When Is A State-Owned Entity An "Instrumentality?" My Answers Will Surprise You

I'm in the middle of the appeal that Joel Esquinazi filed with the 11th Circuit. Putting aside for a moment the two typos—very rare for an appellate brief—and the fact that the issue statements would make Bryan Garner vomit, the brief raises some interesting questions. I want to address one of these questions: what industries are susceptible to being accurately labeled "public services" that would implicate the prong of the "instrumentality" test?

And is there an area here where the DOJ could make our lives easier vis-a-vis including some of this in the upcoming Guidance?

Health Care. I'm losing this argument, I know. In my opinion, the DOJ should not be prosecuting payments to foreign doctors as FCPA violations. I could understand calling regional health departments (like in the Schering Plough case) foreign officials. Ministries of Health, fine. But doctors? Individual hospital administrators? I can't see it. Despite my training and experience in not being "US-centric" I admit to a certain US-flavored influence. Everyone is their own reasonable person, and my doctor isn't a government official. When I had surgery, that doctor wasn't a government official. When I was in France, and had to go to a doctor, that doctor wasn't a government official either.
Even if a doctor would normally fit the definition of a government official, we shouldn't be treating them that way. It's certainly not what the FCPA was designed to prohibit. I would like to see the DOJ abandon its series of medical devices cases. Paying a doctor to use one scalpel rather than another isn't an FCPA violation, or shouldn't be.

I recognize that I've lost this argument from a "government official" perspective. The test set out by the courts—adopting the real-world analysis always done by the DOJ—would support the legal finding underpinning the J&J case, the Smith & Nephew case, Biomet, and the others.

But there's a line between what the DOJ can legally do, and what they should do. There's a policy question here, and it's not where I want my tax dollars spent. If they want to charge these cases, use the Travel Act. And I think that companies shouldn't make these payments. That's not the question. The question is whether the FCPA Unit should be the one bringing these cases. I think not.

Telecommunications: I think that Esquinazi loses on the law. I think it's actually pretty clear that he does. His lawyers do the best they can with the facts they have, but it's a loser. As Tom and I spoke about, though, there's that damn "statement" or whatever, that says "no, Haiti Teleco isn't a government instrumentality," followed by the "clarification," which said that although the first statement is accurate, it's really not. That "clarification," in my opinion, proved Karl Marx right: "history repeats itself first as tragedy, second as farce."
Still, the 11th Circuit should affirm.

But again, let's move beyond the legal question. Is telecom something that the government should prosecute as FCPA violations? My gut says no. Maybe again it's a US bias. Verizon isn't government. Neither is Cablevision. I admit that in foreign countries, the phone system might be government run. But I think we can distinguish between government systems and private systems that have government involvement. Haiti Teleco might fit the legal definition, so we *can*charge FCPA violations. But we shouldn't. Unless we're dealing with actual government, let's not stretch things to include private telecom companies, even if government influenced.
I think the DOJ can make a policy statement without being seen as condoning bribery of Haiti Teleco and similar companies.

Oil & Gas: sorry, I think we're stuck with this one. I would extend this to pretty much any extractive industry. How a country mines, processes, and sells its natural resources is a purely government function. Even if it's a purportedly private company, I think we have to consider them government if they otherwise meet the legal definition.

Utilities: Water, gas, electricity, these are all things the government provides for its citizens. If a private company happens to be the intermediary, I have no problem if we charge their bribery as an FCPA violation.

Banking: Banks are not government. Even central banks. The function they perform is almost purely a commercial one. "Almost" because some banks also have national monetary policy control. Let's make a line between these kind of functions and the lending/borrowing function. The former is government, the latter isn't. I would also say that any government investment into the banking industry because of the financial crisis should be excluded from FCPA-based charges. Special circumstances are just that.

Entertainment: No. Not because Gerald and Patricia Green are innocent. They're not. But because we have better things do to with my tax dollars than prosecuting payments to film festival producers. I don't care if the payments were to the President of the country. No. Prosecuting bribery in the entertainment industry is like closing Rick's down because we're shocked, shocked, that there's gambling going on in this establishment. Bad? Yes. FCPA violations? Please.

China: Here's where things get interesting. Most companies I've spoken with take the approach of "everyone in China is a government official." This is an untenable, unfair, uncompetitive conclusion that companies have been forced into by the DOJ's position on state-owned entities. Let me be clear, because I think Mike Koehler's jaw is hanging wide open at that openly critical statement. I fully support and believe that state-owned entities can be "instrumentalities" of the government. I think efforts to "reform" the FCPA by taking that piece out are misguided (and that's a charitable adjective). But calling everyone in China a government official shows that despite a legal permissibility, we should rethink things from a policy perspective.

Unless clearly performing a public function like utilities etc., let's make life just a little easier for corporations, shall we? In fact, I wouldn't mind if the DOJ went further. Let them say that unless someone in China is actually a government worker, they're not going to charge an FCPA violation under the instrumentality theory. This isn't a legal matter, it's a policy decision. It would make life a LOT easier for corporations. And in my opinion, it would be the right call. The attitude—the culture, if you will—in China supports this kind of conclusion.

And here's where the DOJ can really surprise people with the guidance. I'd like to see something in there that says "although the DOJ can't condone illicit payments to any company, we won't charge FCPA violations for payments to hospitals, film festivals, doctors, telecom companies, or anyone in China not clearly government." They could even caveat it a little, if they wanted. But it would show the same kind of thoughtful approach to these questions that the DOJ expects from companies.

Because while I believe that companies mostly have this figured out, what they have figured out is how to conduct a fairly complicated analysis in every case. Companies spend a lot of time, for example, talking about whether RBS is government, or Bank of America, for that matter. AIG. Volvo. Just about everything Temasek invests in. And investments by the Saudi royal family via various sovereign wealth funds.

Rather than doing an analysis in every case, let's have the DOJ make the prosecutorial policy decisions that would make these analysis unnecessary. Guide us.