Ericsson Agrees To Pay Over USD $1 Billion To Settle FCPA Charges

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On December 6, 2019, Telefonaktiebolaget LM Ericsson (Ericsson or the Company), resolved long-running investigations by the U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC) into the Company's alleged violations of the U.S. Foreign Corrupt Practices Act (FCPA). Ericsson agreed to pay in total more than $1 billion to the DOJ and the SEC and enter into a deferred prosecution agreement (DPA) with the DOJ. This is the second-largest FCPA settlement ever and illustrates the application of several recently announced policies on corporate investigations.

Background

The DOJ alleges that, from approximately 2000 to 2016, Ericsson and its subsidiaries engaged in large-scale bribery schemes in multiple countries to win lucrative telecommunications contracts from state-owned customers. The SEC complaint alleges that the Company's misconduct resulted in approximately $427 million in illicit profits. In addition, the DOJ and the SEC allege that Ericsson concealed illicit payments through fraudulent contracts with third parties and improperly recorded these payments in its books and records.

Ericsson entered into a three-year DPA with the DOJ to resolve criminal charges of conspiracy to violate the anti-bribery provision of the FCPA and conspiracy to violate the books-and-records provision of the FCPA. Ericsson's subsidiary, Ericsson Egypt Ltd., pleaded guilty to one count of conspiracy to violate the anti-bribery provisions of the FCPA. Ericsson also agreed to retain an independent compliance monitor for a term of three years.

Penalties

As part of its settlement, Ericsson will pay a $520 million criminal penalty to the DOJ and $540 million in disgorgement and pre-judgment interest to the SEC. Neither the DOJ nor the SEC appears to have credited Ericsson for the payments it will make to the other enforcement agency, despite recent DOJ guidance suggesting agencies coordinate to avoid "piling on" penalties[1]. In contrast, in March of 2019, Russian-based telecommunication company Mobile Telesystems PJSC (MTS) received credit from the DOJ for the civil penalty it paid to the SEC, and no further disgorgement was required.[2]

Ericsson's settlement is particularly remarkable in light of the bribe amounts at issue. Comparable settlements have involved between $300 million to $2 billion in bribes.[3] The amount of the bribes Ericsson allegedly paid — $62 million — is smaller, but the total settlement amount is, as noted above, the second-largest in the history of FCPA enforcement.[4] This proportion is attributable, at least in part, to the amount of profits that the DOJ claimed resulted from Ericsson's misconduct. The DOJ calculated Ericsson's criminal fine based on the Company's pecuniary gain — in this case, over $382 million. Although some

[1] See Policy on Coordination of Corporate Resolution Penalties, May 9, 2018; and Deputy Attorney General Rod Rosenstein Delivers Remarks to the New York City Bar White Collar Crime Institute, May 9, 2018.

[2] See *Mobile Telesystems Pjsc and Its Uzbek Subsidiary Enter Into Resolutions of $850 Million With the Department of Justice for Paying Bribes in Uzbekistan*, U.S. Department of Justice Office of Public Affairs, Mar. 7, 2019.

[3] See, *e.g.*, *Telia Company AB and Its Uzbek Subsidiary Enter Into a Global Foreign Bribery Resolution of More Than $965 Million for Corrupt Payments in Uzbekistan*, U.S. Department of Justice Office of Public Affairs, Sept. 21, 2017 (estimating Telia paid more than $331 million in bribes); and Petroleo Brasileiro S.A. Petrobras Non-Prosecution Agreement, Sept. 26, 2018 (estimating that Petrobas paid more than U.S. $2 billion in corrupt payments).

[4] Complaint, *SEC v. Telefonaktiebolaget LM Ericsson*, No. 1:19-cv-11214, at ¶ 2 (S.D.N.Y. Dec. 6, 2019).

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exceptions exist,[5] the DOJ's reliance on pecuniary gain to calculate a company's criminal fine is not unusual. This case, therefore, demonstrates how even relatively smaller bribes can result in large settlements, particularly when those bribes allow a company to win lucrative contracts. Ericsson's criminal fine was also increased because the DOJ found that numerous "high-level personnel of the organization participated in, condoned, or [were] willfully ignorant of the offense."[6] Notably, the DOJ counted regional and country executives — not merely senior executives or Board members at headquarters — as "high-level personnel" for the purpose of calculating Ericsson's fine.

The $540 million in disgorgement that Ericsson agreed to pay as part of its settlement with the SEC is also a function of Ericsson's profits. Taking into account additional misconduct in Saudi Arabia that is not included in the criminal charges, the SEC determined that Ericsson should pay $427 million in profits plus pre-judgment interest. This disgorgement amount is itself among the largest in FCPA history. Although the SEC did not explain how Ericsson's profits were calculated or indicate whether Ericsson entered into a tolling agreement with the SEC, the SEC's complaint describes illicit activity dating as far back as 2011 — several years outside the five-year statute of limitations that applies to disgorgements under *Kokesh v. SEC*.[7] Notably, the settlement was announced just one month after the Supreme Court agreed to consider whether the SEC has the authority to obtain disgorgement at all.[8]

Cooperation and Remediation Credit

Ericsson did not earn full credit for cooperation and remediation and received only a 15% reduction in its fine, as opposed to the full 25% reduction available under the FCPA Corporate Enforcement Policy. Although the DOJ acknowledged Ericsson's numerous efforts to cooperate with the government's investigation, it nonetheless granted Ericsson only partial credit for its efforts because the Company purportedly failed to disclose allegations of corruption with respect to two relevant matters, produced certain materials late and failed adequately to discipline certain employees.[9]

In recent months, the DOJ has drawn attention to untimely productions of documents with increasing frequency. Ericsson is the fifth company in 2019 that received only a partial-credit award due at least in part to purported failure to produce materials in a timely manner. The Ericsson settlement underscores the U.S. enforcement authorities' cooperation expectations and the importance of planning ahead and working diligently and proactively with the DOJ in providing requested information.

Even if a company intends to cooperate fully with investigating agencies throughout an enforcement action, producing documents and data located overseas may raise difficult data privacy issues. Although the FCPA Corporate Enforcement Policy provides that a company whose ability to produce documents is restricted by local data privacy laws may still be eligible for full credit, the company "bears the burden of establishing the prohibition" and must "work diligently to identify all available legal bases to provide such documents" through alternative means.[10] Similarly, companies subject to more employee-friendly labor laws may find it difficult to meet the DOJ's and the SEC's expectations with respect to remediation. Ericsson, for example, was cited for its failure to adequately discipline employees, even though the DPA itself reflects that numerous culpable employees left the Company prior to finalizing the settlement.

Corporate Monitorship

Although Ericsson's large monetary settlement is somewhat unusual, the three-year corporate monitorship imposed on the company is consistent with both DOJ guidance and previous FCPA resolutions with other telecommunications companies, including MTS and Netherlands-based VimpelCom. Since 2013, one in three companies that resolved an FCPA investigation with the DOJ or the SEC through a plea agreement or settlement was required to retain an independent compliance monitor. Most of these companies were headquartered outside the U.S.

The Ericsson case serves as a reminder that corporate monitorships — despite being widely acknowledged as highly disruptive to a company's normal operations — are still prescribed by U.S. enforcement agencies because of their perceived effectiveness, especially in reducing recidivism. It is therefore imperative for a company to commit to strengthening its FCPA compliance program and to ensure its program will be seen by the DOJ as effective, as soon as compliance issues or internal controls weaknesses are identified.[11]

[5] See, *e.g.*, *United States v. Mobile TeleSystems PJSC* Deferred Prosecution Agreement at ¶¶ 4(j), 7(c) (using "the value of the unlawful payment" to calculate base fine, where subsequent action by the local government resulted in "no realized pecuniary gain to the Company as a result of the misconduct."); and DOJ Sentencing Memo., *United States v. Siemens*, at 12-13 (noting that the bribe amount was used to calculate Siemens's base fine because "calculating a traditional loss figure in a case of this magnitude, involving literally thousands of contracts over many years, would be overly burdensome, if not impossible.")

[6] *United States v. Telefonaktiebolaget LM Ericsson* Deferred Prosecution Agreement at ¶ 7.

[7] 137 S.Ct. 1635 (2017).

[8] *Liu v. SEC*, No. 18-1501, 2019 WL 5659111, at *1 (U.S. Nov. 1, 2019).

[9] *United States v. Telefonaktiebolaget LM Ericsson* Deferred Prosecution Agreement at ¶ 4(b)-(c).

[10] See 9-47.120 - FCPA Corporate Enforcement Policy.

[11] See, *e.g.*, where Dutch-based telecom company Telia was able to settle with the U.S. authorities without a monitorship because of its extensive remedial measures, including "replacing all relevant members of its board and senior management and implementing a new comprehensive compliance program."

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