

## Some remarks concerning European law

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## **SOME REMARKS CONCERNING EUROPEAN LAW**

### **The example of the anti-Helms-Burton measures**

C.H. van Rhee

#### *Introduction*

The Cuban Liberty and Democratic Solidarity (Libertad) Act, also known as the Helms-Burton Act, was signed by President Clinton on March 12, 1996. The Act caused outrage all over the world, since many countries are of the opinion that the measures encompassed by Helms-Burton are in contravention of international law.

Helms-Burton envisages, amongst other things, putting an end to the "trafficking" in property having belonged to US nationals which was confiscated by the Cuban government on or after January 1, 1959. It gives rise to actions for damages by American citizens (including Cubans who have acquired American citizenship after the confiscation of their property) before courts in the US against individuals and companies who are involved in such "trafficking". The term "trafficking" is used in a very broad sense, including engaging in commercial activity, using or otherwise benefiting from confiscated property. Until now, the right to bring an action for damages has been suspended.

In addition, Helms-Burton allows the US to refuse the admittance of foreign nationals involved in "trafficking" (including their spouses, minor children and representatives) to their territory. This rule has not been suspended and is occasionally enforced.

Measures against Helms-Burton have been implemented by many states. The European Community (EC hereafter) and the European Union (EU hereafter) have also legislated against this Act. The EC measures against Helms-Burton (as well as against some other US legislation) are encompassed by a regulation dated November 22, 1996 (Council Regulation (EC) no. 2271/96, *Official Journal* 1996 L 309/1) and are, amongst other provisions, based on Article 235 of the Treaty of Rome (i.e., the Treaty Establishing the European Community, ECT hereafter). In accordance with the procedure prescribed by Article 235, the regulation was implemented as a result of a proposal of the Commission of the EC, and issued by the unanimous Council after consultation with the European Parliament.

The following measures were taken:

1. Judgments of courts or tribunals and decisions of administrative authorities from outside the EC based on the Helms-Burton Act may not be recognised or enforced in the Community (Article 4);
2. Citizens of the EC and legal persons incorporated within its territory may not comply with requirements or prohibitions, including requests of foreign courts, which are based on or result from the Helms-Burton Act. The only exception to this rule is where authorisation of the Commission of the EC has been acquired due to the fact that disobedience would result in serious damage to the interests of the Community or the natural or legal persons within its territory (Article 5);
3. Natural or legal persons may recover damages, including procedural costs, resulting from the

application of the Helms-Burton Act. These damages must be paid by the legal or natural persons or their representatives who have caused the damage. The claim for damages should be brought before a court in the Member State where the natural or legal person having caused the damage or his representatives possesses assets. The damage may be recovered from the forced sale of these assets (Article 6). Awards of damages are enforceable under the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. Recovery may be obtained on the basis of the provisions of Articles 2 to 6 of Title II and Article 57(3) of the Convention. These Articles contain rules on jurisdiction of the courts of the Member States. Articles 2, 4, 5(3) and 57(3) deserve special attention. Article 2 lays down as the main rule that persons domiciled within the territory of a Member State will be sued in the courts of that State irrespective of their nationality. Article 4 declares the national rules of jurisdiction of a particular Member State applicable where the defendant is not domiciled within the territory of a Member State. Article 5(3) designates the court of the place where a harmful event as a result of a tort, delict or quasi-delict has occurred as being competent. (The Court of Justice of the European Communities has ruled that if the place where the event which gives rise to liability under Article 5(3) and the place where that event results in damage are not the same, both the court of the place where the damage occurred and the court of the place of the event giving rise to it are competent.) If Articles 2 and 5 designate different competent courts, the plaintiff may choose the forum. It should, however, be noted that, apart from these rules, Article 16 of the Brussels Convention applies since Article 4 of the Convention, which unlike Article 16 is specifically declared to be applicable by the anti-Helms-Burton Regulation, refers to this rule. Relevant for the recovery of damages as a result of Helms-Burton is paragraph 1 of this Article, which establishes that as regards rights in rem and tenancy in immovable property, the courts of the Member State where the property is situated are exclusively competent. In the case of such rights in rem and such tenancy, therefore, neither the other rules on jurisdiction encompassed by the Brussels Convention nor national rules (Article 4) may be applied. Finally, Article 57(3) determines that the Brussels Convention "shall not affect the application of provisions which, in relation to particular matters, govern jurisdiction ... and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts."

In addition to the EC regulation, the European Union took action against Helms-Burton on the basis of Articles J.3 and K.3 of the Treaty on European Union (Treaty of Maastricht hereafter). The Union decided that all of its Member States should take the measures they may find necessary to safeguard the interests of natural or legal persons within their territory which are not protected by the EC regulation (*Official Journal* 1996 L 309/7).

In order to understand the above European measures and the way in which they were enacted, some knowledge of the structure and competences of the European Community and the European Union is required. In this note I will discuss:

- the difference between the European Community and the European Union;
- the type of instrument encompassing the anti-Helms-Burton measures;
- the legal basis of the EC and EU measures against Helms-Burton;
- some related issues.

### *The European Union and the European Community*

Currently, 15 (western) European States have joined the EU. The EU was created in 1992 by the Treaty of Maastricht. It consists of three so-called 'pillars', the first of which embodies the European Communities (European Economic Community - renamed European Community by

the Treaty of Maastricht -, the European Coal and Steel Community and the European Atomic Energy Community, i.e., Euratom). These Communities are a creation of the 1950s. The European Communities can be characterised as supra-national organisations. They have their own (shared) institutions (European Parliament, Council of Ministers, Commission, Court of Justice - including the Court of First Instance - and Court of Auditors). Although, therefore, the EU and the European Communities should be distinguished, this distinction is often disregarded by non-lawyers (e.g. in newspaper articles).

The second and third pillars of the EU have an intergovernmental character. They embody the common Foreign and Security policy of the Member States (second pillar) and cooperation in the field of Justice and Home Affairs (third pillar). Within these two pillars the institutions of the European Communities (i.e., the first pillar) occasionally play a rôle. It should, however, be remembered that in such cases the institutions have merely been "borrowed" from the Communities and do not become part of the second and third pillars.

The second and third pillars differ considerably from the first pillar. Whereas the creation of the European Communities resulted in a transfer of sovereignty from the Member States to the Communities, the aims of the second and third pillar are more restricted, leaving sovereignty in the areas they cover ultimately with the Member States themselves.

#### *The instrument encompassing the EC measures against Helms-Burton*

The primary legislation of the European Communities consists of Treaties. Their secondary legislation, on the other hand, may be enacted under different guises, i.e., by way of Regulations, Directives and Decisions. The anti-Helms-Burton measures have, as I have stated above, been enacted by way of a regulation.

According to Article 189 ECT, regulations are measures which have general application. They are designed to apply to situations in the abstract (J. Steiner, L. Woods, *Textbook on EC Law*, London 1996, p. 33). They are binding in their entirety and directly applicable in all Member States. The latter feature means that at the national level no further implementation is required for regulations to take effect. This is only different where provisions in a regulation are conditional or insufficiently precise, or require further implementation before they can take full legal effect. Since the measures in the Helms-Burton regulation are not conditional, seem sufficiently precise and do not need further implementation, the rights created by this regulation may be invoked by the individual citizens of the Community both against the State (vertical direct effect) and against fellow citizens (horizontal direct effect).

#### *Article 235 ECT*

In principal, acts of the European Communities are only permitted if primary legislation, i.e., the Treaties, allow the Community to act. This is logical, since the sovereignty of the Member States is at stake. This sovereignty can only be limited with the consent of these States. Each piece of legislation originating from the Community must indicate the Treaty provision which forms its legal basis. The anti Helms-Burton legislation is, as I have stated above, amongst other provisions, based on Article 235 ECT.

Article 235 ECT reads:

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

Article 235 ECT is a very broad provision. It allows the Community to act if a more specific basis for legislation cannot be found. Article 235 ECT has few limitations. It requires that the power it assigns to the Community should be used to attain one of the objectives of the Community, and that attainment of this objective must take place in the course of the operation of the Common Market. These conditions place hardly any severe constraint on the Council (P. Craig, G. de Búrca, *EC Law*, Oxford 1997, p. 106). The principle of subsidiarity, introduced by the Maastricht Treaty in the ECT (see Article 3b ECT) may, however, place some restraint on the Council in using Article 235 as the basis for legislation. The principle of subsidiarity means that action at Community level should only be taken when the result at which such action aims cannot be sufficiently achieved by actions of the individual Member States. It seems, however, that lately less emphasis has been put upon the application of this principle, and therefore its effects on the future action of the Community remains to be seen.

#### *European Union measures against Helms-Burton*

The Maastricht Treaty introduced changes in the Treaty Establishing the European Economic Community (currently known as the Treaty Establishing the European Community, i.e., the ECT). Apart from the Articles introducing these changes, which are usually not printed in statute books since their result appears in the amended ECT, the Maastricht Treaty also contains Articles concerning the second and third pillars. These are reproduced in all statute books under the heading "Maastricht Treaty" or an equivalent heading. The Articles in the Treaty of Maastricht are not designated by way of numbers, but by way of letters. Therefore, it is immediately evident whether a particular Article originates from this Treaty or not.

The measures against Helms-Burton taken at the EU level are based on Articles J.3 and K.3 of the Treaty of Maastricht. These Articles may be found in the sections dealing with common Foreign and Security policy and cooperation in the field of Justice and Home Affairs. They fix the procedure for adopting joint action. The EU measures taken against Helms-Burton on behalf of these Articles oblige the Member States to take additional steps to protect the interests of natural or legal persons within their territory from the effects of Helms-Burton. These measures may be necessary where a sufficient basis for action at Community level cannot be found.

Bringing about EU measures like those in the case of Helms-Burton is more complicated than taking measures at the Community level, since the former measures can only be introduced after agreement has been reached between the individual Member States, whereas at the Community level the Community institutions take the necessary steps. For true European integration it is therefore important that as many areas as possible should be brought within the ambit of the first pillar. A transfer of these areas from the second and third pillars to the first pillar is needed. This will, of course, not be an easy task, since many Member States jealously guard their sovereignty. Nevertheless, such transfers are taking place, for example as a result of the recent Treaty of Amsterdam which, when it enters into force (most likely in the second half of 1998) brings the Schengen agreement on the removal of all checks on the movement of people across internal EC borders within the ambit of the Community (currently, Schengen is in the 3rd pillar). As a result of such changes, the area covered by the European Communities grows: the Communities become competent to legislate in an ever increasing area.

The growing jurisdiction of the Communities creates problems in, amongst other things, the area of the application of Community legislation by the Courts. As I have stated above, the Communities have their own court, the Court of Justice of the European Communities, but this Court is only competent in a restricted number of cases. One of its main tasks is to provide

national courts with so-called preliminary rulings on the interpretation of Community law. Most of this Community law must, however, be applied by national courts in actual cases, if necessary after the Court of Justice has given a binding interpretation of Community law. Although this binding interpretation guarantees some uniformity, such uniformity may not always be achieved. Whether or not uniformity will be attained is dependent on the willingness of national courts to ask for a preliminary ruling and marked differences exist in this respect between the national courts in Europe. It seems, for example, that British courts are very reluctant to ask for preliminary rulings, whereas the German courts are champions in asking for an interpretation of EC law, showing a real commitment to the European cause. It is still to be seen what rôle, if any, the Court will play in the interpretation of Helms-Burton.

#### *Final remarks*

In this note I hope to have shown that some knowledge of the basic structure and competences of the EC/EU is necessary for understanding measures emanating from these bodies. Such knowledge is not only relevant for European lawyers, but also, as the Helms-Burton example shows, for non-European lawyers. Since Europe is one of the main allies and trading partners of the US, EC/EU law may affect many American citizens and companies. Therefore, EC/EU law is a topic which deserves the attention of both American lawyers and American law students.

#### *Literature*

The literature on the European Communities and the European Union is abundant.

Useful introductions to European law are:

- G.A. Bermann *et al.*, *Cases and Materials on European Community Law*, St. Paul 1993 (West Publishing Co.)
- P. Craig, G. de Búrca, *EC Law*, Oxford 1997 (Clarendon Press)
- J. Steiner, L. Woods, *Textbook on EC Law*, London 1996 (Blackstone Press)

For a handy collection of primary and secondary EC/EU legislation, see N. Foster (ed.), *Blackstone's EC Legislation 1997-1998*.