

The implications of the Second Circuit's ruling in Hoskins

30 August 2018



Cadwalader partners Jodi Avergun and Joseph Moreno

The US Court of Appeals for the Second Circuit handed the Department of Justice a rare defeat on 24 August by holding that prosecutors could not assert conspiracy or aiding and abetting liability to effectively circumvent the jurisdictional language of the Foreign Corrupt Practices Act.

In *United States v Hoskins*, the Second Circuit grappled with whether a foreign national who could not be charged as a principal for violating the FCPA could be guilty as a co-conspirator or an accomplice – a strategy the DOJ has pursued

in past cases and asserted in its published guidance. In reviewing the language of the FCPA as well as its legislative history, the Second Circuit affirmed the decision of the district court and found that the DOJ's overly broad jurisdictional argument was beyond what the US Congress intended for the statute.

While the Second Circuit nonetheless permitted the case to proceed on an agency theory of liability, the ruling may prompt defendants that are not clearly subject to the FCPA, such as unaffiliated third parties operating outside the United States, to push back against aggressive prosecutions that for decades have largely gone unlitigated and therefore unchecked by the courts.

The DOJ's case against Hoskins

Lawrence Hoskins, a British national, lived in France while working for a UK subsidiary of Alstom SA, a French multinational that provides power and transportation services.

According to the DOJ, between 2002 and 2009, individuals associated with Alstom and its US subsidiary, Alstom Power Inc (Alstom US) retained and paid two consultants to bribe government officials in Indonesia to help secure a \$118 million energy contract.

In its indictment of Hoskins on bribery and money laundering charges, the DOJ asserted that he was one of several individuals within Alstom responsible for approving the selection of, and the payments to, the two consultants and knew that a portion were intended as bribes.

At least some of the funds used to make the bribe payments were from US bank accounts, and several executives of Alstom US held meetings within the United States to discuss the scheme. According to the DOJ, while Hoskins never travelled to the United States during the relevant period he did communicate with US-based colleagues regarding the scheme via telephone and email.

The DOJ charged Hoskins under two provisions of the FCPA. First, the DOJ charged Hoskins with conspiracy to violate the FCPA both as an agent of Alstom US, and independently as a foreign person who aided and abetted violations of the FCPA by Alstom US and its employees. This theory implicated both the provision of the FCPA applicable to US domestic concerns and that which applies to foreign persons who further a corrupt scheme while present in the United States. Second, the DOJ charged Hoskins with substantive violations of the FCPA as an agent of a US company, and by aiding and abetting that company.

The district court dismissed portions of the indictment to the extent they charged Hoskins with conspiring to violate the FCPA. The court found that prosecutors could not charge a party with conspiracy to violate a statute that it could not directly violate. Both parties appealed the decision.

Second Circuit rejects conspiracy theories

In examining the jurisdictional bases for the FCPA, the Second Circuit revisited the statutory language and reiterated it as follows:

- American citizens, nationals and residents, regardless of whether they violate the FCPA domestically or abroad;

- Most American companies, regardless of whether they violate the FCPA domestically or abroad;
- Agents, employees, officers, directors and shareholders of most American companies, when they act on the company's behalf, regardless of whether they violate the FCPA domestically or abroad;
- Foreign persons (including foreign nationals and most foreign companies) not within any of the aforementioned categories who violate the FCPA while present in the United States.

In its analysis, the Second Circuit reaffirmed the basic principle that where a crime is so defined that only certain categories of persons may commit the offence through their own acts, persons not within those categories can be guilty of conspiring to commit the crime or guilty of the substantive crime itself as an accomplice. However, it also noted that the principle is subject to exception in cases where a legislative scheme makes clear that conspiracy and complicity liability do not apply. The Second Circuit held that the FCPA contains just such a scheme, in which the carefully tailored text was very clear as to the extent of its jurisdiction.

First, the Second Circuit noted that none of the three operative provisions of the FCPA assign liability to persons in Hoskins's position – non-resident foreign nationals, acting outside US territory, who lack an agency relationship with a US person and who are not officers, directors, employees or shareholders of US companies. The circuit court found that the specificity of the FCPA as to what categories of persons to whom it applies indicates that the omission of others was not an inadvertent oversight but rather “a limitation created with surgical precision to limit its jurisdictional reach.”

In addition, the Second Circuit's review of the FCPA's legislative history led it to find that the law's extraterritorial jurisdiction provisions were carefully crafted to address the potential overreach and conflict such provisions can cause in terms of international relations. This history indicated that earlier drafts of the FCPA relied on conspiracy and complicity theories to charge employees of public companies, but that language was replaced because of jurisdictional concerns. As a result, the Second Circuit held that Congress acted specifically to limit the FCPA's reach and clearly intended to omit from its jurisdiction a foreign national who acts outside the United States but not on behalf of an American person or company as an officer, director, employee, agent or shareholder.

Finally, the Second Circuit looked at the 1998 amendments to the FCPA, which expanded liability to foreign persons who committed acts within the United States, asserted jurisdiction to US companies and nationals bribing persons wholly outside the United States, and created new criminal penalties for foreign nationals. However, the Second Circuit noted that the 1998 amendments again made clear which specific categories of foreign nationals were covered under the FCPA, and made no mention of broader liability based on conspiring or aiding and abetting an offence. The Second Circuit took this as further evidence of an affirmative decision by Congress to leave foreign nationals outside the FCPA when they do not act as agents, employees, directors, officers or shareholders of a US issuer or domestic concern, and when they operate outside US territory.

The appeals court also found that the DOJ failed to establish Congress's intent to allow conspiracy and complicity liability to broaden the FCPA's extraterritorial reach. Looking to *RJR Nabisco Inc v European Cmty*, the Second Circuit deferred to the principle that courts will not apply a US law extraterritorially unless "the affirmative intention of the Congress [is] clearly expressed." In *RJR Nabisco*, the US Supreme Court laid out a framework for discerning and interpreting extraterritorial jurisdiction that looked to the terms of a statute and an analysis of how such jurisdiction would apply. Here, the Second Circuit found that the FCPA's express inclusion of extraterritorial jurisdiction in certain provisions contradicted the notion that it should be implicitly expanded through conspiracy and complicity theories in other situations.

Primary liability under agency theory upheld

Despite this setback for the DOJ, the Second Circuit ruled in favour of the prosecution in finding that Hoskins could be found guilty for substantive violations of the FCPA as an agent of a US company. While Hoskins was never present in the United States, the court held that the government would be permitted to argue that Hoskins, as an agent of the US subsidiary, conspired with employees and other agents of Alstom US and with other foreign nationals who were present in the United States. The case was thereby remanded on the open issues.

Why the *Hoskins* decision matters

The initial beneficiaries of the *Hoskins* decision are likely to be foreign-based joint venture partners of, or consultants to, US companies or their foreign subsidiaries who act solely outside the United States. However, its longer-term impact on how the DOJ prosecutes foreign bribery offences against individual and corporate defendants remains to be seen.

One possibility is that the DOJ will be forced to spend more effort establishing the basis for an agency relationship for non-US defendants – an issue that may already have been impacted by developments in the *Hoskins* case. In *United States v Rolls-Royce plc*, the

government alleged that Rolls-Royce, a UK engineering company, paid bribes to a government official in Kazakhstan to win a \$145 million contract to supply equipment and services for the construction of a gas pipeline from Kazakhstan to China. In a related case against an employee of Rolls-Royce's Dutch subsidiary, *United States v Zuurhout*, the DOJ's criminal charge only alleged in the most conclusory fashion that the defendant was an agent of a domestic concern, and the DOJ did not charge him with a substantive FCPA violation.

However, the DOJ subsequently charged a similarly situated defendant in *United States v Finley* with an FCPA conspiracy charge and a substantive violation alleging the defendant was an agent of a domestic concern – namely the US indirect subsidiary of Rolls-Royce.

Another possibility is that, rather than engaging in legal contortions to allege an agency relationship, the DOJ will use money laundering and other statutes that can adequately address bribery charges. For example, in its superseding indictment filed in May 2018 against additional alleged participants in the Rolls-Royce scheme, the DOJ declined to bring FCPA charges against two foreign nationals who worked for the technical advisor to the state owned enterprise and who participated in channeling the bribe payments to government officials, opting instead for money laundering charges. The federal money laundering statute has extraterritorial application and does not exempt any particular class of defendant from punishment. In addition, the FCPA is an offence that is specifically enumerated in the money laundering statute, as if the financial transaction at issue is intended to promote or conceal, it would violate the law.

The *Hoskins* decision may also accelerate the trend, as seen in *Rolls-Royce*, *United States v VimpelCom Ltd*, and *United States v Keppel Offshore & Marine Ltd*, of the DOJ partnering with and assisting foreign law enforcement agencies to pursue their own bribery prosecutions against non-US nationals acting outside the United States. Each case generated significant financial settlements for the foreign regulators – which are certainly an incentive to aggressively pursue such a strategy going forward.

As for Hoskins himself, the case against him continues. While the case is undoubtedly a win for his lawyers and the broader community of FCPA practitioners, it might not make much difference to him. The DOJ has alleged he is an agent of a domestic concern, and that, as such, he conspired with others to violate the FCPA. Before it will be permitted to introduce evidence of the conspiracy, the prosecution must establish the facts of Hoskins's agency and the jury will be required to find that he was an agent of Alstom US. This will likely not be an insurmountable hurdle for the DOJ to overcome, and a jury will probably not ultimately decide the case differently because of what may be viewed in their eyes as a legal technicality.