WILMERHALE

Second Circuit Limits Reach of FCPA's Anti-Bribery Provisions Charged Under Agency Principles

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Introduction and Executive Summary

On August 12, 2022, the US Court of Appeals for the Second Circuit issued another decision in a long-running criminal action that holds significant implications for the reach of the US Foreign Corrupt Practices Act (FCPA) over foreign individuals and companies. In its second opinion in a case spanning approximately nine years, the Second Circuit was asked to determine the reach of a provision of the FCPA that renders unlawful certain acts by an "agent" of "a domestic concern." The Second Circuit held that Lawrence Hoskins, a foreign national who previously worked for a UK subsidiary of Alstom S.A., a global corporation headquartered in France, was not acting as an "agent" of a separate US subsidiary of Alstom S.A. that hired consultants to bribe Indonesian government officials. The Second Circuit's decision in *United States v. Hoskins,* ---F.4th---, 2022 WL 330357 (2d Cir. Aug. 12, 2022), will likely spur federal authorities to place renewed focus on gathering and assessing evidence associated with the fact-intensive inquiry required to establish agency in applicable cases. Companies and individuals facing scrutiny under an agency theory should closely evaluate the evidentiary record on agency and push back on broad-brush government arguments. The *Hoskins* decision also serves as a reminder to companies to consider the structure and substance of their relationships with subsidiary companies, subsidiary employees, and other third parties that may expose the company to liability when those entities and individuals are determined to be acting as agents of the company.

Legal Background

The anti-bribery provisions of the FCPA generally prohibit "issuers" (15 U.S.C. § 78dd-1), "domestic concerns" (Section 78dd-2), certain enumerated individuals and entities acting on their behalf, and

other persons who take action in furtherance of a bribery scheme while located within the United States (Section 78dd-3) from bribing foreign government officials to obtain or retain business.[1] As is relevant to the *Hoskins* decision, under Section 78dd-2 in particular, the US Department of Justice (DOJ) has jurisdiction to prosecute domestic concerns (i.e., US persons or entities) or any "officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern."[2]

A Protected Legal Battle and a Convoluted Procedural Posture

The case against Lawrence Hoskins is only one (long-running) chapter in a broader investigation into violations of the FCPA by French transportation and power company Alstom S.A. Following a multiyear investigation by the DOJ, Alstom S.A. pleaded guilty in 2014 to violating the FCPA in what was then the "[l]argest-ever foreign bribery resolution with the Department of Justice."[3] In connection with its investigation of Alstom, in 2013, the DOJ charged Hoskins, a UK citizen who previously worked for a UK subsidiary of Alstom S.A., with, among other charges, (1) substantive FCPA charges of Section 78dd-2 (American companies and persons), in which it was alleged that he was acting as an agent of a separate, US-based Alstom subsidiary, Alstom Power, Inc. (Alstom US),[4] and (2) conspiring to violate Section 78dd-2 and Section 78dd-3 (acts taken while on US soil), both as an agent of Alstom US and as a result of his allegedly conspiring with others who fell within the categories of individuals and entities enumerated within Section 78dd-2 and Section 78dd-3 of the FCPA.[5] The DOJ alleged that Hoskins, as an agent of Alstom US, worked with his alleged co-conspirators to retain two consultants to bribe Indonesian officials in order to help secure a $118 million contract to build power stations for Indonesia's state-owned electricity company.[6]

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[1] 15 U.S.C. § 78dd-1 (issuers); 15 U.S.C. § 78dd-2 (domestic concerns); 15 U.S.C. § 78dd-3 (other persons acting within the United States).
[2] *See id*.
[3] *See United States v. Alstom S.A.*, No. 3:14-CR-00246-JBA (D. Conn. Dec. 22, 2014); *see also* US Department of Justice Press Release No. 14-1448: Alstom Pleads Guilty and Agrees to Pay $772 Million Criminal Penalty to Resolve Foreign Bribery Charges (Dec. 22, 2014), https://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery.
[4] These counts also alleged that Hoskins aided and abetted a domestic concern. *See United States v. Hoskins*, 902 F.3d 69, 73 (2d Cir. 2018).
[5] *See United States v. Hoskins*, --- F.4th ----, 2022 WL 3330357, at *3 (2d Cir. Aug. 12, 2022) [hereinafter, *Hoskins*]; *see also United States v. Hoskins*, No. 3:12CR238 (JBA), 2016 WL 1069645, at *1 (D. Conn. Mar. 16, 2016). In total, the government brought 12 counts against Hoskins, including a count of conspiring to violate the FCPA and six counts of substantive violations of the FCPA. *See United States v. Hoskins*, 902 F.3d at 72-73. Hoskins was also charged with conspiring to launder money pursuant to 18 U.S.C. § 1956(h) and four counts of substantive money laundering. *See Hoskins*.
[6] *United States v. Hoskins*, 902 F.3d at 72; *see also* US Department of Justice Press Release No. 13-862: Former Senior Executive of French Power Company Charged in Connection with Foreign Bribery Scheme

Hoskins moved to dismiss the FCPA conspiracy count, arguing that as a foreign national working for a foreign Alstom subsidiary who had no ties to the United States, he was not one of the "narrowly-circumscribed groups of people" enumerated in the FCPA's categories of defendants and that the government could not circumvent this statutory limitation through the use of a conspiracy charge.[7] In 2015, Judge Janet Bond Arterton of the US District Court for the District of Connecticut granted Hoskins's motion in part, holding that Hoskins could only be charged pursuant to accomplice liability if he could be charged under the FCPA with substantive violations of the statute itself. Judge Arterton thus dismissed the conspiracy count to the extent that it alleged Hoskins conspired to violate Section 78dd-2 without demonstrating that Hoskins himself fell into one of the categories of defendants enumerated by the FCPA, though Judge Arterton declined to dismiss the conspiracy charge to the extent it alleged Hoskins acted as an agent of a domestic concern. Judge Arterton likewise dismissed the conspiracy charge to the extent it alleged Hoskins conspired to violate Section 78dd-3, as Hoskins had not entered the United States during the relevant period and thus could not be charged with substantive FCPA violations under this provision.[8]

The decision was appealed to the Second Circuit, which, among other things, affirmed the district court's ruling that the government could not charge Hoskins with conspiracy to violate Section 78dd-2 or Section 78dd-3 absent it being established that he fell within one of the categories of individuals enumerated in the FCPA (i.e., the DOJ needed to establish that Hoskins was an agent of Alstom US, a domestic concern).[9]

Following remand, a jury convicted Hoskins of the FCPA conspiracy charge, six counts charging substantive violations of the FCPA, and four money laundering and conspiracy to commit money laundering charges.[10] Hoskins then moved for a judgment of acquittal, arguing that he was entitled to acquittal on the FCPA counts as he was not acting as an agent of Alstom US. Hoskins also moved for acquittal of the money laundering counts. In a rare decision, Judge Arterton overturned the jury's verdict on the FCPA charges, holding that the government had not presented sufficient evidence to establish an agency relationship between Hoskins and Alstom US, while denying Hoskins's motion for a judgment of acquittal on the money laundering and conspiracy to commit money laundering charges. The DOJ appealed Judge Arterton's ruling with respect to the sufficiency of the evidence as to an agency relationship between Hoskins and Alstom US, while Hoskins cross-appealed on other issues related to the Speedy Trial Act and Sixth Amendment, the court's jury instruction regarding withdrawal from a conspiracy, and whether the District of

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(July 30, 2013), https://www.justice.gov/opa/pr/former-senior-executive-french-power-company-charged-connection-foreign-bribery-scheme.

[7] *United States v. Hoskins*, 902 F.3d at 73.

[8] *United States v. Hoskins*, 123 F. Supp. 3d 316, 327 (D. Conn. 2015), *aff'd in part, rev'd in part*, 902 F.3d 69 (2d Cir. 2018).

[9] *United States v. Hoskins*, 902 F.3d at 72-73, 97-98.

[10] *Hoskins*, --- F.4th ----, 2022 WL 3330357, at *3; *see also United States v. Hoskins*, No. 3:12CR238 (JBA), 2020 WL 914302, at *1 (D. Conn. Feb. 26, 2020), *aff'd*, --- F.4th ----, 2022 WL 3330357 (2d Cir. Aug. 12, 2022).

Connecticut was the appropriate venue for alleged money laundering offenses. A three-judge panel of the Second Circuit heard oral arguments on August 17, 2021.

The Second Circuit Speaks (Again)

Slightly less than a year after hearing oral arguments, the Second Circuit issued its second opinion in the matter. Noting that "[t]he crux of this appeal is whether there was an agency relationship between Hoskins and [Alstom US]," a three-judge panel of the Second Circuit answered this question in the negative and upheld Judge Arterton's acquittal of Hoskins on the FCPA charges.[11] In its split decision on this issue, a majority of the panel provided valuable guidance on the key elements of an agency relationship—guidance that holds significant implications for future FCPA actions.

The majority began its analysis by confirming a basic premise agreed upon by both parties—namely, that the "common law meaning of agency" applied for the purposes of the appeal.[12] Drawing on Second Circuit precedent, the majority explained that "[t]he three elements necessary to an agency relationship are (1) a manifestation by the principal that the agent will act for him; (2) acceptance by the agent of the undertaking; and (3) an understanding between the parties that the principal will be in control of the undertaking."[13]

After considering the record before it, the majority rested its decision largely on Alstom US's lack of control over Hoskins. The majority acknowledged there was evidence that Hoskins "collaborated with and supported" Alstom US and an Alstom US employee centrally involved in the bribery scheme, Fred Pierucci,[14] because Hoskins and his alleged co-conspirators at Alstom US took various actions in furtherance of hiring the consultants who, in turn and in furtherance of their consultant agreements, bribed Indonesian officials. For example, the majority noted that Hoskins took direction from Pierucci and others at Alstom US and was asked by Pierucci to execute certain tasks, including issuing revised consulting agreements to the two consultants.[15] Hoskins also met with the consultants and was involved in discussions regarding the commissions the consultants would receive.[16] Further, Hoskins proposed changes to the payment schedule for one of the

[11] *Hoskins*, --- F.4th ----, 2022 WL 3330357, at *1, 5.
[12] *Id*. at *5. Notably, in a separate opinion concurring and dissenting in part (discussed further below), Judge Raymond Lohier questioned the government's agreement to using the common-law definition of agency, noting that "the wisdom of" this "concession" was "debatable." *Id*. at *13 (Lohier, J., concurring and dissenting).
[13] *Id*. (quoting *Johnson v. Priceline.com, Inc.*, 711 F.3d 271, 277 (2d Cir. 2013)).
[14] At the time, Pierucci was the head of boiler sales worldwide for Alstom and an Alstom US executive. *See id.* at *2-5; *see also United States v. Hoskins*, 2020 WL 914302, at *6 n.4, *aff'd*, --- F.4th ----, 2022 WL 3330357 (2d Cir. Aug. 12, 2022).
[15] *Hoskins*, --- F.4th ----, 2022 WL 3330357, at *2-3.
[16] *Id*.

consultants and asked Pierucci for approval of these new terms, and otherwise acted as an intermediary between Alstom US personnel and senior personnel at Alstom's Indonesia business.[17]

The government argued that Hoskins's support of Alstom US made Hoskins an agent of the US subsidiary. Not so, said the majority. Instead, the majority concluded that the evidence failed to indicate that Alstom US "actually controlled Hoskins's actions."[18] Crucially, the majority observed that "Hoskins and his [Alstom US] counterparts operated under separate, parallel employment structures"; Hoskins was employed by Alstom's UK subsidiary but assigned to work in the "International Network" department of Alstom's French subsidiary, which served as an "internal-facing 'support organization' that provided operational business units with support 'on an as-needed basis.'"[19] The majority observed that Pierucci had not hired Hoskins, could not fire him, and did not set or influence Hoskins's compensation.[20] This "lack of control," in turn, was "fundamental to the question of whether Hoskins was an agent" because, the majority observed (quoting the Restatement of Agency), one of the chief justifications for a principal's accountability for his agent's actions is the "ability to select and control the agent and to terminate the agency relationship."[21]

The majority further observed that the relationship between Hoskins and Alstom US lacked "any indication that Hoskins had any authority to act on [Alstom US's] behalf."[22] The majority explained that there was no evidence Hoskins was authorized to enter into agreements on behalf of Alstom US; indeed, the government itself noted that Hoskins could not independently hire a consultant without Alstom US's instruction. This fact, the majority explained, was inconsistent with an agency relationship, under which an agent could "bind principals to certain legal commitments."[23] The record further lacked evidence that Alstom US could "'revoke' any authority it purportedly gave to Hoskins, or even do anything to control Hoskins's actions."[24]

While the majority was clearly dubious of Hoskins's authority to act for Alstom US or ability to bind Alstom US to a particular course of action, the majority ended its analysis by returning to the fundamental issue of control. Acknowledging that "there is some evidence that Hoskins supported [Alstom US] in his working relationship," the majority nonetheless concluded this evidence was insufficient to establish Alstom US "exercised control over the scope and duration of its relationship with Hoskins."[25] Without this control, the majority concluded, there could be no finding of agency.

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[17] *Id*.
[18] *Id*. at *6.
[19] *Id*. at *2, 6.
[20] *Id*. at *6.
[21] *Id*. (quoting Restatement (Third) of Agency § 1.01 cmt. c).
[22] *Id*.
[23] *Id*.
[24] *Id*.
[25] *Id*. at *7.

After dispensing with the government's appeal, the majority moved on to consider Hoskins's cross-appeals and affirmed the district court's ruling denying Hoskins's motion to dismiss the indictment under the Speedy Trial Act and on Sixth Amendment grounds. The majority likewise dismissed Hoskins's contentions that the district court committed reversible error in its jury instructions on withdrawal from a conspiracy and on venue.

Notably, the panel was not of one mind on all issues raised by the parties' appeals. Judge Lohier wrote separately to concur with the majority that the district court did not err in its analysis of the Speedy Trial Act and Sixth Amendment issues, as well as its jury instructions. But breaking from the majority, Judge Lohier explained that he would reverse the district court's acquittal of Hoskins on agency grounds.

While Judge Lohier acknowledged that Alstom's corporate organizational structure "favors the majority's account" in part because Hoskins did not formally report to Alstom US, he observed that the organizational structure masked "the reality of the relationship between Hoskins and [Alstom US] on the ground."[26] Judge Lohier noted that in his view, to prove an agency relationship existed, the government need not prove that Alstom US "could cut Hoskins out of the scheme entirely" but rather need only make the more limited showing that Alstom US could "terminate his involvement—and thus revoke his authority—at least in part."[27] Judge Lohier explained that evidence indicating that Hoskins's work for Alstom US was performed on an "as requested" basis could support an agency finding, as it was up to subsidiaries like Alstom US to initiate the agency relationship with Hoskins, and Alstom US thus had authority to revoke Hoskins's authority to work on Alstom US's behalf regardless of Alstom's formal organizational structure.[28] Judge Lohier acknowledged that the evidence of an agency relationship was "slim," but it was sufficient, in his mind, to support the jury's verdict on this issue.[29]

Implications for the Future of Enforcement

While the full effects of this decision will continue to be debated, the Second Circuit's opinion may give federal enforcement authorities pause before they charge individuals with violations of the FCPA's anti-bribery provisions under an agency theory. The *Hoskins* decision is also likely to spur federal authorities to place renewed focus on gathering evidence to support the fact-intensive inquiry required to assess whether a US company exerts sufficient control over alleged agents, be they individuals or other corporate entities. As the second edition of the Resource Guide to the US Foreign Corrupt Practices Act (published by the Securities and Exchange Commission (SEC) and DOJ in 2020) makes clear, the DOJ and SEC acknowledge that "control" is the "fundamental

[26] *Id*. at *14 (Lohier, J., concurring and dissenting).
[27] *Id*. (Lohier, J., concurring and dissenting).
[28] *Id*. at *15 (Lohier, J., concurring and dissenting).
[29] *Id*. (Lohier, J., concurring and dissenting).

characteristic" of an agency relationship, an analysis informed both by the "formal relationship between the parent and subsidiary" and by the "practical realities" of how these entities "actually interact."[30] This already fact-intensive inquiry has been made more challenging by virtue of the Second Circuit's decision in *Hoskins*. Of particular note is the Second Circuit's arguably short shrift of the "practical realities" the SEC and DOJ stress in the Resource Guide; Judge Lohier's dissent on this issue and his view that Alstom's organizational structure masked the realities of the agency relationship "on the ground" demonstrates that these "on the ground" interactions failed to carry the day.

The Second Circuit's decision is all the more notable given two separate hallmarks of the FCPA enforcement space—namely, the relative dearth of FCPA case law (especially appellate case law) and the increasing use of agency principles by the DOJ and SEC to charge parent organizations based on actions partially or wholly undertaken by their subsidiaries. Numerous FCPA resolutions have included bribery charges against a parent organization under the FCPA based on the actions of the parent's alleged agents, including in some cases its wholly owned foreign subsidiaries and subsidiary employees.[31] The *Hoskins* ruling may have significant implications for companies with foreign subsidiary organizations, as the agency analysis undertaken in *Hoskins* may serve as a check on the DOJ's and SEC's ability to charge FCPA violations based on actions undertaken wholly at a foreign subsidiary organization. Though the *Hoskins* majority's agency analysis focuses on factors more applicable to an analysis of the relationship between a corporate entity and an individual, the majority's attention to the organizational structure of Alstom's various subsidiaries and its careful analysis of traditional agency law principles may serve as a warning to the SEC and DOJ that the organizational and reporting structures between a parent company and a subsidiary, affiliate or joint venture outside the United States are ignored or discounted at the government's peril. *Hoskins* should at a minimum allow corporations and individuals to push back on broad-brush government arguments regarding agency.

[30] US Department of Justice and US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act 28 (2020), https://www.justice.gov/criminal-fraud/file/1292051/download.
[31] *See, e.g.*, *In the Matter of United Indus. Corp.*, Exchange Act Release No. 60005 (May 29, 2009) (Order Instituting Cease-and-Desist Proceedings); *see also In the Matter of Alcoa Inc.*, Exchange Act Release No. 71261 (Jan. 9, 2014) (Order Instituting Cease-and-Desist Proceedings); *In the Matter of PTC Inc.*, Exchange Act Release No. 77145 (Feb. 16, 2016) (Order Instituting Cease-and-Desist Proceedings); *United States v. Telefonaktiebolaget LM Ericsson*, No. 19-CR-00884 (S.D.N.Y. Nov. 26, 2019) (Deferred Prosecution Agreement, Att. A at 1-2) ("Ericsson was a holding company operating worldwide through its subsidiaries and affiliated entities. The subsidiaries acted as divisions of the parent, rather than separate and independent entities."); *United States v. Stericycle, Inc.*, No. 22-CR-20156 (S.D. Fla. Apr. 14, 2022) (Deferred Prosecution Agreement, Att. A at 2-5).

Contributors

Jay Holtmeier
PARTNER

jay.holtmeier@wilmerhale.com
+1 212 295 6413

Kimberly A. Parker
PARTNER

kimberly.parker@wilmerhale.com
+1 202 663 6987

Christopher Cestaro
PARTNER

christopher.cestaro@wilmerhale.com
+1 202 663 6904

Erin G.H. Sloane
PARTNER

erin.sloane@wilmerhale.com
+1 212 295 6458

Claire Guehenno
COUNSEL

claire.guehenno@wilmerhale.com
+1 212 295 6254

Mike Romeo
SENIOR ASSOCIATE

mike.romeo@wilmerhale.com
+1 213 443 5319