COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 31.07.1996
COM(96) 420 final

96/0217 (CNS)

Proposal for a

COUNCIL REGULATION (EC)

protecting against the effects of the application of certain legislation of certain third countries, and actions based thereon or resulting therefrom

(presented by the Commission)

EXPLANATORY MEMORANDUM

At its meeting of 15 July 1996, the Council of the European Union identified a range of measures that could be deployed by the EU in response to damage to the interests of EU companies resulting from the implementation by the US of the Cuban Liberty and Democratic Solidarity (Libertad) Act (the Helms Burton Act). The Council instructed COREPER to make the necessary preparations for urgent Community and co-ordinated action.

One of the measures identified by the Council was "the use/introduction of legislation by the EU to neutralise the extra-territorial effects of the US legislation". The present Communication contains a proposal for a Council Regulation which would introduce legislation to this effect at EU level.

The proposed Community legislation aims to protect the legal order of the European Community and its external economic interests through a number of specific measures. It aims only to establish a defensive mechanism for the Community and persons resident or companies incorporated therein against unlawful and damaging effects of US legislation and actions

There are clear advantages to be gained from taking these measures at Community, rather than national, level. Politically they would constitute a clear and united signal to the US. They would also achieve a level of protection that could not be obtained through identical or comparable (co-ordinated) national measures, not least because certain Member States have indicated that they would have difficulty in introducing such legislation at national level, or in introducing it rapidly. Furthermore the assurance of identical conditions for economic operators within the Community will help to maintain the unity of the internal market, especially in circumstances where the US decided to avail of the power to differentiate between countries or companies in the continuation of the suspension of the right to file under Title III. Finally Community legislation would provide at Community level for a possibility to "claw back" amounts awarded to US citizens/companies by enabling Community persons to start legal proceedings anywhere in the Community where those US citizens/companies hold assets.

With regard to the individual Articles of the proposal, the following points can be made:

Article 1 defines the scope of the legislation and actions against which protection should be provided. The legislation concerned is to be listed in the Annex to the Regulation. At present, only the extra-territorial elements of US legislation regarding the unilateral embargo of Cuba are contained in the Annex. Any extension of the list in the Annex to other legislation (of the same third country or of another third country) would have to be decided by the Council on the basis of a proposal from the Commission. The same applies in case of the removal of items from the list of so-called primary legislation.

Where the legislation of the third country forms the basis of secondary legislation or similar instruments, the Commission may, in accordance with Article 7c, add this secondary legislation to the list in the Annex, in conformity with the Committee procedure contained in Article 8. Some secondary legislation has already been listed in the Annex.

In order to enable the Community to act quickly, adequately and proportionately to defend its interests, the Commission should be provided with the necessary information by the natural and legal persons within the Community whose economic interests are being negatively affected by the contested legislation. Article 2 provides for notification to the Commission to that effect.

Where the information provided under Article 2 might be of a confidential nature, an explicit guarantee of a confidential treatment is provided for in Article 3.

Article 4 aims at blocking the recognition or enforceability within the Community of judgements by courts or tribunals outside the Community, which give effect to the contested US legislation. The article will be effective especially in preventing the enforcement of judgements by US courts based on Title III of the Helms-Burton Act.

Non-compliance with the contested elements of the US legislation covered by the Regulation is obligatory under Article 5. The existence of such a rule is intended to be an effective defence in US courts in cases where persons might be sued in the US for such non-compliance. (Similar clauses are found in legislation of the United Kingdom and Canada).

Nevertheless, under certain circumstances, non-compliance might result in disproportionate damage to a person/company. For this reason the possibility is provided to obtain an authorisation for compliance. Such an authorisation would be given by the Commission in conformity with the Committee procedure contained in Article 8.

Article 6, the "claw-back" clause, enables the recovery of amounts obtained by US persons under the contested US legislation. This Article will be especially significant if the suspension of the possibility to start legal proceedings under Title III of the Helms-Burton Act is not extended beyond 1 February 1997. The present proposal follows the Canadian "blocking statute" in that it allows for the recovery of the full amount, and not only for the part of the amount that was obtained by doubling or tripling the original compensation/payment made under a judgement of a US court or tribunal.

The Commission will be entrusted with certain tasks, such as the amendment of the Annex of the Regulation and the authorisation of compliance. Article 7 also obliges the Commission to keep the Council informed on the effects of the contested US legislation and actions based thereon and to make a full report annually. Furthermore, the Commission shall publish in the Official Journal the judgements to which Article 4 applies.

In the first two tasks mentioned, the Commission shall be assisted by a Committee of representatives of the Member States, which should, in view of the importance of the measures to be taken by the Commission, operate in accordance with Article 2 (PROCEDURE II) of Council Decision 87/373/EEC of 13 July 1987 (OJ No L 197, p. 33, 18.7.1987).

Article 9 obliges Member States to determine penalties to be imposed in the event of breach of the provisions of the Regulation. Such penalties have to be effective, proportional and dissuasive.

Article 10 provides for the mutual exchange of information on the implementation of the Regulation between the Member States and the Commission so as to help prevent discrepancies in implementation.

As to the applicability of the Regulation, Article 11 stipulates that the Regulation not only has a territorial limitation but will also be limited to natural or legal persons, private or public, who are legally resident or incorporated and actually domiciled within the Community. Such a limitation is desirable to avoid natural or legal persons seeking protection under the Regulation, while their permanent interests lie outside the Community. This would be relevant in particular with regard to persons normally resident or incorporated within the US.

Nevertheless, consideration could be given to extending the applicability of the Regulation to persons, resident or incorporated in a third country with similar or identical legislation, and which would extend the applicability of its legislation to persons, resident or incorporated in the Community. In particular, such reciprocity could render the claw-back clause even more effective, because it would increase the possibilities to have access to assets of the US person/company from which amounts are to be recovered.

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protecting against the effects of the application of certain legislation of certain third countries, and actions based thereon or resulting therefrom

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular 113 and 235 thereof,

Having regard to the proposal of the Commission,

Having regard to the opinion of the European Parliament[1])

Whereas it is an objective of the EC that there should be an open system of international trade and capital investment,

Whereas certain third countries have enacted or are likely to enact certain laws, regulations, and other legislative instruments which purport to regulate the activities of natural and legal persons under the jurisdiction of the Member States of the European Community;

Whereas by their extra-territorial application such laws, regulations and other legislative instruments violate international law;

Whereas these laws and actions based thereon or resulting therefrom, including regulations and other legislative instruments, affect or are likely to affect the established legal order and have adverse effects on the external economic interests of the EC and the interests of natural and legal persons exercising their rights in accordance with the common import and export regimes and on the principle of free movement of capital between the Community and third countries;

Whereas, under these exceptional circumstances, it is necessary to take action at the Community level protecting the established legal order and the external economic interests of the Community and the interests of these persons, in particular by removing, neutralising, blocking or otherwise countering the effects of the foreign legislation concerned;

Whereas the Commission, in the implementation of this Regulation, should be assisted by a committee composed of representatives of the Member States;

Whereas this action takes the form of measures ancillary to the achievement of the objectives set out above;

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[1]) Opinion delivered on ...., OJ nr.....

Whereas the Treaty does not provide for the adoption of certain provisions of this Regulation powers other than those of Article 235;

HAS ADOPTED THIS REGULATION:

Scope of protection

Article 1

This Regulation provides protection against and counteracts the effects of the extra-territorial application of the laws specified in the Annex and of actions based thereon or resulting therefrom, including regulations and other legislative instruments.

On the basis of a proposal of the Commission, the Council may add or delete laws to or from the Annex.

Notifications

Article 2

Any person shall notify to the European Commission[2]) any information obtained by that person, with regard to the direct or indirect effects of the laws or actions mentioned in Article 1, on the economic and financial interests of that person.

Confidentiality

Article 3

All information supplied under this Regulation shall only be used for the purposes for which it was provided.

Information which is by nature confidential or which is provided on a confidential basis shall be covered by the obligation of professional secrecy. It shall not be disclosed by the Commission without the express permission of the person providing it.

Communication of such information shall be permitted where the Commission is obliged or authorised to do so, in particular in connection with legal proceedings. Such communication must take into account the legitimate interests of the person concerned that his or her business secrets should not be divulged.

This Article shall not preclude the disclosure of general information by the Commission.

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[2]) Information should be supplied to the following address: European Commission, Directorate General I, Rue de la Loi/Wetstraat 200, 1049 Brussels

Non-recognition of judgements

Article 4

No judgement of a court or tribunal located outside the Community giving effect, directly or indirectly, to the laws and actions mentioned in Article 1, shall be recognised or be enforceable in any manner.

Non-compliance

Article 5

No person shall comply, whether directly or through a subsidiary or other intermediary person, actively or by deliberate omission, with any requirement or prohibition, including requests of foreign courts, based on or resulting, directly or indirectly, from the laws and actions mentioned in Article 1.

Persons may be authorised, in accordance with the procedures provided in Articles 7 and 8, to comply fully or partially to the extent that non-compliance would seriously damage their interests or those of the Community.

Recovery of damages

Article 6

Any person shall be entitled to recover any amount obtained by any natural or legal person in whose favour a judgement by a non-Member State court or tribunal was given, to the extent that it is established before a court within the Community that the amount awarded was based on the laws and actions mentioned in Article 1.

Such recovery may be obtained from the natural or legal person in whose favour the judgement was given, or from any legal person incorporated in the Community and owned or controlled by such person. [3]

[3] A legal person incorporated in the Community is :

"owned" by another natural or legal person if more than 50 per cent of the equity interest in it is beneficially owned by that person;

"controlled" by another natural or legal person if that other person has the power to name a majority of its directors or otherwise to legally direct its actions.

Management provisions

Article 7

For the implementation of this Regulation the Commission shall:

a. inform the Council regularly on the effects of the laws, regulations and other legislative instruments and ensuing actions mentioned in Article 1, on the basis of the information obtained under this Regulation, and to make yearly a full public report thereon;

b. grant authorisations under the conditions set forth in Article 5;

c. add or delete, where appropriate, references to secondary regulations or other legislative instruments deriving of the laws specified in the Annex, and falling under the scope of this Regulation;

d. to publish in the Official Journal of the European Communities the judgements to which Article 4 applies;

Article 8

For the purposes of the implementation of paragraphs b. and c. of Article 7, the Commission shall be assisted by a committee composed of the representatives of the Member States and chaired by the representative of the Commission.

The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft within a time limit which the chairman may lay down according to the urgency of the matter. The opinion shall be delivered by the majority laid down in Article 148(2) of the Treaty in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the committee shall be weighted in the manner set out in that Article. The chairman shall not vote.

The Commission shall adopt measures which shall apply immediately. However, if these measures are not in accordance with the opinion of the committee, they shall be communicated by the Commission to the Council forthwith.

In that event the Commission may defer application of the measures which it has decided for a period of not more than one month from the date of such communication.

The Council, acting by a qualified majority, may take a different decision within the time limit referred to in the previous paragraph.

General and final provisions

Article *9*

Each Member State shall determine the penalties to be imposed in the event of breach of the provisions of this Regulation. Such penalties must be effective, proportional and dissuasive.

Article 10

The Commission and the Member States shall inform each other of the measures taken to implement this Regulation and of all other relevant information pertaining to this Regulation.

Article 11

This Regulation shall apply within the territory of the Community, including its air space and in any aircraft or on any vessel under the jurisdiction or control of a Member State, and to any natural or legal person, private or public, resident or incorporated within the Community.

Article 12

This Regulation shall enter into force on the day of its publication in the *Official Journal of the European Communities.*

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at,
For the Council

The President

ANNEX

LAWS, REGULATIONS AND OTHER LEGISLATIVE INSTRUMENTS
referred to in Article 1

COUNTRY: UNITED STATES OF AMERICA

ACTS

1. "National Defense Authorization Act for Fiscal Year 1993", Title XVII - Cuban Democracy Act of 1992, section 1706.

2. "Cuban Liberty and Democratic Solidarity Act of 1996.

REGULATIONS

1. 31 CFR (Code of Federal Regulations) Ch. V (7-1-95 edition) Part 515 - Cuban Assets Control Regulations, subpart E - Licenses, Authorizations and Statements of Licensing Policy.

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10