

February 28, 2020

United States v. Hoskins—District Court Rejects DOJ’s Attempt to Expand Extraterritorial Reach of FCPA Through Agency Liability

U.S. District Court for the District of Connecticut Finds That the Trial Evidence Did Not Support a Finding That the Defendant Was an Agent of a U.S. Company and Grants Post-Conviction Motion for Judgment of Acquittal of FCPA Charges

SUMMARY

On February 26, 2020, in *United States v. Hoskins*, the Hon. Janet Bond Arterton of the United States District Court for the District of Connecticut granted Defendant Lawrence Hoskins’ motion for a judgment of acquittal with respect to six counts of violating the Foreign Corrupt Practices Act (FCPA) and one count of conspiracy to violate the FCPA. Hoskins is a British citizen who was living outside the United States and was employed by a United Kingdom subsidiary of a power and transportation company, Alstom S.A. (Alstom). Alstom also has a United States-based subsidiary (Alstom U.S.), which hired consultants to pay bribes to Indonesian officials in order to secure a valuable contract for Alstom and its subsidiaries to build power stations for Indonesia’s state-owned electricity company. The government alleged that Hoskins was one of the individuals responsible for approving the selection of, and authorizing payments to, the consultants to direct corrupt payments to Indonesian officials. Hoskins was convicted after trial of six counts of violating the FCPA, one count of conspiracy to violate the FCPA, three counts of money laundering, and one count of conspiracy to commit money laundering. In granting Hoskins’ motion for a judgment of acquittal of the FCPA charges, the district court concluded that the evidence could not establish the existence of an agency relationship between Hoskins and Alstom U.S. The district court distinguished evidence that Alstom U.S. controlled the overall project of hiring consultants from evidence that Alstom U.S.

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controlled the actions of Hoskins himself, concluding that only the latter would establish FCPA liability in the circumstances. In so holding, the district court focused on the absence of facts that typically establish an agency relationship, such as the right to terminate the arrangement with Hoskins. Separately, the district court denied Hoskins' motion for acquittal with respect to the four counts of money laundering charges.

BACKGROUND

Hoskins was indicted in 2013 based on allegations that Alstom U.S. had retained consultants to bribe Indonesian officials to secure a \$118 million power supply contract with the Indonesian government for Alstom and its subsidiaries. Hoskins was an employee of a United Kingdom subsidiary of Alstom from 2002 to 2009, and was not an employee of Alstom U.S. The indictment alleged that although Hoskins did not travel to the United States, he was responsible for approving and authorizing the payments to the consultants, and he made telephone calls and sent emails to United States-based co-conspirators in furtherance of the scheme.¹

On August 24, 2018, the Second Circuit ruled that a foreign national who does not otherwise fall under the categories of persons directly covered by the FCPA cannot be held liable for violating the statute under conspiracy liability theories, and thus that Hoskins could not be liable for violating or conspiring to violate the FCPA without a showing that he was acting as an employee, officer, director, or agent of Alstom U.S. when he engaged in the prohibited conduct. The Second Circuit permitted the government to pursue liability in further proceedings under the theory that Hoskins was acting as an agent of Alstom U.S.²

At the conclusion of trial in the district court, on November 8, 2019, the jury found Hoskins guilty on one count of conspiring to violate the FCPA, six counts of violating the FCPA, three counts of money laundering, and one count of conspiracy to commit money laundering. The jury acquitted Hoskins of one count of money laundering. Hoskins filed a motion for acquittal of all counts.³

THE DISTRICT COURT DECISION

On February 26, 2020, Judge Arterton granted Hoskins' motion for a judgment of acquittal as to the seven counts of violating and conspiring to violate the FCPA based on the lack of evidence that Hoskins acted as an agent of Alstom U.S.⁴

The district court relied on traditional elements of agency law from non-FCPA contexts to evaluate the existence of a principal-agency relationship: (1) the manifestation by the principal that the agent has been engaged to act on the principal's behalf; (2) the agent's acceptance of the undertaking; and (3) the understanding of the parties that the principal is to control the undertaking.⁵ In its decision, the court focused on the evidence supporting the third element, namely whether Alstom U.S. controlled the actions of Hoskins.⁶ In describing the requisite degree of control, the court explained that no agency relationship exists if the putative principal lacks interim control over the alleged agent's performance of tasks beyond

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the initial specifications, even where the potential principal exercises control over several important aspects of a transaction.⁷

The government argued that Hoskins acted under the control of Alstom U.S. with respect to approving and authorizing payments to consultants, because Alstom U.S. employees provided direction and feedback to Hoskins, and because Alstom U.S. employees dictated the terms upon which consultants would be hired.⁸ At trial, the government introduced emails indicating that Hoskins was doing work on behalf of Alstom U.S. and taking direction from Alstom U.S. employees, as well as testimony suggesting that Hoskins had followed the directives of Alstom U.S. employees.⁹

Hoskins argued that corporate records demonstrated that Alstom U.S. did not have the right to exercise control over him, that he had approval authority in connection with hiring consultants, and that his reporting line was independent of the reporting lines of Alstom U.S. employees.¹⁰

The court acknowledged that the government had introduced evidence supporting the conclusion that Alstom U.S. controlled the hiring of consultants for the project and that Hoskins had followed instructions received from Alstom U.S. employees.¹¹ The court distinguished this showing that Alstom U.S. controlled the project, however, from that required to establish an agency relationship, namely that Alstom U.S. controlled Hoskins' actions.¹² In this regard, the court found that the government's evidence was insufficient to establish that Hoskins agreed or understood that Alstom U.S. would control his actions on the project, or that Alstom U.S. actually had the authority or ability to control his actions.¹³ Additionally, the court stated that the typical factors indicative of a principal-agency relationship were not present—in particular the right of Alstom U.S. to terminate Hoskins' role in approving and authorizing payments.¹⁴

Separately, the district court denied Hoskins' motion for a judgment of acquittal as to three counts of money laundering and one count of conspiracy to commit money laundering.¹⁵ Based on both testimony and emails introduced at trial by the government, the court found that the jury determination that Hoskins was aware the funds in question would pass through the United States was reasonable.¹⁶ The court also rejected Hoskins' arguments challenging venue in the District of Connecticut.¹⁷

IMPLICATIONS

The judgment of acquittal of the FCPA counts reinforces the significance of the Second Circuit's decision in *Hoskins*, which put limitations on the extraterritorial reach of the FCPA in the conspiracy context. The district court's decision makes clear that the government will not be able to limit the practical effects of the Second Circuit's decision simply by making charging decisions that invoke an expansive view of the existence of an agency relationship. Instead, courts following *Hoskins* will engage in a fact-intensive inquiry to determine whether an agency relationship existed by examining whether the alleged principal had the right to control the defendant's actions. In cases involving foreign resident defendants who do not enter the United States, factors relating to corporate separation of affiliates and the division of responsibilities

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and authority between employees of United States and foreign subsidiaries are relevant—and may prove to be important—considerations.

Because the inquiry is fact-intensive, however, courts addressing facts that meaningfully differ from those in *Hoskins* may sustain FCPA liability for foreign residents on the basis of an agency relationship. Additionally, the District Court’s denial of Hoskins’ motion for acquittal with respect to money laundering charges demonstrates the expansive reach of United States money laundering laws, which continue to provide a flexible, alternative means by which the government can prosecute foreign nationals alleged to have been involved in corrupt payments.

It remains to be seen whether other courts will follow the Second Circuit’s requirement that a foreign national located outside the United States may not be exposed to FCPA-related liability absent proof that the individual was acting as an employee, officer, director, or agent of a United States entity when engaged in the allegedly illegal conduct. One court has already explicitly declined to follow *Hoskins*—in late June 2019, in *United States v. Firtash*, the Hon. Rebecca R. Pallmeyer of the United States District Court for the Northern District of Illinois held that “controlling Seventh Circuit case law declines to impose the requirement recognized in *Hoskins*” that “even when charged via the federal conspiracy or complicity statutes, ‘foreign nationals may only violate the [FCPA] outside the United States if they are agents, employees, officers, directors, or shareholders of an American issuer or domestic concern.’”¹⁸ In addition, how prosecutors and defense counsel react in other cases to the rulings in *Hoskins* will likely help determine whether those rulings engender or reflect significant limitations in the scope of FCPA-related liability for non-United States actors. At a minimum, it should be expected that FCPA-related prosecutions of foreign nationals employed by companies with United States affiliates will include significant focus on parent-subsidary interactions and associations and traditional elements of principal-agency relationships.

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ENDNOTES

- 1 *United States v. Hoskins*, 902 F.3d 69, 72-74 (2d Cir. 2018).
- 2 *Id.* at 71. For further information on the decision by the Second Circuit, please see our publication dated August 27, 2018, *United States v. Hoskins—Second Circuit Rejects DOJ’s Attempt to Expand the Extraterritorial Reach of the FCPA Through Conspiracy and Complicity Doctrines*; <https://www.sullcrom.com/files/upload/SC-Publication-Second-Circuit-Limits-Extraterritorial-Reach-of-FCPA.pdf>.
- 3 *United States v. Hoskins*, 3:12-cr-99238-JBA, 2020 WL 914302, at *1 (D. Conn. Feb. 26, 2020).
- 4 *Id.* at *14.
- 5 *Id.* at *2-3.
- 6 *Id.* at *3-9.
- 7 *Id.* at *3.
- 8 *Id.* at *6-7.
- 9 *Id.* at *6-8.
- 10 *Id.* at *4-6.
- 11 *Id.* at *7.
- 12 *Id.* at *7.
- 13 *Id.* at *7-8.
- 14 *Id.* at *8-9.
- 15 *Id.* at *11 *14.
- 16 *Id.* at *11.
- 17 *Id.* at *11-13.
- 18 *United States v. Firtash*, 392 F. Supp. 3d 872, 889-92 (N.D. Ill. 2019).

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