Übungen

I. Facts:

The countries Alpha and Beta were member states of the European Union. Alpha was a long-standing member of the EU, while Beta was a new member which had only recently joined. Alpha was one of the largest countries in the EU, with a population of more than seventy million, a diverse industrial base and sophisticated economy. It also had high personal and corporate income tax rates of over 40%. In contrast, Beta was an emerging market economy, having only recently joined the EU after many years under communism; it had a relatively small population of 1 million, and one of the lowest per capita incomes and wealth levels in the European Union. Also, Beta's coastal location on the Adriatic Sea, mild and sunny climate made it an obvious place for developing a tourist industry. To attract foreign investment, Beta lowered its corporate income tax rates to 10% for most companies with operations there. One of the industries which Beta had hoped to attract was the gambling industry. After joining the EU, Beta enacted a statute that eliminated any corporate income tax for all foreign-registered or foreign-incorporated companies which were engaged in the gambling and/or gaming industry if those companies moved their centre of management and main operations, including casinos, to Beta. Moreover, Beta adopted a light touch regulatory approach to attract the casino business by not requiring any fit and proper standards for individuals who own casino businesses and imposing only minimal health and safety controls on casino operations.

Hyman Lansky was president and the majority shareholder of 'Gambling Express GmbH', a private limited company, organised under the laws of Alpha with its headquarters and main operations, which included a fledgling, barely profitable casino, located in a small, coastal city on Alpha's northern coast on the North Sea. Gambling Express GmbH was suffering from low revenues because of the economic recession and the heavy regulations imposed by Alpha on gambling businesses, which included, *inter alia,* tight restrictions on opening hours and large windows and clocks in casinos. To combat gambling addiction, Alpha imposed a surtax on each gambling transaction which would help pay for programs to educate the public about the social problems associated with gambling and for gambling rehabilitation programs. Lansky was convinced that Alpha's strict regulations and anti-gambling education programs had significantly harmed his business and substantially diminished his firm's future prospects. Moreover, he was tired of the cold, rainy northern European weather and did not like paying Alpha's high income taxes and surtax on gambling transactions. He was attracted to Beta's low tax rates, light regulatory environment and growing tourist trade. Further, he was a citizen of Beta, but a resident of Alpha. He called a special meeting of the Board of Directors and proposed a resolution that Gambling Express GmbH would invest in a major expansion by moving its headquarters and main operations to Beta and establish a large casino there. Although three minority shareholders opposed Lansky's resolution, it passed by a majority vote. As a concession to the disgruntled minority shareholders, Lansky agreed that the company would keep its one small casino operating in Alpha and that it would maintain its incorporation as a Alpha company.

Alpha company law provides that the seat of a company organized under Alpha law is the place where its operational headquarters are located. In other words, the place where a company has its operational headquarters is supposed to coincide with the place of its incorporation. Alpha company law therefore is based on the ‘real seat’ theory, according to which a company must comply with the full requirements of company law applicable in the State where it has its real seat. A pure version of the ‘real seat’ theory would prohibit the ‘export’ of a company’s principal place of business from state A to the territory of state B while maintaining its incorporation in state A. Although it may be possible for a company organized under Alpha’s law to pursue economic activities in another Member State or establish a subsidiary there, the operational headquarters must remain in Alpha.

In addition, Alpha’s company law provides that if a company organized under its law seeks to move its centre of business to another EU state, the company must go through the lengthy and costly process of dissolution and/or liquidation of its assets in Alpha before it can transfer its seat of business and be reincorporated in another EU state. If the company moves its headquarters without complying with these requirements, it is subject to sanctions and to personal liability for its directors and controlling shareholders.

In contrast, a company organized under Alpha’s law is not subject to these requirements if the company is moving its principal place of business to another location in Alpha.

II. EC Treaty

Article 43 provides:

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

Article 46 provides:

The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.

Article 48 provides:

Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

Mr. Lansky has hired you to provide legal advice on Alpha’s regulatory restrictions regarding his proposed move to Beta. Please consider the following questions.

III. Questions:

1. May a company registered in Alpha request transfer of its registered office to another Member State of the European Union relying directly on Community law?

   If the answer is yes, may the transfer of the registered office be made subject to any kind of condition or authorisation by the Home State Alpha or the Host State Beta?

2. May EC Treaty law be interpreted as meaning that national rules or national regulatory practices which differentiate between commercial companies with respect to the exercise of their rights, based on the Member State in which their registered office is situated, is incompatible with Community law.?

3. Can the legal restrictions on Gambling Express GmbH moving its principal place of business to another EU state while remaining incorporated in Alpha be justified under Article 46?

Relevant European Court of Justice judgments:

Daily Mail and General Trust Case 81/87 [1988] ECR 5483.
Centros Ltd. and Erhvervs – og Selskabsstyreisen Case C-212/97 [1999] ECR I-1459.
CaixaBank France Case C-442/02 [2004] ECR I-8961.
Uberseering Case C-208/00 [2002] ECR I-9919.
Inspire Art Ltd. Case C-167/01 [2003] ECR I-10155.
SEVIC Systems, Case C-411/03 [2005] ECR I-10805.
Cadbury Schweppes Case C-196 [2006] ECR I – 7995
Alpha Vita Vassilopoulos and Carrefour-Marinopoulos [2006] ECR I-8135.

Articles: Ringe, W.-G., ‘No Freedom of Emigration for Companies?’, 2005 *European Business Law Review* 621.