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COLLATERAL LITIGATION

A Different Kind of FCPA Settlement: What Corporate Defendants and "Victims" Can Learn From the Nokia-Ericsson Civil Resolution

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The peril of FCPA punishments often is perceived as arising exclusively from government agencies like the DOJ and SEC, and other emerging enforcement agencies both domestic and international. So, when Swedish telecom giant Ericsson announced its $1 billion settlement in December 2019 with the DOJ and the SEC, it was a somewhat predictable resolution negotiated with, and payable to, the usual players. However, in a less noticed and more unusual development, in May 2021 Ericsson announced a $97 million *direct* settlement with competitor Nokia that arose from its billion-dollar FCPA resolution.

This important development represents an example of one of the unintended consequences of a settlement for companies seeking finality when resolving an FCPA case with the government. General counsels and compliance officers should include this risk among the "offensive" options to consider upon settling FCPA allegations. For internal audiences who are desensitized to the message that they may have to pay millions of dollars to enforcement agencies, perhaps the special sting of having to pay millions to their direct competitor may garner new attention.

In this article, we examine the relative rarity of competitor-victim claims that follow from an FCPA resolution, and the possibility of an upward trend on the heels of recent support for victim claims and restitution from the DOJ and federal courts.

The high value of modern FCPA resolutions certainly makes them an attractive target for enterprising plaintiffs. And there are several reasons potential plaintiffs may have significant leverage in asserting a victim claim, including the availability of public admissions by defendants, the defendants' desire to avoid further discovery that may threaten settlements with government enforcement agencies and the scope of potential damages.

Boards of corporate FCPA defendants should anticipate this type of claim, and we provide strategic considerations for the investigation phase, enforcement resolution negotiations and tax implications below.

See "Lessons from Telecom Giant Ericsson's Billion-Dollar Record-Setting Deal" (Jan. 8, 2020).

The Appeal of Follow-On Claims

In May 2021, Telefonaktiebolaget LM Ericsson (Ericsson) issued a press release announcing that the company had reached a settlement with competitor Nokia for €80 million ($97 million), arising out of a 2019 investigation and settlement with DOJ and the SEC over Ericsson's violations of the FCPA. Ericsson revealed little in the press release about Nokia's actual legal claims, and the confidential settlement came without Nokia bringing any formal claims against Ericsson. But, despite the lack of specificity, the announcement says a great deal about the potential for follow-on civil claims by competitors who demonstrate that they are the victims of corruption.

Corporate stakeholders have long taken notice of the financial ramifications of FCPA investigations and settlements, and public companies know that defending against derivative shareholder lawsuits are a risk even if the plaintiffs' suits are not always successful.[1] Claims by corporate "victims" of corruption are far less common, but scorned investors and competitors who lost out on business due to corrupt activity may be encouraged by the Nokia settlement and other recent restitution orders to make these types of claims going forward.

It is not difficult to see why these claims are attractive. Corporate victims can take advantage of sworn statements of facts and admissions in enforcement agency plea agreements and settlements, often the result of candid cooperation by defendant companies seeking leniency. Victims also may have significant leverage to extract settlements, knowing that further discovery could jeopardize the defendant's government agreements and that businesses will be eager to end an episode that has already done significant damage to the defendant's reputation and bottom line. On the other hand, if litigated, the claims may be difficult to prove, particularly for competitors who would need to present evidence that, but for the corrupt conduct, they were the rightful recipient of the contracts or business in question.

Suffice it to say, if these claims do proliferate, there are significant considerations for companies on either side.

See "Civil Litigation in the Aftermath of FCPA and U.K. Bribery Act Investigations" (May 13, 2020).

Ericsson's FCPA Case

In 2019, Ericsson agreed to pay over $1 billion in penalties and fines related to violations of the FCPA in a half dozen countries. The resolution had three parts:

1. a parent-level deferred prosecution agreement (DPA) by Ericsson with DOJ;
2. a criminal plea agreement by subsidiary Ericsson Egypt; and
3. resolution of a civil complaint filed by the SEC.

As discussed below, the structure of the resolution is relevant to what types of follow-on claims were available to Nokia.

As part of the DPA, Ericsson was required to admit and acknowledge certain facts about its misconduct and accept responsibility for those acts. Ericsson admitted to a scheme lasting 16 years and involving misconduct spanning six different countries. The telecom giant

acknowledged bribe payments to government officials in Djibouti and China, as well as additional violations of books-and-records and internal controls provisions of the FCPA in Vietnam, Indonesia, China and Kuwait. The books-and-records violations involved slush funds and sham consulting contracts that Ericsson employees created but presumably could not be tied directly to payments or benefits that went to government officials to obtain contracts, a requirement for an FCPA bribery charge. According to the DPA paperwork, the government and Ericsson agreed that the company profited by approximately $383 million from the scheme.

The plea agreement with subsidiary Ericsson Egypt was limited to corrupt conduct in Djibouti. The government found that the Djibouti corruption centered on a single contract that resulted in $7 million in profit for Ericsson Egypt.

The SEC complaint covered much of the same conduct as the DPA, but alleged additional conduct involving Saudi Arabia and another $740 million in revenue, resulting in disgorgement of over $458 million in profits. However, the final judgment reached in the SEC case incorporates only acknowledgments by Ericsson of the facts admitted in the DPA. In other words, even if Ericsson had to disgorge related profits, it made no admissions of misconduct about the corruption issues in Saudi Arabia.

The Nokia Settlement: A Road Map for Other Competitor Victims

Less than 16 months after inking resolutions with the government, Ericsson announced its settlement with Nokia for $97 million, which the company explained arose out of the same conduct as the FCPA settlement with the government. Many of the specific details of the settlement are unknown: Ericsson's announcement does not specify what legal claims were at issue or what jurisdictions were involved. When asked about the settlement, a Nokia spokesperson referred to the accuracy of the Ericsson release and declined further comment. There are a few instructive elements of the case.

Narrow but Well-Developed Factual Record

First, Nokia did not file any formal legal actions against Ericsson, and, thus, the company likely did not benefit from civil discovery to develop additional facts. However, Nokia could rely on certain factual admissions included in Ericsson's resolution, coupled with Nokia's own knowledge of the markets and contracts at issue, including intelligence gathered from Nokia's employees and cooperative counterparties within the markets involved. For example, the Ericsson DPA included a thorough and detailed 30-page sworn statement of facts.

Although the DPA uses anonymized descriptions of the individuals and entities involved, it describes the methods used to provide improper benefits, the contracts obtained, relevant dates of the misconduct, and specific communications among employees about the scheme. While the facts in the SEC complaint were not specifically admitted, the additional factual basis for conduct in Saudi Arabia is laid out in sufficient detail. These documents likely served as roadmaps for Nokia to identify the most damning evidence and to determine whether the contracts for which they competed unsuccessfully with Ericsson were tainted.

See "Collateral Consequences of Bribery: When Can Ethical Competitors Initiate Suit in the U.S. and U.K.?" (May 15, 2013).

Range of Legal Theories

Second, there is a fairly broad range of legal theories a company could advance against a competitor who violated the FCPA. Perhaps the most straightforward claim is for restitution under the Mandatory Victims' Rights Act (MVRA). Following a landmark restitution ruling in *United States v. OZ Africa Management GP LLC*, in which investors of a mining company were allowed to recover reimbursement for mining rights they lost as a result of bribes the defendant paid to local judges, we predicted that victim restitution claims under the MVRA could surge.[2] Indeed, DOJ issued multiple statements around the same time recognizing investors as an appropriate "victim" under the MVRA, and encouraging victims of FCPA violations to come forward for compensation.[3]

But Nokia's case demonstrates why traditional MVRA claims may often be inadequate in FCPA situations. The MVRA only provides potential court-ordered restitution for a victim if a defendant *has been convicted of a crime*. The DOJ, however, typically resolves corporate investigations through a pre-conviction resolution, like a DPA or non-prosecution agreement, that would not trigger application of the MVRA. As with Ericsson's resolution, the bulk of the DOJ resolution was reached through a DPA with the parent company and, thus, Ericsson was not required to actually plead guilty to the majority of its misconduct for which the MVRA otherwise could have applied. Instead, the MVRA claim could have applied only to the conduct admitted in Ericsson Egypt's Djibouti conviction, and a share of the $7 million earned on that specific contract – only a small fraction of the more than $450 million in tainted profits disgorged by the SEC.

The Nokia case demonstrates the applicability of other potential civil theories of liability that can lead to a recovery even without a court order for restitution following a conviction. For example, claimants could pursue claims under state unfair trade practices statutes, federal competition law, or common law tort doctrines.[4] Courts have endorsed claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), where the defendant engaged in a pattern of corrupt behavior.[5] And it may even be possible to make a claim under trade secret laws, such as the Economic Espionage Act (EEA), where a competitor's technology, pricing or bid information was misappropriated.[6] Ericsson admitted, for example, that it paid an agent who provided inside information, including competitor information, about a contract tender in Kuwait.

Competitors also may be entitled to relief in foreign courts. Article 35 of the United Nations Convention Against Corruption (UNCAC) obligates signatory states to assist parties injured by corruption to obtain restitution or compensation. Most countries do that through domestic legal systems. For example, Egypt's civil code "allows for the payment of compensation for acts of corruption that have caused damage to third parties."

Broad Scope of Potential Damages

Given the various types of claims at Nokia's disposal, there may have been an even broader scope of damages available than what was disclosed in Ericsson's FCPA resolutions. The DPA cited $383 million in pecuniary gain,

and the SEC settlement included more than $450 million in disgorged profits. It is unlikely that Nokia competed for each and every contract Ericsson received, and also unlikely that it could prove it was the frontrunner on every contract for which the two companies competed, which typically would be required to pass the "but-for" analysis to recover restitution under the MVRA. Nevertheless, Nokia's $97 million settlement price tag suggests that Ericsson believed a significant amount of damages was at risk.

Even if based on the same general facts, Nokia's damages claims may have gone *beyond* the profits identified in the FCPA settlements. For example, Nokia would not be held to the heightened burden of proof that the DOJ must satisfy for a criminal FCPA violation. Civil claims therefore could reach a broader scope of conduct or transactions than DOJ may have been able to prove based on the evidence available.

And while FCPA bribery offenses require corrupt payments to *government officials*, civil claims can arise from corrupt payments to private actors. The Ericsson resolutions hint to that possibility. According to the SEC complaint, Ericsson earned $427 million from contracts as a result of $62 million in bribes paid to the government officials in Djibouti, Saudi Arabia and China. The books-and-records violations involved approximately $88 million in additional misused funds that may not have been subject to FCPA bribery violations but could be the source of civil liability. If Nokia competed for contracts tainted by commercial bribery not covered under the FCPA, then the pool of potential damages could have ballooned.

Finally, civil claims often carry the threat of punitive damages that go beyond compensation for lost profits, and some statutes (including RICO) provide for treble damages, thereby increasing the potential exposure to Ericsson through a civil action.

Potential for Jeopardizing Defendant's Government Resolution

In its press release announcing the Nokia settlement, Ericsson explained that the "amount reflects uncertainty, risk, expense, and potential distraction from business focus associated with a potentially lengthy and complex litigation." As discussed above, the potential scope of threatened damages and cost of litigation in multiple jurisdictions likely loomed large for Ericsson. The risk of new information being revealed during discovery also could have been a major source of leverage for Nokia.

Corporate FCPA defendants almost universally cooperate with government enforcement agencies during criminal investigations to obtain a better deal through cooperation credit. The resulting resolutions are premised on the government's belief that the defendant investigated in good faith and candidly disclosed all relevant misconduct. A pre-conviction resolution like a DPA, for example, could be jeopardized if a victim plaintiff possesses or exposes new evidence about additional tainted transactions, unearthing a broader scope of misconduct than was revealed in the government investigation. Even if additional misconduct does not directly violate a DPA, it could result in the government extending a DPA or threatening to impose a

corporate monitor. Such threats may be enough to motivate an FCPA defendant to settle before a plaintiff even can file a complaint that potentially includes additional evidence or allegations.

Was Nokia a Turning Point?

So why have we not seen this type of claim more often, and why might now be a turning point? On one hand, the right factual circumstances need to be present. Often the necessary causal link to demonstrate a victim claim will not be obvious, and public admissions may not be quite as robust as they were here.

In other cases, competitors may themselves have unclean hands, or fear that discovery could reveal their own misconduct or compliance gaps, causing companies to follow the adage that "those who live in glass houses should not throw stones." Indeed, it is common for enforcement agencies to do a sweep of an entire industry when corruption is detected, and a civil claim could bring a plaintiff's own conduct within that industry into better focus for authorities. For instance, within a few years, BNY Mellon, JP Morgan Chase, Credit Suisse, and Deutsche Bank all settled similar FCPA claims involving the hiring of relatives of foreign government officials to influence future business dealings.

Where a company has good reason to believe it would have received a contract but for a competitor's bad acts, however, the follow-on claim may be worth pursuing. The recent support of victim claims by the *Och-Ziff* court, coupled with DOJ's subsequent public support of the idea that other FCPA victims should step forward, may embolden future claims.

Companies may consider the opportunity for victim claims both **reactively** – when a specific FCPA investigation or settlement is announced in their industry – and **proactively** – reporting suspicions and providing assistance to enforcement agencies when they suspect a competitor is unfairly competing through corrupt practices.

What Is a Defendant to Do?

Companies want finality when they resolve an FCPA case with the government. However, corporate boards and investors need to consider the potential for follow-on liability that may result from FCPA-derived civil claims.

Keep Collateral Consequences in Mind When Settling

Companies and their counsel should consider these global consequences when negotiating the structure of an FCPA resolution and the types of admissions they are willing to make. Structuring a resolution to minimize avenues like restitution under the MVRA could be a critical strategy. Insisting on resolutions that do not explicitly admit key facts may be another way to limit exposure.

Consider Negotiating Parallel Resolutions

If defendants anticipate significant follow-on civil claims, they also may consider negotiating a resolution in tandem with government settlements. Recent U.S. Supreme Court rulings have made clear that SEC disgorgement is meant to compensate "known victims." If a defendant has agreed to direct some of its ill-gotten gains to specific known victims, it follows that the amount arguably could be deducted from what the government collects.

Minimize Bottom Line Impact by Considering Tax Treatment

Companies also face different tax implications depending on whether a settlement amount constitutes a civil penalty, disgorgement, restitution under the MVRA or damages under a civil action. Structuring resolutions so that the financial fallout hits tax-deductible categories could save a considerable sum for the corporation.

Remember the Plaintiffs' Roadblocks

Finally, the potential for follow-on civil claims after an FCPA resolution is not necessarily a death knell. A number of roadblocks make follow-on civil claims difficult for plaintiffs. For example, the causes of action outlined above generally require a plaintiff to demonstrate the bribe or corrupt behavior caused an actual injury to the plaintiff. It can be difficult enough for the government to prove that a specific payment caused the defendant to improperly win a contract. Competitor plaintiffs would have to prove not only that the defendant won the contract because of a corrupt payment, but that the plaintiff was the rightful recipient. In many competitive contracting scenarios, such a claim will be merely speculative. Requirements for RICO claims can be a high bar and plaintiffs may struggle to allege the necessary elements, such as framing misconduct as a pattern of corrupt practices, rather than limited one-off episodes. There also likely will be jurisdictional and discovery challenges where most of the culpable individuals, entities and supporting evidence is located overseas.

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[1] *See, e.g., City of Pontiac Gen. Employees' Ret. Sys. v. Wal-Mart Stores, Inc.*, 5:12-CV-5162, 2019 WL 1529517, at *1 (W.D. Ark. Apr. 8, 2019) (awarding attorneys' fees to plaintiff counsel after Wal-Mart agreed to $160 million settlement arising from allegedly corrupt actions in Mexico); but see Doshi v. Gen. Cable Corp., 386 F. Supp. 3d 815, 820 (E.D. Ky. 2019) (dismissing putative class action arising from FCPA settlements with DOJ and SEC).

[2] *See* Ephraim (Fry) Wernick, Dan Wallmuth, *New Ruling in Och-Ziff Case Could Lead to a Billion Dollar Restitution Award and Throws Doubt on Benefits of Settling FCPA Cases*, V&E Foreign Corrupt Practices Act Update (Sept. 18, 2019); *see also, e.g.*, Petitioner Victim PetroEcuador's Memorandum of Law in Support of Motion for Recognition of Its Rights as a Victim and Entitlement to Restitution, *United States v. Ripalda*, No. 18-CR-20312-COOKE (S.D. Fl. 2018) (seeking victim status under the MVRA and other statutes in Frank Chatburn FCPA enforcement action); Ephraim (Fry) Wernick, Brian L. Howard II, and Michael Hoosier, *Venezuela's CITGO Joins Other Companies and State-Owned Entities Seeking to Claim Victim Status and Restitution in FCPA Cases*, The V&E Report (June 3, 2020).

[3] *See* Letter, *United States v. OZ Africa Management GP, LLC*, No. 16-515 (E.D.N.Y. Nov. 22, 2019).

[4] *See, e.g., NewMarket Corp. v. Innospec, Inc.*, 2011 WL 1988073 (E.D. Va. May 20, 2011) (holding that plaintiffs stated claims for state antitrust and business conspiracy laws against defendant who resolved an FCPA case and admitted to bribing foreign officials in Iraq and Indonesia); *Korea Supply Co. v Lockheed Martin Corp.*, 63 P.3d 937 (Cal. 2003) (holding plaintiff stated a claim for tortious interference with prospective economic advantage under California law based on plaintiff's allegations that business was lost due to defendant's bribery).

[5] *See Envt'l Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1063 (3d Cir. 1988), *aff'd* 493 U.S. 400 (1990) (holding that plaintiff stated a RICO claim where "a European conglomerate, and two American corporations – successfully, and over a two-year period – organized to influence a foreign country's award of a procurement contract by illegal means," the firms hired a consultant to facilitate the bribery, and the businesses developed a sophisticated sham bookkeeping operation to hide the scheme).

[6] Pub. L. No. 104-294, 110 Stat. 3488 (codified at 18 U.S.C. §§ 1831–39); *see, e.g., Sterling Computers Corp. v. Haskell*, No. 4:17-CV-04073-KES, 2018 WL 671210, at *4 (D.S.D. Feb. 1, 2018) (holding that "bid structure," "pricing structure," and pricing information could constitute trade secrets under EEA).