The extraterritorial reach of the U.S. Foreign Corrupt Practices Act and the UK Bribery Act

Mar 26 2013 Michael Gilbert and Darla Woodring

Last month, in two separate enforcement actions, judges in the United States District Court for the Southern District of New York issued rulings which addressed when the United States Securities and Exchange Commission could bring enforcement actions in the U.S. against foreign nationals under the Foreign Corrupt Practices Act (FCPA) in cases involving bribes paid in foreign countries. In one case, the court held that the SEC had jurisdiction; in the other, the court dismissed the case. These cases are of great interest because they help to explain the outer limits of the SEC's extraterritorial jurisdiction in cases where the relevant conduct has taken place abroad.

The UK counterpart to the FCPA, the Bribery Act, which took effect in July 2011, also provides for extraterritorial jurisdiction. The Bribery Act extends jurisdiction to both offences committed in the UK and offences committed outside the UK by those who have a "close connection" to the UK. In addition, the Bribery Act makes it an offence for companies to fail to prevent bribery. This provision applies not only to companies that are incorporated in the UK but also to companies which carry on business, or part of their business, in the UK. Under both laws, there is a real potential for enforcement actions even when the conduct at issue appears to be quite removed from either the United States or the United Kingdom.

U.S. Foreign Corrupt Practices Act jurisdiction

The limits of the U.S. SEC's ability to pursue cases against foreigners for conduct that occurs abroad were explored in *Securities and Exchange Commission v Straub*, No 11 Civ 9645, 2013 Dist LEXIS 22447 (Southern District of New York February 8, 2013) and *Securities and Exchange Commission v Sharef*, No 11 Civ 9073, 2013 U.S. Dist LEXIS 22392 (Southern District of New York February 19, 2013). These recent cases are summarised below.

a. *Securities and Exchange Commission v Straub*

On February 8, 2013, U.S. District Judge Richard Sullivan denied a motion to dismiss an SEC enforcement action for lack of jurisdiction. Judge Sullivan held that, although the defendants, who were Hungarian nationals, were never physically present in the United States in connection with the alleged scheme to bribe government officials in Macedonia, the SEC could proceed with a case against them for violating the FCPA.

The SEC alleged that the defendants, who were executives of a Hungarian telecommunications company, Magyar Telekom Plc (Magyar) bribed Macedonian government officials to mitigate the effects of a new law. At the time, the company's securities were publicly traded in the U.S. through American Depository Receipts (ADRs) listed on the New York Stock Exchange (NYSE). The defendants made certifications to Magyar's auditors regarding the accuracy of the company's financial statements and also signed management representation letters in connection with the statements.

1. Personal jurisdiction over foreign nationals

The defendants argued that, as they were foreign nationals and the alleged bribery took place in Macedonia, the court lacked jurisdiction over them. The court held that the SEC's allegations satisfied the requisite "minimum contacts" standard, noting that physical absence from the forum was not, in and of itself, sufficient to defeat personal jurisdiction. The court reasoned that the defendants "allegedly engaged in a cover-up [of the bribe payments] through their statements to Magyar's auditors[,] knowing that the company traded ADRs on an American exchange, and that prospective purchasers [of the ADRs] would likely be influenced by any false financial statements and filings."

2. Substantive violation of 15 USC § 78dd-1(a)

As well as addressing the personal jurisdiction question, Judge Sullivan also examined the viability of a substantive FCPA claim brought under 15 USC § 78dd-1(a), which makes it illegal to "use ... the mails or any means or instrumentality of interstate commerce corruptly in furtherance of a [bribe]" to "any foreign official". The SEC alleged that the defendants sent documents related to the alleged bribery scheme via email. Although the defendants were outside the United States when they sent the emails (which were addressed to recipients also outside the United States), the emails were routed or stored on network servers located in the United States. In an issue of first impression, the court considered whether the SEC had to allege that the defendants *intended* to use servers based in the United States (i.e., instrumentalities of interstate commerce). The court held that the SEC did not have to do so; the defendants could be liable even if they did not know that their emails were routed through servers in the United States.

b. *Securities and Exchange Commission v Sharef*

On February 19, 2013, less than two weeks after the denial of the defendants' motion to dismiss in *SEC v Straub*, another judge sitting in the Southern District of New York, Judge Shira Scheindlin, granted the motion of another defendant, Steffen, to dismiss an action brought by the SEC against him and other former senior executives at Siemens Aktiengesellschaft (Siemens), an electronics company headquartered in Germany. Steffen was the former chief executive officer of an Argentine Siemens subsidiary.

The SEC's complaint alleged that the defendants had paid millions of dollars in bribes to government officials in Argentina in exchange for a billion dollar contract to create national identity cards. It also alleged that one of Steffen's co-defendants had signed certifications representing that Siemens's financial statements, which obviously did not report any bribe payments, were not false or misleading. Steffen filed a motion to dismiss asserting, *inter alia*, that the court lacked personal jurisdiction over him.

As Judge Sullivan had done in *Straub*, Judge Scheindlin analysed the issue of personal jurisdiction, but: "Steffen's actions [were] far too attenuated from the resulting harm to establish minimum contacts." The court scrutinised Steffen's role in the scheme and noted that while he may have "pressured" others to make certain bribes, he ultimately did not authorise the bribes, nor did he sign and falsify any of the SEC filings to conceal the bribes.

Judge Scheindlin expressed concern that: "Under the SEC's theory, every participant in illegal action taken by a foreign company subject to U.S. securities laws would be subject to the jurisdiction of U.S. courts no matter how attenuated their connection with the falsified financial statements."

These two recent District Court decisions have made it clear that, although there are limitations, foreign nationals face a real risk that conduct which occurs outside the United States could give rise to an SEC enforcement action for violation of the FCPA. While these decisions reached different conclusions, the analysis of whether a foreign national has the requisite "minimum contacts" is a fact-specific inquiry. Certainly, signing financial statements or certifications that ultimately will be filed in the United States, or form the basis of such filings, can be a sufficient basis for jurisdiction, but it is not a requirement.

UK Bribery Act jurisdiction

The UK Bribery Act 2010 is generally viewed as being more widely applicable than the FCPA. Notably, it prohibits not only the bribery of foreign officials, but also commercial bribery. The Bribery Act also applies to those who receive bribes, not just those who pay bribes. Furthermore, the Bribery Act contains a provision, which has no parallel in the FCPA, that makes it an offence for "commercial organisations" to fail to prevent bribery.

There are four main offences under the Bribery Act. Sections 1 and 2of the Act contain general offences that prohibit bribing or receiving a bribe. Section 6relates to bribing a "foreign public official" and s7 applies when "commercial organisations" fail to prevent bribery. In addition to s7, a "commercial organisation" can be held liable for offences under the other sections based on the actions of its senior officers.

In March 2011, the Ministry of Justice published Bribery Act 2010: Guidance to help "organisations understand the legislation and deal with the risks of bribery". The document explains that "courts will have jurisdiction over the sections 1, 2, or 6 offences *committed in the UK*" or when the person is a British national, resident or has "a close connection" to the UK. Thus, even if the conduct occurs entirely outside of the UK, the Bribery Act may still apply.

With regard to the s7 offence of failing to prevent bribery, there is no requirement that the bribery which an organisation failed to prevent must have occurred in the UK. As long as the individuals involved in the bribery are "associated persons" (agents or employees) of a "commercial organisation" that does part of its business in the UK, s7 applies. UK courts can exercise jurisdiction over an entity that "carries on a business or part of a business in the UK irrespective of the place of incorporation". The guidance goes on to say: "organisations that do not have a demonstrable business presence in the [UK]" do not meet the criteria for carrying on a business. It further provides that "the mere fact that a company's securities ... trad[e] on the London Stock Exchange, in itself" does not qualify.

While this guidance would seem to suggest reasonable limitation on extraterritorial application of s7 of the Bribery Act, the guidance is non-binding. The Serious Fraud Office (SFO) is responsible for bringing actions to enforce the Bribery Act. The SFO has not yet brought an action under s7 (although there are believed to be several in the pipeline). The new director of the SFO made the following comments just before the Bribery Act came into force:

"The phrase 'carrying on business' is a very general one and the SFO is adopting a very wide interpretation of these words ... our view is that if a foreign group has a subsidiary in the UK and in another country and that bribery occurs in that other country then that bribery is within the remit of the SFO."

It is foreseeable therefore that, for example, the SFO could bring an action against a foreign company with a UK subsidiary for failing to prevent bribes paid by its agents outside the UK even if none of the conduct actually occurred in the UK and the agents themselves had no other "close connection" to the UK.

Potential to ensnare

While the precise contours of the extraterritorial application of both the FCPA and the Bribery Act are still being fleshed out by regulators and jurists, the reality remains that both laws have the potential to ensnare conduct which, at first blush, appears to have little connection with either country.

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