EXECUTIVE SUMMARY

Thousands of French binational citizens, known as **"accidental Americans"**, face a number of considerable injustices in banking and taxation matters. Subject, sometimes very late in life, to income tax with the United States government, even though they may have lived there for only a few days in their childhood, **they are confronted with refusals to open accounts, account closures or reduced access to certain financial services**. These obstacles range from administrative burdens to cases of real discrimination: the former must be reduced and the latter must be stopped.

In addition, it is important to define the **American authorities' control procedures focusing on the most suspected cases of tax fraud or evasion and on significant assets**, rather than on individuals with low and modest incomes, and to **ensure that personal data are processed in accordance with the highest standards of privacy protection**.

ORIGINS OF THE PROBLEM

• Three legal characteristics are combined:

– First, **it is possible to obtain American citizenship by simple birth on the territory of the United States or by descent**, without the need for the individual to maintain relationships with this country;

– Second, **U.S. nationals are taxed on their total worldwide income**, while all other jurisdictions (except Eritrea) base this levy on a simple residence criterion;

– Finally, the United States adopted an extraterritorial law in 2010, known as **FATCA** [1], and then signed bilateral agreements with most countries [in the world] in the following years, **enabling it to collect important data on assets held by Americans from financial institutions established abroad.**

• Until the adoption of the latter texts, the taxation of French citizens born in the United States or of American parents remained largely theoretical: even if some of these individuals did not know either that they were US nationals or that they were liable to pay taxes to the federal government, the American tax administration was not in a position, legally or technically, to know the economic situation of Americans living outside the United States. It is now being done

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[1] *() The foreign account tax compliance act was adopted on March 18, 2010 by the United States Congress.*

An example of this over-compliance by banks is that even customers who are actually American, but whose tax situation is fully in order, or those who demonstrate that they do not hold this citizenship or are not subject to US tax for various reasons, can continue, year after year, to receive the same requests for supporting documents and the same reduced access to certain offers by their bank.

• The "accidental Americans" have, first in principle, but only then in most cases, an **obligation to declare**, by completing the FBAR [3], and to **pay their tax arrears** to the IRS.

Completing this form is already a difficult task, especially for an individual unfamiliar with the American administrative system, which increases the risk of making honest mistakes. When a new taxpayer is identified, the IRS frequently requests compliance over a number of previous years.

The settlement stage is just as delicate. Strictly speaking, the provisions of the 1994 Franco-American tax treaty prevent, in accordance with a general principle of international law, cases of double taxation by allowing the amount paid to the tax authorities of the second jurisdiction to be charged as a tax credit to the first jurisdiction.

However, this system only works satisfactorily for taxations that not only exist but are defined in a similar way by both parties. This condition is not met in at least two cases. First, the **United States does not consider the CSG and CRDS** [4] **as income-based taxes** and then allocated to social security, **but as social contributions**, the payment of which cannot be used to reduce an arrears to the US tax authorities. Secondly, the IRS does not take into account the **French scheme relating to the capital gain on the sale of a principal residence**, and therefore considers the proceeds of this sale to be a normal resource.

• Since they do not consider themselves bound to the United States, and in order to stop being accountable to the IRS, many "accidental" binational are tempted to renounce their American citizenship. However, the procedure has two major shortcomings, due to its complexity and the fact that it only provides a solution for the future. In addition to the burden of obtaining the required supporting documents, the claimant faces three types of expenses: a fixed administrative fee of $2,350, the fees of a lawyer or accountant whose assistance is often essential, and possible tax arrears, with or without penalties for delay.

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[3] *() Foreign bank and financial accounts report must be transmitted as soon as the total amount deposited on all foreign accounts has exceeded the $10,000 threshold at any time during the year.*

[4] *() Generalized social contribution (*contribution sociale généralisée*) and contribution for the reimbursement of the social debt (*contribution pour le remboursement de la dette sociale*).*

through the **perverse and unforeseen effects of an initially laudable system designed to combat tax fraud and evasion** in the context of the 2008 crisis.

NATURE OF THE DIFFICULTIES EXPERIENCED

Fiscal in law, the difficulties of "accidental Americans" are in fact banking in first instance.

• Indeed, the FATCA law and the agreement concluded in 2013 between France and the United States **force financial institutions**, i.e. essentially banks, insurance companies and companies managing stock exchange transactions, **to notify the IRS** [2] **of the assets they hold on behalf of American clients**, both regularly and on request.

Not doing this reporting or doing it imperfectly theoretically exposes the accounts, and therefore both their holders and the banks that host them, to two types of **sanctions**: directly, a **flat-rate levy of 30%** on payments from disputed American sources and, indirectly, difficulties such as reduced access to American territory for individuals or a deteriorated "good standing" for companies.

In order to avoid these retaliatory measures, which were never applied at the time of submission of this report, banks are seeking to identify the **"indicia of Americanness"** of their customers: naturally, an identity document mentioning the status of a United States national, but less precisely, place of birth, telephone number, standing order from or to that country, etc..

Most banks indicate that the administrative burden of identifying these customers leads them to weigh the cost of potential sanctions against the profitability of the accounts in question, so that **they choose, as a preventive measure, to separate from customers or refuse new ones**.

While a legal person under private law, like a bank, obviously has wide latitude in choosing its contracting partners, such practices are likely to constitute cases of discrimination solely on the basis of actual or assumed nationality, which is condemned by French constitutional case law and the Criminal Code. The **Defender of rights**, in 2016 and again in 2018 at the request of the co-rapporteurs, **denounced the illegality of these specific discriminations** against certain "accidental Americans".

Moreover, all the French and American public players we met agree that this behavior is **overzealous**, which would partly explain why **the question seems to be raised with much less acuity in countries** other than France.

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[2] The Internal revenue service is an agency placed under the authority of the Treasury department, responsible for collecting income and corporate taxes.

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Relinquishing your American nationality is only possible if you have no debt to the federal government. Admittedly, this criterion seems to be very imperfectly verified by the consular services, but it is being pointed out – more and more clearly, it is true – to the persons concerned that this change in civil status does not relieve them of the obligation to pay any deductions due previously. Under these conditions, those who keep "indicia of U.S.-person status" remain potentially subject to their banks reporting.

WHAT SOLUTIONS ARE AVAILABLE?

• Some guarantees must be provided by the French public authorities. The priority is to require banks to stop discrimination and to respect their customers' privacy more, so as not to be more diligent than FATCA requires.

• Moreover, the Government cannot remain without taking initiatives and must imperatively initiate real negotiations. In the short term, the lifting of some thresholds, the extension of the moratorium so that the absence of a fiscal or social identification number is not sanctioned, and the creation of a post of fiscal *attaché* at the American Embassy in Paris would provide initial technical relief. In the medium term, France must continue its negotiations with a view to a more favorable interpretation of the bilateral convention: very recent progress on the status of the CSG is to be welcomed.

If no progress is made, denunciation of the FATCA agreement should be considered as a perfectly possible option.

• On all these issues, a common approach must be sought and promoted at **European Union level**.

• Finally, developments are desirable and possible in American law.

Admittedly, it seems unrealistic to repeal or amend the provisions of American constitutional and civil law that give rise to the difficulties.

But the **three bills TTFI, RBT and SCE** [5], submitted to U.S Congress and which are further developed in this report, would exempt most of the binational. The government's regulatory power may also take steps, provided that it has the political will to do so.

At the end of their works, the rapporteurs made 12 proposals, explained below. They urge the Government to take advantage of it to intensify its diplomatic efforts and note with satisfaction the commitment of several of their colleagues in the Senate and the European Parliament on this subject.

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[5] Respectively: territorial taxation for individuals, residency-based taxation, and single country exemption.