

Foreign Executive's FCPA Convictions Overturned

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District Court Finds Insufficient Evidence That He Acted As Agent of U.S. Subsidiary

Background

On February 26, 2020, a federal judge in Connecticut granted in part the motion for acquittal of a former senior executive with the French power and transportation company Alstom S.A., overturning a jury verdict that found him guilty on seven counts of violating or conspiring to violate the Foreign Corrupt Practices Act (FCPA).¹ As we reported in a prior [alert](#), the executive, Lawrence Hoskins, was convicted in November 2019 for his role in an alleged scheme to bribe Indonesian officials to obtain a \$118 million power contract for Alstom's U.S. subsidiary, Alstom Power, Inc. ("Alstom-U.S.") and its consortium partner, Marubeni Corporation.² The ruling by U.S. District Judge Janet Bond Arterton is the latest dramatic turn in this lengthy prosecution, and if followed by other courts, the decision could substantially restrict the government's ability to prosecute individuals and companies based outside the United States under the FCPA.

Alstom-U.S., based in Windsor, Connecticut, headquartered Alstom's utility boiler business, and thus was closely involved in Alstom's bidding on the power contract. The government charged Alstom-U.S. with paying the bribes through two consultants whom it hired for that purpose. Hoskins, who worked for a separate Alstom entity in France, had responsibility for reviewing and approving aspects of consulting agreements in accordance with Alstom policy and contributing to the selection of consultants. The government presented evidence that Hoskins did so with respect to the consultants who conveyed the bribes at issue here.

Hoskins' conviction, however, was notable given the scarcity of his contacts with the U.S. during the existence of the scheme. A UK national, Hoskins was employed during the relevant time by Alstom UK Limited, a British subsidiary of Alstom, but worked mainly for Alstom Resource Management SA, a French subsidiary of the company, in Paris. Hoskins never set foot in the U.S. while the bribery scheme was ongoing, did not work for a U.S. entity, and only communicated with U.S.-based conspirators by phone and email from France. The Department of Justice (DOJ) nevertheless initially charged Hoskins on three independent theories of liability, alleging that Hoskins: (1) conspired with Alstom-U.S., its employees and foreign consultants to violate the FCPA; (2) aided and abetted the FCPA violations committed by Alstom-US, its employees and foreign consultants; and (3) acted as an "agent" of Alstom-US in conspiring with others to violate the FCPA and committing substantive violations of the Act.

In a significant decision in 2018, discussed [here](#), the Second Circuit rejected the government's first and second theories of liability, holding that Hoskins could not be charged with conspiring to violate, or aiding and abetting violations of, the FCPA, absent a showing that he otherwise fell within the scope of the statute, because those charges did not come within the FCPA's "carefully drawn limitations" on the categories of individuals and entities who may be liable thereunder. Those, the Second Circuit held, include only: (1) issuers of securities listed on U.S. stock exchanges and their officers, directors, employees, or agents; (2) U.S.-based companies or other business entities and individuals ("domestic concerns") and, as applicable, their officers, directors, employees, or agents; and (3) foreign nationals and businesses while present in the U.S.³ The Second Circuit, however, allowed the government to proceed on its first theory – that Hoskins acted as an agent of Alstom-U.S. – because the FCPA expressly includes agents of U.S. companies, whether or not they were physically present in the U.S.⁴

The case against Hoskins then proceeded to trial on October 28, 2019. The district court, guided mainly by appellate court decisions defining basic principles of agency in the civil context, instructed the jury that to find Hoskins guilty on the FCPA charges, it had to find (1) "a manifestation by the principal [here, Alstom-U.S.] that the agent [Hoskins] will act for it," (2) "acceptance by the agent [Hoskins] of the undertaking," and, (3) "an understanding between the agent [Hoskins] and the principal [Alstom-U.S.] that the principal [Alstom-U.S.] will

be in control of the undertaking.” The district court went on to instruct that the undertaking “consists of the acts or services which the agent performs on behalf of the principal.”

After a two-week trial, the jury convicted Hoskins on the conspiracy and substantive FCPA counts, along with related money laundering charges.

District Court Finds Government Failed to Present Sufficient Evidence at Trial That Hoskins Acted as Agent of Alstom-U.S.

Following the verdict, Hoskins filed a motion for acquittal under Federal Rule of Criminal Procedure 29(c), arguing that the government failed to present evidence from which a reasonable juror could conclude beyond a reasonable doubt that he was an agent of Alstom-U.S.⁵ The district court agreed with Hoskins, and overturned his conviction as to the FCPA counts.

In coming to its decision, the district court relied on basic principles of agency law drawn from the Third Restatement of Agency. In particular, recognizing that “agency analysis ‘is highly-factual and often nuanced,’” it noted that “[a]n essential element of agency is the principal’s right to control the agent’s actions” including “interim control” of the agent – i.e., “the right to give interim instructions or directions to the agent once their relationship is established.”⁶ Where, on the other hand, a purported principal merely controls aspects of a transaction, but lacks control over how the agent performs the task beyond the “initial specifications,” the court observed, no agency relationship exists.⁷

Here, the district court determined that the government’s evidence at trial was insufficient to show that Alstom-U.S. exercised interim control over Hoskins with respect to the consultant hiring process. The government presented evidence that Alstom-U.S. controlled “important aspects” of the consultant hiring process, including which consultants to hire and the terms on which they were engaged, and instructed Hoskins to update Alstom-U.S. on the status of the power project and send out versions of the consulting agreements. The government also showed that Hoskins provided advice to Alstom-U.S. on payment terms under one of the consulting agreements.⁸ The district court held that the government did not, however, make an adequate showing that Alstom-U.S. had an interim right to give Hoskins instructions as to how he carried out those responsibilities, which remained within his discretion.⁹ The court also placed significant weight on the lack of evidence that anyone at Alstom-U.S. had the power to terminate Hoskins’ participation in the hiring of consultants for the Indonesian project, since the “principal’s right of control presupposes that the principal retains the capacity to ... terminate the agency relationship by revoking the agent’s authority.”¹⁰

Implications of the District Court’s Decision

The district court’s decision curtails the agency theory of FCPA liability recognized by the Second Circuit in 2018. By limiting the reach of the statute to a discrete category of foreign individuals who are subject to pervasive “interim control” by U.S. persons, the court imposed an evidentiary burden on prosecutors to show that the U.S. principal “retain[ed] the capacity throughout the relationship to assess the [foreign] agent’s performance, provide instructions to the [foreign] agent, and terminate the agency relationship by revoking the [foreign] agent’s authority.”¹¹ This standard, and the nuanced manner in which it was applied to these facts, will likely encourage defense counsel to challenge the government’s basis for agency-based FCPA liability in future cases.

It is important to note, however, that even though the district court overturned Hoskins’ conviction on the FCPA counts, it denied his motion for acquittal as to his convictions on four money laundering counts.¹² This leaves the government with an alternative weapon for reaching overseas individuals who facilitate bribery.

Moreover, as we have discussed previously [here](#), at least one court outside the Second Circuit has rejected the position that foreign nationals can only be charged with FCPA violations if they are agents, employees, officers, directors, or shareholders of a U.S. issuer or domestic concern. Last June, a district judge in the Northern District of Illinois concluded that the Second Circuit’s analysis in *Hoskins* was incompatible with governing Seventh Circuit precedent and refused to dismiss FCPA conspiracy and aiding and abetting charges against two foreign nationals who had never visited the U.S. during the alleged bribery scheme, setting up a potential split among U.S. Courts of Appeal in a future case.¹³

The government may appeal the district court’s decision in *Hoskins*, which means that the decision may not be the last word on the issue of whether Hoskins acted as an agent of Alstom-U.S. Anticipating that possibility, the district court granted Hoskins’ alternative motion for a new trial under Criminal Rule of Civil Procedure 33 in the event that the court’s judgment on the motion for acquittal is vacated or reversed.

Whatever the outcome, the district court's decision underscores the importance for multinational companies of (1) clearly and specifically defining the scope of responsibilities and reporting lines of any foreign executives who are located abroad and have roles touching upon the operations of U.S. affiliates and (2) ensuring that those responsibilities and reporting lines are observed in practice.

1. *U.S. v. Hoskins*, No. 3:12cr238 (JBA), 2020 U.S. Dist. LEXIS 32663 (D. Conn. Feb. 26, 2020).
2. The bribes in this case 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. See DOJ Press Release, *Alstom Sentenced to Pay \$772 Million Criminal Fine to Resolve Foreign Bribery Charges*, Nov. 13, 2015, available [here](#).
3. *U.S. v. Hoskins*, 902 F.3d 69, 71-72 (2d Cir. 2018).
4. *Id.* at 73-74.
5. *Hoskins* had filed a motion for acquittal under Fed. R. Crim. P. 29(a) at the conclusion of the government's case, which the district court denied without prejudice to renew following the jury verdict.
6. *Hoskins*, 2020 U.S. Dist. LEXIS 32663, *9 (citation omitted).
7. *Id.* at *25-*30.
8. *Id.* at *20-*22, *26-*27.
9. *Id.* at *26-*30.
10. *Id.* at *28-*29.
11. *Id.*
12. *Id.* at *30-*44.
13. *U.S. v. Firtash*, 392 F. Supp. 3d 872 (N.D. Ill. 2019). The government did not appeal the district court's ruling in that case.

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