# In Blow to U.S. Government, Court Overturns Former Alstom Executive's FCPA Convictions

On February 26, 2020, a federal judge in Connecticut dealt yet another blow to the U.S. Department of Justice's (DOJ) aggressive approach to prosecuting foreign companies and individuals for overseas bribery. In a 29-page decision, U.S. District Court Judge Janet Bond Arterton held that prosecutors failed to prove beyond a reasonable doubt that former Alstom S.A. executive Lawrence Hoskins was an "agent" of a U.S. domestic concern and granted Hoskins's post-trial motion for acquittal on all seven counts relating to the Foreign Corrupt Practices Act (FCPA). The Judge denied the motion as to four money laundering counts.

DOJ had previously suffered a significant setback in the case when the U.S. Court of Appeals for the Second Circuit ruled that foreign nationals acting outside the physical territory of the United States cannot be prosecuted for violating the FCPA under aiding-and-abetting or conspiracy theories. The Second Circuit stated that "the FCPA clearly dictates that foreign nationals may only violate the statute outside the United States if they are agents, employees, officers, directors, or shareholders of an American issuer or domestic concern." *United States v. Hoskins*, 902 F.3d 69, 97 (2d Cir. 2018). Following this decision, the U.S. Government tried, and a jury ultimately convicted, Hoskins on the theory that—although he was a British national and former executive of a French company who operated outside the United States—he had acted as the agent of Alstom's U.S. subsidiary.

In overturning the jury's verdict on the FCPA charges, Judge Arterton concluded that while the Government demonstrated that the U.S. subsidiary had exercised authority over the process of hiring consultants for a project in Indonesia (which consultants Alstom allegedly used to bribe foreign officials in order to secure a contract), and that at times Hoskins assisted the U.S. entity in conducting that process, prosecutors had identified no evidence that the U.S. company "control[led] Mr. Hoskins's actions in a manner consistent with agency relationships." This decision, and the Second Circuit's earlier ruling, shows that DOJ's jurisdictional reach has its limits. On the other hand, it must be noted that the Government can and likely will appeal; that even if the acquittals are affirmed on the facts of this specific case, DOJ will still have the ability to prosecute foreign nationals for FCPA violations in other cases where agency can be shown; and that the money laundering convictions against Mr. Hoskins continue to stand. It is thus clear that U.S. prosecutors still have powerful tools at their disposal to go after non-U.S. persons accused of overseas corruption.

## I. Background

The FCPA's anti-bribery provisions make it a crime to corruptly pay, or offer, promise, or authorize a payment to a foreign government official in order to obtain or retain business. Under the language of the statue, this prohibition applies to three categories of individuals and entities:

1) Issuers of securities registered pursuant to 15 U.S.C. § 78*l* or required to file reports under Section 78*o*(d), or any officer, director, employee, or agent of such issuer, or any stockholder

acting on behalf of the issuer, using interstate commerce in connection with the payment of bribes, 15 U.S.C. § 78dd-1;

2) U.S. domestic concerns—defined as any U.S. citizen, national, or resident, or any company organized under the laws of the United States or that has its principal place of business in the United States—using interstate commerce in connection with the payment of bribes, 15 U.S.C. § 78dd-2; and

3) foreign persons or businesses taking acts to further certain corrupt schemes, including ones causing the payment of bribes, while present in the United States, 15 U.S.C. § 78dd-3.

While these statutory jurisdictional bases would appear to exclude non-resident foreign nationals operating exclusively outside of the United States, the Government long argued that the FCPA could reach such persons through the conspiracy and accomplice liability statutes. In other words, prior to *Hoskins*, DOJ aggressively asserted that literally anyone could be prosecuted under the FCPA, so long as it could be shown that the person or company aided-and-abetted or conspired with an individual or entity who fell within one of the three statutorily enumerated categories.

In July 2013, U.S. federal prosecutors utilized this expansive reading of U.S. jurisdiction to charge Lawrence Hoskins, a former Alstom Senior Vice President for the Asia Region, with conspiring with and aiding-and-abetting a domestic concern to violate the FCPA by approving and authorizing payments to consultants who were retained for the alleged purpose of paying bribes to Indonesian government officials in order to secure a contract. A year later, Hoskins moved to dismiss Count One of the Third Superseding Indictment, which charged him with conspiracy to violate the FCPA.[1] He argued that as a British citizen working in France at a French company, he did not fall under any of the statute's three specifically enumerated categories and was therefore exempt from liability.

## II. Second Circuit Decision

The District Court granted Hoskins's motion to dismiss the conspiracy count, holding that Congress did not intend to impose conspiracy or accomplice liability on non-resident foreign nationals who were not subject to direct liability. *Hoskins*, 123 F. Supp. 3d at 327. On appeal, the Second Circuit affirmed that the FCPA's plain language and legislative history affirmatively exclude foreign nationals from liability unless they commit an act in furtherance of a corrupt payment within the United States, and "that the government may not override that policy using the conspiracy and complicity rules." *Hoskins*, 902 F.3d at 95. The Court also held, however, that if the Government could prove that Hoskins acted as an "agent" of a domestic concern liable as a principal for the substantive FCPA counts, then "there is no affirmative legislative policy to leave his conduct unpunished, nor is there an extraterritorial application of the FCPA." *Id.* at 98. Accordingly, the case returned to the District Court to litigate the issue of agency.

[1] Hoskins had previously moved to dismiss the Second Superseding Indictment in its entirety. The Court, however, denied that motion because the indictment alleged that Hoskins worked as an agent of Alstom's U.S. subsidiary and "the existence of an agency relationship is a 'highly factual' inquiry" best left to the jury to decide. *United States v. Hoskins*, 123 F. Supp. 3d 316, 318 (D. Conn. 2015).

## III. Conviction and Post-Trial Acquittal on FCPA Counts

The case against Hoskins proceeded to trial in October 2019. In an effort to meet their burden of proving that Hoskins was an agent of a U.S. domestic concern, prosecutors introduced evidence that (1) Alstom's U.S. subsidiary controlled the "undertaking" of hiring consultants for the Indonesian project at issue, and (2) Hoskins assisted in those efforts by following the U.S. subsidiary's instructions regarding the hiring process. At the conclusion of the trial, the jury determined that Hoskins had acted as the U.S. entity's agent and found him guilty of violating the FCPA and money laundering.

In weighing Hoskins's post-trial motion for acquittal, or in the alternative for a new trial, Judge Arterton noted that "[t]he 'right of interim control' of the agent by the principal 'is what distinguishes an agency relationship from a mere contractual one.'" She further stated that "[e]ven where a purported principal 'exercise[s]' control' over several 'important' aspects of a transaction, no agency relationship has been established where he lacks interim control over how the purported agent performs the task 'beyond the initial specifications.'" Applying these principles, the Judge concluded that the Government's evidence—which merely demonstrated that the U.S. company had "authority to determine the terms upon which consultants would be hired and Mr. Hoskins's assistance in efforts to retain those consultants"—was insufficient to show that Alstom's U.S. subsidiary exercised interim control over Hoskins's actions. As Judge Arterton explained: "[T]he Court sees no evidence upon which a rational jury could conclude that Mr. Hoskins agreed or understood that API would control his actions on the Tarahan Project, as would be required to create an agency relationship. Nor does the Court see any evidence upon which a rational jury could conclude that API actually had the authority or ability to control Mr. Hoskins's actions."

Based on these conclusions, the Court granted the motion for acquittal in part and overturned the jury's verdict on the seven FCPA-related counts. The Judge found, however, that the Government had presented sufficient evidence to support guilty verdicts on the four counts related to money laundering and thus allowed those convictions to stand.

## IV. Conclusion

The District Court's and Second Circuit's earlier decisions in the *Hoskins* case—holding that prosecutors cannot use conspiracy or accomplice theories to prosecute non-resident foreign nationals acting outside the United States for violations of the FCPA—served as a significant check on DOJ's expansive view of the extraterritorial reach of its jurisdiction under the statute. This constraint on the Government's power appeared to be somewhat undermined by the jury's verdict, as the finding of agency against a non-U.S. defendant who was neither employed nor controlled by the U.S. subsidiary seemed to set a low bar for future FCPA prosecutions. Assuming it survives appeal, Judge Arterton's order overturning the verdict swings the pendulum back in the other direction, making clear that in order to establish FCPA liability, U.S. prosecutors must prove that a U.S. issuer or domestic concern had an actual right of interim control over the foreign national.

To be clear, however, that does not mean that non-resident foreign nationals are now free to engage in overseas corruption without fear of consequences from U.S. authorities. Prosecutors still possess powerful tools to prosecute corrupt activities by non-U.S. persons outside the United States—such as the ability to bring FCPA charges where an agency relationship can be established, or to use other statutes (e.g. the money laundering statutes) to prosecute offenders.

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