

Fact-finding Mission
On the Extra-territoriality of American Law

Paris, October 5, 2016

The Extra-territoriality of American Laws: A Summary of the Work of the Mission

The extraterritoriality of certain American laws, i.e. the enforcement of laws passed in the United States regarding natural or legal persons from another country on account of links they sometimes have with the United States (a payment in dollars for example), essentially concerns three areas:

- The American systems concerning international sanctions
- The legislation in the field of the corruption of public officials abroad
- The application of American individual taxation to non-resident American citizens

The report which is presented today could, at first sight and particularly on account of its title, appear to imply a legal approach to this question. In fact, it deals with broad and strategic issues ranging from world economic competition to the disastrous consequences of American taxation for certain binational French people to the field of economic intelligence.

The application of American laws to French companies and people creates a certain number of difficulties.

First of all, **in the economic and financial sectors**, many French and European companies have paid substantial fines relating to violations of American anti-corruption laws or of the American system of international sanctions, which took place outside American territory. The fines thus inflicted hugely have increased since 2008. In the space of a few years the total of the fines paid by European companies, who are the first target of such fines, amounts to more than 20 billion dollars. Certain recent examples perfectly illustrate this:

- The fine of almost 9 billion dollars paid by BNP Paribas for the violation of American international sanctions;
- The fine of 772 million dollars paid by Alstom for the violation of American anti-corruption legislation;
- The fine of 398 million dollars paid by Total for the violation of American anti-corruption legislation;
- The fine of 800 million dollars paid by Siemens for the violation of American anti-corruption legislation;

- The fine of 787 million dollars paid by the Crédit Agricole for the violation of American international sanctions.

These levies are sufficiently hefty as to be perceptible at a certain macro-economic level. This is particularly the case for the record fine paid by BNP Parisbas in 2014 which heavily affected its balance of current transactions in France.

In the same way, the systemic impact which these fines can have upon the financial markets is to be feared. For example the file which was made public concerning Deutsche Bank which is currently negotiating a penalty which could reach 14 billion dollars, has upset all the European stock markets.

Secondly, the extra-territoriality of American tax laws is also especially harmful for a section of bi-nationals, i.e. “accidental Americans”. These people who were born in the United States and who thus have American nationality, have, however, no other link with this country. They can, nonetheless, be subject to checks and proceedings carried out by the American tax administration. This can even lead to them being banned from travelling to the United States and means they run the risk of other proceedings being brought against them by the French tax administration at the request of its American counterpart. It can also mean having problems with their own banks (refusal to open an account or to take out certain life insurance policies).

In order to answer these issues, the *rapporteure* and the chair of the mission have already substantially contributed, during the examination of the bill on transparency, the fight against corruption and the modernization of economic activity (known as the “Sapin II” bill), to the introduction of:

- A judicial convention of public interest : a French form of plea-bargaining;
- An extraterritorial provision authorizing possible proceedings before French courts to be carried out against foreign companies facing corruption charges for acts carried out abroad, as long as the accused company has any economic activity whatsoever in France

Nonetheless, they would like to go further and consider it necessary to have the United States understand that certain practices have become abusive and that France shall no longer accept them.

Consequently, France must demand reciprocity in the application of certain international agreements. It must also arm itself with legal measures similar to those possessed by the United States in order to impose cooperative policies upon the latter.

The mission considers, nevertheless, that cooperation alone will not solve the problems which have surfaced over the last few years. A new relationship must be established that will lead, in particular, to the request for the United States to clarify its position concerning American international sanctions.

These aims cannot be reached, however, without the strengthening of the means given over to French economic intelligence and through the improvement of our judicial arsenal.

Thus, the mission is opening up various new approaches at every level: national, European, bilateral and also international.

Proposals of the Parliamentary Mission

➤ *At a national level*

- To conclude the legislative process, ongoing since 2006, aimed at clarifying, enlarging and strengthening the punishment of violations of international sanctions and embargos applied by France.
- To introduce, as regards the results of the experiment concerning the ending of corruption (following the law dealing with transparency, the struggle against corruption and the modernization of economic activity), the notion of a system of plea-bargaining with the same inspiration (court-approved and made public) in the field of the violation of embargos by any company doing business in France.
- To amend the so-called “blocking statute” dating from 1968 by changing its wording in order to identify the information which is truly sensitive and whose transmission to foreign authorities should be either prohibited or limited. This should include a provision for a strict framework concerning the oversight or monitoring accepted by French companies concerning plea-bargaining with foreign authorities (checking by the administration concerning the choice of overseers/monitors and the information sent to these foreign authorities). It should also include the strengthening of legal penalties if the law is not respected so that it will be more credible for foreign, notably American, authorities and jurisdictions and can thus be accepted as a “legal justification”.
- To strengthen the means in France in the field of economic intelligence. This implies better coordinating the various departments in this field and facilitating the transmission of information between the National Financial Prosecution Service and the future Anti-corruption Agency and thus removing the unjustified legal obstacles which the latter faces. It means giving real political priority to economic intelligence and this requires an inter-ministerial dimension.
- To put our economic intelligence capabilities at the disposal of our companies, especially to help them be sure that their Iranian co-contractors are not, directly or indirectly, people or entities which are subject to sanctions.

➤ *At a European level*

- To seek to overcome the problems resulting from the current view of the provisions for international sanctions within the European Union (the enactment, at a community level, of the provisions applied at a national level) through measures such as the facilitation of information exchange between the departments in charge of the application of sanctions in the various member states, the continuation of the harmonization of national practices, especially regarding the granting of licences, the need to standardize punishment for violations which must reach a stage where they are public and credible in all member states. In addition, measures need to be taken to ensure that European courts have access to the information justifying individual measures which freeze assets so as to reduce the cases in which courts censure such action. There is also the need for the launching of an initiative to set up a European Office in charge of applying the measures set down by the Union (management of licences, information provided to companies and, if necessary, the investigation of and administrative sanctions for violations) which could be accompanied by the broadening of the missions of the European Anti-fraud Office (OLAF).
- To launch or relaunch the process of the updating of the 1996 European blocking regulation, so as to extend it, where necessary, to other American laws aside from the Amato-Kennedy and Helms-Burton laws.
- To invite European bodies to halt the decline of the international use of the Euro in payments which has been the case for several years and to promote the European currency as an international currency.

➤ *At a bilateral level*

- Either by the negotiation of an amendment to the bilateral tax agreement, or by strong diplomatic action in support of the passing of an *ad hoc* American legislative provision, to obtain a derogation for “accidental Americans” which would allow them either to abandon their American citizenship by means of a simple and free procedure or to be exonerated from their American tax obligations.
- To engage the necessary diplomatic action so that the commitments concerning total reciprocity taken by the American administration in the framework of the “FATCA” agreement be honored.
- To follow up on the steps taken with the American administration so as to apply the agreement of July 14, 2015, concerning Iran’s nuclear programme. This would imply obtaining supplementary clarifications on the scope of the still-existing American sanctions (the extent of the indirect implication in an operation of a *US Person* which would have the effect of having such an operation be subject to “primary” sanctions; the exclusive nature of the current list of so-called penalized SDN entities; the mechanisms governing the possible reform of the agreement or *snapback*...); inviting the American administration to lift sanctions and in particular, the secondary sanctions, whose implementation is a matter for the Executive or to create waivers of a general nature; especially emphasizing the most handicapping provisions such as maintaining the prohibition of so-called *U-Turn* transactions ensuring the compensation in New York of operations in dollars considered “primary” sanctions (but not “secondary”) or in addition the banning of the possibility for foreign banks involved in certain transactions in Iran to open correspondence accounts.

- If the global negotiation is not suspended, to include in the Transatlantic Trade and Investment Partnership (T-TIP):

- Obligatory clauses concerning transparency and the making public of the possible extra-territorial application of the laws of the parties involved;

- An obligation to reply, for the parties involved, to the requests for information made by the companies of the other parties, as regards the conformity to such legislation, of the operations they intend to carry out ;

- Anti-corruption commitments containing a « *non bis in idem* » clause in the case of proceedings by one of the parties and the prohibition of implementation issues concerning anti-corruption laws of the provisions of inter-state arbitration.

➤ *At an international level*

- To appraise the compliance of the United States' system of international sanctions to the commitments taken in the framework of the World Trade Organization, as well as the possibility of a referral to the WTO dispute settlement body in the context of the European Union using the instrument of economic sanctions more and more. If such a referral were to appear advisable, then an appeal to the WTO dispute settlement body could be made.