

European issues
n°602
29th June 2021

Participating in European sovereignty through law

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In the late 1980s, as the debate about the decline of American hegemony intensified[1], economist and political scientist Susan Strange emphasised the 'structural power' of the United States, understood as "the power to determine the frameworks of the global economy that has allowed it to choose and shape the structures within which other countries, their political institutions, businesses and professionals must operate"[2].

In Europe, the reputedly "extraterritorial" scope of certain US laws, illustrated by the heavy fines imposed by the American authorities on continental companies, could be considered as one of the most immediate manifestations of this power. It also appears to be a response to the new gap created by globalisation between a now deterritorialized market and regulatory States that are no longer homogeneous and superimposed[3], and this at a time when the institutions of international economic regulation often seem to be in deadlock. The growing interdependence between economies, enabled by globalisation and encouraged by free trade, has gradually eroded the markets established by borders to such an extent that the nation-State, conceived as the protector of a narrowly defined territory, could be considered a historically dated model[4], without a new body with a general scope having been able, to date, to replace it in its tasks, such as the fight against financial crime. In this new complex system, «new geopolitics of norms» has been created.[5] Europe must find its rightful place within it so that it can assert its sovereignty.

I. A NEW "GEOPOLITICS OF NORMS"

Extraterritoriality is a complex phenomenon in its various forms. Broadly speaking, extraterritoriality is understood to mean "the situation in which the powers of a State (legislative, executive or jurisdictional) govern legal relations outside the territory of that State"[6]. The US anti-corruption[7], anti-money laundering and anti-terrorist financing[8], anti-tax avoidance[9] and even, the adoption by the American Congress of different economic sanctions programmes vis-à-vis Iran, Sudan[10] and Cuba[11] for example, have all been criticized for their "extraterritorial" nature.

In France, parliamentary information missions on "the extraterritoriality of US legislation", on "State decisions on industrial policy" or how to "restore the sovereignty of France and Europe and protect our companies from laws and measures with extraterritorial scope" or reports such have not found words strong enough to condemn the extraterritoriality of US law, denouncing "the obvious over-representation of European companies in cases relating to the application of certain US laws" and pointing to the fact that "the payment of several tens of billions of dollars in a few years by European companies represents a significant drain on European economies for the benefit of US public finances". Moreover, US law is identified as "a weapon of economic warfare"[12], an "external legal policy" that outlines the "determination to make their national law dominate international business law so as to encourage the hegemony of their companies on international markets".

[1] R. Keohane, J. Nye, *Power and Interdependence: World Politics in Transition*, Little Brown, 1977.

[2] S. Strange, *States and Markets*, Pinter, 1988.

[3] M. Shapiro, "The success of Judicial Review and Democracy", in Martin M. Shapiro et A. Stone Sweet (eds), *On Law, Politics and Judicialization*, Oxford University Press, 2002, pp. 149-183. Pour une analyse récente dans le contexte de l'extraterritorialité du droit américain, v. aussi A. Garapon et P. Servan-Schreiber, *Deals de Justice : Le marché américain de l'obéissance mondialisée*, PUF, 2013, p. 168.

[4] M. Abélès, *Anthropologie de la globalisation*, Payot, 2008, p. 280.

[5] H. de Vauplane, *Une nouvelle géopolitique de la norme*, in *Deals de Justice*, pp. 23-40.

[6] See « Extraterritorialité » in J. Salmon, *Dictionnaire de droit international public*, Bruylant, 2001, p. 491.

[7] *Foreign Corrupt Practices Act*, 1976.

[8] *Organised notably around the Bank Secrecy Act of 1970 (31 U.S.C. § 5311 and seq.) and of the Patriot Act of 2001.*

[9] *Foreign Account Tax Compliance Act*, 2010.

[10] *Solidarity Act et Iran and Libya Sanctions Act*, 1996.

[11] *Cuban Liberty and Solidarity Act*, 1996.

[12] D. Iweins, *Comment répondre aux offensives du droit américain*, LJA, 14 February 2017.

This is also true on the other side of the Atlantic: in September 2012, the *New York Times* expressed concern about the "lack of American names" in major settlement agreements with the US government under its anti-corruption legislation[13].

The diversity of these situations and the heterogeneity of the international principles that form the framework within which the scope of extraterritoriality is assessed nevertheless invites in practice "a nuanced understanding of the extraterritoriality of US law"[14] that can differentiate between measures taken on the basis of an international text and a widely shared objective and measures that respond to a national political agenda, such as the sanctions imposed by Donald Trump against Tehran following the withdrawal of the United States from the Iranian agreement.

For example, for more than twenty years, the United States was the only country with legislation prohibits bribery of foreign public officials, while in France and until 29 December 2000, bribes remained deductible from the taxable income of companies that used them to obtain contracts abroad. In December 1997, the OECD's [Convention on Combating Bribery of Foreign Public Officials in International Business Transactions](#) marked the introduction of a global anti-corruption standard largely inspired by American one. However, twelve years after the adoption of the Convention, the institution noted that no French company had been convicted in France of foreign bribery and thus criticised France for "not exercising its repressive action with all the vigour expected in such cases [of international corruption]"[15]. As noted by Emmanuel Breen[16], the United States has not always shown willing in the application of anti-corruption standards to foreign companies. Indeed, it was not until 2006 – thirty years after the adoption of US anti-bribery legislation – that the Department of Justice (DoJ) initiated proceedings against the oil company Statoil ASA, Norway's largest company. Accused of corruption between 2001 and 2002[17], the company, listed on the New York Stock Exchange, admitted having maintained contacts and negotiated with an Iranian public official who was in a position to be able to award hydrocarbon contracts, settling a few months later

with the American authorities to end the proceedings. This was followed by fines against Technip, Siemens and VimpelCom, known for their amounts that were completely out of line with the standards that typified European criminal practice in financial matters at the time.

While a broad consensus may have partly justified US interference in the defence of common values and shared challenges, international sanctions policies are not all appreciated in the same manner. Indeed, the policies of sanctions and embargoes against Cuba through the Cuban Liberty and Democratic Solidarity Act (or Helms-Burton Act) or Syria and Libya through the Iran and Libya Sanctions Act (or D'Amato-Kennedy Act), just like the more recent measures, were essentially taken unilaterally by the United States, and can only be understood as a desire by the Americans to impose their foreign policy on other States,[18] and therefore as a direct breach of the sovereignty of the latter.

The issue is as important as it is topical: the sanctions[19] against Russia and China show that the question of sanctions will remain omnipresent under the Biden administration. The emergence of blocking laws and regulations in the EU and China to respond to the extraterritorial application of sanctions, beyond their disputed effectiveness, does not solve the basic problem, namely the lack of consensus over sanctions among the main actors and the tendency for some to go it alone. They may have a dissuasive effect, but they do not solve the problem – which is a lack of coordination – and also the difficulties encountered by certain international organisations (UN and WTO in particular).

II. EUROPEAN LAW AS AN INSTRUMENT FOR THE ASSERTION OF VALUES

Europe plays a part in this vision of law as an instrument of its influence on third countries and of the assertion of its principles and values. It is itself one of the actors of the extraterritoriality of law.

In this respect, the response of some European countries to the fines imposed by the US authorities on the basis of their anti-bribery legislation has been

[13] SL. Wayne, *Foreign Firms Most Affected by a U.S. Law Barring Bribes*, *New York Times*, 4 septembre 2012: « A law intended to prohibit the payment of bribes to foreign officials by United States businesses has produced more than \$3 billion in settlements. But a list of the top companies making these settlements is notable in one respect: its lack of American names ».

[14] R. Bismuth, *Pour une appréhension nuancée de l'extraterritorialité du droit américain – quelques réflexions autour des procédures et sanctions visant Alstom et BNP Paribas*, *Annuaire français de droit international LXI – 2015 – CNRS Editions*.

[15] OECD, "OECD deplors low number of convictions in France for foreign bribery but recognises recent efforts to ensure full independence of prosecutors", 23 October 2012.

[16] E. Breen, *FCPA : la France face au droit américain de la lutte anti-corruption*. Joly éditions, 2017.

[17] US. Statoil, ASA, No. 1 :06-CR-00960-RJH-1 (S.D.N.Y. 2006).

[18] R. Bismuth, *op. cit.*

[19] In the issue of European sanctions, see Robert Schuman Foundation [European Issue 598](#) 31 May 2021

the adoption of mirror schemes, notably in the UK and France. For example, in support of article 21 of [the law concerning transparency, the fight against corruption and the modernisation of public economic life](#) otherwise known as Sapin 2, the principles governing the jurisdiction of French criminal law are adjusted to comply in particular with the principles set out in Articles 4-1 and 4-2 of the OECD Convention. As a result, since 2016, French law has been applicable in all circumstances to bribery and influence-peddling offences, even if the acts are not punishable under the law of the country where they were committed. Prosecution can now take place without necessarily having to be preceded by "a complaint from the victim, his or her beneficiaries or an official denunciation by the authority of the country where the act was committed": the reservations established by Article 113-8 of the Criminal Code no longer apply. The adoption of a "European compliance package" could define the implementation of harmonised measures to prevent and fight corruption - the European Union should adopt a regulation or a directive that would oblige all Member States to follow a harmonised anti-corruption policy - and constitute a lever to establish the conditions for a level playing field between the European Union and the United States. The case of Airbus[20] and the first coordinated prosecution resolutions[21] already demonstrate the new role played by the French and British prosecution authorities in the fight against international corruption.

Adopted with the dual objective of promoting the free movement of personal data within the European Union, while protecting individuals by guaranteeing a high level of protection against data processing and making actors processing personal data accountable, the General Data Protection Regulation (GDPR) has become, since its adoption in 2016, a new global standard, innovating notably via its extraterritorial nature. Article 3 of the text specifies that the Regulation applies to data controllers or processors who are not established in the European Union, when the processing operations are aimed at persons in the European Union and are linked to offers of goods or services (even free of charge) in the European Union, or to the profiling of the behaviour of these persons in the territory of the European Union.

By including elements located outside its territory in its legal system, the GDPR is therefore extraterritorial which was already apparent in the Google vs. Spain case[22] in which the European judge extended the application of European data protection law to the activities of Google Inc. in Mountain View in relation to the data of European users.

Ongoing discussions in Brussels for the creation of [European due diligence](#) also typifies the determination of the European lawmaker to impose its values via a new extraterritorial approach spurred on by civil society.

In this respect, we might note that the first two cases that gave rise to prosecutions on the basis of French due diligence concern a global issue (global warming) and a foreign supplier rather than domestic entities. The largest companies with their head office in France, which are covered by the text, have thus been subject to due diligence since 2017 in terms of human rights, health and safety of people and environmental damage, not only for their own activities but also those of their subsidiaries, main suppliers and subcontractors, even if they are established abroad. Artificial intelligence or the European Green Deal will undoubtedly give us new examples of this phenomenon which is directly connected with the expansion of production chains.

However, the European Union's influence in terms of standards cannot be reduced to *de jure* extraterritoriality alone. The Brussels effect refers to the European Union's unilateral capacity to regulate world markets by establishing standards in the areas of competition policy, environmental protection, food safety or the digital economy. A consumer market that is still one of the largest and richest, supported by robust institutions, a propensity to create high standards, and by the euro, which has become one of the main currencies for international trade, still allows Europe to position itself as a standard setter.

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Extraterritoriality must be understood as a complex phenomenon with differentiated forms that are not exclusive to the United States and that will multiply

[20] ECJ, 13 May 2014, [aff. C-131/12](#).

[21] A. Bradford, *The Brussels Effect: How the European Union Rules the World*, Oxford University Press: Oxford 2020 (p. 424).

[22] In 1980, the 27 States accounted for 30% of world GDP. The European Union represented 15% of world GDP in 2015 (IMF). In 2050, it is estimated to account for only 9% of world GDP (PwC). In 1959, Europe represented 21.7% of the world's population. In 2050, it will represent less than 10% of the world's population (7.6% according to the UN).

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in the face of global challenges and "new forms of illegality" that go beyond national borders. Interstate collaboration requires as a first prerequisite a certain harmonisation of the rules and methods used through the development of global standards, obtained at the price of 'functional equivalence', 'common but differentiated responsibilities' and even a 'national margin of appreciation' in other areas. Above all, by asserting its interests and sovereignty, the European Union has the responsibility of participating in the constitution of a global law without taking refuge behind a strictly formal legitimacy. As Antoine Garapon points out, it harnesses the power of a market with a certain vision of the world, forcing it to find its place in society

according to principles, a certain idea of the world, and this from a moral perspective. By re-establishing an equality of arms and by participating in the emergence of a European sovereignty, above all the law will be the instrument of the affirmation of values.

Still limited by its competence to the protection of the financial interests of the European Union, the [European Prosecutor's Office](#), that entered into operation on June 1 last will undoubtedly have a major role to play.

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