Far and Beyond Territory. Lessons for the EU from the US Legal Practice

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Abstract

The principle of extraterritoriality in the US law gives the United States the power to enact (legal) standards that may apply to non-US legal subjects, as well. This is particularly the case of international corruption, where the American standards have been settled through the application of the Foreign Corrupt Practices Act ("the FCPA") of 1977. The present study explores the essentials of the FCPA addressing extraterritoriality as a legal principle in order to reveal the former's impact on the architecture of European criminal law. The FCPA imposes inter alia criminal and civil liability for (i) the bribery of foreign (i.e. non-US) officials; (ii) the failure of issuers' to maintain books and records that accurately reflect the disposition of company assets; and (iii) the failure of issuers' to institute proper internal controls concerning the authorization of transactions. The extraterritorial effect of the FCPA may manifest itself by that "covered entities" (i.e. parent issuer corporations and joint venture partners) can be held civilly and criminally liable for improper payments made by their subsidiaries or joint ventures. Such liability becomes possible if, for example, the issuer's subsidiary or joint venture makes improper payments, and the parent, member of the joint venture, or its employees "authorized, directed, or controlled the activity in question". Several European companies have been sanctioned on the FCPA basis: Siemens in 2008, Daimler and Alcatel in 2010, Alstom in 2014, Rolls-Royce in 2017, Ericsson in 2019 and Airbus in 2020. To date, the European Union does not practice its own extraterritoriality, or at least an extraterritoriality equivalent to the United States. It appears that this principle of extraterritoriality, when used as an economic or diplomatic tool, damages European companies and directly affects the sovereignty of the EU member states.

Keywords*: extraterritoriality, FCPA 1977, international corruption, US standards, European criminal law*

I. Introduction

International law, in general, as well as criminal international law, is based on the principle that "a state cannot take measures on the territory of another state by means of enforcement of its national laws without the consent of the latter"[1]. Usually, a sovereign state could grant such a consent to other states or their nationals, within certain limits and

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[1] Dover R., Frosini J., *The Extraterritorial Effects of Legislation and Policies in the EU and US*, 2012, [https://www.europarl.europa.eu/RegData/etudes/STUD/2012/433701/EXPO-AFET_ET(2012)433701_EN.pdf] p. 7.

based on reciprocity, by an international convention. A state acts "in excess of its own jurisdiction when its measures claim to regulate acts, which are done outside its territorial jurisdiction by persons who are not its own nationals and with no, or no substantial effect, within its territorial jurisdiction"[2]. Excessive and abusive assertion of jurisdiction could lead to international responsibility or protests at *ultra vires* acts[3].

Extraterritoriality generally refers to the unilateral use of measures that are taken under a state's sovereign powers to enforce its own law, in a territory other than its own, for actions committed outside its territory by entities or people from other countries.

As the doctrine pointed out[4], the territory is more a legal concept than a geographical one, being possible that one territory as a single legal unit to be composed of multiple geographical units that are not contiguous. Being primarily a legal concept, the territory determines the spatial jurisdiction of one state where its normative system is valid, effective and enforceable. Nonetheless, international law does not prohibit the states to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory[5]. It is also accepted that a state has enforcement jurisdiction abroad only to the extent necessary to enforce its legislative jurisdiction.

Essentially, extraterritoriality was first conceived as part of criminal law and founded on several principles[6] that are exceptions from the general rule of the territoriality stated above. One such principle is the objective territorial principle also known as the ubiquity principle. According to the former, a state can assert (national) jurisdiction if a particular action has been committed on its own territory even if part of said action or merely its outcome has been performed or has occurred in another state. The jurisdiction of one's state is thus shaped out when any essential constituent of the offence is consummated on state territory. In this case, the jurisdiction extends naturally to all constitutive parts of a single offence, including those actions or results that are territorially linked with the foreign jurisdiction. As a consequence, the extraterritoriality in such cases is merely formal.

The nationality principle imposes that jurisdiction be established by reference (i) to nationality or the national side of the person who commits the offence; or (ii) to a person or the national interest injured by the offence. Similarly, to the above, this is not a genuinely extraterritorial case since nationality is still a strong feature of any sovereign state, where the national law follows a citizen for instance wherever he/she goes or whatever he/she suffers. It is natural that national jurisdiction apply to all persons who are linked from the beginning with that jurisdiction by means of citizenship, permanent residence or incorporation.

The same inference applies to the "substantial connection" principle whereby jurisdiction is established based on the real and substantial connection between

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[2] Dover R., Frosini J. (2012), cited paper, pp. 7-8.

[3] Dover R., Frosini J. (2012), cited paper, p. 8.

[4] Valentin C., *Drept internațional* [International Law], Bucharest, Universul Juridic, 2010, p. 221.

[5] Permanent Court of International Justice, the case of S.S. Lotus, France v. Turkey Judgment no. 9 of 7 September 1927, para. 46, [https://web.archive.org/web/20101210073754/ http://www. worldcourts. com/ pcij/eng/decisions/ 1927/1927.09.07_lotus.htm].

[6] Redress / FIDH, *Extraterritorial Jurisdiction in the European Union. A Study of the Laws and Practice in the 27 Member States of the European Union*, London / Paris, 2010, [https://www.refworld.org/ pdfid/4d1a0104c.pdf] pp. 16-22.

companies or persons in different jurisdictions. In such case, the extraterritoriality is elusive since the connection is often a link between a parent-company and its subsidiaries or a relationship based on the guidance and direct control of one company/person to another. Acting abroad does not mean that national laws are inapplicable where it could be proved that, for instance, one person aids and abets another person. Substantially, such cases are also covered by the ubiquity principle.

Another exception is that of the universality principle, whereby jurisdiction is established based on the need to deal with certain crimes, usually internationally recognized. The universality principle is a real example of extraterritoriality since the jurisdiction of one state is applicable with no direct connection with the territory. The exception is based on the political will of the states to cooperate in order to prohibit a *de facto* immunity of an offender who commits a crime on a certain territory and escape to another territory. The universality principle determines jurisdiction by reference to the place where the person is held in custody.

However, the extent of the universality principle is limited to that crimes where a reaction is needed based on an international treaty or customary international law. Other crimes that are not part of such large consensus aimed at suppressing them cannot be prosecuted on the basis of extraterritoriality.

In brief, there is not much room for real extraterritoriality which is actually reduced to the cases where the universality principle is applicable. The following study explores the framework behind extraterritoriality in order to reveal if other situations except the universality principle have grown to be justified as real exceptions from the territorial standard. For instance, constituent elements of the federal states – territories, states, provinces – also invoke extraterritoriality. The principles of extraterritoriality developed at inter-state level are similar to those at intra-state level, despite the absence of the aspect of sovereignty in the former[7]. Thus, it is not a surprise that in the United States, a federal state, the legislators have a far stronger preference that their legal codes be enforceable outside the US territorial space.

II. The Foreign Corrupt Practices Act

Foreign Corrupt Practices Act could be interpreted as having an extraterritorial effect. The FCPA, codified at 15 US Code Chapter 2B §§ 78m, 78dd-1, 78dd-2, 78dd-3, 78ff, was enacted by the US Congress in 1977 as part of the 1934 Securities Exchange Act. In enacting the FCPA, Congress originally limited its jurisdictional scope to U.S. companies and individuals.

The FCPA is widely considered[8] being a "by-product of the Watergate scandal that revealed, among other things, certain unreported campaign contributions. This caused the US Securities and Exchange Commission to investigate undisclosed corporate payments to domestic and foreign governments and politicians. As part of a voluntary disclosure program, over 200 corporations (mostly Fortune 500 companies) admitted to making questionable payments to foreign government officials of over USD 300 million. This caused Congress to enact criminal and civil penalties for such illicit foreign payments made in exchange for business".

[7] Dover R., Frosini J. (2012), cited paper, p. 14.
[8] Dover R., Frosini J. (2012), cited paper, p. 24.

In 1988, the FCPA amended §§ 78dd-1, 78dd-2, 78dd-3 and added two very narrow affirmative defenses for (i) the payment, gift, offer, or promise of anything of value that was made, was *lawful under the written laws and regulations* of the foreign official's, political party's, party official's, or candidate's country; and (ii) the payment, gift, offer, or promise of anything of value that was made, was a *reasonable and bona fide expenditure*, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was *directly related* to the promotion, demonstration, or explanation of products or services, or the execution or performance of a contract with a foreign government or agency thereof.

The 1998 amendments expanded the Act's jurisdiction to include foreign individuals and corporations. Today, the statute imposes criminal and civil liability for (i) the bribery of foreign (i.e., non-US) officials; (ii) the failure of "issuers" to maintain books and records that accurately reflect the disposition of company assets; and (iii) the failure of "issuers" to institute proper internal controls concerning the authorization of transactions.

"Foreign official" under the FCPA is defined as: "Any officer or employee of a foreign government or any department, agency or instrumentality thereof, or of a public international organization, or any person acting in an official capacity or on behalf of any such government, department, agency or instrumentality or for, or on behalf of any such public international organization" [15 USC. § 78dd-1(f)(1)(A)].

This definition includes "individuals appointed by a foreign head of state or by the head of an executive department, individuals whose day-to-day performance is supervised by a governmental authority, foreign legislators, officials of foreign municipalities, accountants, lawyers, other professionals acting on behalf of a government entity (e.g., physicians in publicly-owned hospitals), military officials, officials of state-owned companies and/or consortiums (of particular relevance in oil and gas contexts and circumstances in which privatization is in progress), certain officers of non-governmental organizations, and non-US political parties and candidates for political office outside the United States"[9].

The prohibitions applies to:

- *any issuer* which has a class of securities registered pursuant to 15 US Code Chapter 2B §§ 78l or which is required to file reports under 15 US Code Chapter 2B §§ 78o(d), or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer [15 US Code Chapter 2B §§ 78dd-1(a)];

- *any domestic concern*, other than an issuer which is subject to §§ 78dd–1, or for any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern [15 US Code Chapter 2B §§ 78dd-2(a)] where the term "domestic concern" means any individual who is a citizen, national, or resident of the United States; and any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States [15 US Code Chapter 2B §§ 78dd-2(h)(1)];

- *any person* other than an issuer that is subject to §§ 78dd–1 or a domestic concern (as defined in §§ 78dd–2), or for any officer, director, employee, or agent of such person or any stockholder thereof acting on behalf of such person [15 US Code Chapter 2B §§ 78dd-3(a)] where the term "person", when referring to an offender, means any

[9] Dover R., Frosini J. (2012), cited paper, p. 25.

natural person other than a national of the United States or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the law of a foreign nation or a political subdivision thereof [15 US Code Chapter 2B §§ 78dd-3(f)(1)].

FCPA expressly provide as an alternative jurisdiction that the prohibitions applies also to:

- any issuer organized under the laws of the United States, or a State, territory, possession, or commonwealth of the United States or a political subdivision thereof and which has a class of securities registered pursuant to 15 US Code Chapter 2B §§ 78l or which is required to file reports under 15 US Code Chapter 2B §§ 78o(d), or for any United States person that is an officer, director, employee, or agent of such issuer or a stockholder thereof acting on behalf of such issuer, to corruptly do any act outside the United States [15 US Code Chapter 2B §§ 78dd-1(g)(1)];
- any United States person to corruptly do any act outside the United States [15 US Code Chapter 2B §§ 78dd-2(i)(1)];

A violation of the anti-bribery provisions requires proof of the following constituent elements[10]:

- An issuer, a domestic concern or a person as defined above;
- That makes use of the mails or any means or instrumentality of interstate commerce;
- In furtherance of an offer, payment, promise to pay, or authorization to pay anything of value;
- To any foreign official as defined above, or to any foreign political party or official thereof, or any candidate for foreign political office, or other person while knowing that all or a portion of the payment would be passed on to a foreign official, foreign political party or official thereof or candidate for foreign political office;
- Inside the territory of the United States or, for any US issuer or domestic concern, outside the United States;
- To corruptly influence any official act or decision of a foreign official in his official capacity, induce an action or an omission to act in violation of a lawful duty, or to secure any improper advantage, or to induce a foreign official to use his influence with foreign government to affect or influence any act or decision of such government;
- In order to assist the offender in obtaining or retaining business for or with, or directing business to, any person.

A company that violates the FCPA's anti-bribery or accounting provisions may be subject to criminal fines and punishment, civil fines, and disgorgement.

Specifically, any issuer that violates §§ 78dd-1 shall be criminally fined not more than $2,000,000 and shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the US Securities and Exchange Commission. Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who willfully violates §§ 78dd-1 shall be fined not more than $100,000, or imprisoned not more than 5 years, or both. Whenever a fine is imposed upon any officer, director, employee, agent, or stockholder of an issuer, such fine may not be paid, directly or indirectly, by such issuer. Similar penalties are provided for any domestic concern for the violations of §§ 78dd-2 and for any natural person that is an

[10] Tarun R.W., *Basics of the Foreign Corrupt Practices Act*, Chicago, 2006, p. 3 [https://www.lw.com/upload/pubContent/_pdf/pub1287_1.pdf].

officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern. Similar penalties are also provided for any juridical person for the violation of §§ 78dd-3 and for any natural person who willfully violates that section.

Separately, any person who willfully violates any provision of the 15 US Code Chapter 2B (other than §§ 78dd-1, meaning accounting provisions), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of the 15 US Code Chapter 2B, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in 15 US Code Chapter 2B §§ 78o(d), or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $25,000,000 may be imposed; but no person shall be subject to imprisonment for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

In addition to penalties for violating the FCPA itself, a corporation violating the FCPA exposes itself to a number of related consequences[11]. One of the most significant effects of violating the FCPA is the possibility of administrative sanctions. Indictment of a company can result in a suspension of its right to conduct business with the US government or its agencies. The US government may also revoke licenses and permits necessary to conduct one's business. This may effectively prevent a company from operating until an FCPA investigation is concluded. Indictment for bribery may also result in the suspension of a party from federal financial assistance and other non-financial benefits.

Both the US Department of Justice and the US Securities and Exchange Commission may enforce the FCPA. The Department of Justice has responsibility for all criminal enforcement of the FCPA, including criminal enforcement against issuers. The Securities and Exchange Commission has responsibility for civil enforcement of the anti-bribery and accounting provisions in cases involving issuers.

The past decade has seen increasingly aggressive enforcement of the FCPA. It is the result of a deliberate effort by the Department of Justice and the Securities and Exchange Commission to encourage compliance with the FCPA. The current increase in investigations and prosecutions has resulted from the US government's broad interpretation of the FCPA's text, and its insistence that parent companies are responsible for the actions of their foreign subsidiaries.

The extraterritorial effect of the FCPA manifests itself in that parent issuer corporations and joint venture partners can be held civilly and criminally liable for improper payments made by their subsidiaries or joint ventures. Such liability is possible if, for example, the issuer's subsidiary or joint venture makes improper payments, and the parent, member of the joint venture, or its employees "authorized, directed, or controlled the activity in question". For example, the Department of Justice's Criminal Resource Manual, the manual for federal prosecutors, addresses the

[11] Dover R., Frosini J. (2012), cited paper, p. 26.

scope of the FCPA as follows: "Although this has not yet been interpreted by any court, the Department interprets it as conferring jurisdiction whenever a foreign company or national causes an act to be done within the territory of the United States by any person acting as that company's or national's agent"[12]. Thus, under the Department's interpretation, the United States can bring a felony FCPA prosecution against a foreign national who has never set foot in the United States, provided that the foreign defendant caused some act in furtherance of the offense to take place in the United States[13]. Companies with global operations are clearly affected by enhanced FCPA enforcement[14].

Courts align with the government in the broad interpretation of the FCPA provisions. For instance, they have broadly interpreted the term "obtain or retain business" under the anti-bribery provision to include payments to government officials that are only loosely connected to a business purpose. The leading FCPA decision is in United States v. Kay[15] whereby the court dismissed an indictment for violation of the FCPA after the defendant argued that payments made to Haitian officials to reduce customs duties and sales tax on rice shipped to Haiti were not made to obtain or retain business because no government contract was sought. On appeal, the government successfully argued that such payments were within the scope of the FCPA's statutory language because the FCPA "covers payments that indirectly advance the payer's goal of obtaining or retaining foreign business". The government reasoned that a reduction in duties and taxes is the type of advantage that "always will assist in obtaining or retaining business in a foreign country". Relying on the FCPA's legislative history, the court stated that the FCPA applies "broadly to payments intended to assist the payer, either directly or indirectly, in obtaining or retaining business".

According to the above-mentioned it is reasonable to infer that the FCPA works under the ubiquity and substantial connection principles, and seeks to regulate the interaction between non-US officials and the foreign subsidiaries of US companies or companies organized under the laws of a state of the United States or a territory, possession, or commonwealth of the United States.

A clear manner in which the FCPA works in practice is presented in the following major cases instrumented against European corporations. Today, it appears that the principle of extraterritoriality, when used as an economic or diplomatic tool, damages European companies and directly affects the sovereignty of the EU member states[16].

III. The Siemens Case

According to the press release[17] of 15.12.2008 from the US Department of Justice:

"Siemens Aktiengesellschaft (Siemens AG), a German corporation, and three of its subsidiaries pleaded guilty to a two-count information charging criminal violations of

[12] DoJ / SEC, *A Resource Guide to the US Foreign Corrupt Practices Act*, 2015 [https://www.justice. gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf], p. 107.

[13] Tarun R.W., cited paper, p. 13.

[14] Dover R., Frosini J. (2012), cited paper, p. 26.

[15] United States Court of Appeals, Fifth Circuit, Decision of 4 February 2004, 359 F.3d 738 [https://casetext.com/case/us-v-kay-6].

[16] [http://www.europarl.europa.eu/doceo/document/E-8-2018-006496_EN.html].

[17] [https://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html].

the FCPA's internal controls and books and records provisions. Siemens S.A. Argentina pleaded guilty to a one-count information charging conspiracy to violate the books and records provisions of the FCPA. Siemens Bangladesh Limited and Siemens S.A. Venezuela, each pleaded guilty to separate one-count information charging conspiracy to violate the anti-bribery and books and records provisions of the FCPA.

As the charging and plea documents reflect, beginning in the mid-1990s, Siemens AG engaged in systematic efforts to falsify its corporate books and records and knowingly failed to implement and circumvent existing internal controls. As a result of Siemens AG's knowing failures in and circumvention of internal controls, from the time of its listing on the New York Stock Exchange on March 12, 2001, through approximately 2007, Siemens AG made payments totaling approximately $1.36 billion through various mechanisms. Of this amount, approximately $554.5 million was paid for unknown purposes, including approximately $341 million in direct payments to business consultants for unknown purposes. The remaining $805.5 million of this amount was intended in whole or in part as corrupt payments to foreign officials through the payment mechanisms, which included cash desks and slush funds.

Beginning around September 1998 and continuing until 2007, Siemens S.A. Argentina made and caused to be made significant payments to various Argentine officials, both directly and indirectly, in exchange for favorable business treatment in connection with a $1 billion national identity card project. From the date that Siemens AG became listed on the New York Stock Exchange on March 12, 2001, through approximately January 2007, Siemens S.A. Argentina made approximately $31,263,000 in corrupt payments to various Argentine officials through purported consultants and other conduit entities, and improperly characterized those corrupt payments in its books and records as legitimate payments for 'consulting fees' or 'legal fees'. Siemens Argentina's books and records, including those containing the false characterizations of the corrupt payments, were part of the books and records of Siemens AG.

Beginning around November 2001 and continuing until approximately May 2007, Siemens S.A. Venezuela admitted it made and caused to be made corrupt payments of at least $18,782,965 to various Venezuelan officials, indirectly through purported business consultants, in exchange for favorable business treatment in connection with two major metropolitan mass transit projects called Metro Valencia and Metro Maracaibo. Some of those payments were made using U.S. bank accounts controlled by the purported business consultants.

Siemens Bangladesh Limited admitted that from May 2001 to August 2006, it caused corrupt payments of at least $5,319,839 to be made through purported business consultants to various Bangladeshi officials in exchange for favorable treatment during the bidding process on a mobile telephone project. At least one payment to each of these purported consultants was paid from a U.S. bank account.

In connection with the cases brought by the Department of Justice, the US Securities and Exchange Commission and the Munich Public Prosecutor's Office, Siemens AG will pay a combined total of more than $1.6 billion in fines, penalties and disgorgement of profits, including $800 million to U.S. authorities, making the combined U.S. penalties the largest monetary sanction ever imposed in an FCPA case since the act was passed by Congress in 1977. Siemens AG agreed to retain an independent compliance monitor for a four-year period to oversee the continued implementation and maintenance of a robust compliance program and to make reports to the company and the Department of Justice. Siemens AG also agreed to

continue fully cooperating with the Department in ongoing investigations of corrupt payments by company employees and agents".

The short presentation of the case is sufficient to understand the key element of the US jurisdiction: listing of Siemens AG on the New York Stock Exchange on March 12, 2001 and using US bank accounts for improper payments made by Siemens Bangladesh and Siemens Venezuela. Simply stated, it is a federal crime for companies traded on U.S. markets to pay bribes in return for business. There is no extraterritoriality case here, but pure national jurisdiction, which reflects the FBI's dedication to enforce the provisions of the Foreign Corrupt Practices Act.

IV. The Daimler Case

According to the press release[18] of 01.04.2010 from the US Department of Justice:

"Daimler AG, a German corporation, and three of its subsidiaries DaimlerChrysler Automotive Russia SAO, now known as Mercedes-Benz Russia SAO, its German subsidiary, Export and Trade Finance GmbH, and DaimlerChrysler China Ltd., now known as Daimler North East Asia Ltd., each pleaded guilty to criminal information charging the companies with one count of conspiracy to violate the anti-bribery provisions of the FCPA and one count of violating those provisions.

Daimler AG, whose shares trade on multiple exchanges in the United States, engaged in a long-standing practice of paying bribes to foreign government officials through a variety of mechanisms, including the use of corporate ledger accounts known internally as 'third-party accounts', corporate 'cash desks', offshore bank accounts, deceptive pricing arrangements and third-party intermediaries. Daimler AG and its subsidiaries made hundreds of improper payments worth tens of millions of dollars to foreign officials in at least 22 countries – including China, Croatia, Egypt, Greece, Hungary, Indonesia, Iraq, Ivory Coast, Latvia, Nigeria, Russia, Serbia and Montenegro, Thailand, Turkey, Turkmenistan, Uzbekistan, Vietnam and others – to assist in securing contracts with government customers for the purchase of Daimler vehicles. In some cases, Daimler AG or its subsidiaries wire transferred these improper payments to U.S. bank accounts or to the foreign bank accounts of U.S. shell companies, in order for those entities to pass on the bribes. Within Daimler AG and its subsidiaries, bribe payments were often identified and recorded as 'commissions', 'special discounts', and/or 'nützliche Aufwendungen' or 'N.A.' payments, which translates to 'useful payment' or 'necessary payment', and was understood by certain Daimler employees to mean 'official bribe'. In all cases, Daimler AG improperly recorded these corrupt payments in its corporate books and records. Daimler AG admitted that it earned more than $50 million in profits from corrupt transactions with a nexus to the territory of the United States. Daimler AG also admitted that it agreed to pay kickbacks to the former Iraqi government in connection with contracts to sell vehicles to Iraq under the U.N.'s Oil for Food program.

DaimlerChrysler Automotive Russia SAO admitted that it made improper payments to Russian federal and municipal government officials to secure contracts to sell vehicles by over-invoicing the customer and paying the excess amount back to the

[18] [https://www.justice.gov/opa/pr/daimler-ag-and-three-subsidiaries-resolve-foreign-corrupt-practices- act-investigation-and].

government officials, or to other designated third parties that provided no legitimate services to the company. Its employees caused the wire transfer of payments from Daimler AG's bank accounts in Germany to, among other destinations, U.S. and Latvian bank accounts held by shell companies with the understanding that the money, in whole or in part, was for the benefit of Russian government officials.

Export and Trade Finance GmbH admitted that it made corrupt payments directly to Croatian government officials and to third parties, including two U.S.-based corporate entities, with the understanding that the payments would be passed on, in whole or in part, to Croatian government officials, to assist in securing the sale of 210 fire trucks.

DaimlerChrysler China Ltd., admitted that it made improper payments in the form of commissions, delegation travel, and gifts for the benefit of Chinese government officials or their designees in connection with sales of commercial vehicles and Unimogs to various Chinese government customers. The company admitted that in certain cases it used U.S.-based agents to facilitate the bribe payments".

In total, Daimler AG and its subsidiaries agreed to pay $93.6 million in criminal fines and $91.4 million in disgorgement of profits relating to a related civil complaint filed by the U.S. Securities and Exchange Commission (SEC). Moreover, Daimler AG agreed to retain an independent compliance monitor for a three-year period to oversee the company's continued implementation and maintenance of an FCPA compliance program, and to make reports to the company and the Department of Justice.

As in the Siemens case, the relevant elements that entails the US jurisdiction were the trading of the Daimler AG's shares on the exchanges in the United States (meaning that Daimler AG is an issuer in sense of the 15 US Code Chapter 2B §§ 78dd-1(a), abovementioned) and the using US bank accounts for improper payments. All these elements are specific to the territorial approach being unreasonable to claim that the regulations voluntarily admitted by the company when listed to the stock exchange were not applicable, in case of violation.

V. The Alcatel Case

According to the press release[19] of 27.12.2010 from the US Department of Justice:

"Alcatel-Lucent S.A., a French telecommunications equipment and services company, and three of its subsidiaries (Alcatel CIT S.A., Alcatel Standard A.G., and Alcatel de Costa Rica S.A.) faced a criminal information with one count of violating the internal control provisions of the FCPA, and one count of violating the books and records provisions of the FCPA. The three subsidiaries were each charged with conspiring to violate the anti-bribery, books and records, and internal controls provisions of the FCPA.

Starting in the 1990s and prior to its 2006 merger with Lucent Technologies Inc., Alcatel pursued many of its business opportunities around the world through subsidiaries like Alcatel CIT and Alcatel de Costa Rica using third-party agents and consultants who were retained by Alcatel Standard. This business model was shown to be prone to corruption, as consultants were repeatedly used as conduits for bribe payments to foreign officials and business executives of private customers to obtain or

19 [https://www.justice.gov/opa/pr/alcatel-lucent-sa-and-three-subsidiaries-agree-pay-92-million-resolve-foreign-corrupt].

retain business in many countries. Specifically, Alcatel CIT won three contracts in Costa Rica worth a combined total of more than $300 million as a result of corrupt payments to government officials and from which Alcatel reaped a profit of more than $23 million. Alcatel CIT wired more than $18 million to two consultants in Costa Rica, which had been retained by Alcatel Standard, in connection with obtaining business in that country. According to court documents, more than half of this money was then passed on by the consultants to various Costa Rican government officials for assisting Alcatel CIT and Alcatel de Costa Rica in obtaining and retaining business. As part of the scheme, the consultants created phony invoices that they then submitted to Alcatel CIT. According to court documents, senior Alcatel executives approved the retention of and payments to the consultants despite obvious indications that the consultants were performing little or no legitimate work.

In addition, Alcatel Standard hired a consultant in Honduras who was a perfume distributor with no experience in telecommunications. The consultant was retained after being personally selected by the brother of a senior Honduran government official. Alcatel CIT executives knew that a significant portion of the money paid to the consultant would be paid to the family of the senior Honduran government official in exchange for favorable treatment of Alcatel CIT. As a result of these payments, Alcatel CIT was able to retain contracts worth approximately $47 million and from which Alcatel earned $870,000.

Moreover, Alcatel Standard retained two consultants on behalf of another Alcatel subsidiary in Taiwan (Alcatel SEL) to assist in obtaining an axle counting contract worth approximately $19.2 million. Alcatel and its joint venture paid these two consultants more than $950,000 despite the fact that neither consultant had telecommunications experience. In fact, Alcatel Standard's purpose for hiring the consultants was so that Alcatel SEL could funnel payments through the consultants to Taiwanese legislators who had influence in the award of the contract. Alcatel earned approximately $4.34 million from this contract.

Department of Justice and Alcatel-Lucent reached a settlement in which the corporation consented to pay a combined $92 million penalty to resolve the FCPA investigation into the worldwide sales practices of Alcatel S.A. In addition to the $92 million penalty, Alcatel-Lucent and its three subsidiaries agreed to implement rigorous compliance enhancements. Alcatel-Lucent also agreed to retain an independent compliance monitor for a three-year period to oversee the company's implementation and maintenance of an enhanced FCPA compliance program and to submit yearly reports to the Department of Justice. In a related matter, the U.S. Securities and Exchange Commission asked and obtained a permanent injunction against FCPA violations and the payment of $45,372,000 in disgorgement and prejudgment interest".

VI. The Alstom Case

According to the press release[20] of 22.12.2014 from the US Department of Justice:

"Alstom S.A., a French power and transportation company, pleaded guilty to a two-count criminal information charging the company with violating the FCPA by falsifying its books and records and failing to implement adequate internal controls. In

[20] [https://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery].

addition, Alstom Network Schweiz AG, formerly Alstom Prom, Alstom S.A.'s Swiss subsidiary, pleaded guilty to a criminal information charging the company with conspiracy to violate the anti-bribery provisions of the FCPA. Alstom Power Inc. and Alstom Grid Inc., two U.S. subsidiaries, both entered into deferred prosecution agreements, admitting that they conspired to violate the anti-bribery provisions of the FCPA. Alstom Power is headquartered in Windsor, Connecticut, and Alstom Grid, formerly Alstom T&D, was headquartered in New Jersey.

Alstom S.A. and its subsidiaries, through various executives and employees, paid bribes to government officials and falsified books and records in connection with power, grid and transportation projects for state-owned entities around the world, including in Indonesia, Egypt, Saudi Arabia, the Bahamas and Taiwan. In Indonesia, for example, bribes was paid to government officials – including a high-ranking member of the Indonesian Parliament and high-ranking members of Perusahaan Listrik Negara, the state-owned electricity company in Indonesia – in exchange for assistance in securing several contracts to provide power-related services valued at approximately $375 million. In total, Alstom S.A. paid more than $75 million to secure $4 billion in projects around the world, with a profit to the company of approximately $300 million. Alstom S.A. and its subsidiaries also attempted to conceal the bribery scheme by retaining consultants purportedly to provide consulting services on behalf of the companies, but who actually served as conduits for corrupt payments to the government officials".

Alstom S.A. agreed to pay $772 million criminal penalty to resolve foreign bribery charges, being the largest-ever foreign bribery resolution with the Department of Justice. This case is emblematic of how the Department of Justice investigates and prosecutes FCPA cases – and other corporate crimes from the perspective of domestic jurisdiction. Again no reference to extraterritoriality was made, but to the fact that two Alstom S.A.'s subsidiaries were in fact incorporated in US and therefore bound by US regulations.

VII. The Rolls-Royce Case

According to the press release[21] of 17.01.2017 from the US Department of Justice:

"Rolls-Royce plc, the United Kingdom-based manufacturer and distributor of power systems for the aerospace, defense, marine and energy sectors, admitted that between 2000 and 2013, the company conspired to violate the FCPA by paying more than $35 million in bribes through third parties to foreign officials in various countries in exchange for those officials' assistance in providing confidential information and awarding contracts to Rolls-Royce and affiliated entities.

In Thailand, Rolls-Royce admitted to using intermediaries to pay approximately $11 million in bribes to officials at Thai state-owned and state-controlled oil and gas companies that awarded approximately seven contracts to Rolls-Royce during the same time period.

In Brazil, Rolls-Royce used intermediaries to pay approximately $9.3 million in bribes to bribe foreign officials at a state-owned petroleum corporation that awarded multiple contracts to Rolls-Royce during the same time period.

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[21] [https://www.justice.gov/opa/pr/rolls-royce-plc-agrees-pay-170-million-criminal-penalty-resolve-foreign-corrupt-practices-act].

In Kazakhstan, between approximately 2009 and 2012, Rolls-Royce paid commissions of approximately $5.4 million to multiple advisors, knowing that at least a portion of the commission payments would be used to bribe foreign officials with influence over a joint venture owned and controlled by the Kazakh and Chinese governments that was developing a gas pipeline between the countries. In 2012, the company also hired a local Kazakh distributor, knowing it was beneficially owned by a high-ranking Kazakh government official with decision-making authority over Rolls-Royce's ability to continue operating in the Kazakh market. During this time, the state-owned joint venture awarded multiple contracts to Rolls-Royce.

In Azerbaijan, between approximately 2000 and 2009, Rolls-Royce used intermediaries to pay approximately $7.8 million in bribes to foreign officials at the state-owned and state-controlled oil company, which awarded multiple contracts to Rolls-Royce during the same time period.

In Angola, between approximately 2008 and 2012, Rolls-Royce used an intermediary to pay approximately $2.4 million in bribes to officials at a state-owned and state-controlled oil company, which awarded three contracts to Rolls-Royce during this time period.

In Iraq, from approximately 2006 to 2009, Rolls-Royce supplied turbines to a state-owned and state-controlled oil company. Certain Iraqi foreign officials expressed concerns about the turbines and subsequently threatened to blacklist Rolls-Royce from doing future business in Iraq. In response, Rolls-Royce's intermediary paid bribes to Iraqi officials to persuade them to accept the turbines and not blacklist the company.

Rolls-Royce entered into a deferred prosecution agreement in connection with a criminal information charging the company with conspiring to violate the anti-bribery provisions of the FCPA. Pursuant to the DPA, Rolls-Royce agreed to pay a criminal penalty of $169,917,710, and the amount of penalties of more than $800 million. The company has also agreed to continue to cooperate fully with the department's ongoing investigation, including its investigation of individuals".

This outcome is a reflection of the immense reach and capabilities of the FBI's international anti-corruption squad and the global impact of the anti-corruption program.

VIII. The Ericsson Case

According to the press release[22] of 06.12.2019 from the US Department of Justice:

"Telefonaktiebolaget LM Ericsson, a multinational telecommunications company headquartered in Stockholm, Sweden, has agreed to enter into a deferred prosecution agreement with the department in connection with a criminal information charging the company with conspiracies to violate the anti-bribery, books and records, and internal controls provisions of the FCPA. The Ericsson subsidiary, Ericsson Egypt Ltd, pleaded guilty today to a one-count criminal information charging it with conspiracy to violate the anti-bribery provisions of the FCPA.

[22] [https://www.justice.gov/opa/pr/ericsson-agrees-pay-over-1-billion-resolve-fcpa-case].

Between 2010 and 2014, Ericsson, via a subsidiary, made approximately $2.1 million in bribe payments to high-ranking government officials in Djibouti in order to obtain a contract with the state-owned telecommunications company valued at approximately €20.3 million to modernize the mobile networks system in Djibouti. In order to effectuate the scheme, an Ericsson subsidiary entered into a sham contract with a consulting company and approved fake invoices to conceal the bribe payments. Ericsson employees also completed a draft due diligence report that failed to disclose the spousal relationship between the owner of the consulting company and one of the high-ranking government officials.

In China, between 2000 and 2016, Ericsson subsidiaries caused tens of millions of dollars to be paid to various agents, consultants and service providers, a portion of which was used to fund a travel expense account in China that covered gifts, travel and entertainment for foreign officials, including customers from state-owned telecommunications companies. Ericsson used the travel expense account to win business with Chinese state-owned customers. In addition, between 2013 and 2016, Ericsson subsidiaries made payments of approximately $31.5 million to third party service providers pursuant to sham contracts for services that were never performed. The purpose of these payments was to allow Ericsson's subsidiaries in China to continue to use and pay third party agents in China in contravention of Ericsson's policies and procedures. Ericsson knowingly mischaracterized these payments and improperly recorded them in its books and records.

In Vietnam, between 2012 and 2015, Ericsson subsidiaries made approximately $4.8 million in payments to a consulting company in order to create off-the-books slush funds, associated with Ericsson's customers in Vietnam that were used to make payments to third parties who would not be able to pass Ericsson's due diligence processes. Ericsson knowingly mischaracterized these payments and improperly recorded them in Ericsson's books and records.

Similarly, in Indonesia, between 2012 and 2015, an Ericsson subsidiary made approximately $45 million in payments to a consulting company in order to create off-the-books slush funds, and concealed the payments on Ericsson's books and records.

In Kuwait, between 2011 and 2013, an Ericsson subsidiary promised a payment of approximately $450,000 to a consulting company at the request of a sales agent, and then entered into a sham contract with the consulting company and approved a fake invoice for services that were never performed in order to conceal the payment. The sales agent provided an Ericsson employee with inside information about a tender for the modernization of a state-owned telecommunications company's radio access network in Kuwait. An Ericsson subsidiary was awarded the contract valued at approximately $182 million; Ericsson subsequently made the $450,000 payment to the consulting company and improperly recorded it in its books.

As part of the deferred prosecution agreement, Ericsson has agreed to pay total penalties of more than $1 billion to resolve the government's investigation into violations of the FCPA. This includes a criminal penalty of over $520 million and approximately $540 million to be paid to the U.S. Securities and Exchange Commission (SEC) in a related matter. Ericsson has accepted to continue to cooperate with the department in any ongoing investigations and prosecutions relating to the conduct, including of individuals; to enhance its compliance program; and to retain an independent compliance monitor for three years".

IX. The Airbus Case

According to the press release[23] of 31.01.2020 from the US Department of Justice:

"Airbus SE, a global provider of civilian and military aircraft based in France, has agreed to enter into a deferred prosecution agreement with the department in connection with a criminal information charging the Company with conspiracy to violate the anti-bribery provision of the FCPA and conspiracy to violate the Arms Export Control Act (AECA) and its implementing regulations, the International Traffic in Arms Regulations (ITAR), in the United States. The FCPA charge arose out of Airbus's scheme to offer and pay bribes to foreign officials, including Chinese officials, in order to obtain and retain business, including contracts to sell aircraft. The AECA charge stems from Airbus's willful failure to disclose political contributions, commissions or fees to the U.S. government, as required under the ITAR, in connection with the sale or export of defense articles and defense services to the Armed Forces of a foreign country or international organization.

Beginning in at least 2008 and continuing until at least 2015, Airbus engaged in and facilitated a scheme to offer and pay bribes to decision makers and other influencers, including to foreign officials, in order to obtain improper business advantages and to win business from both privately owned enterprises and entities that were state-owned and state-controlled. In furtherance of the corrupt bribery scheme, Airbus employees and agents, among other things, sent emails while located in the United States and participated in and provided luxury travel to foreign officials within the United States.

In order to conceal and to facilitate the bribery scheme, Airbus engaged certain business partners, in part, to assist in the bribery scheme. Between approximately 2013 and 2015, Airbus engaged a business partner in China and knowingly and willfully conspired to make payments to the business partner that were intended to be used as bribes to government officials in China in connection with the approval of certain agreements in China associated with the purchase and sale of Airbus aircraft to state-owned and state-controlled airlines in China. In order to conceal the payments and to conceal its engagement of the business partner in China, Airbus did not pay the business partner directly but instead made payments to a bank account in Hong Kong in the name of a company controlled by another business partner.

Pursuant to the AECA and ITAR, the Department of State's Directorate of Defense Trade Controls regulates the export and import of U.S. defense articles and defense services, and prohibits their export overseas without the requisite licensing and approval of the authority.

Between December 2011 and December 2016, Airbus filed numerous applications for the export of defense articles and defense services to foreign armed forces. As part of its applications, Airbus was required under the ITAR to provide certain information related to political contributions, fees or commissions paid in connection with the sale of defense articles or defense services. However, the Company engaged in a criminal conspiracy to knowingly and willfully violate the AECA and ITAR, by failing to provide accurate information related to commissions

[23] [https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign- bribery-and-itar-case].

paid by Airbus to third-party brokers who were hired to solicit, promote or otherwise secure the sale of defense articles and defense services to foreign armed forces.

The company's payment to the United States was $527 million for the FCPA and ITAR violations, and an additional 50 million Euros (approximately $55 million) as part of a civil forfeiture agreement for the ITAR-related conduct. In addition, the Company has agreed to pay a $10 million penalty to the U.S. Department of State's Directorate of Defense Trade Controls. In related proceedings, the Company settled with the Parquet National Financier in France over bribes paid to government officials and non-governmental airline executives in China and multiple other countries and the Company has agreed to pay more than 2 billion Euros (more than approximately $2.29 billion). As part of this coordinated global resolution, the Company also entered into a deferred prosecution agreement with the United Kingdom's Serious Fraud Office (SFO) over bribes paid in Malaysia, Sri Lanka, Taiwan, Indonesia and Ghana, and the Company has agreed to pay approximately 990 million Euros equivalent (approximately $1.09 billion). As part of the deferred prosecution agreement with the department, Airbus has agreed to continue to cooperate with the department in any ongoing investigations and prosecutions relating to the conduct, including of individuals, and to enhance its compliance program".

The pay combined penalties of more than $3.9 billion is the largest global foreign bribery resolution to date.

The jurisdiction of the US was entailed by passive personality principle according to which international corruption involving sensitive U.S. defense technology presents a particularly dangerous combination. Airbus falsely reported information about their conduct to the U.S. government for more than five years in order to gain valuable licenses to export U.S. military technology. The bribery of government officials, specifically those involved in the procurement of U.S. military technology, posed a national security threat to both the U.S. and its allies. Due to its sensitivity the investigation and prosecution of cases involving the export of military and strategic commodities and technology were supervised by the Counterintelligence and Export Control Section.

X. Conclusions

US legislators use extraterritorial measures to advance US foreign policy interests and political norms, and in defense of domestic market conditions (financial markets and copyright materials). The politics behind these positions are clear: in a globalized world the US believes its interests are universally applicable and thus should be actionable and defensible universally[24].

The FCPA was indirect diplomatic tool, and should be viewed in a wider political, diplomatic (military, and economic), and competitive context. To view these legislative case studies only in terms of their legal function is to miss some of the key ways in which the EU can protect and advance its own interests. To date, the European Union does not practice its own extraterritoriality, or at least an extraterritoriality equivalent to the United States. When the EU intervenes beyond its

[24] Dover R., Frosini J. (2012), cited paper, p. 39.

territorial borders to sanction foreign individuals or entities, it is as a consequence of actions committed on European territory, actions which have a direct effect on the European Union, or actions which concern EU nationals[25]. The EU prohibits European companies to comply with US extraterritorial sanctions, but this regulation has never been applied in practice[26]. Companies are faced with the choice to lose access to the American market or even an American penalty on the one hand, and the threat of a European fine on the other. As no European company that is complying with American embargoes has been sanctioned to date, the choice for companies is clear.

So far EU has refrained from doing so out of a respect for state sovereignty, a founding principle of the current Westphalian international legal order. Nevertheless the EU could build an autonomous extraterritorial system, analogous to the American system: same legal instruments, same organizational structures and same judicial control. The fight against corruption, in particular, could represent a good practice on the issue to the European level. O this matter, the EU could adopt new regulations to improve existing standards and provide them with extraterritorial jurisdiction. Until now, some European governments have enacted similar legislation to regulate the behavior of companies registered in their jurisdiction (e.g. UK Bribery Act 2010, which is compliant with the 1997 Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which entered into force on 15 February1999.

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