Foreign Executive Found Guilty of FCPA Violations

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Based on Evidence He Acted as Agent of U.S. Subsidiary in Carrying Out Bribery Scheme

Overview

In November, a jury sitting in the U.S. District Court for the District for Connecticut convicted Lawrence Hoskins, a former senior executive with the French power and transportation company Alstom S.A. ("Alstom"), on a number of Foreign Corrupt Practices Act charges. The charges were brought against Hoskins in connection with his involvement in a scheme to bribe Indonesian government officials to secure a $118 million contract for Alstom's U.S. subsidiary at the time, Alstom Power, Inc. ("Alstom-US").

Hoskins' case raised important questions regarding the jurisdictional reach of the FCPA over individuals who are **not** U.S. persons, such as foreign executives of multinational companies residing abroad. Hoskins, a UK national, did not travel to the U.S. while the bribery scheme was ongoing, did not personally engage in any criminal conduct on U.S. soil, and only communicated with U.S.-based conspirators by phone and email from France. The Department of Justice had initially brought charges against Hoskins based on three independent theories of liability: (1) Hoskins allegedly acted as an "agent" of Alstom-US in violating the FCPA; (2) Hoskins, independently of his agency relationship, allegedly conspired with Alstom-US, its employees and foreign consultants, to violate the FCPA; and (3) Hoskins, independently of his agency relationship, allegedly aided and abetted the FCPA violations committed by Alstom-US, its employees and foreign consultants.

As reported on in greater detail previously here, in a much-awaited decision issued last year, the Second Circuit rejected the DOJ's second and third theories of liability, holding that Hoskins could not be charged with conspiring to violate the FCPA, or aiding and abetting violations of it. The Second Circuit rejected those theories because they reached individuals beyond the three specific categories of persons over whom the FCPA expressly claims jurisdiction: (1) U.S. and foreign issuers of securities listed on U.S. stock exchanges, or their officers, directors, employees, or agents; (2) American companies and U.S. persons ("domestic concerns"); and (3) foreign persons or businesses acting in the U.S. in furtherance of a bribery scheme.

However, the Second Circuit allowed DOJ to still prosecute Hoskins based on its first theory of liability, i.e. by showing that Hoskins acted as an "agent" of a domestic concern (here, Alstom-US), in carrying out the bribery scheme. The case against Hoskins proceeded to trial on October 28, 2019.

Factual Background

At trial, the DOJ presented evidence showing that Hoskins participated with others in a conspiracy to pay bribes to officials in Indonesia – including a high-ranking member of the Indonesian Parliament and the president of Indonesia's state-owned and state-controlled electricity company – in exchange for their assistance in securing a $118 million power services contract for Alstom U.S. and its consortium partner, Marubeni Corporation. The DOJ presented evidence showing that in order to conceal the bribes to the Indonesian government officials, Hoskins and his co-conspirators funneled the bribes through two consultants, who were purportedly retained on behalf of Alstom-US to provide legitimate services in connection with the Indonesian contract.

The bribes paid in connection with the Indonesian contract were part of a widespread bribery scheme that spanned multiple countries including Saudi Arabia, Egypt and the Bahamas, for which Alstom entered into a $772 million plea deal with the DOJ in 2014. Alstom and a Swiss subsidiary each pled guilty to FCPA charges, and Alstom U.S. as well as another U.S. subsidiary of Alstom entered into deferred prosecution agreements.

The Trial Court's Ruling on the Definition of the Term "Agent"

Hoskins's trial turned on the issue of whether Hoskins acted as an "agent" of a domestic concern in carrying out the Indonesian bribery scheme. The DOJ argued that Hoskins was an agent of Alstom-US because he was responsible for "Alstom's and Alstom's subsidiaries' efforts to obtain contracts with new customers and to retain contracts with existing customers in Asia, including the [Indonesian project]" and for retaining the consultants that were allegedly used by Alstom-U.S. to make corrupt payments.

The FCPA does not define the term "agent." The DOJ and Hoskins vigorously disputed how the trial court should instruct the jury regarding the definition of that term. In the end, the trial court, guided mainly by appellate court decisions defining basic principles of agency in the civil context, decided that for FCPA purposes an agency relationship requires simply: (1) "a manifestation by the principal that the agent will act for it," (2) "acceptance by the agent of the undertaking," and, (3) "an understanding between the agent and the principal that the principal will be in control of the undertaking." Defining the agency relationship in this way puts the focus on the control that the principal [here, Alstom-U.S.] had over the **undertaking** [i.e., the bribery scheme] rather than its control over the **agent** [Hoskins].

The trial court specifically rejected Hoskins's proposal that the jury be instructed that agency is defined by "the principal's right to control the agent," including the agent's "day-to-day work for the duration of the agency relationship." The court held that this would wrongly suggest to the jury that the principal had to have exercised generalized control over the agent for an agency relationship to have existed. Instead, the court agreed with the DOJ that the jury would only have to find that the principal was in control of the "undertaking."

The trial court also rejected Hoskins' proposal that the jury be required to consider specific aspects of the actual relationship between Alstom-US and Hoskins in assessing whether an agency relationship existed, including whether "[Alstom-US] had the right to supervise and assess … Hoskins's work, the right to approve or disapprove his actions, and the right to terminate his services."

Hoskins's case proceeded to trial on October 28, 2019. Following a two-week trial, the jury found Hoskins guilty after just one day of deliberations. Sentencing has been set for January 31, 2020.

Implications of the Hoskins Verdict

Even though the Second Circuit's opinion established some limits on the extraterritorial application of the FCPA, it also left the door open for the DOJ to prosecute violations of the Act on the basis of agency principles. The fact that the DOJ was ultimately able to do so successfully in *Hoskins* shows that the threat of prosecution for FCPA violations on agency grounds remains real in the Second Circuit even for those foreign executives that may not otherwise fall within the categories of persons over whom the FCPA prescribes liability. This is especially the case given that the district court in *Hoskins* held that the focus in establishing agency should be on whether the U.S. company controlled the "undertaking," i.e. the bribery scheme, which might make it easier for the government to establish that an agency relationship existed even where the U.S. company might not otherwise have exercised any generalized control over the foreign executive.

A few days ago, Hoskins moved for a judgment of acquittal on all counts or, in the alternative, a new trial, which means the case might still not be over for Hoskins. In the meantime however, the definition of agency adopted by the trial court in *Hoskins* leaves plenty of room for prosecutors in the Second Circuit to present a factual case to a U.S. jury to impose U.S. criminal liability on individual executives even if they are not U.S. persons, do not act in the U.S., and are not controlled or supervised by the U.S. company engaging in the alleged bribery scheme.

An additional wrinkle is that in an opinion issued earlier this year, the U.S. District Court for the Northern District of Illinois in *United States v. Firtash* et al., held that "controlling Seventh Circuit case law declines to impose the requirement recognized [by the Second Circuit] in *Hoskins*" that foreign nationals acting outside the U.S. can only be charged with FCPA violations "if they are agents, employees, officers, directors, or shareholders of an American issuer or domestic concern." On the basis of this holding, the court refused to dismiss charges for conspiracy and aiding and abetting FCPA violations brought against both defendants even though they were foreign nationals who had never visited the U.S. in the course of the alleged bribery scheme. In other words, the court in *Firtash* rejected even the modest narrowing adopted by the Second Circuit in *Hoskins*. The *Firtash* decision has thus created the possibility of a split amongst the U.S. Courts of Appeals on the extent of the extraterritorial application of the FCPA, which may cause the issue to be taken up by the U.S. Supreme Court in the future.

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