

Competitor Recovers Damages from FCPA Violator in Post-Enforcement Civil Litigation

By **Robert A. Johnston Jr.**

On Wednesday, May 12, 2021, Swedish telecommunications manufacturer Ericsson announced that it had reached an €80 million (\$96.66 million) settlement with one of its competitors to compensate for commercial damages the competitor suffered as a victim of Ericsson's corruption scheme.¹

As background, on Nov. 26, 2019, Ericsson resolved a U.S. Foreign Corrupt Practices Act (FCPA) enforcement action by entering into a deferred prosecution agreement (DPA)² with the Department of Justice (DOJ), settling a civil complaint brought by the Securities and Exchange Commission (SEC), and agreeing to pay \$1.06 billion in fines and penalties.³ According to the publicly available resolution documents, Ericsson admitted, among other things, that it had created slush funds that were used by various third parties to pay bribes to government officials to win contracts in China, Djibouti, Indonesia, Kuwait, Saudi Arabia, and Vietnam.⁴ As part of the resolution, an Ericsson subsidiary in Egypt pleaded guilty to one count of

conspiracy to violate the anti-bribery provisions of the FCPA.⁵

As is the case with all FCPA enforcement actions resolved with the DOJ via a DPA or a guilty plea, Ericsson admitted to the facts as alleged by DOJ, and the company is now precluded from making public statements or taking a public position contrary to those admitted facts.⁶ Among other things, in the "Statement of Facts" attached to the DPA, Ericsson admitted that it paid \$2.1 million in bribes (through its Egyptian subsidiary) to win a public tender for a \$22.5 million contract from a state-owned telecommunications company to modernize Djibouti's mobile network infrastructure.⁷

The competitor's complaint against Ericsson does not appear to be publicly available, and the dispute is not discussed in Ericsson's most recent Form 20-F filed with the SEC in March 2021.⁸ In settling the case, Ericsson stated that the "amount reflects uncertainty, risk, expense, and potential distraction from business focus

¹ See Ericsson, "Ericsson announces settlement with impact in second quarter 2021," Press Release (May 12, 2021), <https://www.ericsson.com/en/press-releases/2021/5/ericsson-announces-settlement-with-impact-in-second-quarter-2021>.

² Under a DPA, DOJ commences a criminal case by filing a charging document with the court and simultaneously asking the court to defer prosecution while the company is given the opportunity to demonstrate good conduct and meet certain conditions. Typically, a DPA is accompanied with fines and penalties. At the end of a specified term, the charging document will be dismissed if the DOJ determines that the company has met the conditions set forth in the DPA.

³ The DOJ and SEC subsequently publicized the resolution on Dec. 6, 2019. See, e.g., "Ericsson Agrees to Pay Over \$1 Billion," Department of Justice Office of Public Affairs Press Release (Dec. 6, 2019), <https://www.justice.gov/opa/pr/ericsson-agrees-pay-over-1-billion-resolve-fcpa-case>.

⁴ See generally, *United States v. Telefonaktiebolaget LM Ericsson*, 1:19-cr-00884-AJN (S.D.N.Y. Nov. 26, 2019) (Statement of Facts), <https://www.justice.gov/opa/press-release/file/1272151/download>.

⁵ See *United States v. Ericsson Egypt, Ltd.*, 1:19-cr-00884-AJN (S.D.N.Y. Nov. 26, 2019) (Plea Agreement), <https://www.justice.gov/opa/press-release/file/1272161/download>.

⁶ See *United States v. Telefonaktiebolaget LM Ericsson*, 1:19-cr-00884-AJN (S.D.N.Y. Nov. 26, 2019) (Deferred Prosecution Agreement at para. 23), <https://www.justice.gov/opa/press-release/file/1272151/download> ("The Company expressly agrees that it shall not, through present or future attorneys, officers, directors, employees, agents or any other person authorized to speak for the Company, make any public statement, in litigation or otherwise, contradicting the acceptance of responsibility by the Company ... or the facts described in the alleged Statement of Facts.")

⁷ See *United States v. Telefonaktiebolaget LM Ericsson*, 1:19-cr-00884-AJN (S.D.N.Y. Nov. 26, 2019) (Statement of Facts at paras. 39-64), <https://www.justice.gov/opa/press-release/file/1272151/download>.

⁸ See generally, Ericsson Form 20-F (Mar. 25, 2021), <https://www.ericsson.com/495ae7/assets/local/investors/documents/financial-reports-and-filings/20-f-reports/ericsson-20-f-2020.pdf>, <https://www.ericsson.com/494193/assets/local/investors/documents/2020/annual-report-2020-en.pdf>.

associated with a potentially lengthy and complex litigation.⁹ Nevertheless, the fact that Ericsson was precluded by the terms of the DPA from contradicting its prior admissions that it paid bribes to win government contracts likely rendered any potential defense on the merits in this follow-on civil litigation quite difficult.

While *Ericsson* is unusual, it is not unprecedented. In *Korea Supply Co. v. Lockheed Martin Corp.*, a losing bidder sued the winning bidder for allegedly obtaining a South Korean government contract through bribes, and the California Supreme Court held that foreign bribery and FCPA violations can serve as a basis to assert civil claims under California law for unfair business practices and tortious interference with prospective economic advantage.¹⁰ Specifically in *Korea Supply*, following the launch of a public corruption investigation by South Korean authorities, the losing bidder filed suit asserting that its bid was \$50 million lower than the winning bidder and that the Korean military rated its products superior to the winning bidder, and but for the winning bidder's bribery, the losing bidder would have won the tender.¹¹ Similarly, in 2010, shortly after Innospec Inc. resolved its FCPA case,¹² NewMarket Corp., one of Innospec's competitors, sued Innospec for antitrust and commercial bribery violations under Virginia state law based on Innospec's causing NewMarket's products to fail field tests through Innospec's bribery of government officials in Iraq and Indonesia.¹³ In 2011, Innospec settled NewMarket's suit for \$45 million.¹⁴ Furthermore, there have been instances where allegations of foreign bribery have been asserted as predicate offenses in order to successfully prosecute civil claims under the U.S. Racketeer Influenced and Corrupt Organizations Act against FCPA defendants.¹⁵

Although plaintiffs' securities class actions and shareholder derivative actions against publicly traded FCPA defendants have become a routine, if not automatic, collateral consequence in FCPA enforcement actions, it remains to be seen whether follow-on civil litigation from purported

victims of bribery schemes will become a fixture of FCPA enforcement actions going forward. The result in *Ericsson* undoubtedly will inspire others. Companies under FCPA scrutiny would be well served to assess whether their commercial competitors were harmed by the alleged wrongdoing and whether any admissions in the DOJ or SEC resolution documents will have an adverse impact on the ability to defend against any such follow-on civil litigation brought by an aggrieved competitor.

To learn more about this case specifically or the FCPA generally, please contact **Robert A. Johnston Jr.** or your Lowenstein Sandler LLP attorney.

⁹ Ericsson, "Ericsson announces settlement with impact in second quarter 2021," Press Release (May 12, 2021), <https://www.ericsson.com/en/press-releases/2021/5/ericsson-announces-settlement-with-impact-in-second-quarter-2021>.

¹⁰ See *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937 (Cal. 2003).

¹¹ See *id.* at 942, 954.

¹² See "Innospec Inc. Pleads Guilty to FCPA Charges and Defrauding the United Nations; Admits to Violating the U.S. Embargo Against Cuba," Department of Justice Office of Public Affairs Press Release (Mar. 18, 2011), <https://www.justice.gov/opa/pr/innospec-inc-pleads-guilty-fcpa-charges-and-defrauding-united-nations-admits-violating-us>.

¹³ See *NewMarket Corp. v. Innospec Inc.*, No. 10-cv-00503 (E.D. Va. July 23, 2010) (Complaint).

¹⁴ Hilary Russ, "Judge OKs Innospec's \$45M Deal to End Antitrust Suits," Law 360 (Sept. 22, 2011), <https://www.law360.com/articles/273374/judge-oks-innospec-s-45m-deal-to-end-antitrust-suits>.

¹⁵ See, e.g., *Aluminium Bahrain B.S.C. v. Alcoa*, No. 08-cv-00299 (Feb. 27, 2008) (W.D. Pa. Feb. 27, 2008) (Complaint) (alleging that defendant's bribery of Bahraini officials constituted predicate offenses under the U.S. Racketeer Influenced and Corrupt Organizations Act and seeking civil damages). In this case, the DOJ intervened and stayed the case pending resolution of the FCPA investigation. Alcoa subsequently settled with the plaintiffs in October 2012 by agreeing to pay a cash settlement and to enter into a long-term supply contract. See Amena Bakr, "Alcoa paying \$85 million cash to settle with Bahrain's Alba," Reuters (Oct. 9, 2012), available at <https://www.reuters.com/article/us-bahrain-alba-alcoa/alcoa-paying-85-million-cash-to-settle-with-bahrains-alba-idUSBRE89810I20121009>.

Contact

Please contact the listed attorney for further information on the matters discussed herein.

ROBERT A. JOHNSTON JR.

Partner

T: 212.419.5898

rjohnston@lowenstein.com

NEW YORK

PALO ALTO

NEW JERSEY

UTAH

WASHINGTON, D.C.

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