 1)

3. It is contrary to Articles 43 EC and 48 EC for national legislation to impose on the exercise of freedom of secondary establishment in that State by a company formed in accordance with the law of another Member State certain conditions provided for in domestic law in respect of company formation relating to minimum capital and directors' liability. The reasons for which the company was formed in that other

Member State, and the fact that it carries on its activities exclusively or almost exclusively in the Member State of establishment, do not deprive it of the right to invoke the freedom of establishment guaranteed by the Treaty, save where the existence of an abuse is established on a case-by-case basis.

A Member State is certainly entitled to take measures designed to prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law.

However, the provisions of the Treaty on freedom of establishment are intended specifically to enable companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community to pursue activities in other Member States through an agency, branch or subsidiary.

That being so, the fact that a national of a Member State who wishes to set up a company can choose to do so in

the Member State the company-law rules of which seem to him the least restrictive and then set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty.

Member State in which it has its registered office and pursues its activities only or principally in the Member State where its branch is established is not sufficient to prove the existence of abuse or fraudulent conduct which would entitle the latter Member State to deny that company the benefit of the provisions of Community law relating to the right of establishment.

In addition, the fact that a company does not conduct any business in the

(see paras 105, 136-139, 143, operative part 2)