
foreign corrupt practices act lawflash

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District Court Reinforces Broad Territorial Reach of the FCPA

Decision in Magyar Telekom case maintains that engaging in unlawful conduct abroad that is “directed toward the United States, even if not principally directed there,” may trigger personal jurisdiction.

On February 8, Judge Richard J. Sullivan of the U.S. District Court for the Southern District of New York denied a motion by three former Magyar Telekom executives challenging the extraterritorial reach of the U.S. Foreign Corrupt Practices Act (FCPA).¹ The decision validated regulators’ position that non-U.S. employees of foreign-owned corporations who engage in conduct that is directed toward the United States (e.g., efforts designed to violate U.S. securities regulations) can be held accountable for FCPA violations.

Background

On December 29, 2011, the U.S. Securities and Exchange Commission (SEC) brought suit against defendants Elek Straub, Andras Balogh, and Tamas Morvai. The SEC alleged that the former Magyar executives orchestrated, approved, and executed a plan to bribe Macedonian officials in 2005 and 2006 to block the entry of a competitor to Magyar’s Macedonian telecommunications subsidiaries and to gain other regulatory benefits.² Among other bribes, the Magyar executives allegedly paid a third-party intermediary approximately \$6 million under the guise of fraudulent consulting and marketing contracts to encourage officials to favor Magyar at the expense of its competitors. The SEC has further alleged that the former Magyar executives authorized a payment of approximately \$9 million to Montenegrin government officials through a series of sham contracts. Magyar previously resolved a joint SEC and U.S. Department of Justice enforcement action in December 2011.³

In their motion to dismiss, the defendants alleged that the court lacked personal jurisdiction over them because the alleged crimes were committed overseas. The defendants claimed that their only direct contact with the United States, as alleged by the SEC, was a series of emails that were routed through and stored on U.S. computer servers. The SEC opposed the motion, arguing that the former executives had sufficient ties to the United States because their company listed its stock on U.S. exchanges and filed reports with the U.S. government.

District Court Order

In his order, Judge Sullivan found that the SEC “met its burden at this stage of establishing a prima facie case of personal jurisdiction over [the d]efendants” by demonstrating that the defendants had “minimum contacts with the United States and that the exercise of personal jurisdiction over [them] would not be unreasonable[.]”⁴ Judge Sullivan based his “minimal contacts” finding on the fact that the defendants were “engaged in conduct that was

1. *Sec. & Exch. Comm’n v. Straub (Magyar Telekom)*, No. 11 Civ. 9645 (S.D.N.Y. Feb. 8, 2011) (order denying defendants’ motion to dismiss), available at <http://www.nysd.uscourts.gov/cases/show.php?db=special&id=263>.

2. Press Release, Sec. & Exch. Comm’n, SEC Charges Magyar Telekom and Former Executives with Bribing Officials in Macedonia and Montenegro (Dec. 29, 2011), available at <http://www.sec.gov/news/press/2011/2011-279.htm>.

3. Press Release, Dep’t of Justice, Magyar Telekom and Deutsche Telekom Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay Nearly \$64 Million in Combined Criminal Penalties (Dec. 29, 2011), available at <http://www.justice.gov/opa/pr/2011/December/11-crm-1714.html>.

4. *Magyar Telekom*, slip op. at 12.

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designed to violate United States securities regulations and was thus necessarily directed toward the United States, even if not principally directed there.”⁵ The judge further observed that, both prior to and during the time of the alleged violations, Magyar’s “securities were publicly traded through [American Depository Receipts (ADRs)] listed on the NYSE and were registered with the SEC.”⁶ He also found that the defendants “allegedly engaged in a cover-up through their statements to Magyar’s auditors knowing that the company traded ADRs on an American exchange, and that prospective purchasers would likely be influenced by any false financial statements and filings.”⁷ As a result, the judge had “little trouble” concluding that, “even if [the d]efendants’ alleged primary intent was not to cause a tangible injury in the United States, it was nonetheless their intent, which is sufficient to confer jurisdiction.”⁸

With respect to the “reasonableness” test for personal jurisdiction, Judge Sullivan explained that “[t]he reasonableness inquiry is largely academic in non-diversity cases brought under a federal law which provides for nationwide service of process because of the strong federal interests involved.”⁹ Judge Sullivan supported his finding for reasonableness by stating, “Like each and every court in this [c]ircuit to have applied the reasonableness standard after determining that a given defendant has the requisite minimum contacts, this [c]ourt finds that this is not the rare case where the reasonableness analysis defeats the exercise of personal jurisdiction.”¹⁰ Judge Sullivan further explained that “[a]lthough it might not be convenient for [the d]efendants to defend this action in the United States,” the reality of FCPA enforcement actions counsels in favor of finding jurisdiction because “unlike in a private diversity action . . . there is no alternative forum available for the government. Thus, if the SEC could not enforce the FCPA against [the d]efendants in federal courts in the United States, [the d]efendants could potentially evade liability altogether.”¹¹

Implications

The decision in *Magyar Telekom* has shown that non-U.S. employees of foreign companies may not evade FCPA enforcement on jurisdictional grounds where such employees engage in unlawful conduct that is ultimately directed toward the United States. One example of such conduct, as learned from *Magyar Telekom*, is the falsification of corporate books and records, which led the company to file fraudulent financial statements with the SEC.

Contacts

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If you have any questions regarding this LawFlash, or require assistance with any issue relating to the defense of a government enforcement matter, please contact the authors, **George J. Terwilliger, III** (202.739.5988;

5. *Id.* at 8.

6. *Id.*

7. *Id.* at 9.

8. *Id.*

9. *Id.* at 12 (quoting *Sec. & Exch. Comm’n v. Syndicated Food Servs. Int’l, Inc.*, No. 04-CV-1303 (NGG)(ALC), 2010 WL 3528406, at *3 (E.D.N.Y. Sept. 3, 2010)).

10. *Id.*

11. *Id.*

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gterwilliger@morganlewis.com), **Daniel Levin** (202.739.5986; dlevin@morganlewis.com), and **Benjamin D. Klein** (202.739.5394; bklein@morganlewis.com), or any of our white collar practitioners:

Houston

Ryan D. McConnell 713.890.5755 rmccconnell@morganlewis.com

New York

Leslie R. Caldwell 212.309.6260 lcaldwell@morganlewis.com
Kelly A. Moore 212.309.6612 kelly.moore@morganlewis.com
Martha B. Stolley 212.309.6858 mstolley@morganlewis.com

Philadelphia

Eric W. Sitarchuk 215.963.5840 esitarchuk@morganlewis.com
John C. Dodds 215.963.4942 jdodds@morganlewis.com
Eric Kraeutler 215.963.4840 ekraeutler@morganlewis.com
Matthew J. Siembieda 215.963.4854 msiembieda@morganlewis.com
Lisa C. Dykstra 215.963.5699 ldykstra@morganlewis.com
Nathan J. Andrisani 215.963.5362 nandrisani@morganlewis.com
Meredith S. Auten 215.963.5860 mauten@morganlewis.com
Alison Tanchyk 215.963.5847 atanchyk@morganlewis.com

San Francisco

Susan D. Resley 415.442.1351 sresley@morganlewis.com

Washington, D.C.

George J. Terwilliger III 202.739.5988 gterwilliger@morganlewis.com
Robert J. Bittman 202.739.5989 rbittman@morganlewis.com
Fred F. Fielding 202.739.5560 ffielding@morganlewis.com
Margaret M. Gatti 202.739.5409 mgatti@morganlewis.com
Daniel Levin 202.739.5986 dlevin@morganlewis.com
Matthew S. Miner 202.739.5987 mminer@morganlewis.com
Ronald J. Tenpas 202.739.5435 rtenpas@morganlewis.com
Kathleen McDermott 202.739.5458 kmcdermott@morganlewis.com
Scott A. Memmott 202.739.5098 smemmott@morganlewis.com

Wilmington

Colm F. Connolly 302.574.7290 cconnolly@morganlewis.com

Frankfurt

Jürgen Beninca +49.69.714.007.19 jbeninca@morganlewis.com

London

Nick Greenwood +44 (0)20 3201 5570 ngreenwood@morganlewis.com
David Waldron +44 (0)20 3201 5590 dwaldron@morganlewis.com
Iain Wright +44 (0)20 3201 5630 iwright@morganlewis.com

Moscow

Jonathan H. Hines +7 495 212 2552 jhhines@morganlewis.com
Vasilisa Strizh +7 495 212 2540 vstrizh@morganlewis.com
Nane Oganesyanyan +7 495 212 2575 noganesyan@morganlewis.com
Oleg I. Berger +7 495 212 2545 oberger@morganlewis.com

Almaty

Aset A. Shyngyssov +7 727 250 7575 ashyngyssov@morganlewis.com

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