

Eleventh Circuit Issues Much Anticipated Opinion Defining "Foreign Official" Under the FCPA

The Eleventh Circuit recently issued the first federal appellate opinion to determine what constitutes an "instrumentality" of a foreign government for purposes of the US Foreign Corrupt Practices Act ("FCPA"), upholding the convictions of two men accused of bribing officials at Telecommunications D'Haiti, S.A.M. ("Teleco"), Haiti's then state-owned telephone company.¹ Those 2011 convictions started a debate regarding the extent to which a government-owned or -controlled business must serve a governmental function to qualify as an "instrumentality of a foreign government" under the FCPA. In *Esquenazi*, the Eleventh Circuit concluded that a business qualifies as a government instrumentality if it both: (1) is controlled by a foreign government, and (2) "performs a function that the controlling government treats as its own."²

The FCPA generally prohibits any domestic entity from using the mails or interstate commerce to bribe "any foreign official" for the purpose of influencing that foreign official to make a decision that furthers the domestic entity's business.³ The statute defines a "foreign official" as "any officer or employee of a foreign government or any department, agency, or *instrumentality* thereof."⁴ The FCPA does not, however, expressly define the word "instrumentality," nor had any federal court of appeals addressed the issue previously.

At trial, the parties offered evidence regarding the extent of Teleco's ties to the Haitian government. The prosecution's evidence indicated that Teleco was owned by the Haitian government and operated by government appointees during the relevant period. The evidence also indicated that Teleco had a government-granted monopoly on telecommunication services within Haiti and that defendants had sought "political risk" insurance in previous contract negotiations with Teleco, coverage that typically applies only when a foreign government is a party to a contract. The defendants countered with evidence that no Haitian law expressly designates Teleco as a government entity.

¹ See *United States v. Esquenazi*, No. 11-15331, 2014 WL 1978613, at *8 (11th Cir. May 16, 2014).

² *Id.* at *8.

³ 15 U.S.C. §§ 78dd-2(a)(1), (3).

⁴ *Id.* § 78dd-2(h)(2)(A) (emphasis added).

The trial court instructed the jury that an "instrumentality" is a "means or agency through which a function of the foreign government is accomplished" and that "[s]tate-owned or state-controlled companies that provide services to the public may meet this definition," and went on to list a series of factors for the jury to consider in deciding whether Teleco was an instrumentality of the Haitian government.⁵ The defendants were then convicted, with one receiving a total sentence of 15 years' imprisonment—the longest sentence imposed to date in an FCPA case.

On appeal, the parties agreed that covered "instrumentalities" must perform a government function, but disagreed about "what functions count as the government's business."⁶ The defendants argued that only an entity that is an "actual part" of the government or serves a "core government function" should qualify.⁷ The Eleventh Circuit rejected the defendants' arguments and affirmed their convictions.

Looking at the plain meaning and statutory context of "instrumentality," the court first found that limiting the definition only to entities that are an "actual part of the government" was "too cramped [a definition] and would impede the 'wide net over foreign bribery' [that] Congress sought to cast in enacting the FCPA."⁸ Similarly, the court rejected the "core government function" test on the ground that "limit[ing] instrumentality . . . in that way . . . would put the United States out of compliance with its international obligations."⁹ Instead, the Eleventh Circuit concluded that to qualify as an instrumentality under the FCPA, an entity "must be under the control or dominion of the government" and "must be doing the business of the government."¹⁰ As for whether an entity's function constitutes "government business," the Eleventh Circuit instructed that the critical question is whether the function is one that the foreign government "treats as its own."¹¹ This standard, the court explained, allows courts to make objective decisions in specific cases without prescribing a rigid list of functions that may not closely correspond to a foreign government's own view of what its business is.

Ultimately, the court concluded that Teleco "easily" met its test. Recognizing, however, that both corporations and the government need "*ex ante* direction about what an instrumentality is,"¹² the Eleventh Circuit provided a non-exhaustive list of factors relevant to both components of its definition. Factors relating to whether an entity is "controlled by a foreign government" include:

- The foreign government's formal designation of the entity;
- Whether the foreign government has a majority interest in the entity;
- The government's ability to hire and fire the principals of the entity;
- The extent to which the entity's profits, if any, flow directly to the public fisc;
- The extent to which the government funds the entity should it fail to generate enough revenue to cover its own expenses; and

⁵ *Esquenazi*, 2014 WL 1978613, at *9-*10.

⁶ *Id.* at *5.

⁷ *Id.* at *7. Defendants also argued that the evidence was insufficient to prove that Teleco qualified as a government instrumentality under the FCPA, that the jury instructions were misleading to the extent that they suggested that governmental ownership or control was enough to render a business an instrumentality, and that statute was impermissibly vague concerning what constitutes an "instrumentality" for the same reason.

⁸ *Id.* at *4 (quoting *United States v. Kay*, 359 F.3d 738, 749 (5th Cir. 2004)).

⁹ *Id.* at *7.

¹⁰ *Id.* at 5-6.

¹¹ *Id.* at *7.

¹² *Id.* at *8.

- The length of time the foregoing indicia have existed.¹³

In determining whether an entity performs a function that the controlling government treats as its own, courts should consider:

- Whether the entity has a monopoly over the function;
- Whether the government subsidizes the entity's costs;
- Whether the entity provides services to the public at large in the foreign country; and
- Whether the foreign country's public and government generally perceive the entity as performing a governmental function.¹⁴

Applying these factors to the case before it, the *Esquenazi* court concluded that the district court's jury instructions had accurately and adequately defined a public "instrumentality"; that the evidence presented by the prosecution was sufficient to establish that Teleco was such an instrumentality, including evidence that the Haitian government had granted it a monopoly and that it was generally considered a governmental entity in providing nationalized telecommunications service; and that the FCPA was not unconstitutionally vague in defining "instrumentality."

Conclusion

The boundaries between public and private entities are often blurred, particularly in developing countries where corruption risks are the target of heightened Justice Department scrutiny. The Eleventh Circuit's opinion in *Esquenazi* underscores the importance of conducting due diligence on a company's business relationships in order to determine whether such contacts may be government-owned or -controlled. Companies conducting business internationally will also need to examine their compliance policies in light of the standard set forth by the *Esquenazi* court, to ensure that they reflect the factors that courts will use to interpret the term "instrumentality" in the FCPA context.

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¹³ *Id.*

¹⁴ *Id.* at *9.