FCPA Jurisprudence: U.S. Court of Appeals (11th Circuit) Defines "Instrumentality" Under the FCPA, Adopts Government's View

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The U.S. Court of Appeals for the Eleventh Circuit has defined, for the first time by a federal appellate court, a key statutory term in the U.S. Foreign Corrupt Practices Act ("FCPA"): the meaning of a foreign government "instrumentality."[1] The court held that an "instrumentality" under section 78dd-2(h)(2)(A) of the FCPA is "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own." The court's analysis emphasized two elements: whether the government "controls" the entity, and whether the entity is performing a function that the foreign government "treats as its own." On the one hand, this decision is significant given the absence of prior judicial precedent at the appellate level. As the court of appeals explained: "The FCPA does not define the term 'instrumentality,' and this Court has not either. For that matter, we know of no other court of appeals who has." On the other hand, the decision is not likely to substantially change the landscape for FCPA prosecutions, as the court largely adopted the broad definition of "instrumentality" advocated by the U.S. Department of Justice ("DOJ") and specifically defined in the *Resource Guide to the U.S. Foreign Corrupt Practices Act*, issued by DOJ and the U.S. Securities and Exchange Commission ("SEC") in November 2012.

Factual Background of the *Esquenazi* case

Defendants Joel Esquenazi and Carlos Rodriguez co-owned Terra Telecommunications Corp. ("Terra"), a Florida company that purchased phone time from foreign vendors and resold minutes to customers in the United States. Both were charged and convicted by a jury in the U.S. District Court for the Southern District of Florida for bribing officers of Telecommunications D'Haiti, S.A.M. ("Haiti Teleco") to relieve debts that Terra had incurred against Haiti Teleco, saving almost $1.2 million. Later, Terra would make payments to a shell company owned by other Teleco officials, from which charges eventually resulted.

At issue on appeal was whether Haiti Teleco constituted an "instrumentality" of a foreign government within the meaning of the FCPA, 15 U.S.C. § 78dd-2. Following trial and conviction, the Haitian Prime Minister had submitted declarations stating that Haiti Teleco was not a state enterprise. Based on these declarations, the defendants moved for judgments of acquittal and a new trial, which the district court denied, and on October 25, 2011, Esquenazi and Rodriguez were sentenced to prison terms of 180 months and 84 months, respectively, for bribery and money laundering. The court also entered a joint forfeiture order against the defendants for over $3 million.

[1] *See U.S. v. Esquenazi*, No. 11-15331 (11th Cir. May 16, 2014).

The Eleventh Circuit's Definition of Instrumentality

In answering the question of whether an entity, such as Haiti Teleco, was a government "instrumentality" under the FCPA, the Eleventh Circuit defined an "instrumentality" as "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own." The court explained that its analysis was guided by the question of whether the foreign government "considers the entity to be performing a governmental function." And, according to the court, the most "objective" way to answer this question is "to examine the foreign sovereign's actions, namely, whether it treats the function the foreign entity performs as its own."

The court's definition of "instrumentality," it explained, was divided into two parts: a "control" element and a "function" element. For each of these elements, the court set forth a (non-exhaustive) list of several factors for courts and juries to consider. As to the question of whether a foreign government "controls" an entity, factors include:

- the foreign government's formal designation of that entity;
- whether the government has a majority interest in the entity;
- the government's ability to hire and fire the entity's principals;
- the extent to which the entity's profits, if any, go directly into the governmental fisc;
- the extent to which the government funds the entity if it fails to break even; and
- the length of time these indicia have existed.

The court also provided guidance to determine whether the activities of an entity qualify as governmental "functions":

- whether the entity has a monopoly over the function it exists to carry out;
- whether the government subsidizes the costs associated with the entity providing services;
- whether the entity provides services to the public at large in the foreign country; and
- whether the public and the government of that foreign country generally perceive the entity to be performing a governmental function.

Notably, the court stressed that its "definition of 'instrumentality' *requires* that the entity perform a function the government treats as its own." This statement makes it clear that for an entity to be a government instrumentality it must satisfy both elements of the instrumentality definition listed above.

In affirming the defendants' jury convictions, the Eleventh Circuit noted that the district court's instructions to the jury had "substantially cover[ed]" the factors set forth by the circuit court's opinion. It also rejected the defendants' contentions that there was insufficient evidence that Haiti Teleco was an "instrumentality" and/or that the FCPA was unconstitutionally vague as applied.

Foreign Governments' Power to Shape Court Rulings on Instrumentality

The court of appeals left open the question to what extent foreign leaders can steer courts in one way or another on the issue of instrumentality. As noted, in *Esquenazi,* the Haitian Prime Minister provided declarations regarding the status of Haiti Teleco, the entity in question. The Prime Minister initially stated that Haiti Teleco was not a Haitian instrumentality, but later clarified that it was wholly owned by another Haitian instrumentality. The court mentioned the declarations, but did not indicate to what extent they influenced or could have influenced the outcome of the case, since they were not admitted at the trial level. It remains to be seen whether an official declaration from a foreign government stating that an entity is not an instrumentality can foreclose the SEC or DOJ from bringing FCPA violation actions against individuals who bribe officers of that entity.

Other Notable Facets of *Esquenazi*

In addition to its definition of "instrumentality" under the FCPA, other aspects of the decision bear mention:

- *Knowledge of foreign official status is required when bribes pass through an intermediary*. The court of appeals approved a jury instruction that required the jury "to find [that] Messrs. Esquenazi and Rodriguez knew or believed the bribes would ultimately reach the hands of a foreign official." In concluding that the jury could have reasonably reached such a conclusion in this case, the court implied that knowledge of an entity's status as a government instrumentality was sufficient to give rise to an inference that a defendant knew that employees of that instrumentality were foreign officials.
- *A deliberate ignorance instruction is inappropriate when the evidence points only to "actual" knowledge or "no" knowledge*. The court of appeals agreed with the defense's contention that the trial court improperly instructed the jury that the defendants could be found guilty if they found evidence of the defendants' "[d]eliberate avoidance of positive knowledge." The court explained that such an instruction requires evidence that "the defendant purposely contrived to avoid learning the truth" about payments to foreign officials. However, the court concluded that this error did not require reversal due to the strong evidence of willful wrongdoing.

How Different Is the FCPA After *Esquenazi*?

In the end, the *Esquenazi* opinion does not alter the current landscape much, if at all. The *Esquenazi* opinion may even further embolden U.S. FCPA regulators, including DOJ and the SEC, now that they have the backing—for the first time—of an appellate court. Specifically, the court's analysis largely adopts the government's opinion and mirrors the government's analysis reflected in the DOJ/SEC 2012 *Resource Guide to the U.S. Foreign Corrupt Practices Act* ("the Guide"), which states in relevant part that "[t]he term 'instrumentality' is broad and can include state-owned or state-controlled entities. Whether a particular entity constitutes an 'instrumentality' under the FCPA requires a fact-specific analysis of an entity's ownership, control, status, and function." The Guide then lists eleven non-exhaustive factors that courts have instructed juries to consider when determining instrumentality, which are reminiscent of the above-listed factors from the *Esquenazi* decision.

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