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Second Circuit Curbs FCPA Application to Some Foreign Participants in Bribery

I. Introduction

On August 24, 2018, the Second Circuit handed down its long-awaited decision in *United States v. Hoskins*,[1] addressing the question of whether a non-resident foreign national can be held liable for violating the FCPA under a conspiracy theory, where the foreign national is not an officer, director, employee, shareholder or agent of a U.S. issuer or domestic concern and has not committed an act in furtherance of an FCPA violation while in the U.S. In a word, the court held that the answer is "no," concluding that the government may not "expand the extraterritorial reach of the FCPA by recourse to the conspiracy and complicity statutes."[2] The court added, however, that the same foreign national could be liable as a co-conspirator if he acted as an agent of a primary violator.

Continued on page 2

1. No. 16-1010-cr, 2018 WL 4038192 (2d Cir. Aug. 24, 2018).
2. Slip Op. at 70.

Second Circuit Curbs FCPA Application to Some Foreign Participants in Bribery
Continued from page 1

While the ruling is undoubtedly an important curb on some potential sources of liability for foreign entities and individuals, the availability of agent liability may limit the practical impact of the decision for many non-resident foreign nationals. Unfortunately, the decision did not address the scope of agent liability under the FCPA, leaving that issue open. As a result, further development in this and subsequent cases – especially with respect to the meaning of "agency" under the FCPA – will necessarily be required before the full impact of the *Hoskins* ruling becomes clear. However, the decision is likely good news for foreign companies that enter into joint ventures with U.S. companies and some other classes of potential defendants, as it may be harder for the U.S. government to charge them with FCPA violations.

II. Factual and Procedural History

In December 2014, the U.S. Department of Justice ("DOJ") reached a settlement with French conglomerate Alstom S.A. and several of its subsidiaries regarding improper payments to secure a $118 million power project in Indonesia.[3] The DOJ also brought charges against a number of individuals, including Lawrence Hoskins, a British national who was an officer of a British subsidiary of Alstom. All of the other individuals settled;[4] Hoskins did not.

The FCPA prohibits corruptly offering, giving, promising to give, or authorizing the giving of anything of value to any foreign official in order to assist in obtaining or retaining business. The statute specifically sets out three categories of entities or persons to which it applies: (1) Section "dd-1" applies to issuers of securities in the U.S., as well as their officers, directors, shareholders, employees and agents; (2) Section "dd-2" applies to "domestic concerns" (i.e., U.S.-based companies, citizens or residents), as well as their officers, directors, shareholders, employees and agents; and (3) Section "dd-3" applies to any foreign entity or non-U.S. person (as well as their officers, directors, shareholders, employees and agents) who takes steps in furtherance of a corrupt payment "while in the territory of the United States."[5]

Continued on page 3

3. *See* "The Year 2015 in Anti-Bribery Enforcement: Are Companies in the Eye of an Enforcement Storm," FCPA Update, Vol. 7, No. 6 at 22 (Jan. 2016). The DOJ alleges that in his capacity overseeing the Alstom U.S. unit's hiring of consultants, Hoskins authorized payments to consultants in connection with a bribery scheme to secure a $118 million construction project for Indonesia's state-owned electricity company for an Alstom U.S. subsidiary. Hoskins is alleged to have authorized these payments to Indonesian government officials retained by the company as consultants for the purpose of paying bribes to the Indonesian government.

4. *See United States v. Frederic Pierucci*, Document No. 46, Plea Agreement, Case No. 3:12-cr-238(JBA) (filed July 29, 2013), https://www.justice.gov/criminal-fraud/case/united-states-v-frederic-pierucci-court-docket-number-12-cr-238-jba; *United States v. William Pomponi*, Document No. 138, Plea Agreement, Case No. 3:12-cr-00238(JBA) (filed July 17, 2013), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2014/07/23/pomponi-plea-agreement.pdf; *United States v. David Rothschild*, Document No. 8, Plea Agreement, Case No. 3:12-cr-00223(WWE) (filed Nov. 2, 2012), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/04/22/rothschild-guilty-plea.pdf.

5. 15 U.S.C. §§ 78dd-1, 78dd-2, 78d-3.

Second Circuit Curbs FCPA Application to Some Foreign Participants in Bribery

Continued from page 2

The Third Superseding Indictment filed against Hoskins charged him with eight counts of violating the FCPA and four counts of violating the anti-money laundering laws. Hoskins moved to dismiss Count One of the indictment, which alleged that he had conspired with Alstom U.S. and others to violate both Sections dd-2 (domestic concerns) and dd-3 (foreign nationals operating within the U.S.) of the FCPA. Hoskins argued that he could not be held liable for violating the FCPA under a conspiracy theory because he was a foreign national who did not meet the definition of a domestic concern and had not himself acted while within the territory of the U.S.

"While the ruling is undoubtedly an important curb on some potential sources of liability for foreign entities and individuals, the availability of agent liability may limit the practical impact of the decision for many non-resident foreign nationals."

The U.S. District Court for the District of Connecticut granted Hoskins's motion to dismiss the portion of Count One that alleged conspiracy,[6] holding that a non-resident foreign national cannot be charged with conspiracy to violate the FCPA unless the government could show that the defendant (a) acted as an agent of a domestic concern (under Section dd-2) or (b) committed the acts in question while physically present in the U.S. (as Section dd-3 requires).[7] The district court, however, allowed the Government to proceed to trial with the opportunity to prove that Hoskins was primarily liable as an agent of the U.S. subsidiary of Alstom. After its motion for reconsideration was denied in March 2016, the DOJ appealed to the Second Circuit and oral argument was heard on March 2, 2017.[8]

III. The Second Circuit's Decision

The issue presented to the Second Circuit was whether the government could use conspiracy to charge a defendant with violating the FCPA, even if he was not in the category of persons directly covered by the statute.[9] In an opinion by Judge Rosemary Pooler, joined by Chief Judge Robert Katzmann and Judge Gerard Lynch, the court affirmed in part and reversed in part the district court's decision.

Continued on page 4

6. *See* FCPA Update, Jan. 2016, *supra* n.3 at 25-26.
7. *United States v. Hoskins*, No. 3:12-cr-238-JBA, 2016 WL 1069645 (D. Conn. March 16, 2016).
8. *United States v. Pierucci* (*Hoskins*), Case 16-1010, Notice of Hearing Date (2d Cir. Jan. 13, 2017).
9. Slip Op. at 4 n.1. The Court assumed, for purposes of its analysis of conspiracy liability, that Hoskins was not an agent of Alstom U.S.

Second Circuit Curbs FCPA Application to Some Foreign Participants in Bribery

Continued from page 3

The Second Circuit upheld the district court's dismissal of part of Count One, holding the FCPA's "carefully-drawn limitations" do not permit the government to use conspiracy or aiding and abetting theories to charge a foreign national who is neither an employee nor an agent of a domestic concern and did not himself act while within the territory of the U.S.[10] However, the Second Circuit also held that the conspiracy count could proceed because Count One alleged that Hoskins was an "agent" of the U.S. company.

Judge Pooler's 73-page opinion carefully analyzed the Supreme Court's 1932 decision in *Gerbardi v. United States*[11] and the Second Circuit's 1987 decision in *United States v. Amen*,[12] both of which addressed statutes where Congress distinguished between those who could be charged with a violation and those who could not.[13] Based on those cases, the Second Circuit concluded that "conspiracy and complicity liability will not lie when Congress demonstrates an affirmative legislative policy to leave some type of participant in a criminal transaction unpunished."[14]

The court then considered the legislative history of the FCPA in evaluating whether Congress had intended to limit liability to a clearly defined group of potential defendants. The court evaluated the history of the original statute and a series of amendments in 1998 that added Section dd-3 and were designed to conform the FCPA with the requirements of the Organization for Economic Cooperation and Development's (OECD) anti-corruption convention.[15] Based on this analysis, the court concluded that the FCPA evinces "an affirmative Congressional intent to exclude" from liability persons other than those specifically referenced in the text of the statute.

In his concurring opinion, Judge Lynch reinforced this conclusion by noting that it has become commonly accepted since the Fifth Circuit's ruling in *United States v. Castle*[16] that the recipients of bribe payments could not be charged with a violation of the FCPA, because "Congress was concerned about intruding too far into

Continued on page 5

10. Slip Op. at 2.
11. 287 U.S. 112 (1932).
12. 831 F.2d 373 (2d Cir. 1987).
13. In *Gerbardi*, the ruling was that the woman who had been transported across state lines – whether voluntarily or not - could not be a co-conspirator to violate the Mann Act's prohibition against transporting women across state lines for certain purposes, and in *Amen* the ruling was that a so-called "kingpin" statute that was designed to mete out additional punishment to the head of a criminal enterprise could not become the basis for a conspiracy charge against underlings in the criminal enterprise. See I Slip Op. at 22-28.
14. Slip Op. 28.
15. *Id*. at 41-65.
16. 925 F.2d 831 (5th Cir. 1991).

Second Circuit Curbs FCPA Application to Some Foreign Participants in Bribery

Continued from page 4

foreign sovereignty."[17] Judge Lynch wrote that though it was evident that the bribe recipient is a necessary participant in the violation, and could easily be charged as a conspirator, Congress made clear that the FCPA should not reach that far. He took this as another reason to heed the specific delineations in the statute.

The court also considered whether the Supreme Court's recent pronouncements on the extraterritorial application of U.S. laws supported the same conclusion. Analyzing both *Morrison v. Nat'l Bank of Australia, Ltd.*[18] and *RJR Nabisco, Inc. v. European Cmty.*,[19] the court determined that "[b]ecause some provisions of the FCPA have extraterritorial application, 'the presumption against extraterritoriality operates to limit th[ose] provision[s] to [their] terms.'"[20] As Judge Lynch noted in his concurring opinion, the FCPA did "not evince an effort by the United States to rule the world, but rather an effort to enforce American law against those who deliberately seek to undermine it."[21] He added: "In adopting the FCPA, Congress sought to criminalize wrongful conduct by Americans and those who in various ways work with Americans, while avoiding unnecessary imposition on the sovereignty of other countries whose traditions may differ from our own."[22]

Importantly, the Second Circuit did not take the opportunity to hold that conspiracy theory can never be used in FCPA cases. In fact, the Court explicitly held that if Hoskins is ultimately shown to have acted as an agent of a domestic concern, then he can be held liable under a conspiracy theory for the actions of his co-conspirators (namely, the U.S. subsidiary and the other individuals who were employees and agents).[23] Nor did the Court discuss what evidence would be required to prove that Hoskins – the U.K. employee of a U.K. sister company to Alstom U.S. – actually acted as an agent of the U.S. subsidiary, stating in a footnote that they "express no views on the scope of agency under the FCPA."[24]

Continued on page 6

17. Con. Op. at 9.
18. Slip Op. at 66-69.
19. 136 S. Ct. 2090 (2016).
20. Quoting both *RJR Nabisco*, 136 S. Ct. at 2102, and *Morrison*, 561 U.S. at 265.
21. Con. Op. at 15.
22. *Id.* at 11.
23. Slip Op. at 71.
24. *Id.* at 4 n.1.

Continued from page 5

IV. Takeaways

Narrow practical impact for many foreign nationals: With *Hoskins*, the Second Circuit has limited the FCPA's extraterritorial reach somewhat, but has left the door open for conspiracy claims against a non-resident foreign national as long as the government also establishes that the foreign national is an agent of an issuer, domestic concern, or another foreign national who acted in furtherance of a bribe payment in the territory of the U.S. The number of individuals who fall in the group affirmatively beyond the scope of the FCPA after *Hoskins* may end up being relatively small.

Increased focus on the scope of "agency": Left unresolved by this decision is whether Hoskins was, in fact, an agent of Alstom's U.S. subsidiary. The contours and scope of agency in the FCPA context will likely be the subject of significant litigation going forward. And while there are specific legal elements required for a showing of agency, it is an intensely factual inquiry, which could make it more difficult (but not impossible) to persuade a court to address the issue at the motion to dismiss stage. It could be some time before clarity is provided by subsequent rulings.

Potential implication for foreign joint venture partners: One place where the *Hoskins* decision may have significant impact is on the U.S. government's ability to reach the conduct of foreign companies that enter into joint ventures with U.S. issuers or companies. Historically, DOJ charged the foreign JV partners with conspiracy to violate the FCPA.[25] However, the Second Circuit's decision in *Hoskins* would clearly preclude this, and require the government to prove that the foreign national acted as an agent of a U.S. issuer or domestic concern. Given the complexity of international JV structures, it likely will be difficult for the government to prove that a JV partner acted as an agent of its U.S. JV partner rather than of the JV itself. Moreover, given the uncertainty in federal law as to the meaning of "agency" and the fact-specific nature of that determination, contracting parties would be well advised to include contractual provisions specifying their intent not to form an agency relationship. Although courts will look at the effective rather than the formal relationship between the parties, such contractual language is relevant evidence for a factual determination.

What's next for Hoskins?: It remains to be seen whether the government will petition for rehearing *en banc* or even appeal the decision directly to the Supreme Court. While the practical impact of this ruling may be limited, the government

Continued on page 7

25. *See, e.g., United States v. JGC Corp.*, Document No. 4, Deferred Prosecution Agreement at ¶ 1, Case No. 4:11-cr-00260 (S.D. Tex. Filed April 6, 2011) (acknowledging charge of conspiracy with domestic concern to violate the FCPA), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/04/27/04-6-11jgc-corp-dpa.pdf.

Second Circuit Curbs FCPA Application to Some Foreign Participants in Bribery

Continued from page 6

may pursue review in an effort to overturn this decision, which essentially requires a showing of agency in order to hold certain non-resident foreign nationals liable directly or as co-conspirators for alleged FCPA violations. If the government does not seek further appellate review, it will be interesting to see whether and how it establishes that Hoskins was an agent of the U.S. subsidiary.

Kara Brockmeyer

Colby A. Smith

Bruce E. Yannett

Philip Rohlik

Jil Simon

Anne M. Croslow

Kara Brockmeyer and Colby A. Smith are partners in the Washington, D.C. office. Bruce E. Yannett is a partner in the New York office. Philip Rohlik is a counsel in the Shanghai office. Jil Simon and Anne M. Croslow are associates in the Washington, D.C. office. The authors may be reached at kbrockmeyer@debevoise.com, casmith@debevoise.com, beyannett@debevoise.com, prohlik@debevoise.com, jsimon@debevoise.com, and amcroslow@debevoise.com. Full contact details for each author are available at www.debevoise.com.

Continued on page 8

Court Decisions in Europe Undercut Confidentiality of Internal Investigation Documents

In the United States, if a company retains counsel to conduct an internal investigation of possible wrongdoing and the investigation is properly managed, the company generally can be assured that the resulting work product will be protected from disclosure unless and until the company specifically authorizes such disclosure.

Matters are different in Europe, however, and the situation varies among EU jurisdictions. In continental Europe, in-house counsel are, with very few exceptions, generally not considered to be "attorneys" capable of generating a protectable professional privilege, as they are considered to be part of the client's operations and no independent counsel. And in some countries, such as France, the client does not necessarily have the power to "waive" the *secret professional* (the rough equivalent of the attorney-client privilege) to authorize an attorney to divulge material covered by professional secrecy to a third party.

Recent court decisions in the U.K. and Germany have gone even further in making the results of internal investigations conducted by counsel discoverable by state prosecutors in many circumstances without the company's consent. These decisions, if not reviewed by appellate courts or curtailed by legislation, may put a significant damper on the willingness of individuals to cooperate with an internal investigation (as their statements may end up as evidence in a prosecutor's hands), and thus also may create disincentives to internal corporate investigations and hence to self-reporting by companies. As things currently stand, companies need to work closely with counsel to determine if, when, and how privilege may apply to an internal investigation.

In May 2017, the English High Court ruled in *SFO v. ENRC*[1] that the defendant must turn over to the U.K. Serious Fraud Office ("SFO") internal investigation material generated by external counsel. The court held that an investigation by the SFO is not by itself adversarial litigation and because the company could not demonstrate that it anticipated the SFO would prosecute it at the time of the investigation, it could not demonstrate that the materials were generated for the dominant purpose of defending itself in anticipated litigation. Consequently, the company could not rely on litigation privilege to shield attorney work product

Continued on page 9

1. *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 (QB).

Court Decisions in Europe Undercut Confidentiality of Internal Investigation Documents

Continued from page 8

from disclosure. Earlier this year, in *Bilta v. RBS*,[2] the English High Court distinguished the *ENRC* judgment and found that, at the relevant stage of an internal investigation, a tax authority's investigation into the company had ended and a dispute between the company and the tax authority had commenced and therefore, in that particular set of circumstances, materials generated in the internal investigation could be shown to have been generated for the dominant purpose of defending litigation. Therefore litigation privilege applied. The *Bilta* ruling left unresolved whether a company that faces a *risk* of investigation can safely turn to lawyers to advise them.

More recently, on June 27, 2018, the German Constitutional Court declined to extend privilege protections on constitutional grounds to the internal investigation work product of outside counsel of a parent company of the target of a state prosecution.[3] The case involved the results of an internal investigation conducted by the law firm Jones Day, as counsel to Volkswagen AG ("VW"), regarding diesel emission data, in connection with a state investigation of employees of the VW subsidiary Audi AG. In March 2017, the Munich prosecutor raided the Munich offices of Jones Day, seizing hard-copy documents and downloading documents relating to the internal investigation. The Munich raid came after VW had refused to publish the findings of Jones Day's internal investigation.

In considering the constitutional rights of VW, the court upheld the seizure as justified given the strong public interest in efficient prosecution. Jones Day, as a foreign entity, was held not to have standing under German constitutional law. Furthermore, according to the court, the seizure of documents constituted a violation neither of VW's fundamental right of informational self-determination nor its right to a fair trial. VW's rights were held to be inferior to the state's interest in an efficient prosecution of third parties. The court saw no reason to extend the privilege to effectively bar seizure of information belonging to a third party. The court also rejected VW's "sanctity of the home" argument because its own offices were not searched.

In Germany, the applicability of privilege to internal investigation materials depends on whether there is an actual or imminent prosecution. As a general matter, under German law, attorney-client privilege does not bar the seizure of documents unrelated to a client's defense. For example, interview memoranda prepared in connection with an internal investigation by a company's counsel are

Continued on page 10

2. *Bilta (U.K.) Ltd v Royal Bank of Scotland plc* [2017] EWHC 3535 (Ch).

3. German Federal Constitutional Court (*BVerfG*), decisions of June 27, 2018, 2 BvR 1287/17, 2 BvR 1583/17, 2 BvR 1780/17, 2 BvR 1405, 2 BvR 1562/17; NJW 2018, 2385; NJW 2018, 2392; see also The Federal Constitutional Court, "Constitutional complaints relating to the search of a law firm in connection with the 'diesel emissions scandal' unsuccessful" (Press Release No. 57/2018, 6 July 2018), *available at* www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2018/bvg18-057.html.

Court Decisions in Europe Undercut Confidentiality of Internal Investigation Documents

Continued from page 9

generally not privileged because they can be attributed to the client. There is also no privilege protection for evidentiary documents, including documents retained by a lawyer that originate from the client or a third party. Lawyers' documentation of their investigative findings will be protected only to the extent the findings are part of their communication in the defense of a specifically existing or imminent prosecution. In the absence of a criminal prosecution and related defense communication, written conclusions or other work product rendered by a law firm in the course of a client-initiated internal investigation are not protected from disclosure or seizure.

"If companies cannot rely on lawyers (both in-house and outside counsel) to conduct internal investigations of potential bribery or other malfeasance with confidence that the resulting reports can be kept confidential, companies will be less likely to order such investigations in the first place."

It will be interesting to see how other countries address protections applicable to internal investigations. In France, the issue is relatively new: until the Paris Bar issued guidelines in September 2016 affirming that French lawyers could conduct such investigations, their ability to do so was uncertain, and internal investigations in France were few.[4] The Paris Bar guidelines specify that the *secret professional* applies to attorneys' conduct of internal investigations, including but not limited to situations where the company being investigated is a usual client. We believe that a demand by a prosecutor or an investigating magistrate for a law firm to produce the fruits of an investigation conducted by it – which would be forcefully opposed by the organized Bar – would be rejected. In the event of an attempted seizure of such records from law firm offices, French law provides that the police must inform the local Bâtonnier (head of the Bar) of a raid before conducting one, and permit the Bâtonnier or a designate to be present to insure that no privileged material is seized.

These matters are continuing to evolve. The *ENRC* appeal – which was argued in July 2018 – may bring some clarity to the situation in the U.K., and in Germany the coalition treaty contains language that indicates legislative attempts to provide guidelines on how prosecutors should treat material from internal investigations.

Continued on page 11

4. Avocats Barreau Paris, *Nouvelle annexe XXIV: Vademecum de l'avocat chargé d'une enquête interne* (September 13, 2016), *available at* http://www.avocatparis.org/mon-metier-davocat/publications-du-conseil/nouvelle-annexe-xxiv-vademecum-de-lavocat-charge-dune.

Court Decisions in Europe Undercut Confidentiality of Internal Investigation Documents

Continued from page 10

If companies cannot rely on lawyers (both in-house and outside counsel) to conduct internal investigations of potential bribery or other malfeasance with confidence that the resulting reports can be kept confidential, companies will be less likely to order such investigations in the first place. They may also decide not to self-report to authorities in the absence of a good understanding of the facts and thus the likely outcomes. This harms both companies and prosecutors: companies because they will have lost an important strategic option that often is beneficial for them and their shareholders, prosecutors because they would be less likely to detect, and ultimately deter, corporate misconduct not brought to their attention.

Thomas Schürrle

Frederick T. Davis

Alexandre Bisch

Jennifer Deschins

Thomas Schürrle is a partner in the Frankfurt office. Frederick T. Davis is of counsel in the Paris office. Alexandre Bisch is an associate in the Paris office. Jennifer Deschins is an associate in the Frankfurt office. The authors may be reached at tschuerrle@debevoise.com, ftdavis@debevoise.com, abisch@debevoise.com, and jdeschin@debevoise.com. Full contact details for each author are available at www.debevoise.com. *A portion of this article previously appeared, in a different form, on the Global Anticorruption Blog.*

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Debevoise & Plimpton LLP

919 Third Avenue
New York, New York 10022
+1 212 909 6000
www.debevoise.com

Washington, D.C.
+1 202 383 8000

London
+44 20 7786 9000

Paris
+33 1 40 73 12 12

Frankfurt
+49 69 2097 5000

Moscow
+7 495 956 3858

Hong Kong
+852 2160 9800

Shanghai
+86 21 5047 1800

Tokyo
+81 3 4570 6680

Bruce E. Yannett
Co-Editor-in-Chief
+1 212 909 6495
beyannett@debevoise.com

Andrew J. Ceresney
Co-Editor-in-Chief
+1 212 909 6947
aceresney@debevoise.com

David A. O'Neil
Co-Editor-in-Chief
+1 202 383 8040
daoneil@debevoise.com

Jane Shvets
Co-Editor-in-Chief
+44 20 7786 9163
jshvets@debevoise.com

Philip Rohlik
Co-Executive Editor
+852 2160 9856
prohlik@debevoise.com

Kara Brockmeyer
Co-Editor-in-Chief
+1 202 383 8120
kbrockmeyer@debevoise.com

Andrew M. Levine
Co-Editor-in-Chief
+1 212 909 6069
amlevine@debevoise.com

Karolos Seeger
Co-Editor-in-Chief
+44 20 7786 9042
kseeger@debevoise.com

Erich O. Grosz
Co-Executive Editor
+1 212 909 6808
eogrosz@debevoise.com

Jil Simon
Associate Editor
+1 202 383 8227
jsimon@debevoise.com

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