Damned if you do, Damned if you don't

Navigating Conflicting U.S. and Foreign Regulations on Doing Business with Cuba. The EU Perspective.

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Although the issue of the extra-territorial application of USA laws is still very much an issue in the EU, the furore surrounding the application of USA rules on trading with Cuba seems to have substantially subsided.

However, the reality of ever more liberal trade policy towards Cuba set against the maintenance of Helms-Burton and the EU Blocking Regulations, at the very least make conflicts between US and EU laws in the short term more not less likely.

The potential for conflicting compliance obligations therefore remains a real issue for all companies doing business on both sides of the pond.

It is on this basis that we propose to review the provisions and implications of the EU Blocking Regulations.

1. Cuba and the EU

It is fair to say that for the time-being the EU plays a disproportionately important role in Cuba's trading links with the world.

The following summary is taken from the European Commission's country description for Cuba:

"...in terms of trade, the EU is Cuba's largest trading partner, with a third of all trade, almost one half of foreign direct investment and more than half of all tourists coming from Europe. Cuba benefits from the Generalised System of Preferences in its trade exchanges with the EU."

Although between 2003-2008 the EU had applied an embargo on high level political contacts with Havana, but did not impose a ban on trade or investment with Cuba.

2. EU and USA

Quite simply, the EU–USA trading relationship is the most important trading relationship in the world. Anything that threatens this relationship must therefore be considered to be an issue of substantial concern at a global level. In recent years there have been plenty of such issues to raise concerns.

Using 2008 trade data from the EU Commission we can see just how important our trading relationship is:

For the EU, our most important export market was the USA (USA 19.1%; Russia 8%; Switzerland 7.5%). We did somewhat blot our copy book however in terms of imports with China beating the USA (China 16%; USA 12% and Russia 11.2%).

In more general terms collectively the EU and USA account for around 60% of total global GDP (2007).

In terms of investments (2007) – about 60% of all foreign investments in the USA come from the EU. In the EU around 50% of all foreign investments come from the USA. The USA invests more each year in the Netherlands than it does in Japan.

3. Milestones

The whole of the EU/US dispute can be summarised in the following propositions:

- the USA adopted legislation in relation to Cuba (and other countries) which included a wide approach to scope of coverage.
- the EU (and others) objected to the USA legislation and took action.
- the EU firstly adopted its own legislation requiring all EU persons not to give effect to the USA legislation.
- the EU then sought consultations with USA under the auspices of the WTO on the basis that the USA legislation was contrary to commitments given by the USA to the WTO and its Members. Consultations ended and a panel was formed to consider the claims by the EU.
- the USA in effect sought to deny any liability towards the WTO and

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its Members by citing the national security exemption to the WTO agreements.

- the EU and USA came together in the context of the Transatlantic Dialogue and reached an understanding – an agreement to disagree – and on the basis of various mutual commitments the EU decided to seek suspension of the Panel.

- The stand-off remains.

4. The EU measures

On 22 November 1996 two measures were adopted by the European Union which sought to address concerns in relation to the extra-territorial application of various items of US law.

The two measures were: Council Regulation (EC) 2271/96 protecting against the effects of the extra-territorial application of legislation adopted by a third country; and Joint Action 96/668 CFSP adopted under the European Union Treaty and having essentially the same title.

Council Regulation 2271/96 has come to be known as the *"Blocking Regulation"*. Joint Action 96/668 has correspondingly been more or less forgotten or perhaps more charitably been considered to form part of the Blocking Regulation.

The two measures are however adopted under very different constitutional bases and indeed throw into sharp relief the real difference between the EC and the EU.

Taking the Blocking Regulation first, the operative parts of the text can be summarized as follows:

- the Regulation is not of general application but only covers the extra-territorial application of the laws set out in Annex 1. The only entry in Annex 1 is for the United States of America. The relevant measure listed in relation to Cuba are: Cuban Democracy Act 1992 (Sections 1704 and 1706) as consolidated in the Cuban Liberty and Democratic Solidarity Act of 1996 and including the Cuban Assets Control Regulations.

- the Regulation only applies to persons listed in Article 11. In addition to Community nationals ie nationals of one of the Member States, the measures apply to residents (present in the EU for more than 6 months during the preceding 12 month period) and to companies incorporated in one of the Member States. The Regulation also covers persons in the territorial waters or air space of the Community and those on flagged vessels providing they are acting in a professional capacity ie crew.

- the Regulation only covers these persons when they engage in international trade and/or the movement of capital and related commercial activities between the Community and third countries.

- persons directly or indirectly affected by the designated laws are under an obligation to inform the European Commission within 30 days of the date on which they became aware of the restrictions

- no judgments given by non-EU courts applying the designated laws shall be enforceable before the courts of the EU

- no person covered by the Regulation shall comply "whether directly or through a subsidiary or other intermediary person, actively or by deliberate omission", with any requirement or prohibition based on or resulting from the designated laws.

- a mechanism was created under which exemptions could be sought by legal entities who could demonstrate that compliance with the Regulation would *"seriously damage their interests or those of the Community"*.

- finally, and in practice most crucially, Article 9 provides that each Member State is to decide what sanctions are to be imposed for breach. The only requirement being that the sanctions must be "effective proportional and dissuasive".

Joint Action 96/668 supplements the provisions of the Regulation in so far as it calls on Member States to take such additional actions as may be needed to protect the interests of any person covered by the Regulation *"insofar as these interests are not protected under that Regulation"*.

5. CFSP and Joint Actions

To answer the superficially rather simple question: *"What is the legal value of the statements made in the Blocking Regulation as compared with the Joint Action"* we would need to make a fairly extensive foray into the realms of EU Constitutional law.

The quick and dirty answer would be that a CFSP Joint Action is a statement of political will which is not intended necessarily to create individual rights whereas a Council Regulation is a legal measure that derives force of law from the Treaty which set up the EU, is directly applicable in all Member States and can create direct rights in individuals.

CFSP was established as the response of the European Community (EC) to the collapse of communism. It was a recognition that the EC which was established to achieve economic integration of the Member States did not provide for wider cooperation in international affairs nor in domestic non-economic policy making.

To address these gaps the Maastricht Treaty, which entered into force in November 1993, added two extra areas of competence to the existing provisions covered by the EC Treaty.

The European Union was the name given to the overall organization which would be made up of three distinct treaty elements – or *"pillars"*: the European Community (First Pillar); Common Foreign & Security Policy (Second Pillar) and Justice and Home Affairs (Third Pillar).

Under CFSP there are three types of action that can be taken: a Joint Action; Common Positions and Common Strategies. In each case the agreements reached are in essence political commitments between the Member States rather than expressing legal measures which are required to bind Member States as to the substance if not the procedural implementation of specific rules.

6. WTO Dispute Settlement

The prospects for actual conflict between the USA and EU rules were substantially lessened as a result of an understanding reached between the USA and the EU as a means of preventing the completion of a WTO Panel review of the US measures which has been requested by the EU.

WTO Panel DS 38 had been formed at the request of the EU on 3 October 1996. Subsequently the EU requested that the Panel suspend its work and one year after this the Panel lapsed. The EU request for suspension was made following the receipt by the EU of a series of commitments from the USA in connection with its planned enforcement of part of the Helms-Burton legislation (Title IV – alien exclusion provisions).

In return the EU had encouraged the USA to believe through the adoption of a CFSP Common Position on the need to promote democracy and reform in Cuba.

The EU Commission's Market Access Database currently summarises the position in relation to Helms-Burton as follows:

"The Understanding reached at the May 1998 Summit in no way softens the EU's position that the Helms-Burton Act is contrary to international law. The EU never acknowledged the legitimacy of these Acts and fully reserves its right to resume the WTO case against the Helms-Burton Act."

7. National Enforcement

It is not at all unusual to see legal measures adopted in the EU refer matters of enforcement to the Member States. One of the reasons for this is that the EU has no competence to issue legislation imposing criminal law penalties, only Member States can do this.

Thus when we see language referring to *"effective proportional and dissuasive"* sanctions, we really think that this is the EU indicating to Member States that criminal law penalties should be imposed.

To provide a complete picture on the application of the Blocking Regulation it would be necessary to review each of the national enforcement measures in the 27 Member States. Some of these countries were not Member States when these measures were adopted in 1996 (when there were only 15 Member States and not the current 27). New Member States have been required to enact provisions into their national laws as a condition of accession.

In addition do remember that there are a number of new candidate countries for whom the task of accession requires that they adapt their national laws progressively into line with those of the EU. As Regulation 2271/96 is part of the "acquis communautaire" this means that its provisions will at some stage be transposed into the national laws of eg Croatia, Macedonia, Turkey and Serbia.

Indeed anecdotally the Serbian Report on Accession of October 2008 reports that transposition of Regulation 2271/96 still needs to be completed.

To provide a complete picture on transposition and enforcement we would need to review measures in each of the 27 Member States. This we are not in a position to do. However what we can confirm is that the efforts at transposition and enforcement in the 8 Member States we have reviewed can be categorized into the following groups:

- some Member States have not in fact taken any steps to adopt specific enforcement legislation (includes Belgium, Luxembourg and France)

- some Member States have adopted transposition measures by creating what amounts to an administrative infringement (Netherlands and Spain)

- some Member States have adopted transposition measures by creating a criminal offence which may be punished by fines (in the UK for example the level of fine is unlimited if tried on indictment but subject to the statutory maximum for summary offences)

- some Member States have adopted transposition measures by creating a criminal offence which may be punished either by a term of imprisonment (Eire).

This is of course an incomplete picture, but it at least serves to demonstrate that even within the EU the consequences of an infringement by an EU entity could be radically different depending on the identity of the Member State which is competent to deal with the breach.

8. Practical Issues

There are few if any real cases on which to report. Certainly no jurisprudence at the EU level and as far as we are aware no actual judgements before national courts. There are however two fairly well known case studies in which the provisions of 2271/96 have been in issue: Bawag in Austria and UK banks.

a. Bawag

Bawag is one of Austria's larger banks. In 2007 it was the target for acquisition by a US private equity firm, Cerberus Capital. Presumably during the due diligence process it was identified that Bawag operated certain bank accounts for Cuban nationals. In order to complete the transaction Bawag closed these accounts citing compliance with Helms Burton as the reason. The issue became known to the press and generated a lot of negative publicity. The Austrian Government initiated proceedings against Bawag for breach of 2271/96. Cerberus Capital then decided to approach the US authorities to obtain a licence to allow the acquisition to proceed with the Cuban accounts reinstated. Once the licence was obtained (less than 2 months from the data of initiation of the Austrian proceedings) and the accounts reinstated, the Austrian Government dropped the prosecution.

b. UK Banks

In relation to UK Banks there is some circumstantial evidence to suggest that at least 2 major UK banking groups have sought to close accounts used by existing customers to do business in Cuba. It is alleged that the reasons cited for closure are that the banks do business in numerous jurisdictions and need to take steps to ensure compliance with legal rules in all such jurisdictions. The issue has not yet resulted in any formal action being taken by the UK. We understand that it is also fairly unlikely that any such action will be taken.

Just noting some of the differences between the two cases – Bawag involved a unilateral decision to close Cuban accounts justified expressly on the basis of compliance with Helms-Burton; the UK banks apparently asked some customers to *"take their business elsewhere. . ."* but did not close their accounts. In addition although clearly motivated by compliance issues with Helms-Burton, they did not make any such express statement.

c. Hotels

We should just note that a whole series of measures has been taken in relation to the actions of US-owned hotel groups to deny services to Cuban nationals. A specific case arose in 2007 in Norway (not an EU Member State but a Member of the EEA). A booking by a Cuban delegation to a trade fair was refused by Hilton Hotels.

Proceedings were brought in Norway by a NGO under Norwegian Race Relations legislation – the claim being that the refusal was motivated by considerations of race and nationality and was therefore illegal under Norwegian law.

A similar statement issued in the UK by Hilton resulted in even more negative press and the start of an investigation by the UK Commission of Racial Equality.

In the end Hilton sold the EU hotel group (Scandic) to a European investment company and indicated it would reverse its decision to ban Cuban nationals using Hilton Hotels in Europe. It noted that in doing so it raised issues of its ability to comply with Helms-Burton.

Of course it is not only in the area of Helms-Burton that USA laws seek to impose obligations on third parties to control the nationality of individuals who access US goods or technology. As in the areas of export and trade controls the commercial dilemma facing companies caught in such situations is very simply what are the comparative penalties and enforcement risks for infringing the provisions of the USA laws and the EU rules – be they 2271/96 or Racial Equality legislation. Once again it has generally been concluded that enforcement in the USA is tougher and commercially more significant.

The difference for Bawag and Hilton being that the enforcement that was really of concern was not in a court of law but in the court of public opinion. It was the fact that in both cases the news of their commercial decisions was received badly by the general public (and the anti-Castro press in the EU) and this started to have a significant impact on their brand and potentially their business activities in the EU.

In terms of enforcement then this is the crucial element in the EU system.

9. Conclusions

From an EU perspective and in an attempt to answer the question raised in the title of today' session, rather than being *"damned uncertain"* of the consequences of a conflict between EU and USA rules, any company who weighs up the risks of being prosecuted under the Blocking Regulation, should consider this outcome to be *"damned unlikely"*.

Unlikely yes, impossible no.

Footnotes:

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