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THE CONTINUING FAÇADE OF FCPA ENFORCEMENT: A CRITICAL LOOK AT THE TELIA DPA

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In a 2010 article, Professor Mike Koehler drew attention to the remarkable fact that every Foreign Corrupt Practices Act (FCPA) enforcement action against corporate entities over the previous twenty year period was resolved through a negotiated settlement or plea agreement. His analysis revealed that many of these settlements did not reflect a factually or legally supported FCPA case. Instead, he concluded that many corporate defendants were not settling FCPA cases because the evidence against them proved a violation, but rather because the cost/benefit analysis of mounting a challenge versus acquiescing to law enforcement's allegations skewed heavily toward the latter. Given the net effect of the various "carrots and sticks" offered by the government to incentivize settlement, Professor Koehler argued that FCPA defendants are often pushed to accept liability despite dubious enforcement theories or the existence of legitimate defenses. In his view, the overwhelming incentives to settle unsupported FCPA cases distort how the statute is interpreted and create a "façade" of enforcement.

This Article tests Professor Koehler's thesis through an examination of the 2017 deferred prosecution agreement (DPA) between the Department of Justice (DOJ) and Swedish telecommunications firm Telia Company AB. This case is unique because, unlike virtually every other corporate FCPA resolution, the facts underlying Telia's DPA have been subjected to meaningful ex ante *substantive challenge in Swedish courts. The company also made the atypical decision to publicly release its outside counsel's full investigative*

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report, providing an unusually rich source of objective information about the purported foreign bribery scheme. An examination of these materials exposes what appears to be a clear instance of a company folding to DOJ pressure not because of the strength of prosecutors' case, but because of a business decision to avoid the unpredictability and expense of a contested proceeding.

While this conclusion is not intended to suggest Telia and its legal advisers made a strategic error, it highlights that in this case, and most likely in a good number of others, the existence of a corporate resolution does not necessarily mean that there was in fact an FCPA violation. Instead, the Telia case indicates that the "carrots and sticks" identified by Professor Koehler continue to strongly incentivize companies to more or less admit to the version of facts proposed by law enforcement to make an investigation go away. Whether this dynamic will allow the U.S. government to indefinitely extend its extraordinary win streak in corporate FCPA cases depends on how long the foreign companies that are most often targeted choose to accept it.

INTRODUCTION

In a 2010 article, Professor Mike Koehler drew attention to the remarkable fact that every Foreign Corrupt Practices Act (FCPA) enforcement action against corporate entities over the previous twenty years was resolved with a non-prosecution agreement (NPA), deferred prosecution agreement (DPA), plea, or Securities and Exchange Commission (SEC) settlement, as was nearly every FCPA case against individuals.[1] Since such resolutions are not subject to meaningful judicial oversight, Professor Koehler used the absence of litigated challenges by defendants in FCPA cases to argue that enforcement of the law was often a "façade." "Because of the 'carrots' and 'sticks' relevant to resolving a government enforcement action," he wrote, "FCPA defendants are nudged to accept resolution vehicles notwithstanding the enforcement agencies' untested and dubious enforcement theories or the existence of valid and legitimate defenses."[2]

While careful to stress he was not implying that "every FCPA enforcement action is unwarranted or that no company or individual has ever violated the FCPA,"[3] Professor Koehler's analysis showed that many of the settlements reached in "FCPA enforcement actions do not necessarily reflect the triumph of" U.S. law enforcement's legal position.[4] Instead, he concluded that the settlements often reflected "risk-based decision[s]" made by defendants that were "primarily grounded in issues other than facts or the law."[5] In other words, Professor Koehler found that defendants were settling FCPA cases not because the evidence against them proved a violation, but because the cost/benefit analysis of mounting a challenge ver-

1. Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 932 (2010).
2. *Id.* at 907.
3. *Id.*
4. *Id.* at 925.
5. *Id.*

sus acquiescing to law enforcement's allegations skewed heavily towards the latter.

In the decade since Professor Koehler's article was first published, not much has changed with respect to FCPA actions against companies. In fact, of the more than 130 Department of Justice (DOJ) enforcement actions targeting entities for FCPA violations since the start of 2010, all but one resulted in a NPA, DPA, plea, or a DOJ declination letter preceded by an agreement to disgorge allegedly ill-gotten gains (which is essentially a different kind of settlement).[6] In the single exception where a corporate FCPA defendant proceeded to trial, its conviction was thrown out for severe prosecutorial misconduct.[7] This aberration aside, in the forty-three years since the FCPA was passed, no corporate defendant has challenged a civil or criminal FCPA case in court.[8] U.S. law enforcement's near-perfect record in such cases can only mean one of two things: either the DOJ and SEC have made at most one erroneous FCPA charging decision between them, or companies are accepting responsibility for FCPA allegations that are unsupported.

Like North Korea's unanimous national election results,[9] the credibility of perfect enforcement regimes is inherently suspect because it suggests defendants lack a meaningful ability to challenge the government. Indeed, similar statistics in autocratic countries have been used to highlight the flaws in

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6. *See, e.g.*, *FCPA Digest*, SHEARMAN & STERLING LLP, https://fcpa.shearman.com/cases (last visited June 12, 2021) (listing a total of 126 cases filed by the DOJ against entities); *Declinations*, U.S. DEP'T OF JUST. (Aug. 6, 2020), https://www.justice.gov/criminal-fraud/corporate-enforcement-policy/declinations (listing 14 declinations against corporations).

7. *See* United States v. Aguilar Noriega, 831 F. Supp. 2d 1180 (C.D. Cal. 2011).

8. Like the DOJ, the SEC reached negotiated resolutions in all of its more than 130 FCPA enforcement actions against entities since Professor Koehler's 2010 article. *See FCPA Digest*, SHEARMAN & STERLING LLP, https://fcpa.shearman.com/cases (last visited June 12, 2021) (listing 132 actions by the SEC against entities between 2010 and 2020); *SEC Enforcement Actions: FCPA Cases*, U.S. SEC. & EXCH. COMM., https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (last visited June 12, 2021) (listing one action by the SEC against an entity in 2021).

9. *See, e.g.*, Adam Withnall, *North Korea Elections: Kim Jong-un Wins 100% of the Vote*, THE INDEP. (Mar. 10, 2014), https://www.independent.co.uk/news/world/asia/kim-jong-un-wins-100-vote-north-korean-elections-9180814.html.

criminal justice systems based on a weak rule of law. The former British ambassador to Uzbekistan, for example, made such an argument after being told by the Uzbek Foreign Minister that criminal justice in Uzbekistan, considered one of the most repressive countries in the world, was "perfect" because "[i]n our country the innocent are never accused, only the guilty are accused. That's why they are all convicted."[10] Similar arguments have been made about the perennial conviction rate of over 99.9% in China.[11]

The purpose of this Article is to assess the extent to which Professor Koehler's thesis holds true. The 2017 DPA reached between the DOJ and Swedish telecommunications firm Telia Company AB[12] provides a unique opportunity to do so because, unlike virtually all other corporate FCPA resolutions, the facts underlying the government's allegations have been subjected to meaningful *ex ante* substantive challenge and review, albeit in jurisdictions outside the United States. Telia also made the atypical decision to make its outside counsel's full investigative report publicly available, supplying an additional, unusually rich source of objective information about the transactions at issue. For the reasons discussed below, an examination of these materials exposes what appears to be a clear instance of a company folding to DOJ pressure not because of the strength of prosecutors' case, but because of a business decision to avoid the expense, unpredictability, and various other collateral consequences of a contested proceeding.

To be clear, this conclusion is not intended to suggest bad faith on the part of DOJ prosecutors or an error by Telia and its legal advisers. Rather, it is meant to highlight that in this case, and most likely in a good number of others, the mere existence of a corporate resolution does not necessarily establish that there was an FCPA violation. For individual FCPA defendants, who face a much different cost/benefit calculation

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10. Craig Murray, Former British Ambassador to Uzbekistan, Address at York University (Feb. 24, 2005).

11. Neil Connor, *Chinese Courts Convict More Than 99.9 Per Cent of Defendants*, THE TELEGRAPH (Mar. 14, 2016), https://www.telegraph.co.uk/news/worldnews/asia/china/12193202/Chinese-courts-convict-more-than-99.9-per-cent-of-defendants.html.

12. Deferred Prosecution Agreement, United States v. Telia Company AB, No. 17-CR-00581 (S.D.N.Y. Sept. 21, 2017), 2017 WL 8185886 [hereinafter Telia DPA].

than their employers, this is an important factor to weigh when deciding whether to accept a guilty plea or exercise their constitutional right to challenge allegations of wrongdoing at trial.

It should also be relevant to corporations at risk of becoming the target of an FCPA investigation. While the "carrots and sticks" described by Professor Koehler in 2010 exist in much the same form today, recent geopolitical events have made the American regulatory apparatus appear less infallible than it once did.[13] As such, there will likely be future cases where a rational business analysis favors a fight.

I.
WHY PROFESSOR KOEHLER SAW A "FAÇADE" OF FCPA ENFORCEMENT

Professor Koehler's analysis was based on the premise that the DPAs, NPAs, pleas, and SEC settlements reached in every FCPA case against a corporate defendant were not indicative of the overwhelming strength of law enforcement's legal theories or evidence. Instead, he observed,

> [E]ach of these resolution vehicles is the result of private negotiations between the enforcement agencies and the alleged wrongdoer in the context of the enforcement agencies dangling substantial "carrots" for cooperating and agreeing to its version of the facts and interpretation of the law. At the same time, the alleged wrongdoer is cognizant of the enforcement agencies' substantial "sticks" should it disagree with the enforcement agencies.[14]

And further, because corporate FCPA resolutions are generally not subject to substantive judicial scrutiny, "there is no independent analysis of whether factual evidence exists to support the FCPA's legal elements or whether valid and legitimate defenses are relevant to the conduct charged."[15] As a result,

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13. *See, e.g.*, Andy Kroll, *Donald Trump's Presidency Is a Saturday Night Massacre That Never Ends*, ROLLING STONE (June 23, 2020), https://www.rollingstone.com/politics/politics-features/william-barr-donald-trump-justice-department-geoffrey-berman-roger-stone-michael-flynn-1018964/.

14. Koehler, *supra* note 1, at 909.

15. *Id.* at 924.

"in many instances, the FCPA means simply what the DOJ and SEC say it means."[16]

The "carrots and sticks" Professor Koehler identified as driving defendants' settlement decisions were found in the DOJ's Principles of Federal Prosecution of Business Organizations (the "Principles"), the U.S. Sentencing Guidelines (the "Guidelines"), and the SEC's corporate resolution policy.

With respect to the carrots, he noted that the DOJ's Principles state that "[c]ooperation is a potential mitigating factor, by which a corporation . . . can gain credit in a case that otherwise is appropriate for indictment and prosecution."[17] Although the Principles provide that a company's failure to cooperate means only that it will lose mitigation credit, and not that it will be indicted, Professor Koehler found that in practice, this was a "distinction without a difference."[18] "Simply stated," he added, "to challenge the DOJ's theories, its interpretation of facts, or to raise valid and legitimate FCPA defenses is not to cooperate with the investigation—a key factor in DOJ's ultimate decision of whether to seek a criminal indictment against a company."[19] Because of this, he suggested that "corporations opt to disclose even ambiguous conduct to the DOJ and agree to whatever settlement terms the DOJ views proper (notwithstanding the salient fact that such conduct may not even violate the FCPA)."[20]

Professor Koehler argued that the Guidelines similarly "nudge" corporate defendants towards FCPA resolutions: "Application of the [Guidelines] will result in a lower corporate fine if the corporation 'reported the offense to appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct.'"[21] Since putting the DOJ "to its burden in an adversarial proceeding to establish factual evidence that supports the FCPA's legal elements is not 'affirmative acceptance of responsibility,'" such "a

16. *Id.* at 909–10.

17. *Id.* at 925 (citing U.S. Dep't of Just., Just. Manual §9-28.000, at 7 (2008)).

18. *Id.* (citing U.S. Dep't of Just., Just. Manual §9-28.000, at 11 (2008)).

19. *Id.* at 925–26.

20. *Id.* at 926.

21. *Id.* at 927 (citing U.S. Sent'g Guidelines Manual § 8C2.5(g) (U.S. Sent'g Comm'n 2009)).

challenge will result in a corporation being treated more severely from a penalty perspective."[22] In combination, Professor Koehler concluded that the Principles and Guidelines make challenging the DOJ simply "too risky."[23]

While the SEC cannot dangle potential criminal charges over a corporation like the DOJ can, its policies nevertheless create similarly strong incentives for companies to voluntarily disclose even marginal wrongdoing, cooperate, and settle.[24] Indeed, this was the explicit goal of policy changes enacted by the SEC in January 2010. As the then-Director of the SEC noted at the time, the "game changing" new measures were designed to strengthen the SEC's "enforcement program by encouraging greater cooperation from individuals and companies in the agency's investigations and enforcement actions."[25] Since this reform, the SEC has been able to offer the same pro-cooperation resolution mechanisms—DPAs and NPAs—as its counterparts at the DOJ.[26]

Given the net effect of the DOJ/SEC incentives to settle, Professor Koehler reasoned that in many cases FCPA enforcement was a "façade" because the privately negotiated resolutions were based on "untested and dubious legal theories" and "bare-bones, conclusory statements of facts or allegations."[27] In his view, this "façade of FCPA enforcement" had, in turn, bred "overcompliance" by forcing companies to calibrate their compliance policies to "whatever legal signpost may be gleaned from a typical FCPA resolution vehicle," even though such vehicles often were not reflective of the underlying evidence.[28]

Put differently, the overwhelming incentives for corporations to settle even weakly-supported FCPA cases distort how the statute is interpreted and enforced. And because corporate settlements generally require acknowledgement that cer-

22. *Id.* at 927.
23. *Id.*
24. *Id.* at 927–29.
25. *Id.* at 928 (citing Press Release, U.S. Sec. & Exch. Comm., SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations (Jan. 13, 2010), http://www.sec.gov/news/press/2010/2010-6.htm).
26. *Id.* at 928–29
27. *Id.* at 959–60.
28. *Id.* at 1001.

tain employees acted improperly, "these agreements put individual FCPA defendants in [the] almost impossible situation" of confronting U.S. regulators without their employer's support.[29] Rather, because cooperating companies will generally be obligated to support law enforcement's version of events, they will typically seek to assist the government's case against a former employee as much as possible to maximize their "good deed" credit.[30] This dynamic increases the already intense pressure on individual FCPA defendants to plead guilty, as reflected in the fact that the majority of FCPA cases against individuals that go to trial are "stand alone" prosecutions—i.e., ones not brought on the back of a corporate resolution.[31]

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29. *Id.* at 942.

30. *See, e.g.*, United States v. Connolly, No. 16-CR-00370, 2019 WL 2120523, at *12 (S.D.N.Y. May 2, 2019) (finding DOJ and CFTC had effectively outsourced their investigation to defendant's former employer, Deutsche Bank, and its lawyers); Aruna Viswanatha & Dave Michaels, *Flaws Emerge in Justice Department Strategy for Prosecuting Wall Street*, WALL ST. J. (July 5, 2021, 1:37 PM), https://www.wsj.com/articles/flaws-emerge-in-justice-department-strategy-for-prosecuting-wall-street-11625506658?mod=hp_featst_pos3 (quoting a former fedeal prosecutor as stating, "[t]he system of corporate cooperation creates such strong incentives for companies to assist the government with its investigations that it can lead to corporate counsel acting like deputized members of the Department of Justice rather than private defense lawyers"); Clara Hudson, *DOJ Swats away "Outsourcing" Concerns in Cognizant Case*, GLOB. INVESTIGATIONS REV. (Mar. 2, 2020), https://globalinvestigationsreview.com/just-anti-corruption/doj-swats-away-outsourcing-concerns-in-cognizant-case (discussing an FCPA case where two individual defendants argued that DOJ had "outsourced" its investigation to their former employer).

31. *See, e.g.*, *FCPA* Digest, SHEARMAN & STERLING LLP, https://fcpa.shearman.com/siteFiles/FCPA%20Headlines/fcpa-digest.pdf (last visited June 12, 2021) (noting only two cases against individuals that resulted in jury trials after a negotiated resolution was reached by their employer: Amended Judgment in a Criminal Case, United States v. Lambert, No. 18-CR-00012 (D. Md. Nov. 20, 2020) and Judgment in a Criminal Case, United States v. Hoskins, No. 12-CR-00238 (D. Conn. Mar. 11, 2020)). A third individual, Ng Chong Hwa, is scheduled to proceed to trial in 2022 after a DPA was reached by his employer, Goldman Sachs. *See* Minute Entry, United States v. Ng Chong Hwa, No. 18-CR-00538 (E.D.N.Y. May 11, 2021); Deferred Prosecution Agreement, United States v. The Goldman Sachs Group, Inc., No. 20-CR-00437 (E.D.N.Y. Oct. 22, 2020).

II.
Corporate FCPA Enforcement Since 2010

The carrots and sticks described by Professor Koehler remain largely intact today and, if anything, have become more pronounced. An important development in this regard was the DOJ's release of its policy on Individual Accountability for Corporate Wrongdoing—better known as the "Yates Memo"—in September 2015.[32] The overall purpose of the Yates Memo was to strengthen the DOJ's pursuit of individual corporate wrongdoing, by, in part, denying companies any cooperation credit unless they "completely disclose to the [DOJ] all relevant facts about individual misconduct."[33]

The predictable effect of this policy shift has been to further ratchet up the pressure on corporate defendants to not only decline to challenge law enforcement's allegations, but to gear internal investigations towards identifying evidence of their employees' personal guilt, even where it may not be clear that such guilt exists. And since a company's fate turns on finding evidence its employees did something wrong, it is unsurprising that investigations—usually led by outside counsel with duties to the company—generally find just that. As two prominent defense lawyers observed, the Yates Memo "affect[s] the incentives of company counsel when conducting investigations" because it directs "prosecutors to judge corporate cooperation according to the nature and extent of incriminating information disclosed to the government."[34] Consequently, "the Yates Memorandum may, in close cases, lead company counsel to overinterpret the facts, or find wrongdoing where the record is more consistent with innocent mistake or uncertainty."[35]

On the heels of the Yates Memo, in 2016 the DOJ announced a one-year pilot program within the Fraud Section's FCPA Unit.[36] The purpose of the program was to provide even

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32. Memorandum from Sally Yates, Deputy Att'y Gen., Dep't of Just., on Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download.

33. *Id.* at 3.

34. Elkan Abramowitz & Jonathan Sack, *Deferred Prosecution Agreements In Decline? Enforcement Implications*, N.Y.L.J., Jan. 5, 2016, at 4.

35. *Id.*

36. Press Release, Leslie R. Caldwell, Assistant Att'y Gen., Dep't of Just., Criminal Division Launches New FCPA Pilot Program (Apr. 5, 2016), https:/

more motivation for "companies to voluntarily self-disclose FCPA-related misconduct [and] fully cooperate with the Fraud Section."[37] Specifically, the pilot program provided,

> [I]f a company chooses not to voluntarily disclose its FCPA misconduct, it may receive limited credit if it later fully cooperates and timely and appropriately remediates—but any such credit will be markedly less than that afforded to companies that do self-disclose wrongdoing. By contrast, when a company . . . voluntarily self-discloses misconduct, it is eligible for the full range of potential mitigation credit. That means that if a criminal resolution is warranted, the Fraud Section may grant a reduction of up to 50 percent below the low end of the applicable [Guidelines] fine range, and generally will not require appointment of a monitor. In addition, . . . the Fraud Section's FCPA Unit will consider a declination of prosecution.[38]

In November 2017, the pilot program became a permanent feature of the DOJ's U.S. Attorneys' Manual (now called the Justice Manual).[39]

In light of these new incentives, companies in FCPA cases have—virtually without exception—continued to refrain from challenging law enforcement in favor of reaching a settlement. As noted above, of the over 130 criminal FCPA actions targeting entities since Professor Koehler's article was published, all but one was resolved via a privately negotiated NPA, DPA, plea, or "declination with disgorgement," a relatively new form of settlement.[40] The lone exception over this ten-year period

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/www.justice.gov/archives/opa/blog/criminal-division-launches-new-fcpa-pilot-program.

37. *Id.*

38. *Id.*

39. Tom Schoenberg, *Companies Get Extra Incentive to Disclose Bribes: No Charges*, BLOOMBERG (Nov. 29, 2017, 10:30 AM), https://www.bloomberg.com/news/articles/2017-11-29/new-u-s-incentive-for-self-reporting-bribes-no-penalty-at-all.

40. *See FCPA Digest*, SHEARMAN & STERLING LLP, https://fcpa.shearman.com/cases (last visited June 12, 2021); DOJ, *Declinations*, (last updated Aug. 6, 2020), https://www.justice.gov/criminal-fraud/corporate-enforcement-policy/declinations. Note that in one of the fourteen FCPA declinations issued since 2016, the company was not required to disgorge ill-gotten gains in light of "an ongoing parallel investigation by the U.K.'s Serious Fraud Office for violations of law relating to the same conduct." Letter

was the case against Lindsey Manufacturing Company, a privately held company based in California that manufactures emergency restoration systems.[41] The DOJ alleged that Lindsey and employees acting on its behalf paid bribes through two Mexican citizens to secure business with a state-owned power company in Mexico.[42] All of the defendants pleaded not guilty and proceeded to trial. On May 10, 2011, a jury found Lindsey and two of its executives guilty of conspiracy to violate the FCPA and five substantive FCPA violations.[43] Yet, before the defendants were sentenced, the court granted a post-trial motion to dismiss with prejudice due to prosecutorial misconduct. Noting its "deep regret" in finding that the "prosecutors' actions were flagrant, willful, or in bad faith," the court was compelled to dismiss in light of evidence that the charges were "a result of sloppy, incomplete and notably over-zealous investigation, an investigation that was so flawed that the Government's lawyers tried to prevent inquiry into it."[44]

While the DOJ is 0–1 in contested FCPA cases against companies, its flawless record in uncontested corporate FCPA cases since 2010 has resulted in over ten billion dollars flowing to the U.S. Treasury.[45] To put this number into perspective, it greatly exceeds the 2020 budget for the entire Federal Bureau

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from Daniel S. Kahn, Deputy Chief, Dep't of Just., to Matthew Reinhard, Esq., Counsel for Güralp Systems Limited (Aug. 20, 2018), https://www.justice.gov/criminal-fraud/page/file/1088621/download. That company eventually reached a separate DPA with UK authorities requiring it to disgorge £2.1 million. Press Release, Serious Fraud Office, Three Individuals Acquitted as SFO Confirms DPA With Gürlap Systems Ltd. (Dec. 20, 2019), https://www.sfo.gov.uk/2019/12/20/three-individuals-acquitted-as-sfo-confirms-dpa-with-guralp-systems-ltd/.

41. *See* First Superseding Indictment, United States v. Aguilar, No. 10-CR-01031 (C.D. Cal. Oct. 21, 2010).

42. *See* United States v. Aguilar, 831 F. Supp. 2d 1180, 1183 (C.D. Cal. 2011).

43. *See id.* at 1185.

44. *Id.* at 1182, 1209.

45. *See FCPA Digest*, SHEARMAN & STERLING LLP, https://fcpa.shearman.com/cases (last visited June 12, 2021). The SEC's FCPA enforcement actions have contributed billions more over the same period. *See SEC Enforcement Actions: FCPA Cases*, U.S. SEC. & EXCH. COMM., https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml.

of Investigation, an agency with over 35,000 employees.[46] As Professor Koehler noted in a more recent article, it is "easy to see why the DOJ favors the use of NPAs and DPAs to resolve FCPA" cases: such resolutions insulate "the DOJ's FCPA enforcement theories from judicial scrutiny," place it "in the role of prosecutor, judge and jury all at the same time," and allow it "to feed its lucrative FCPA enforcement program."[47]

Considering that the five largest FCPA settlements ever all occurred within the last three years, there is no indication that this enforcement program and the immense industry that has grown around it—dubbed "FCPA Inc."—will voluntarily depart from the status quo any time soon.[48]

III.
Overview of Telia and Background to its Alleged FCPA Violation

A. *Leadup to Telia's Acquisition of MCT*

Telia was founded in 1993 as a 100% state-owned successor to Televerket (Swedish Telecom).[49] In June 2000, Telia was floated on the Swedish stock exchange and the state's ownership was reduced to 70.6%.[50] In 2002, the company merged with Sonera Oyj, a company owned by the government of Finland, and was rebranded TeliaSonera AB.[51] After the merger, ownership was split 46%–19.4% between Sweden and Finland, and Telia immediately became one of the world's largest tele-

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46. *See* Fed. Bureau of Investigations, FY 2020 Budget Request At A Glance (2020), https://www.justice.gov/jmd/page/file/1142426/download.

47. Mike Koehler, *Ten Seldom Discussed Foreign Corrupt Practices Act Facts That You Need to Know*, Bloomberg BNA (May 1, 2015), http://fcpa.stanford.edu/academic-articles/20150501-ten-seldom-discussed-fcpa-facts-you-need-to-know.pdf.

48. *See* Joe Palazzolo, *FCPA Inc.: The Business of Bribery*, Wall St. J. (Oct. 2, 2012), https://www.wsj.com/articles/SB10000872396390443862604578028462294611352.; Mengqi Sun, *FBI Increasingly Probes for Corruption Overseas*, Wall St. J. (Dec. 31, 2020), https://www.wsj.com/articles/fbi-increasingly-probes-for-corruption-overseas-11609434000.

49. *See* John Geary, et al., *Telia's History*, TeliaSonera AB, at 9 (March 2010), https://www.teliacompany.com/globalassets/telia-company/documents/about-telia-company/history/telias-history-1993-2002.pdf.

50. *Id.*

51. *See id.* at 43.

communications companies.[52] Telia registered to list American Depositary Shares (ADSs) on NASDAQ in 2002 and thereby became an "issuer" for purposes of the FCPA.[53]

By 2006, Telia's operations had expanded to include subsidiaries in over a dozen countries.[54] Around the beginning of 2007, Telia embarked on a strategic expansion of its operations in Eurasia. One of the companies identified as a prime acquisition target in the region was MCT Corp., the U.S.-based parent company of Coscom LLC, one of the largest mobile phone operators in Uzbekistan, and three smaller companies in Tajikistan and Afghanistan.[55]

Founded in 1996, Coscom was one of Uzbekistan's three major telecom firms, the other two being Uzdunrobita (owned by Russia's Mobile Telesystems (MTS)) and Unitel (owned by the Dutch/Russian multinational VimpelCom).[56] In 2006, Uzbek officials launched a regulatory action against Coscom accusing the company of evading millions in taxes.[57] At the same time, Uzbekistan's telecom regulator, the Uzbek Agency for Communications and Information (UzACI), repeatedly denied Coscom permits to build new cell towers and issue new phone numbers.[58] The Uzbek government's pressure on Coscom followed similar moves against several other U.S.-owned firms in the country following a breakdown in Washington/Tashkent relations that stemmed from the May 2005 state-di-

52. *See id.*

53. Deferred Prosecution Agreement Attach. A: Statement of Facts ¶ 2, United States v. Telia Company AB, No. 17-CR-00581, (S.D.N.Y. Sept. 21, 2017) [hereinafter Telia DPA Statement of Facts].

54. *See* TeliaSonera AB, Annual Report 2006 36, https://www.teliacompany.com/globalassets/telia-company/documents/reports/2006/annual-report/teliasonera-annual-report-2006-en.pdf.

55. *See* Telia DPA Statement of Facts, *supra* note 53, ¶ 13; Presentation, TeliaSonera Acquisition of MCT Corp. (July 17, 2007), https://www.teliacompany.com/globalassets/telia-company/documents/investors/presentations/2007/teliasonera_presentation_mct-closing_2007-07-17.pdf.

56. *See* Mannheimer Swartling, Report to the Board of Directors of TeliaSonera AB 25, 28 (Jan. 31, 2013) [hereinafter Mannheimer Report].

57. *See* Diplomatic Cable from State Department Official Brad Hanson, WIKILEAKS (June 15, 2007), https://wikileaks.org/plusd/cables/07TASHKENT1140_a.html.

58. *See id.*

rected massacre of hundreds of Uzbek civilians in the town of Andijan.[59]

The anti-American hostility in Uzbekistan forced MCT's owners to start exploring ways to cash out.[60] By the end of 2006, MCT was in preliminary negotiations with two potential buyers: Russia's JFSC Sistema (the parent company of MTS) and Q-Tel, Qatar's national telecommunications firm.[61]

Q-Tel's proposed entry into the Uzbek market was heavily opposed by the Uzbek authorities. Although no public record exists of the exact reason why, the resistance was likely due to the secular Uzbek government's long-running battle against Islamic terrorists and Qatar's support of Wahhabism, an extreme sect of fundamentalist Islam.[62] So just as the U.S. government opposes the involvement of the Chinese company, Huawei, in American telecom infrastructure for national security reasons,[63] the regime of then-President Karimov likely resisted Q-Tel's purchase of Coscom on similar grounds.

Whatever the issue with Q-Tel, Sistema's proposed purchase of Coscom was originally welcomed.[64] As Uzbekistan is a former Soviet country with close cultural and economic ties to Russia, Sistema likely had a natural advantage. There was also speculation that President Karimov's eldest daughter, Gulnara Karimova, was lobbying for Sistema's takeover of Coscom.[65] As the former U.S. ambassador to Uzbekistan, Jon Pur-

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59. *See, e.g.*, *Gold miner Newmont resolves dispute with Uzbekistan*, REUTERS (July 23, 2007), https://www.reuters.com/article/us-newmont-uzbekistan/gold-miner-newmont-resolves-dispute-with-uzbekistan-idUSN2336630420070723; Ken Silverstein, *One Lump or Two? Uzbek Dictator's Daughter Wipes Out Competing Tea Firm with 'Brain' and 'Muscle*,' HARPER'S MAG. (June 6, 2007), https://harpers.org/2007/06/one-lump-or-two-uzbek-dictators-daughter-wipes-out-competing-tea-firm-with-brain-and-muscle/.

60. *See* Mannheimer Report, *supra* note 56, at 31–32.

61. *See* Telia DPA Statement of Facts, *supra* note 53, ¶ 13.

62. *See* Julia Ioffe, *Why Does Uzbekistan Export So Many Terrorists?*, THE ATLANTIC (Nov. 1, 2017), https://www.theatlantic.com/international/archive/2017/11/uzbekistan-terrorism-new-york-sayfullo-saipov/544649/; *Qatar — The other Wahhabi state*, THE ECONOMIST (June 2, 2016), https://www.economist.com/middle-east-and-africa/2016/06/02/the-other-wahhabi-state.

63. *See America's War on Huawei Nears its Endgame*, THE ECONOMIST (July 16, 2020), https://www.economist.com/briefing/2020/07/16/americas-war-on-huawei-nears-its-endgame.

64. *See* Diplomatic Cable from Ambassador Jon Purnell, WIKILEAKS (Apr. 13, 2007), https://wikileaks.org/plusd/cables/07TASHKENT769_a.html.

65. *See id.*

nell, stated in a leaked diplomatic cable, UzACI's "heavy-handed" actions against Coscom were accompanied by indications that the company's problems "would go away if MCT agreed to sell the firm to Sistema's subsidiary MTS, Russia's leading telecom firm. C[oscom] officials told the Embassy that they believed Gulnora [sic] Karimova had close ties to Sistema and stood to gain personally from C[oscom]'s sale to MTS."[66]

Ambassador Purnell's assessment of Gulnara's interest in a Sistema/MTS takeover of Coscom was likely correct. As the U.S. government knew since at least 2005,[67] Gulnara had been a major shareholder in MTS following its takeover of Uzdunrobita (a company she partly owned) in 2004.[68] Her apparent personal interest in MTS buying Coscom is therefore unsurprising since such a transaction would result in MTS owning two of Uzbekistan's three major telecom operators (and presumably increase the value of her MTS shares as a result). But in any event, whatever support Gulnara may have given to the proposed transaction was insufficient to make it happen.

Instead, MCT rejected Sistema's overtures in early 2007 because the price it offered was too low.[69] When discussions subsequently resumed with Q-Tel that February, the Uzbek government expressed its displeasure by shutting Coscom's entire network down for ten days.[70] The tactic worked as planned and Q-Tel discontinued further negotiations.[71]

B. *MCT Acquisition and Related Agreements with the Local Partner*

At around that point, Telia's joint venture with Turkish firm Turkcell, Fintur Holdings B.V., entered the picture as a

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66. *Id.*

67. *See* Diplomatic Cable from Ambassador Jon Purnell, WIKILEAKS (Sept. 13, 2005), https://wikileaks.org/plusd/cables/05TASHKENT2473_a.html (stating Gulnara bought Uzdunrobita, "modernized the equipment[,] and found the right partner, Russian MTS, to continue key developments. . . . Gulnora [sic], who acquired [her stake in Uzdunrobita] at rock bottom rates, made a considerable sum of money on the transaction.").

68. *See* Deferred Prosecution Agreement Attach. A at A-4, United States v. Mobile TeleSystems PJSC, No. 19-CR-00167-JPO (S.D.N.Y. Mar. 18, 2019) (referring to Gulnara Karimova as "Foreign Official").

69. *See* Diplomatic Cable from Ambassador Jon Purnell, *supra* note 67.

70. *See* Diplomatic Cable from State Department Official Brad Hanson, *supra* note 57.

71. *See id.*

potential "compromise candidate acceptable to both MCT and the Uzbeks."[72] To avoid the same fate as Q-Tel, Telia executives began a "multi-channel" effort to express the company's interest in Coscom to Uzbek authorities and feel out whether President Karimov's regime would find it an acceptable buyer.[73] This fact on its own is unremarkable since Uzbekistan in 2007 was a highly autocratic country where it was widely-known that no major commercial enterprises were permitted without explicit government support.[74] In addition to their lobbying activities, throughout the spring of 2007, Telia and Fintur engaged in "extensive, comprehensive due diligence" on MCT involving "a large internal project team supported by external consultants and legal advisors."[75] This culminated in a due diligence report that was presented to the Telia Board of Directors on June 11, 2007.[76]

The report included detailed valuation information and emphasized "that cooperation with a local partner with knowledge of the country and the prevailing political system is an important measure in order to protect the operations and combat political risks."[77] The report went on to state that "a local partner consisting of a strong local group which, among other things, owned a bank and which had interests in various industries in Uzbekistan, had been identified."[78] In addition to local know-how and telecom expertise, the local group intimated that it would be able to sell Coscom frequencies that would allow it to upgrade its network along with a block of unallocated Uzbek phone numbers to assign to new subscribers.[79] Telia did not know how the local group obtained the

72. Diplomatic Cable from Ambassador Jon Purnell, *supra* note 67.

73. *See* Telia DPA Statement of Facts, *supra* note 53, ¶ 15; Diplomatic Cable from Ambassador Jon Purnell, *supra* note 67 ("[Fintur] has lobbied with the office of President Karimov, the National Security Service, and the National Security Council.").

74. *See* Mannheimer Report, *supra* note 56, at 85 (stating Telia's solicitation of President Karimov's support for the acquisition of MCT "was considered to be a normal measure."); *see also* CRAIG MURRAY, DIRTY DIPLOMACY, 166 (2006) ("In Uzbekistan, no enterprise is possible without government support.").

75. Mannheimer Report, *supra* note 56, at 4, 34.

76. *See id.* at 34.

77. *Id.* at 34–35.

78. *Id.* at 35.

79. *See id.* at 76.

frequencies and number blocks, nor did the company even know how such telecom assets could be obtained in Uzbekistan. Indeed, "[t]his is one of the reasons why a local partner was retained" in the first place.[80]

In every discussion with Telia, the local group was represented by Bekhzod Akhmedov, a prominent executive known in Tashkent as "Mr. Telecom" and the Chief Executive Officer (CEO) of one of Coscom's chief rivals, Uzdunrobita.[81] Akhmedov told Telia he was planning to leave Uzdunrobita, so Telia decided to continue discussions with him in spite of the potential conflict of interest.[82] Internal Telia documents linked Akhmedov with Gulnara Karimova, describing him as the head of her "investment group."[83] Yet according to the Telia and Fintur executives who led the acquisition discussions, this link was never definitively verified, and when Akhmedov was asked directly about Gulnara's potential involvement, he did not provide "any clear answer."[84] The issue was not pressed because "[s]peaking in more detail about circumstances which might possibly involve parts of the [Uzbek] regime was considered . . . something one did with great caution."[85]

Because of Akhmedov's evasiveness, many of those involved in the due diligence process assumed there was a strong

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80. *Id.* at 41.

81. *Id.* at 44.

82. *Id.* at 51–52. Akhmedov was not the only potential local partner considered. "However, interest was focused on [Akhmedov] who claimed to be the representative of [Gulnara's] corporate group. This group consisted of a number of companies with operations in several industries and including cooperations [sic] with *inter alia* a well-known international corporate group. At the same time, [Akhmedov] stood for telecommunications expertise and was also perceived as a partner in the local group." *Id* at 51.

83. *Id.* at 51. For example, in a March 20, 2007 internal email, a Telia executive wrote: "Through various channels, we got to [Gulnara's] telecom team and I have scheduled a meeting with [her] CEO in charge of telecoms, [Akhmedov]." Telia DPA Statement of Facts, *supra* note 53, ¶ 17. On May 15, 2007, another internal Telia email stated: "[We] now have a preliminary hand-shake for principles of a potential partnership with [Akhmedov], the person who is the Chief Executive for [Gulnara's] investment group. According to the proposed deal, the new local partners will bring in new . . . 3G frequencies as well as some technically value-adding assets, such as number blocks, in the company in exchange for 26% of the Uzbekh [sic] venture plus USD 32.5 million." *Id.*

84. Mannheimer Report, *supra* note 56, at 41.

85. *Id.*

possibility that Gulnara "could be involved in or, quite simply, be the local partner."[86] But despite the obvious sensitivities around her connection with President Karimov, Telia determined that because Gulnara was a businesswoman and "not a politician," it "would not be a problem *per se* for [her] to participate" in the planned transaction if that turned out to be the case.[87] Indeed, her stake in MTS and her existing business dealings within the Uzbek telecom market were widely known, as an expert due diligence report commissioned by Telia explicitly stated: "[I]t was general knowledge in the business community in the capital of Uzbekistan that Gulnara Karimova had a central and leading role in the telecom industry via [her] company Zeromax."[88] Given her interest in telecoms, the expert report even suggested possible upsides in Telia partnering with Gulnara directly.[89] Since MTS, like Telia at the time, listed shares on the New York Stock Exchange and was therefore subject to the FCPA, Gulnara's open involvement in the company's subsidiary Uzdunrobita likely gave Telia additional comfort vis-à-vis U.S. bribery laws.[90]

Accordingly, the Telia deal team continued negotiations with Akhmedov's "local group" notwithstanding Gulnara's possible involvement. During a June 11, 2007 meeting, the Telia Board greenlighted the acquisition of MCT by Fintur, but only on the condition that a binding agreement with the local partner was first put in place.[91] While the DOJ later highlighted that the Telia Board was not informed Gulnara could be one

86. *Id.* at 40.

87. *Id.* at 51–52.

88. Tingsrätt [TR] [Stockholm District Court] 2019 p. 1 B 12201-17 (Swed.).

89. *Id.* at 65.

90. By 2006, it was also public knowledge that Gulnara Karimova owned a large stake in another prominent company subject to the FCPA, an Uzbek bottling company affiliated with US-headquartered Coca-Cola. *See, e.g.*, Edward Alden & Andrew Ward, *Coca-Cola accused over Uzbek venture*, FIN. TIMES (June 13, 2006), https://corpwatch.org/article/uzbekistan-coca-cola-accused-over-uzbek-venture; Roz Trading Ltd. v. Zeromax Group Inc., 517 F. Supp. 2d 377, 380 (D.D.C. 2007). This presumably gave Telia's deal team and its lawyers further reassurance as to the propriety of dealing with her on a commercial level.

91. Mannheimer Report, *supra* note 56, at 36.

of the individuals represented by Akhmedov,[92] the Board members themselves stated that the identity of those in the local group was little discussed, and in any event, largely irrelevant to their consideration of the deal.

According to interviews conducted by Telia's counsel, Mannheimer Swartling, the directors "all stated that the discussions were not particularly extensive regarding the local partner or the licenses and other rights which the local partner would provide," because "it did not appear at that time as particularly remarkable."[93] There were thus "no in-depth discussions regarding the matter"; instead, the Board's focus was more on

> [T]he political risks associated with the country . . . [and i]n that context, it appeared to be significant that the local partner was a well-established and strong group which appeared to have the right business and political contacts which might be necessary in order to ensure commercial operations in Uzbekistan.[94]

Each one of Telia's Board members further "pointed out that obviously no bribes would be permitted to be paid" and several of them "emphasised that the overall information which was given [by the deal team] was sufficient for the [Board's] handling of the matter and that the more specific details were the responsibility of operational management."[95]

However, while Telia's Board wanted to move forward, Telia's partner in Fintur, Turkcell, backed out of the acquisition due to its ownership interest in a competing Uzbek telecom operator.[96] Undeterred, on July 3, 2007, the Telia Board resolved to acquire MCT on its own.[97] The Board approved a maximum purchase price of $440 million, which in-

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92. Telia DPA Statement of Facts, *supra* note 53, ¶ 19 ("In materials for a June 11, 2007 board meeting created by certain [Telia] management, . . . they took care to avoid any reference to the partnership with [Gulnara]. Instead, [Gulnara's] involvement was referred to only as a 'strong local group who owns . . . a leading bank in Uzbekistan and with business interests in various industries.'").

93. Mannheimer Report, *supra* note 56, at 77.

94. *Id.*

95. *Id.*

96. *See id.* at 35.

97. *See id.*

cluded $30 million for the acquisition of the frequencies and number block owned by the local partner (assets which were specifically detailed to the Board by the then-CEO).[98] Prior to this approval, the Board was informed of a June 27, 2007 meeting with the local partner, represented by Akhmedov, and told that a binding term sheet with the local partner would be signed the next day, July 4, 2007.[99] The materials provided to the Board also stated that Telia expected to receive a letter from UzACI supporting the investment and that a merger with the local partner's company could be expected within the three weeks following the acquisition of MCT.[100]

Per this approved plan, Telia signed a Cooperation Agreement with the local partner that was intended to set forth how the local partner would become a part owner of Coscom in exchange for its "frequencies and number series" and its "assist[ance] in extending Coscom's existing licences on at least equivalent terms and conditions as those applicable to other operators in the country."[101] This agreement further envisaged that the transfer of the frequencies and number series to Coscom would take place through a merger with 3G Co., the local partner's soon-to-be-formed Uzbek subsidiary.[102] Negotiations with Akhmedov determined that the price for 3G Co., including the relevant rights, would be twenty-six percent of Coscom's shares plus $30 million.[103] The terms of the Cooperation Agreement were intended to be incorporated into a Shareholders' Agreement, which the parties would enter into once the 3G Co. merger took place.[104]

The Cooperation Agreement was signed by Akhmedov on behalf of the local partner or "his nominee." Although the DOJ later intimated that this was misleading in light of Gulnara's possible involvement,[105] Akhmedov "was not be-

98. *Id.* at 78.
99. *Id.*
100. *See id.* at 36, 78.
101. *Id.* at 36–38.
102. *Id.* at 39; *see* Telia DPA Statement of Facts, *supra* note 53, ¶ 17.
103. *See* Mannheimer Report, *supra* note 56, at 39. Reflecting the outcome of the parties' negotiations, the $30 million cash component of the Cooperation Agreement was $2.5 million less than what was originally agreed with Akhmedov in the May 2007 preliminary "hand-shake" agreement. Telia DPA Statement of Facts, *supra* note 53, ¶ 17.
104. *See* Mannheimer Report, *supra* note 56, at 39.
105. Telia DPA Statement of Facts, *supra* note 53, ¶ 23.

lieved [by Telia] to be the local partner; in any event, not on his own."[106] In fact, it was "not [originally] intended that Bekhzod Akhmedov would personally sign any agreement as the local partner."[107] According to Mannheimer's investigation, the reason he signed the Cooperation Agreement was merely "a consequence of the condition imposed by the [Telia Board] that an agreement with the local partner must be signed in order to be able to go through with the MCT deal."[108] In other words, Telia was on a deadline with MCT and Akhmedov stepped in to facilitate the closing.

In all other respects, the Cooperation Agreement was in line with what the Telia Board previously approved, including a provision specifying that the local partner would only be paid after delivery of the assets Akhmedov promised. How Akhmedov obtained those assets was "felt to be less interesting" to both the Board and the Telia executives running the deal.[109] Instead, "[t]he focus was on the commercial deal . . . [and] protecting TeliaSonera's investments."[110] By stipulating that no payment would be made if the local partner did not deliver, "the primary risk which was perceived [by Telia] was addressed."[111] Thus, following execution of the Cooperation Agreement, Telia closed the acquisition of MCT on July 16, 2007 for a final purchase price of approximately $300 million.[112]

Although the corporate vehicle through which the local partner planned to formally act, generically referred to as "3G Co." in the Cooperation Agreement, was originally intended to be a newly established British Virgin Islands entity, Akhmedov subsequently informed Telia that the local partner would instead be using a Gibraltar registered shell company, Takilant.[113] This change was not "considered to be particularly remarkable since a foreign company was [always] meant to be

106. Mannheimer Report, *supra* note 56, at 40.
107. *Id.* at 40.
108. *Id.* at 40.
109. *Id.* at 41.
110. *Id.*
111. *Id.*
112. *TeliaSonera Closes the MCT Acquisition for SEK 2.0 Billion*, U.S. SEC. & EXCH. COMM. (July 17, 2007), https://www.sec.gov/Archives/edgar/data/1169870/000115752307006904/a5449602ex99_1.htm.
113. Mannheimer Report, *supra* note 56, at 41–42.

part of the local partner's formal structure" and it was deemed immaterial "whether this was established on the British Virgin Islands or somewhere else."[114] Nevertheless, as a standard due diligence measure Telia investigated who beneficially-owned Takilant and discovered that the only person officially attached to the company was Gayane Avakyan, a twenty-three-year-old Uzbek woman.[115]

While this fact gave Telia pause, there was never any belief within the company that Avakyan was in fact the local partner. Rather, Telia's deal team believed that "there was still an influential group of individuals who were owners of . . . business interests in several different industries in Uzbekistan behind her."[116] As such, Avakyan's role was seen as a "legal formality" rather than "the person who performed the services and undertakings which the local partner had agreed to perform."[117] Thus, despite the fact that Avakyan executed documents on Takilant's behalf, Telia understood "that it was the local group in Uzbekistan, through [Akhmedov], which constituted the real substance in the local partnership and thereby the critical factor which was of the greatest significance in context."[118]

Because of this, Takilant "was approved [by Telia] in tests under the [FCPA]."[119] According to Mannheimer's investigation, Avakyan's position as Takilant's sole owner and representative "gave rise to some, but not deeper, reflections regarding whether [it] might entail any [legal] problems," because "Takilant was perceived as a formal contracting party, [the] legal status of which had been checked and confirmed."[120] In other words, Telia, likely on the advice of its legal advisers, conducted due diligence into Takilant, found nothing that

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114. *Id.* at 49.
115. *Id.* at 47.
116. *Id.* at 48.
117. *Id.*
118. *Id.*
119. *Id.* at 47. "The fact that a company acted as a formal party [representing the local partner] was a part of the picture and a natural and expected element for handling agreements and the exchange of performances. Even TeliaSonera set up a [shell] structure for the establishment of the business. The fact that Takilant had its registered office in a tax haven was . . . not considered *per se* to be something particularly remarkable, based upon an obvious point of departure that it was a question of lawful tax planning." *Id.* at 49.
120. *Id.* at 49.

would prevent it from performing its assigned function in the transaction, and moved forward.

As part of the contemplated structure for transferring the frequencies and number series to Coscom, Takilant formed an Uzbek subsidiary, Teleson Mobile, in August 2007.[121] As Telia knew from the outset, transfer of these assets would not be possible through "Gibraltar-based Takilant and Coscom; instead, [under Uzbek law] this required local handling in Uzbekistan. Establishing an Uzbek subsidiary was thus a formal precondition for being able to handle the frequencies and other rights in Uzbekistan."[122]

With Teleson and the assets in place, in December 2007, Telia negotiated and signed three separate agreements with Takilant to effectuate the transactions outlined in the July 2007 Cooperation Agreement. The centerpiece of these agreements was the "3G Agreement," which set forth how the frequencies and number block were to be transferred.[123] The direct transfer originally planned in the Cooperation Agreement was abandoned after Telia received an expert opinion from a local Uzbek lawyer that direct transfers of "licences, frequencies or number series" were not permitted under Uzbek law.[124] As an alternative, the 3G Agreement laid out a three-step indirect transfer process that was originally proposed by Akhmedov: (1) Teleson would first waive its ownership rights, (2) the rights would then revert back to the regulator, UzACI, and (3) then be re-issued to Coscom.[125] Although "[n]o formal written opinion regarding the [new] structure was obtained," the local lawyer verbally "revised his opinion when the [new] structure . . . to be used was presented."[126] The regulator, UzACI, also confirmed that the indirect transfer was "legally valid."[127]

After the new transaction structure was approved by Telia's Uzbek counsel, the 3G Agreement was signed on December 24, 2007. Two days later, Teleson submitted its waiver documents to UzACI and Coscom's application was then filed and

121. *Id.* at 50.
122. *Id.*
123. *Id.* at 57.
124. *Id.* at 59.
125. *Id.* at 58.
126. *Id.* at 59.
127. *Id.*

approved on December 27, 2007.[128] How this procedure was handled by the local partner and UzACI was of "minor significance" to Telia. Instead, the crucial issue was that Coscom ultimately obtained the assets.[129] In the event "this was not fulfilled by Takilant, the 3G Agreement held that no payment would be made. Given this commercial allocation of the risk, how the entire procedure played out was felt to be less interesting [to Telia], as long as the procedure was lawful."[130]

The "Assignment Agreement," also signed on December 24th, specified that once Takilant fulfilled its obligations, it would be permitted to purchase twenty-six percent of Coscom for $50 million. In turn, the "Shareholders' Agreement" provided that Telia would pay Takilant $80 million for its frequencies and numbers.[131] As is typical in corporate transactions, the Shareholders' Agreement contained incentives and protections for both parties. The agreement gave Telia "the right to purchase Takilant's shares in the event of any changes in the ownership and control of Takilant" at the higher of the then-current market price or a floor price to be determined by the number of Coscom subscribers at the relevant time.[132] Telia was also given a preference in any dividends paid up to $30 million, meaning that Takilant would not receive any dividends until Telia recouped its $30 million cash investment.[133] For Takilant, the agreement gave it a put option, whereby after a two-year lock-up period it could force Telia to buy its shares for the greater of $50 million or an amount to be determined based on the number of Coscom subscribers at the relevant time.[134]

On December 27, 2007, "after the rights had been registered to Coscom in accordance with the 3G Agreement, [Telia] deposited USD 80 million into Takilant's account with Parex Bank[ ] in Latvia. Takilant thereafter, . . . deposited USD 50 million for 26 per cent of the shares" into Telia's account with Handelsbanken in Stockholm.[135] The net effect

128. *Id.* at 58–59.
129. *Id.* at 59.
130. *Id.*
131. *Id.* 60–61, 63.
132. *Id.* at 61.
133. *Id.* at 61–62.
134. *Id.* at 62.
135. *Id.* at 63.

was that, in exact accordance with the Telia Board's authorization in July, Coscom received its frequencies and numbers in exchange for paying Takilant $30 million and giving it twenty-six percent of the company.

C. *Other Agreements Between Telia and Takilant*

Between 2007 and 2010, Telia and Takilant completed a series of additional transactions that followed roughly the same structure as those used in the 2007 acquisition agreements. In brief, these other transactions were:

1. *Fall 2007 Loan to Takilant*

From early on in the negotiations between Telia and Takilant, Akhmedov requested a total cash payment of $32.5 million, which included $2.5 million for what he described as unspecified "costs associated with the transactions."[136] But Telia rejected this request, and the cash component in the final deal was fixed at $30 million dollars.[137] Because this left Akhmedov short of what he needed to finalize his end of the transaction, in the fall of 2007, Akhmedov borrowed the equivalent of $2.025 million from Coscom in local currency (the Uzbek som).[138] The loan was disbursed in four payments, each of which was within the scope of local Coscom management's authority.[139] Per the terms of the loan agreement, Akhmedov repaid the loan in full in the fall of 2008.[140]

2. *August 2008 Agreement to Purchase Number Series and Network Code*

In the summer of 2008, Telia agreed to purchase from Takilant another block of one million unassigned phone numbers and a mobile network code, which allows mobile users to connect with the network operated by their specific provider, for $9.2 million.[141] As with the earlier Takilant transactions, Telia protected itself by splitting payment into two tranches: $4 million upfront and $5.2 million paid after delivery of the

136. *Id.* at 64.
137. *Id.* at 63–64.
138. *Id.* at 63–64.
139. *Id.* at 64.
140. *Id.* at 63.
141. *Id.* at 66.

assets.[142] And like the 2007 3G Agreement, the transfer was to be indirect, with Takilant's subsidiary, Teleson, first waiving its rights to the assets, followed by a reassignment to Coscom.[143] This sequence was completed on August 26, 2008, and Takilant was paid in full on September 16, 2008.[144] Because the transaction was relatively small, it was approved on the authority of Telia's CEO without consideration by the Board.[145]

3. *January 2010 Buyback Agreement*

In late 2009, Akhmedov asked Telia to extend a large loan to Takilant due to unspecified "financing needs."[146] Telia declined to do so, but as an alternative, offered to buy back most of Takilant's Coscom shares in accordance with its "overall strategy to increase its shareholdings in partner companies where possible."[147] To determine the value of these shares, Takilant retained an outside financial adviser who appraised them at $250 million, whereas Telia's internal valuation put them at between $200 and $225 million.[148] Following negotiations, the parties ultimately agreed to a purchase price of $220 million.[149] While this amount was higher than what Takilant could have gotten if it had exercised its put option under the 2007 Shareholders' Agreement, Takilant was not actually using its put, nor did Telia want it to.[150] The put was an all-or-nothing option, meaning that Takilant could not sell just a portion of its shares, but had to sell its shares all at once.[151] But Telia did not want to cash out Takilant completely, as doing so would in effect end the partnership that Telia's Board had considered important to Coscom's success.[152] As such, the Buyback Agreement left Takilant with a six percent stake in Coscom and obligated it to "continue to assist and support

142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 67.
146. *Id.*
147. *Id.* at 68.
148. *Id.*
149. *Id.*
150. *Id.*
151. *See id.* at 62.
152. *See id.* at 68.

[Telia's] operational activities in Uzbekistan."[153] To this end, the Buyback Agreement amended Takilant's put option to extend the lock-up period to February 2013 so that it could not fully cash out until after that date.[154] The Buyback Agreement was put before the Telia Board during a meeting on January 22, 2010.[155] According to Mannheimer's investigation, the Board viewed the buyback as "positive" for Telia because it would mean "obtaining a larger ownership share in [Coscom] which, in turn, meant a larger share of the value and the profits."[156] The Board therefore approved the transaction without extensive discussion because "[it] was based on the previously agreed put option" and the price "appeared to be reasonable based upon the increase in [Coscom's] value" since the put was first negotiated in 2007.[157]

4. *2010 4G Agreement*

In the spring of 2010, Akhmedov again had financing needs, this time connected with $15 million owed to Chinese firm Huawei stemming from a purchase of hardware and other telecom equipment.[158] To eliminate this debt, Akhmedov proposed a three-stage transaction: (1) Telia would purchase the debt from Huawei for $15 million; (2) the debt would then be eliminated by the transfer of 4G frequencies from Takilant to Telia; and (3) the floor price of Takilant's put option would be increased (since the value of the 4G frequencies exceeded $15 million).[159] While the structure of this deal was somewhat unusual, it was roughly similar to that used in previous transactions with Akhmedov and the costs were consistent with an externally "appraised value for the relevant frequencies."[160] As such, it was approved by Telia's CEO and

153. *Id.*
154. *Id.*
155. *Id.* at 80.
156. *Id.*
157. *Id.*
158. *Id.* at 69. The debt was owed by Swiss firm Zeromax GMBH, not Takilant. *Id.* As noted above, Telia was informed in 2007 that there was wide speculation that Gulnara Karimova had an ownership interest in Zeromax. *Id.* at 72. As with Takilant, this was never conclusively established, and Zeromax was at all times represented by Akhmedov in its negotiations with Telia. *Id.*
159. *Id.* at 69–70.
160. *Id.* at 70–71.

all stages were completed by June 2010. The transaction was thereafter detailed to Telia's Board.[161]

5. *November 2010 Agreement*

To service and grow their subscriber base, telecom firms in Uzbekistan needed four things: (1) an operating license; (2) a mobile network code; (3) blocks of phone numbers to assign to new accounts; and (4) the right to use parts of the radio frequency spectrum.[162] Thus as Coscom's business developed, Telia was predictably interested in obtaining more frequencies as they became available. On November 1, 2010, Telia agreed to buy more 4G frequencies offered by Takilant. Takilant, again acting through Akhmedov, also agreed to negotiate and file the necessary paperwork for Coscom to lease a fiberoptic cable network owned by the Uzbek government.[163] The deal used the same "payment on delivery" model used in previous deals, and after Takilant delivered, Telia paid the agreed-upon $55 million in December 2010.[164] This amount was far less than the $75 million ceiling price the Telia Board imposed when they pre-approved the deal in October 2010.[165]

IV.
Criminal Investigation into Takilant and Telia's Internal Investigation

In the summer of 2012, two associates of Gulnara Karimova were arrested in Geneva on suspicion of money laundering after they repeatedly tried to gain access to an account at a private Swiss bank, Lombard Odier Darier Hentsch

161. *Id.* at 72.

162. *Id.* at 26–28. Just like visible light and X-rays, radio frequencies exist within a portion of the electromagnetic spectrum characterized by its oscillation rate (i.e., the rate at which it alternates between peaks and troughs each second). *See* D. Mohankumar, *Mobile Phone Communication. How it Works?*, Electro Schematics, https://www.electroschematics.com/mobile-phone-how-it-works/. The radio waves that are useful in telecommunications usually oscillate between 800 million and 3 billion times per second, or 800 to 3000 Megahertz (MHz). *See id.* To prevent interference between different mobile networks, mobile operators must retain rights to use specific portions of the radio bandwidth. *See id.* Certain frequencies are able to transmit more data across larger areas and are thus more valuable. S*ee id.*

163. Mannheimer Report, *supra* note 56, at 73.

164. *Id.*

165. *Id.* at 74.

& Cie, holding nearly $650 million.[166] While authorities suspected the account had been opened years earlier in Akhmedov's name,[167] it was subsequently revealed that the account was in fact controlled by Gulnara Karimova.[168] This discovery also linked Gulnara with Takilant, and bank records showed that the approximately $330 million Telia had paid to Takilant since 2007 all ended up at Lombard Odier.[169] Accordingly, the long-held suspicion among many within the Telia deal team that Gulnara may be behind the local partner was established as true.[170]

Sweden is an extremely liberal country, and the revelation that Telia, a prominent and partially state-owned company had indirectly paid hundreds of millions of dollars to the daughter of a notoriously brutal dictator predictably drew a great deal of attention in the Swedish press.[171] Put on the defensive, Telia immediately engaged highly respected outside counsel at Mannheimer Swartling to independently investigate whether any of the company's investments in Uzbekistan involved "corruption-related crimes or money laundering."[172] Within three

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166. *See* Eliza Ronalds-Hannon & Miranda Patrucic, *Swedish Telecom Took Shortcut in Central Asia*, OCCRP (Dec. 29, 2012), https://www.occrp.org/en/investigations/1765-swedish-telecom-took-shortcut-in-central-asia.

167. *See Uzbekistan's Gulnara Karimova linked to telecoms scandal*, BBC NEWS (Nov. 27, 2012), https://www.bbc.co.uk/news/world-asia-20311886.

168. Hugo Miller, *Ex-Uzbek Boss's Daughter Gets Chance at $350 Million*, BLOOMBERG (Dec. 3, 2020), https://www.bloomberg.com/news/articles/2020-12-03/ex-uzbek-boss-s-daughter-gets-chance-to-win-frozen-350-million.

169. Complaint, United States v. All Funds Held in Account Number CH1408760000050335300 at Lombard Odier Darier Hentsch & Cie Bank, Switzerland, et al., No. 16-CV-01257 (S.D.N.Y. Feb. 18, 2016), ECF No. 1 at ¶ 126.

170. Telia DPA Statement of Facts, *supra* note 53, ¶ 8 (stating that Takilant was beneficially owned by Gulnara Karimova a.k.a. "Foreign Official").

171. *See, e.g.*, Sven Bergman, *Teliasonera in multimillion dollar deal with dictatorship*, SVT NYHETER (Sept. 19, 2012), https://www.svt.se/nyheter/granskning/ug/teliasonera-i-miljardaffar-med-diktatur.

172. Mannheimer Report *supra* note 56, at 19. Mannheimer Swartling is one of the largest and most well-respected law firms in the Nordics. Since Telia is majority owned by two governments, Mannheimer's investigation was done on behalf of the state and Telia's independent Board. *See TeliaSonera Appoints Mannheimer Swartling To Lead an External Review of Its Investment in Uzbekistan in 2007*, Telia Company (Oct. 3, 2012), https://www.teliacompany.com/en/news/press-releases/2012/10/teliasonera-appoints-mannheimer-swartling-to-lead-an-external-review-of-its-investment-in-uzbekistan-in-2007/. Likely because of Telia's public ownership and the intense culture

months, Mannheimer Swartling reviewed over 40,000 emails, analyzed all of the deal documents for the transactions in question, sought information from Uzbek authorities, and interviewed nearly forty of the key individuals involved.[173] Despite the highly accelerated timeline, the investigation was extensive and thorough, and there has never been any allegation that Mannheimer Swartling was in any way misled or denied access to key materials or individuals.

On February 1, 2013, the firm presented a 406-page report of its findings to the Telia Board.[174] While the report noted Telia's decision to establish business operations in "a country with a corrupt system," it concluded that this fact on its own did not mean that "payment of bribes or bribery occurred or that they are punishable or otherwise unlawful in Sweden or in Uzbekistan."[175] Instead, Mannheimer found that after the decision to invest in Uzbekistan was made, Telia was mainly concerned with addressing the "political and commercial risks" to Coscom's business going forward rather than the "historical relationships underlying and surrounding the local partner."[176]

As to Gulnara's involvement, Mannheimer concluded that more due diligence should have been carried out in order to clarify the relationships between her, Akhmedov, and Takilant/Teleson.[177] In Mannheimer's view, the fact that a deeper dive was not conducted did not reflect corrupt intent, but rather a "very low" "level of ambition" on the part of Telia's deal team to do so.[178] Although Mannheimer could not identify a specific violation of any of Telia's internal ethics guide-

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around corporate transparency in Sweden, Mannheimer's full report was made public. *See* Guillermo Iribarren, *Sweden: A World Leader for Transparency*, INT'L COMPLIANCE ASS'N. (Oct. 25, 2016), https://www.int-comp.org/insight/2016/october/25/sweden-a-world-leader-for-transparency/.

173. Mannheimer Report, *supra* note 56, at apps. 1 and 2.

174. *See* TELIASONERA, *Statement by the Board in respect of the external review of TeliaSonera's investments in Uzbekistan*, EUROPAWIRE (May 2, 2013), https://news.europawire.eu/teliasonera-statement-by-the-board-in-respect-of-the-external-review-of-teliasoneras-investments-in-uzbekistan-10293859325/eupress-release/2013/02/05/23/28/45/7500/?amp; Mannheimer Report, *supra* note 56.

175. Mannheimer Report, *supra* note 56, at 3.

176. *Id.* at 4.

177. *Id.* at 6.

178. *Id.*

lines, it nevertheless found that because "there was no deeper analysis of the local partner in Uzbekistan," "there was not full compliance with internal ethical guidelines."[179] But in terms of actual bribery, even assuming that "there was an intention to enter into agreements with [Gulnara's] investment group," Mannheimer could not "establish within the scope of the inquiry that she holds such a position or performs such duties that can fulfill the [applicable legal] requirements."[180]

In other words, even assuming that money was intentionally paid to Gulnara, there was no evidence that she had any official or unofficial duties or influence with respect to UzACI in general or the Coscom transactions in general.[181] Since this placed Gulnara outside the category of people who could, in theory, be bribed under Swedish law, Mannheimer ended its legal analysis of possible bribery there:

> An assessment of the undue nature of the payment[s] [to Takilant] within the scope of payment of bribes crime revolves around the recipient of the benefit. The typical bribe is given for the purpose of influencing the recipient's performance of his/her duties. Where a stated intention or effect cannot be proven, the assessment of the undue nature of the payment is dependent upon whether the transaction, considered generally, can be thought to influence the recipient's performance of his/her duties. *Consequently, an assessment of the undue nature of the payment is both impossible and irrelevant without an identified recipient who is covered by the provision governing the acceptance of bribes and who, in addition, can be deemed to have been given, promised, or offered a benefit in exchange for the performance of his/her duties.*[182]

For completeness, Mannheimer also considered whether the evidence indicated a money laundering violation. But because money laundering requires an underlying predicate offense (here, bribery), Mannheimer's conclusion that there was no bribery compelled the same conclusion for money laundering. The firm wrote,

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179. *Id.* at 7.
180. *Id.* at 9.
181. *Id.*
182. *Id.* at 151 (emphasis added).

> It has not been possible for the inquiry to establish the representatives of TeliaSonera paid bribes to anyone. [UzACI] has confirmed that the allocation of frequencies, etc. took place in accordance with the regulatory requirements prescribed in Uzbekistan and that no corruption took place. No other information has been adduced in the inquiry. . . . There is thus no cause to consider whether the subjective conditions for liability [under the Swedish money laundering statutes] exist.[183]

To summarize, the key takeaways from Mannheimer's analysis were: (1) a company owned by the Swedish and Finnish governments made a business decision to establish operations in a dictator-led country widely perceived as among the most corrupt in the world; (2) the Telia deal team should have shown more initiative to dig into which parties besides Akhmedov and Avakyan were behind the local partner; and (3) even if the deal team knew or should have known that Gulnara was receiving all or part of the payments going to Takilant, the evidence did not indicate that money laundering or bribery had been committed by any Telia employees or by the company itself.[184]

V.
The Telia DPA

On September 21, 2017, Telia announced its entry into a DPA with the DOJ requiring it to pay nearly $550 million in fines (an amount that reflected "an aggregate discount of 25% [approximately $181 million] off of the bottom of the otherwise-applicable U.S. Sentencing Guidelines" in light the company's "full credit for its cooperation" with the DOJ's investiga-

183. *Id.* at 155.

184. *Id.* at 2–9. To round out its analysis, Mannheimer also considered whether the Coscom transactions, which ceased in 2010, could have, in theory, violated stricter anti-bribery laws passed in Sweden in 2012. While the new rules expanded the group of people who could receive bribes, the new law still "required that there be a connection to duties, i.e. that the recipient had such a position that he had a practical opportunity within the scope of his/her work duties to affect or influence the decision-making process." *Id.* at 159. "Where [as in Gulnara's case] no such connection to the duties exist, the elements for the receipt of a bribe have not been fulfilled." *Id.*

tion).[185] Despite Mannheimer's finding that the evidence did not support criminal liability 4.5 years earlier, the DPA required Telia to concede that the DPA's allegations were both true and "establishe[d] beyond a reasonable doubt" that the company had violated the FCPA.[186]

Specifically, Telia admitted the veracity of the DOJ's allegation that the entire $331 million paid by Telia to Takilant were intentionally "corrupt payments" to Gulnara Karimova in exchange for her "agreement to expand Telia's and Coscom's share of Uzbekistan's telecommunication market."[187] And further, that certain Telia executives "understood that they had to regularly pay [Gulnara] millions of dollars in order to enter the Uzbek telecommunications market and continue to operate there."[188] These admissions are remarkable in the degree to which they directly contradict the findings of Telia's own outside counsel. They are even more remarkable because the DPA does not reference any material pieces of evidence that were not already factored into Mannheimer's analysis. The complete reversal in position cannot, therefore, be attributed to some dramatic new evidence discovered after 2013.

To the contrary, all of the DOJ's main contentions appear to be based on the exact same evidence cited in the Mannheimer report (i.e., internal Telia emails, deal documents, and interviews). A comparison of the key allegations in the DPA's Statement of Facts with the Mannheimer Report shows the following:

DOJ Allegation 1	During the preliminary search for the local Uzbek partner, Akhmedov was identified as "one of [Gulnara's] key [people] in the Telecom area" and "Chief Executive for Gulnara's investment group."[189]
Mannheimer Finding	Partially consistent. While Mannheimer identified the same email cited by the DOJ, it also found that the degree to which Akhmedov was working

185. Telia DPA, *supra* note 12, ¶¶ 3–4.
186. Telia DPA Statement of Facts, *supra* note 53, at 1.
187. *Id.* ¶ 11.
188. *Id.*
189. *Id.* ¶ 17.

for, or in conjunction with, Gulnara could never be definitively determined through the due diligence process.[190]

DOJ Allegation 2

In the materials provided to the Telia Board on June 11, 2007, Gulnara's speculated involvement in the local partner was not mentioned by the Telia deal team. "Instead, [Gulnara's] involvement was referred to only as a 'strong local group who owns . . . a leading bank in Uzbekistan and with business interests in various industries.' "[191]

Mannheimer Finding

Partially consistent. Again, Mannheimer concluded that the involvement of Gulnara's investment group in the local partner was a matter of speculation at this time.[192] And further, in interviews with the Telia Board members who were present in this meeting, Mannheimer was told that the identities of all people who might be behind the local partner were not relevant to its consideration of the deal.[193] Thus, while the information provided about the local partner was admittedly "sparse," the Telia Board believed the limited details it received were sufficient for "its handling of the matter."[194]

DOJ Allegation 3

On June 20, 2007, Telia's deal team received an update from its outside legal advisor stating: "As you know we are dealing with [Akhmedov], who is the general manager of Uzdunrobita. [Our local contacts] indicated that [Akhmedov] has the power to strike a deal on behalf of [Gulnara]. I attended

190. Mannheimer Report, *supra* note 56, at 41.
191. Telia DPA Statement of Facts, *supra* note 53, ¶ 19.
192. Mannheimer Report, *supra* note 56, at 41.
193. *Id.* at 77.
194. *Id.*

	two meetings with Akhmedov and at least at the second meeting, he indirectly confirmed this."[195]
Mannheimer Finding	Partially consistent. Mannheimer concluded that a number of individuals within Telia and at least one of its lawyers on the deal team assumed that Akhmedov was working with Gulnara, although when Akhmedov was asked this question directly, he "provided no clear answer."[196] This assumption was based on Gulnara's widely-known involvement in the Uzbek telecom industry and her part-ownership of Uzdunrobita, the company where Akhmedov served as CEO. Mannheimer further concluded that even if the Telia team and its lawyers determined that Gulnara was working with Akhmedov, it would pose no legal issues because she was seen as a businesswoman with no official government role.[197]
DOJ Allegation 4	On July 4, 2007, Akhmedov and Telia signed the Cooperation Agreement that required the local partner to provide licenses and frequencies to Coscom in return for "a net balance of $30 million" plus a put option to sell back its shares within three years.[198]
Mannheimer Finding	Consistent. Mannheimer determined that the Telia Board approved the amounts due to the local partner after receiving detailed information about the assets that it would provide to Coscom. To protect Telia, the Cooperation Agreement specified that the local partner would not receive any funds until

195. Telia DPA Statement of Facts, *supra* note 53, ¶ 21.
196. Mannheimer Report, *supra* note 56, at 41.
197. *Id.* at 9.
198. Telia DPA Statement of Facts, *supra* note 53, ¶ 23.

	Coscom actually received the promised assets.[199]
DOJ Allegation 5	On July 23, 2007, Akhmedov forwarded Telia a letter from UzACI "expressing its gratitude" and showing a positive reaction to Telia's interest in entering the Uzbek telecommunications market.[200]
Mannheimer Finding	Consistent. Telia knew from the start of its exploration into purchasing Coscom that the transaction would not be possible without the approval of the Uzbek government.[201] No evidence has ever been identified to suggest that Gulnara was in any way involved with UzACI's decision to eventually grant its approval. Nor has any evidence ever been identified to suggest that anyone within UzACI was bribed in connection with this letter of support or otherwise. To the contrary, the fact that UzACI would want Telia to buy Coscom makes obvious sense: Telia was a highly respected and well-resourced multinational company that wanted to make a massive investment in Uzbekistan's infrastructure. For a developing country with a struggling economy, such a transaction was clearly desirable.
DOJ Allegation 6	In August 2007, Telia "ordered a Coscom executive to make a corrupt cash payment of approximately $2 million directly to [Akhmedov]" in the lobby of a Tashkent hotel.[202]
Mannheimer Finding	Inconsistent. The only evidence cited for this allegation in both the DPA and Mannheimer Report is an email from a

199. Mannheimer Report, *supra* note 56, at 41, 78–79.
200. Telia DPA Statement of Facts, *supra* note 53, ¶ 25.
201. Mannheimer Report, *supra* note 56, at 3.
202. Telia DPA Statement of Facts, *supra* note 53, ¶ 26.

disgruntled former Coscom employee who claimed his "honor had been 'spoiled'" when he was made to hand-off the cash.[203] While Mannheimer determined that the equivalent of $2 million in Uzbek soms was loaned to Akhmedov in August 2007, the allegation that this was a "corrupt" payment transferred in cash is highly suspect not only because no corroborating evidence has ever been identified, but also because it is extremely improbable on its face.

First, access to hard currency—soms and especially U.S. dollars—is subject to strict controls in Uzbekistan, and it is very doubtful that local Coscom executives could have secured such a huge amount in this instance.[204]

Second, since the loan was paid to Akhmedov in local Uzbek soms, an in-person exchange of this amount is not realistically possible. At 2007 exchange rates, $2 million equated with roughly 2.5 billion Uzbek soms.[205] Even if the entire sum was converted into the largest som denomination available in 2007 (1,000), it would require 2.54 *million* individual bills.[206] At a thickness of

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203. *Compare* Telia DPA Statement of Facts, *supra* note 53, ¶ 26, *with* Mannheimer Report, *supra* note 56, at 64.

204. Charles Recknagel, *Uzbekistan: Currency Restrictions Surprise Experts*, RADIO FREE EUR./RADIO LIBERTY (Nov. 9, 1996), https://www.rferl.org/a/1082262.html.

205. *See Historical Exchange Rates: USD/UZS*, FXTOP.COM, https://fxtop.com/en/historical-exchange-rates.php?A=1&C1=USD&C2=UZS&DD1=01&MM1=08&YYYY1=2007&B=1&P=&I=1&DD2=30&MM2=08&YYYY2=2007&btnOK=GO%21 (showing average exchange rate of 1,270 UZS/USD in August 2007).

206. $2 million converted at the average August 2007 exchange rate noted above equals 2.54 billion Uzbek soms. In 2007, the highest denomination of Uzbek som available was 1,000. *See Uzbekistan*, BANKNOTE WORLD, https://www.banknoteworld.com/banknotes/Banknotes-by-Country/Uzbekistan-

about 0.0043 inches and a weight of 1 gram per banknote,[207] 2.54 million 1,000 som banknotes would constitute a stack of paper over nine hundred feet high weighing 5,600 pounds.[208] Put into large suitcases holding fifty pounds of bills each, over 100 would be needed (along with at least fifty people to carry them).[209] While this is theoretically possible, it is extraordinarily unlikely.

Lastly, the logic of this allegation runs directly counter to the purported bribery scheme described by the DOJ—if Telia was in fact comfortable paying hundreds of millions in bribes via wire transfer, why would it go through the extraordinary trouble of making this one relatively small "corrupt" payoff in cash? And further, the evidence shows that Telia *rejected* Akhmedov's request for this money during the deal negotiations. For this reason, Akhmedov was compelled to seek it from local Coscom management, which he said was required for "costs associated with the transactions."[210] Even if the money did eventually end up with Gulnara—and

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Currency/?filter_id4t4k5qb3=1%2C000. A larger 5,000 som bill was first introduced in 2013. *Uzbekistan to Introduce 10,000-Som Banknote*, RADIO FREE EUR./RADIO LIBERTY (Feb. 22, 2017), https://www.rferl.org/a/uzbekistan-10-000-som-banknote/28324456.html. Transferring the cash equivalent of $2 million to soms in 2007 would therefore require at least 2.54 million bank notes ((2,000,000 x 1,270) / 1,000 = 2,540,000).

207. These are the approximate dimensions of a $1 bill. *See Currency Facts*, U.S. CURRENCY EDUC. PROGRAM, https://www.uscurrency.gov/about-us/currency-facts. The dimensions of the 1,000 Uzbek som banknote is not publicly available, but for present purposes it can be safely assumed to be roughly the same size as US currency.

208. The height calculation is: (2,540,000 x 0.0043 inches) / 12 = 910.16 feet. The weight calculation, based on 453.6 grams to a pound, is: (2,540,000 x 1 gram) / 453.6 = 5,599.65 pounds.

209. (5,600 pounds / 50) = 112 bags weighing 50 pounds.

210. Mannheimer Report, *supra* note 56, at 64.

	there is no evidence that it did[211]—the record is clear that Telia did not authorize such a transfer. As such, Mannheimer's finding that the $2 million was wired to Akhmedov pursuant to a formal loan agreement between Takilant and Coscom is far more probable and supported by the evidence. What exactly Akhmedov did with this money is unclear from the public record, but if Telia intended it as a bribe, it presumably would not have structured it as a documented loan that required it to be repaid (which it then was, with interest).[212]
DOJ Allegation 7	On December 3, 2007, Telia received a legal opinion that Uzbek law prohibited direct transfers of telecom assets between private entities (as was originally proposed in the Cooperation Agreement). On December 14, 2007, Telia and Takilant signed the 3G Agreement that provided for an indirect transfer of frequencies and a number block through UzACI. Coscom received the assets on December 27, 2007 pursuant to a decision issued by UzACI, and Telia thereafter paid Takilant $30 million in cash and gave it a twenty-six percent stake in Coscom.[213]
Mannheimer Finding	Partially consistent. Mannheimer identified the same legal opinion as the DOJ, but also noted that the proposed

211. Note, for example, that the DOJ's comprehensive forfeiture action against Takilant's various accounts does not allege any transfer of approximately $2 million in or around August 2007. *See* Complaint, United States v. All Funds Held in Account Number CH1408760000050335300 at Lombard Odier Darier Hentsch & Cie Bank, Switzerland, et al., No. 16-CV-01257, (S.D.N.Y. Feb. 18, 2016), ECF No. 1 at ¶ 111 (listing all allegedly "corrupt" payments between Telia and Takilant between 2007 and 2010).

212. Mannheimer Report, *supra* note 56, at 63–64.

213. Telia DPA Statement of Facts, *supra* note 53, ¶¶ 29–33.

	transaction structure was changed as a direct result of this opinion, and that the new structure was approved by local Uzbek counsel: "[A]ccording to information provided by TeliaSonera, the lawyer in Uzbekistan revised his [earlier] opinion when the structure which subsequently came to be used was presented. [UzACI] subsequently stated that Coscom's holdings of licences, frequencies and number series is legally valid."[214] The amounts paid to Coscom were specifically approved by the Telia Board in June 2007.[215] Moreover, the fact that Telia and Takilant altered the original deal structure to comply with Uzbek law contradicts the DOJ's unsupported contention that UzACI answered to Gulnara.
DOJ Allegation 8	In the summer of 2008, Telia "authorized a $9.2 million bribe payment to [Gulnara] through [Takilant]" that "purportedly was for Coscom to acquire a number series of one million numbers and a network code."[216]
Mannheimer Finding	Inconsistent. Mannheimer analyzed this same transaction but did not find any evidence that the $9.2 million was intended as a bribe to Gulnara. Rather, it concluded that the $9.2 million was in fact for a number block and network code that Coscom did actually receive.[217]
DOJ Allegation 9	In December 2009, Telia executives circulated a memo to the Board explaining that Takilant had requested to sell all or part of their stake in Cos-

214. Mannheimer Report, *supra* note 56, at 59.
215. *Id.* at 78.
216. Telia DPA Statement of Facts, *supra* note 53, ¶ 35.
217. Mannheimer Report, *supra* note 56, at 66–67.

com.[218] The memo explained that in the event Takilant exercised its put option, it could force Telia to buy it out at "the higher of USD 150 million and fair market value, currently in the magnitude of USD 250 million for [the full] 26 percent."[219] The memo further explained that it was not in Telia's interest for Takilant to exit the partnership because Takilant could assist with local regulatory issues (e.g., currency conversion and operating license renewals).[220]

As such, the memo stated the company's objective was to "maintain a good relationship with [Takilant] and extend the period they stay as a shareholder as long as possible."[221] On January 22, 2010, the Telia Board approved repurchase of approximately seventy-five percent of Takilant's Coscom shares for a maximum of $220 million.[222] The Board also approved an amendment to Takilant's put option that "required [it] to stay in the partnership for at least another three years, at which point the floor price for the sale of the remaining shares would be approximately $50 million."[223] This transaction was completed on February 2, 2010.[224] In the DOJ's view, the entire $220 million was a "bribe payment to [Takilant] to benefit [Gulnara] in order to continue [Telia's] telecom business in Uzbekistan."[225]

218. Telia DPA Statement of Facts, *supra* note 53, ¶ 37.
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.* ¶¶ 38–39.
223. *Id.* ¶ 38.
224. *Id.* ¶ 39.
225. *Id.* ¶ 12(f).

Mannheimer Finding	Inconsistent. While Mannheimer found evidence that this transaction did in fact take place, it found no evidence to suggest it was intended as a bribe to Gulnara (or even that Telia knew for certain that Gulnara was behind Takilant at this time).[226] To the contrary, it found that the $220 million paid was in line with Telia's own internal valuation of the shares it repurchased from Takilant (which was substantially lower than the $250 million value ascribed to these shares by Takilant's financial advisor).[227] The fact that Telia negotiated Takilant down to a price it considered more reasonable and required Takilant to extend its lock up period strongly suggests that this was a normal, arms-length transaction.[228] Indeed, the idea that Telia would have paid a nearly quarter billion-dollar bribe just for one of its smaller subsidiaries to stay in business is extremely implausible. Moreover, the fact that Telia perceived a business interest in maintaining a relationship with Takilant as its local partner is in no way nefarious. Doing business in an obscure jurisdiction like Uzbekistan posed obvious challenges, and it was for this reason that the Telia Board made the MCT acquisition "expressly conditional on a local partner in Uzbekistan being tied to the operations."[229] Local partners were a routine part of Telia's busines as it expanded into new countries, and the Board noted that there was already a

226. Mannheimer Report, *supra* note 56, at 67–69.
227. *Id.*
228. *Id.*
229. *Id.* at 36.

	local partner in place for MCT's "companies in Tajikistan and Afghanistan [and] [t]here was therefore no need for support from any additional parties in these countries."[230]
DOJ Allegation 10	On January 14, 2010, an internal Telia email discussed the need for Coscom to acquire 4G frequencies.[231] After ensuing discussions with Akhmedov, in April 2010 Telia "agreed to make a $15 million corrupt payment to benefit [Gulnara] in order to obtain certain 4G frequencies."[232] "To effectuate the corrupt payment, . . . [Telia] agreed to execute four separate agreements" between multiple entities, and increase the floor price of Takilant's put option to sell its remaining six percent of Coscom from $50 million dollars to $75 million dollars.[233] This transaction was completed on June 11, 2010.[234]
Mannheimer Finding	Inconsistent. Mannheimer found no evidence to suggest that this transaction was intended as a bribe to Gulnara. Coscom did in fact obtain the 4G frequencies, and the amount Telia paid for them was in line with their "externally . . . appraised value."[235]
DOJ Allegation 11	On October 17, 2010, Telia executives submitted a proposal to the Telia Board explaining that Takilant, "'a local Uzbek partner with good local market knowledge and good political connections,' had offered Coscom addi-

230. *Id.*
231. Telia DPA Statement of Facts, *supra* note 53, ¶ 40.
232. *Id.* ¶ 41.
233. *Id.* ¶ 41–48. As discussed above, the entities involved in these transactions were Zeromax, Takilant, and Huawei. Mannheimer Report, *supra* note 56, at 69-70.
234. Telia DPA Statement of Facts, *supra* note 53, ¶¶ 40–48.
235. Mannheimer Report, *supra* note 56, at 71.

tional 4G frequencies and the opportunity to lease [a] fiber optic network from Uzbektelecom" for $20 million paid to Uzbektelecom and $55 million payable to Takilant. Internal Telia calculations showed "that the deal created 'significant savings with a total present value of approximately USD 165 million.'" The Board approved the transaction and UzACI issued the telecom assets to Coscom on November 26, 2010. In subsequent emails, Akhmedov asserted that the $55 million payment was justified as compensation for "not exercising [Takilant's] option to acquire the frequencies in question," even though Takilant never produced evidence that it held such an option. Payment was nevertheless made on December 16, 2010.[236]

Mannheimer Finding

Consistent. The DPA omits Mannheimer's finding that the final purchase price was far less than the $75 million ceiling price imposed by the Telia Board when it pre-approved the transaction (which suggests that this deal was the result of an arms-length negotiation).[237] To the extent the DOJ's allegation about there not being "proof" that Takilant ever actually had rights to the assets is intended to suggest wrongdoing, the more plausible explanation is that Telia simply did not care from a business perspective. The local partner had arranged a deal whereby Coscom would receive valuable telecom assets (that Telia could not get on its own) at a steep discount from their market value. Whether Takilant or some other

236. Telia DPA Statement of Facts, *supra* note 53, ¶¶ 49–53.
237. Mannheimer Report, *supra* note 56, at 74.

	company actually owned these assets before they were transferred to Coscom was likely viewed as irrelevant.
DOJ Allegation 12	Following the events of 2012 and the "public allegations of corruption," Telia failed to sever ties with Takilant and "even considered paying more bribes to benefit [Gulnara]," although the company ultimately decided against doing so.[238]
Mannheimer Finding	Not Addressed. Mannheimer's report does not discuss this allegation, probably because, as the DPA itself recognizes, no bribes were actually promised or paid.[239]

VI.
Related Legal Proceedings

As noted above, corporate FCPA settlements are generally not subject to substantive judicial examination, and when a company's admissions to the DOJ result in criminal charges against individual employees, such cases rarely go to trial. Rather, in virtually all instances the individual defendants plead guilty, thereby ensuring that the DOJ's factual allegations are never truly questioned in court.

In fact, of the more than 130 individuals charged with criminal FCPA violations over the last ten years, to date there have been only two trials involving a defendant whose company had entered into a DPA.[240] In the first case, *United States*

238. Telia DPA Statement of Facts, *supra* note 53, ¶ 56.

239. *See generally* Mannheimer Report, *supra* note 56, at 2–11.

240. *See FCPA Digest*, Shearman & Sterling LLP, https://fcpa.shearman.com/cases (last visited June 12, 2021) (listing a total of 135 cases filed by the DOJ against individuals between 2010 and 2020). Note that in addition to the pending case against Ng Chong Hwa (discussed *supra* note 31), two former executives at Cognizant Technology Solutions Corp. are scheduled to be tried on criminal FCPA charges in October 2021. *See* Status Conference, United States v. Coburn, No. 19-CR-00120 (D. N.J. Jan. 6, 2021), ECF No. 136 (setting trial date). While Cognizant did not technically enter a DPA, it agreed to disgorge $19,370,561 and "fully cooperate" in exchange for the DOJ declining to pursue FCPA charges against it. *See* Letter from Dep't of Just., to Counsel for Cognizant (Feb. 13, 2019), https://www.justice.gov/criminal-fraud/file/1132666/download.

v. Hoskins, the DOJ charged a former vice president of French conglomerate Alstom S.A. with bribery and money laundering in connection with a power plant project in Southeast Asia.[241] Since the indictment against Hoskins was filed in 2013, his case has had an arduous seven-plus-year journey through the courts. In 2015, the district court rejected the DOJ's FCPA theory and granted Hoskins' motion to dismiss the bribery counts.[242] In 2018, this decision was upheld in part by the Second Circuit after the DOJ filed an interlocutory appeal.[243]

The Second Circuit's decision allowed the DOJ to try Hoskins on FCPA charges but required prosecutors to prove that he acted as an "agent" of one of Alstom's U.S. subsidiaries when making the alleged bribes.[244] When the case finally proceeded to trial in 2019, Hoskins was convicted of six counts of violating the FCPA and additional money laundering counts.[245] But in yet another setback for the DOJ, on February 26, 2020, the district court granted Hoskins' post-trial motion for acquittal on all FCPA counts on the grounds that the government had failed to prove he acted as an "agent" of a U.S. entity.[246] While the money laundering conviction was left intact, the *Hoskins* case is yet another example of a corporate FCPA resolution not necessarily relying on strong—or even minimally sufficient—evidence or legal theories.[247]

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241. *See* United States v. Hoskins, No. 3:12CR238(JBA), 2020 WL 914302, at *1 (D. Conn. Feb. 26, 2020).

242. *See* United States v. Hoskins, 123 F. Supp. 3d 316, 327 (D. Conn. 2015).

243. *See* United States v. Hoskins, 902 F.3d 69, 74, 98 (2d Cir. 2018).

244. *See id.* at 97–98.

245. *See* Press Release, Dep't of Just., Former Senior Alstom Executive Convicted at Trial of Violating the Foreign Corrupt Practices Act, Money Laundering and Conspiracy (Nov. 8, 2019), https://www.justice.gov/opa/pr/former-senior-alstom-executive-convicted-trial-violating-foreign-corrupt-practices-act-money.

246. *See* United States v. Hoskins, No. 3:12CR238(JBA), 2020 WL 914302, at *13–14 (D. Conn. Feb. 26, 2020).

247. The second case where a defendant proceeded to trial after his company reached a DPA appears to have been more strongly supported. *See* Amended Judgment in a Criminal Case, United States v. Lambert, No. 18-CR-00012 (D. Md. Nov. 20, 2020). Note, however, that the defendant in that case has appealed his conviction, which remains pending before the Fourth Circuit Court of Appeals. United States v. Lambert, No. 2020-04590 (4th Cir. Dec. 1, 2020).

While the DOJ did not charge any Telia executives following settlement with the company, three former executives were charged with bribery in Sweden.[248] As discussed below, this prosecution, like *Hoskins*, seriously calls into question the basis of their employer's admissions to FCPA offenses.

A. *Swedish Criminal Proceedings*

Telia's DPA presumably put Swedish law enforcement in an awkward position: one of the country's largest companies had admitted to a massive, nine-figure bribery scheme and yet no employees had been charged with wrongdoing. Thus, one day after the DPA was made public, Swedish prosecutors filed criminal bribery charges against Telia's former CEO, General Counsel, and business head for Eurasia.[249] All defendants

248. The only individuals DOJ decided to charge in connection with Telia's alleged $331 million bribe payments—Gulnara Karimova and Bekhzod Akhmedov—were not Telia employees. *See* Press Release, Dep't of Just., Mobile Telesystems Pjsc and Its Uzbek Subsidiary Enter into Resolutions of $850 Million with the Department of Justice for Paying Bribes in Uzbekistan (Mar. 7, 2019), https://www.justice.gov/opa/pr/mobile-telesystems-pjsc-and-its-uzbek-subsidiary-enter-resolutions-850-million-department. It may not be a coincidence that, of the large group of individuals involved in the Coscom/Takilant transactions, Gulnara and Akhmedov are the least likely to have their cases ever heard in a US courtroom. Gulnara is serving a thirteen-year prison sentence in Uzbekistan (a country that has no extradition treaty with the US). *See Gulnara Karimova Sentenced Again for Corruption, Financial Crimes*, Radio Free Eur./Radio Liberty (Mar. 18, 2020, 12:13 PM), https://www.rferl.org/a/gulnara-karimova-sentenced-again-for-corruption-financial-crimes/30495071.html. Akhmedov fled to Russia in 2012 to escape from Gulnara's increasingly severe extortion and threats to his family. *See* Mike Eckel, *Cash Cow for Karimova: Court Documents Assert Shakedown by Daughter of Late Uzbek President*, Radio Free Eur./Radio Liberty (Oct. 12, 2017, 3:26 PM), https://www.rferl.org/a/uzbekistan-karimova-akhmedov-testimony-shakedown/28790227.html. Like Uzbekistan, Russia has no extradition treaty with the US. Thus, by charging only Akhmedov and Gulnara, the individual accountability demanded by the Yates Memo is seemingly satisfied even while the allegations against the two defendants will probably remain unproven and in legal limbo indefinitely.

249. *Sweden Charges Ex-Telecom Execs in Uzbek Corruption Scandal*, AP News (Sept. 22, 2017), https://apnews.com/article/ff71d569d4d045bb9484598c42bf160f.

pleaded not guilty and the case proceeded to a lengthy trial in Stockholm District Court in 2018.[250]

Like the DOJ's case against Telia, the thrust of Swedish prosecutors' case was that the defendants had colluded to pay Gulnara Karimova millions of dollars in bribes in order to secure her influence over the Uzbek communications regulator, UzACI.[251] After being presented with the prosecution's evidence in supposed support of this claim, the court, acting as factfinder, concluded:

- The local partner in Uzbekistan was formally and ultimately Takilant. From the audits carried out at the customary review of the company, what is referred to as the "Due Diligence Process," it was found that [only] Gayane Avakyan was behind the company. [While] Gayane Avakyan had links to Gulnara Karimova . . . [at] the time there was still [only] an unconfirmed rumour that Gulnara Karimova was behind the partner.[252]
- On February 11, 2008, an investigative journalist in Sweden "drew attention to the rumour that the Karimov family was behind the local partner. The headline of the article was 'Telia does Business with a Dictator.'" At a March 2008 Telia Board meeting, "the issue about the company's alleged unethical behaviour in Uzbekistan was raised. However, it was not possible to clarify whether there was any truth behind the rumour that Gulnara Karimova was behind Takilant, and the Board of Directors did not take any action on the matter."[253]
- The rumor that Gulnara was Takilant's ultimate beneficial owner could not be confirmed until "2016 by a reply from Switzerland on request [for] international legal assistance in criminal cases from [the] Swedish prosecutors," long after Telia's transactions with Takilant concluded.[254]
- Based on evidence received from the Swiss authorities, Gulnara assumed an official Uzbek government role at some

250. *See* Ola Westerberg, *Bribery Trial to Start Against Swedish Telecom Bosses*, OCCRP (Sept. 3, 2018, 3:53 PM), https://www.occrp.org/en/daily/8542-bribery-trial-to-start-against-swedish-telecom-bosses.

251. Stockholms Tingsrätt [TR] [Stockholm District Court] 2019 B 12201-17, at 7 (Swed.), https://anticorruptionblog.files.wordpress.com/2019/02/english-translation.pdf [hereinafter Stockholm District Court Judgment].

252. *Id.* at 14.

253. *Id.* at 16.

254. *Id.* at 48.

point in 2008. This role, based in Geneva, was "in the Uzbek Foreign Service administration" and no evidence was presented that her duties had any connection with regulation of telecommunications in Uzbekistan.[255]

- While the "public prosecutors' position is that [Gulnara's Foreign Service assignment] is proof of [her] employment as a civil servant and related matters with a broad functional area of responsibility during 2007 with links to the telecom industry,"[256] no evidence was presented that President Karimov

> either in writing, verbally or via delegation, gave [his daughter] governmental employment or an assignment in a position of trust to manage the telecom sector in Uzbekistan.
>
> [Rather,] [t]he public prosecutor's allegations seem to be essentially based on general information that Uzbekistan was a kleptocracy where President Islam Karimov enriched himself and his family as much as possible and that there was a general reputation in Tashkent that Gulnara Karimova was awarded the telecom market by [her father].[257]

- The evidence presented proved, at most, that Gulnara *maybe* had a degree of undocumented, indirect influence over UzACI's decisions concerning Coscom, but that there were equally plausible possibilities.

> One such is that Gulnara Karimova acted as a businesswoman and that as such she acted improperly or inappropriately. The public prosecutor has himself pointed out that Gulnara Karimova had a large business empire where the telecom sector accounted for about one-half of the assets, and that she engaged in criminal activities. It is noted here that the payments from Telia [went] to her company; *a fact that even standing alone speaks against the assertion that work has been carried out on behalf of another party in governmental employment or that she has acted within*

255. *Id.* at 52. Media reports indicate Gulnara served as Uzbek ambassador to the UN in Geneva starting in December 2008. *Swiss Probe Private Bank Lombard Odier Over Suspected Uzbek Money Laundering*, REUTERS (Feb. 23, 2017, 12:10 PM), https://www.reuters.com/article/swiss-uzbekistan-probe-idUSL8N1G873S.

256. Stockholm District Court Judgment, *supra* note 251, at 55.

257. *Id.* at 61.

> *the framework of an assignment of trust [within the telecom industry].*[258]

- [I]t appears that there was a great interest from [Telia] to obtain approval from President Islam Karimov or the responsible minister for telecom issues, Abdulla Aripov, for conducting telecom operations in the country.

  By means of the investigation, this behaviour has been explained by the fact that it was a common recurring procedure that Telia, via subsidiaries, sought approval from the highest decision-making management in a country before deciding on major investments. This is to ensure that the company was welcome to conduct telecommunications operations in the country, which is necessary because the infrastructure in telecom operations is of importance for countries' national security.[259]

- While the evidence that Telia's deal team sought to make contact with Gulnara could *possibly* suggest that she had influence over UzACI, there were equally plausible explanations—"namely that Gulnara Karimova acted as a businesswoman with sometimes unauthorized means" and that, in the event Telia bought Coscom, it would "become a direct competitor" to her.[260]

  Taken together, . . . [the evidence] supports the alternative hypothesis which is that Gulnara Karimova has conducted business in the telecom industry as a businesswoman via her private companies and not in any governmental position.

  Also, the fact that there were formal structures in Uzbekistan with a minister responsible for telecommunications who was also the head of the telecommunications authority UzACI may be considered to contradict the public prosecutor's assertion that Gulnara Karimova was responsible for the telecom sector via governmental employment.[261]

- The public prosecutors' contention that President Karimov had "assigned the telecom sector" to Gulnara was based on "Google web searches that cannot be verified or confirmed.

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258. *Id.* at 62–63 (emphasis added).
259. *Id.* at 63.
260. *Id.* at 64.
261. *Id.* at 65 (emphasis added).

The probative value of the information individually may thus be regarded as non-existent."[262]

- To the extent the evidence suggested Gulnara had any unofficial influence over UzACI, it was in the context of her conducting "lobbying-like activities, which were aimed at influencing civil servants/public officials to make a certain decision, which is not punishable as a bribe."[263]
- The District Court notes that the [evidence presented at trial] does not support the public prosecutor's assertions that Gulnara Karimova had a governmental position that makes her fall within the group of persons susceptible to bribery according to Swedish legislation. On the contrary, . . . the District Court found that the alternative hypothesis entailing that Gulnara Karimova acted as a businesswoman . . . may be assessed as being a reasonable conclusion.[264]

In light of these findings, the Swedish court concluded that the "central objective requisites for the offence of bribery . . . [were] not fulfilled," and ordered an acquittal of the three Telia defendants.[265] The court also rejected prosecutors' request to impose a $208.5 million forfeiture order against Telia.[266] Instead, the court directed the Swedish government to *pay the defendants* a total of over SEK 38 million (approximately $3.9 million) to reimburse them for their legal costs.[267]

The Swedish government appealed this decision to the Svea Court of Appeal in Stockholm, an intermediate appellate court. On February 4, 2021, the Court of Appeal upheld the District Court's decision in all material respects and ordered that an additional SEK 16.7 million (approximately $2 million) be paid to the defendants for their legal costs associated with the appeal.[268]

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262. *Id.* at 67.
263. *Id.* at 69.
264. *Id.* at 8.
265. *Id.* at 86.
266. *Id.* at 87–88.
267. *Id.* at 1–4 (ordering a payment of SEK 14,337,511 to Tero Kivisaari, SEK 11,884,570 to Olli Tuohimaa, SEK 11,067,511 to Lars Nyberg, and SEK 954,190 to Telia).
268. *See* Svea Hovrätt [SH] [Svea Court of Appeal] 2021 pp. 1–3 B 2892-19 (Swed.).

B. *Civil Proceedings in the United States*

In 2016, the DOJ entered into a DPA with VimpelCom, another multinational telecom company with a subsidiary in Uzbekistan, in which the government alleged the company paid "over $114 million in bribes in exchange for [Gulnara Karimova's] understood influence over decisions made by UzACI concerning Uzbekistan's telecommunications market."[269]

On the basis of VimpelCom's admission that this was in fact the case, a shareholder class action was subsequently filed against VimpelCom's successor company, VEON Ltd., in federal court.[270] The plaintiffs alleged, *inter alia*, that "VEON's conduct that formed the basis of its FCPA violations led to material misstatements and omissions in its SEC filings" and thereby harmed its shareholders.[271] In a ruling dismissing most of plaintiffs' case, the district court found the allegation "that Veon needed [Gulnara] Karimova's support to secure favorable concessions from [UzACI]" to be unfounded.[272] On this point, the judge concluded that Veon's failure to disclose Karimova's involvement did "not render the statements materially misleading because, while Karimova was connected to those in government and allegedly held 'several positions' in the Uzbek government, she was not a 'government authority' herself and had no oversight authority in the telecommunications industry."[273]

C. *Criminal Proceedings in Uzbekistan*

In late 2010, Western media sources first began to report on evidence that the bulk of Gulnara Karimova's business empire rested on strongarm, mafia-like tactics.[274] At a time when Uzbekistan was described by U.S. diplomats as "a nightmarish world of 'rampant corruption', organised crime and forced la-

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269. Deferred Prosecution Agreement at 25, United States v. VimpelCom Ltd., No. 16-CR-137 (S.D.N.Y. Feb. 22, 2016).

270. *See In re* VEON Ltd. Sec. Litig., No. 15-CV-08672, 2017 WL 4162342 (S.D.N.Y. Sept. 19, 2017).

271. *Id.* at *2.

272. *Id.* at *7.

273. *Id.*

274. *See* David Leigh, *'Robber Baron' the Scourge of Uzbekistan*, MAIL & GUARDIAN, (Dec. 17, 2010), https://mg.co.za/article/2010-12-17-robber-baron-the-scourge-of-uzbekistan/.

bour," Gulnara was accused of leveraging her father's reputation as a ruthless dictator in order to bully her way into huge swathes of the Uzbek economy.[275] Leaked U.S. diplomatic cables similarly stated, "[m]ost Uzbeks see Karimova as a greedy, power-hungry individual who uses her father to crush business people or anyone else who stands in her way. She remains the single most hated person in the country."[276] Before this, she was mostly known as a hard-partying socialite, pop singer, and jewelry designer.[277] As Gulnara accumulated huge amounts of wealth and developed relationships with local organized crime figures during the early 2000s, the U.S. government was largely indifferent, almost certainly because the United States' alliance with the Uzbek military in its ongoing war in Afghanistan was seen as more important than the antics of President Karimov's daughter.[278]

But after a public falling out with her father in or around early 2014, the long leash Gulnara previously enjoyed began to shorten: she was charged by Uzbek authorities with running an organized crime group and put under house arrest.[279] Two years later, she was found guilty by a Tashkent court of extortion, embezzlement, tax evasion, and fraudulently concealing financial statements.[280] Following a separate trial in 2020, Gulnara received a thirteen-year sentence for additional counts of extortion, money laundering, and misappropriation.[281] Given these proceedings, Gulnara's criminality is well-established (at least insofar as the Uzbek legal system can be

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id. See also* Don van Natta Jr., *U.S. Recruits a Rough Ally to Be a Jailer*, N.Y. TIMES, May 1, 2005 (describing Uzbekistan as one of the detention locations for "extraordinary rendition" terrorism suspects and American use of an Uzbek air base to attack locations in the region).

279. *Gulnara Karimova Ordered to Prison After Violating House Arrest, Uzbek Prosecutor Says*, RADIO FREE EUR./RADIO LIBERTY (Mar. 6, 2019, 12:36 AM), https://www.rferl.org/a/uzbekistan-gulnara-karimova-prison/29805872.html.

280. Bermet Talant, *Uzbekistan Explains What Gulnara Karimova Was Convicted of, Announces More Charges*, OCCRP (July 28, 2017, 4:46 PM), https://www.occrp.org/en/daily/6780-uzbekistan-explains-what-gulinara-karimova-was-convicted-of-announces-more-charges.

281. Catherine Putz, *Another 13 Years on Corruption Charges for Gulnara Karimova*, DIPLOMAT (Mar. 18, 2020), https://thediplomat.com/2020/03/another-13-years-on-corruption-charges-for-gulnara-karimova/.

considered credible). However, these proceedings also established that her *modus operandi* was extorting local businesspeople, not demanding huge sums from international companies in exchange for favorable action from the government.

To the contrary, while Gulnara was charged with numerous different crimes (most of which were unrelated to Telia or Coscom), she was never charged with bribery in Uzbekistan. Nor has any direct evidence been found in Uzbekistan or elsewhere to show that Gulnara had any influence over UzACI or that any of the money paid to Takilant was passed on to anyone with official or unofficial control or influence over the country's telecom industry.[282] And further, as the Swedish court found, the only evidence substantiating the rumor that President Karimov "assigned" the Uzbek telecom industry to his daughter were "web searches on websites in Central Asia."[283] Indeed, no UzACI employee has ever been charged with wrongdoing related to Telia, and in fact, the head of UzACI at the time of the Telia transactions, Abdulla Aripov, was promoted to Prime Minister of Uzbekistan in 2016 (a position he still holds today).[284]

Thus, while the exact nature of the relationship between Akhmedov, Gulnara, and Takilant has never been fully examined in a court in Uzbekistan or elsewhere, the evidence that has come to light strongly suggests Gulnara was not being paid for any reason having to do with her role at the Foreign Ministry. Indeed, it is unclear what, if anything, this role entailed aside from providing her the convenient fringe benefit of diplomatic immunity while she shuttled between her homes in Geneva and Spain.[285]

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282. *See, e.g.*, Stockholm District Court Judgment, *supra* note 251, at 62–63.

283. *See id.* at 69.

284. *See Uzbek Party Nominates Deputy Cabinet Head Aripov for PM*, REUTERS (Dec. 12, 2016, 1:29 PM), https://uk.reuters.com/article/uk-uzbekistan-primeminister/uzbek-party-nominates-deputy-cabinet-head-aripov-for-pm-idUKKBN14129L.

285. *See* Henry Foy, *Former Uzbekistan Leader's Daughter Found Guilty of Graft*, FIN. TIMES (Mar. 18, 2020), https://www.ft.com/content/75e5335c-6906-11ea-800d-da70cff6e4d3; *see also* Leigh, *supra* note 274.

VII.
DID TELIA VIOLATE THE FCPA?

Because it is clear that the DPA is grounded in the same factual record as the Mannheimer Report, the Report, together with the factual findings of the Swedish court, can reasonably be relied upon as the most credible record of what happened between Telia, Takilant, and Coscom. This sort of detailed public record is highly unusual, since in nearly all other corporate FCPA cases, the parties only make public law enforcement's allegations and the terms of the company's settlement. Thus, unlike in most cases, an independent assessment of whether Telia actually committed an FCPA bribery violation is possible because the evidentiary record can be compared with the crime's elements: (i) direct or indirect payment to a "foreign official," (ii) by an "issuer," "domestic concern," or any other person or entity taking action in furtherance of an FCPA violation while in the U.S. (or an agent of any of these parties), (iii) with "corrupt intent," (iv) in order to obtain or retain business or to secure any improper advantage.[286]

A. *Element 1: Payment to a "Foreign Official"*

The evidence clearly proves there was an assumption among certain members of the Telia deal team that Gulnara was likely involved in Takilant. Yet the evidence also shows that Telia's due diligence investigation could not establish whether or not this was true. Rather, proof that Gulnara was Takilant's beneficial owner was not discovered until 2013 when the Swiss police found documents to that effect hidden in a wall safe at Gulnara's Geneva villa.[287] At the time of the relevant transactions (2007–2010), therefore, Telia at most knew only that there was unverified speculation that Gulnara was possibly receiving some or all of the payments flowing to Takilant.

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286. *See* 15 U.S.C. §§ 78dd-1 to -3; *see also* Chevron Corp. v. Donziger, 974 F. Supp. 2d 362, 596 (S.D.N.Y. 2014) (listing the elements of a bribery offense under the FCPA).

287. Swiss Fed. Dep't of Justice and Police, Report on the Investigation in the Criminal Investigation Against Karimova Goulnora, Akhmedov Bekhzod, Madumarov Rustam, Avakyan Gayane, Ergashev Alisher and Sabirov Shokhrukh, Case No. 1058952 (Mar. 31, 2016), ¶ 3.1.1.4.1 (on file with the author) (trans.) [hereinafter Swiss Investigative Report].

The issue then becomes whether Gulnara was a "Foreign Official." The sphere of people who can qualify as a "Foreign Official" under the FCPA is extremely broad,[288] and there is no requirement that their official duties be specifically tied to the influence sought with the alleged bribes.[289] Despite slim details of what, if any, official responsibilities she had, the mere fact that she technically served in the Uzbek Ministry of Foreign Affairs likely renders her a "Foreign Official" for purposes of the FCPA.[290]

But the more important question is when her government service began. In the criminal proceedings in Stockholm, Swedish prosecutors formally asked their Swiss counterparts to provide evidence of Gulnara's diplomatic role. Based on the Swiss response, the Swedish prosecutors decided "to restrict the claim that [she was] Minister to only refer to 2008" because there was no evidence that she had an official role before then.[291] The significance of this is that the partnership with Takilant was established in 2007 and, by the beginning of 2008, Telia was no longer an "issuer" subject to the FCPA (as discussed below).

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288. The FCPA defines the term "foreign official" to mean "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization." 15 U.S.C. § 78dd-1(f)(1); *see also* United States v. Esquenazi, 752 F.3d 912, 925 (11th Cir. 2014) (concluding that the term "instrumentality" means "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own").

289. *See* 15 U.S.C. § 78dd-1(a)(1) (prohibiting payments to a foreign official for the purposes of, *inter alia*, "securing *any* improper advantage" or "inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence *any* act or decision of such government or instrumentality") (emphasis added); *see also* 15 U.S.C. §§ 78dd-2(a)(1), -3(a)(1).

290. *See Esquenazi*, 752 F.3d at 920.

291. Stockholm District Court Judgment, *supra* note 251, at 52. According to the Swiss Federal Police's full investigative report, Gulnara was appointed "Deputy Foreign Minister for International Cultural and Humanitarian Cooperation" in February 2008 and in September 2008, she was elected "[P]ermanent [R]epresentative of Uzbekistan at the United Nations" in Geneva. Swiss Investigative Report, *supra* note 287, ¶ 3.1.1.1. In 2010, Gulnara was also named Uzbek Ambassador to Spain. *Id.*

And moreover, regardless of whether Gulnara's official role started in 2008 or earlier, the Mannheimer Report concluded the evidence showed that no one at Telia knew of that role.[292] Instead, she was regarded merely as a powerful "business woman" who happened to be related to the president.[293] Thus, even if the evidence showed that Telia knowingly engaged in business transactions with Gulnara, the fact that her father was president does not, on its own, indicate that such payments were intended as bribes to her or to anyone else working for the Uzbek government.[294] Rather, as the Stockholm District Court found, the fact that all of Telia's payments went to a private company controlled by Gulnara "speak[s] directly against the . . . claim that [Gulnara] acted within the framework . . . [of a] position of trust."[295]

B. *Element 2: By a Party Subject to FCPA Jurisdiction (Or Their Agent)*

There is no question that when Telia decided to list ADSs on NASDAQ in 2002 it became subject to the FCPA as an "issuer."[296] However, Telia's ADS facility was little used—between May 2006 and April 2007, for example, the average daily trading volume (ADTV) for Telia's shares in the United States was 417, representing "0.0% of the ADTV on a worldwide basis (20,397,216 shares)."[297] In fact, Telia had delisted from NASDAQ in August 2004, although it continued to comply with its

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292. Mannheimer Report, *supra* note 56, at 51–52.

293. Stockholm District Court Judgment, *supra* note 251, at 65.

294. *See* §78dd-1(a)(3) (prohibiting payments to "any person," a foreign official or otherwise, "while knowing" that all or a portion of such payments "will be offered, given, or promised, directly or indirectly, to any foreign official" for an improper purpose); *see also* 15 U.S.C. § 78dd-2(a)(3), -3(a)(3).

295. Stockholm District Court Judgment, *supra* note 251, at 65.

296. Telia DPA Statement of Facts, *supra* note 53, ¶ 2; *see* 15 U.S.C. § 78dd-1(a) (applying the FCPA's bribery prohibitions to "any issuer which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 78o(d) of this title").

297. TeliaSonera AB, Certification of a Foreign Private Issuer's Termination of Registration of a Class of Securities Under Section 12(G) of The Securities Exchange Act of 1934 or Its Termination of the Duty to File Reports Under Section 13(A) or Section 15(D) of The Securities Exchange Act of 1934 (Form 15F) (June 5, 2007).

SEC reporting requirements.[298] On June 5, 2007, a month before the MCT acquisition, Telia notified the SEC that it was terminating these reporting requirements.[299]

This decision was likely spurred by changes instituted by the SEC in March 2007 that made it "considerably easier for foreign private issuers to deregister their securities and exit the [SEC]'s reporting system."[300] Under the new rules, once an issuer gives the SEC notice, the clock starts on a ninety-day period within which the SEC can object. If there is no objection, "the class of securities will automatically become deregistered and the corresponding Exchange Act reporting obligations will be terminated."[301]

Because there is no indication that the SEC objected in Telia's case, its reporting obligations ceased by September 5, 2007, a fact that the DPA admits.[302] This means that the company was no longer an FCPA "issuer" in December 2007 when the first payments to Takilant were made.[303] Perhaps in recognition of this weakness in its case, the DOJ claimed various alternate purported grounds for jurisdiction over Telia.

First, the DOJ alleged that "Telia and its subsidiaries used both US citizens and US companies (collectively 'Telia agents') to aid in establishing a corrupt relationship with [Gulnara Karimova]. Each Telia agent was a 'domestic concern' as that term is used in the FCPA."[304] Because the DOJ has never charged any U.S. citizens or companies in connection with Telia's case, it is unclear which "Telia agents" this refers to, what they purportedly did, or when their conduct took place. But in any case, while it is true that U.S. citizens and U.S. subsidiaries of foreign companies are themselves subject to the FCPA, the law is less clear on whether jurisdiction over an agent translates into corresponding jurisdiction over a

298. *Id.*
299. *See id.*
300. Latham & Watkins LLP, The SEC Facilitates Foreign Private Issuer Deregistration Under the Exchange Act, CLIENT ALERT (Apr. 11, 2007), https://www.lw.com/upload/pubContent/_pdf/pub1842_1.pdf.
301. *Id.*
302. *See* Telia DPA Statement of Facts, *supra* note 53, ¶ 2.
303. 15 U.S.C. § 78dd-1.
304. Telia DPA Statement of Facts, *supra* note 53, ¶ 12(h).

foreign entity that is not otherwise within the FCPA's scope.[305] Further, to the extent the relevant activity took place before Gulnara's governmental role began in 2008, it could not have been "to aid in establishing a corrupt relationship" with her.

Second, the DOJ alleged that certain "Telia management and Telia agents used US-based email accounts to communicate with others and effectuate the scheme. In addition, Telia and Cosom made . . . numerous corrupt payments that were routed through" New York.[306] Although the FCPA can apply to foreign companies which are neither issuers nor domestic concerns based on their "use of the [U.S.] mails or any means or instrumentality of interstate commerce" or other activity within the United States, it must be done "corruptly" or in furtherance of an improper direct or indirect payment to a foreign official. [307] But, as discussed below, the evidence does not indicate any of the contacts between the United States and Telia or any of its agents were done with any corrupt intent or for any illegal purpose.

Finally, the DOJ contended that "at least one Telia executive sent emails in furtherance of the corrupt scheme 'while in the territory of the US' as that term is used in the FCPA."[308] While the DPA does not detail the contents of these emails or who sent them, for this sort of tenuous connection with the United States to confer FCPA jurisdiction over Telia, the emails must have been in furtherance of a corrupt payment intended to improperly influence a foreign official.[309] As with the previous allegation, the evidence does not suggest this was the case.

Per the above, the DOJ's jurisdictional hook is weak and vulnerable to challenges on various grounds. At bottom, all of the 2007 transactions between Telia and Takilant took place before Gulnara became a "Foreign Official" and each of the other transactions in question occurred while Telia was no longer an FCPA issuer.

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305. *See* United States v. Hoskins, 902 F.3d 69, 85 (2d Cir. 2018); *but see* Std. Oil Co. of Tex. v. United States, 307 F.2d 120, 127–28 (5th Cir. 1962) (discussing the doctrine of respondeat superior in the context of imputing criminal liability to a corporation for the acts of its agents).

306. Telia DPA Statement of Facts, *supra* note 53, ¶ 12(i).

307. 15 U.S.C. § 78dd-3(a).

308. Telia DPA Statement of Facts, *supra* note 53, ¶ 12(j).

309. 15 U.S.C. § 78dd-3(a).

C. *Element 3: With Corrupt Intent*

The Congressional reports from when the FCPA was being drafted indicate that the word "corruptly" in the statute means an intent or desire to wrongfully influence the recipient:

> The word "corruptly" is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payor or his client, or to obtain preferential legislation or favorable regulation. The word "corruptly" connotes an evil motive or purpose . . . .[310]

With respect to this element, the DOJ alleged that Telia made "corrupt payments, totaling approximately $331,200,000, to benefit [Gulnara Karimova] in order to enter and continue to operate in Uzbekistan."[311] More than any other aspects of the DOJ's case, the facts thoroughly refute this contention.

To begin with, Telia tried (and failed) to establish whether Gulnara was actually receiving any of the payments going to Takilant. Thus, at the time the decisions to authorize the transactions with Takilant were made, there was only "an unconfirmed rumour" that Gulnara may be involved.[312] On this basis, it is difficult to see how any of the Takilant payments were made with an intention to benefit her.

Second, even if there was such an intention, the evidence shows that the Telia deal team considered her to be a businesswoman and was unaware of her role at the Ministry of Foreign Affairs in Geneva.[313] Nor could they have been—according to the Swiss Federal Police, this role did not even begin until February 2008, well after the partnership with Takilant was solidified.[314] Since the "corruptly" element requires an intention to induce the bribe recipient to misuse their official position or

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310. S. Rep. No. 95-114, at 10 (1977); *see also* Chevron Corp. v. Donziger, 974 F. Supp. 2d 362, 597 (S.D.N.Y. 2014) ("'Corruptly' [under the FCPA] means to act 'knowingly and dishonestly, with the specific intent to achieve an unlawful result by influencing a foreign public official's action in one's own favor.'") (quoting United States v. Kay, 513 F.3d 432, 449 (5th Cir. 2007)).

311. Telia DPA Statement of Facts, *supra* note 53, ¶ 12.

312. Stockholm District Court Judgment, *supra* note 251, at 14.

313. Mannheimer Report, *supra* note 56, at 51–52.

314. Swiss Investigative Report, *supra* note 287, ¶ 3.1.1.1.

improperly influence someone else's exercise of a government role, without knowledge that Gulnara had an official position, there is no way that Telia could have had a corrupt intent.[315]

Moreover, one of Telia's main lawyers on the deal described Akhmedov as the CEO of Gulnara's "investment group" and yet nevertheless authorized it (as did a number of other lawyers on the basis that Telia's due diligence investigation did not find any definitive link between Gulnara and Takilant).[316] This then gives Telia a well-grounded "advice of counsel defense," which precludes a finding that an individual or company acted with criminal intent where the facts show that a lawyer's advice, provided after the lawyer is given all pertinent information, was followed in good faith.[317] Here, not only was Telia's lawyer aware of Gulnara's possible involvement, it was the *lawyer* who informed Telia of this fact.[318]

Third, the facts show that the $331 million paid to Takilant was not exchanged for some improper action on Gulnara's part, but rather for actual hard assets that Telia did in fact receive. Between all of the transactions, Telia received rights to various frequencies, at least two million unused phone numbers, shares worth twenty percent of Coscom, a lease for a fiberoptic cable network, an operating license, and a network code.[319] The precise, objective value of these assets is beyond the scope of this Article, but there are a number of factors that circumstantially suggest the amounts Telia agreed to pay for them was reasonable:

a) The Telia Board authorized all of the major transactions after receiving detailed reports on the terms, and according to the DOJ's own allegations, the Board was not alerted to the possibility that Gulnara might be involved.[320] As such, its decision making was presumably untainted by any improper motives and yet still granted its approval.

b) All of the transactions were within the valuation ranges determined by Telia's internal team and its outside advisers. In the one instance when Takilant retained its own outside

315. Stockholm District Court Judgment, *supra* note 251, at 65.

316. Telia DPA Statement of Facts, *supra* note 53, ¶ 17.

317. United States v. Beech-Nut Nutrition Corp., 871 F.2d 1181, 1194 (2d Cir. 1989).

318. Telia DPA Statement of Facts, *supra* note 53, ¶ 21.

319. Mannheimer Report, *supra* note 56, at 58–72.

320. Telia DPA Statement of Facts, *supra* note 53, ¶ 19.

adviser to give it a valuation, Telia negotiated it down by $30 million in order to bring it in line with its own analysis.[321] If it was true that Gulnara's grip over telecoms was such that Telia was willing to pay her $331 million in bribes just to stay in business, it would hardly make sense to quibble over relatively minor valuation discrepancies.

c) Assets like frequency rights, phone numbers, and licenses are both critical to the function of a telecom company and in finite supply. Consequently, they are extremely valuable. For example, when 4G licenses were auctioned off in the United States by the Federal Communications Commission in 2015, telecom companies forked over $44.9 billion for them.[322] While a 4G license in Uzbekistan is obviously worth far less than its equivalent in America, no evidence has been produced to suggest that anything Telia purchased from Takilant was worth materially less than the sale price.

If, as the above indicates, Telia and Takilant exchanged money for assets of an equal value, clearly no component of the payment could have been intended as a bribe. Moreover, Telia insisted that the terms of each transaction required Takilant to first deliver the assets it promised to Coscom before it would be paid. In the three instances where Takilant requested funds without a corresponding transfer of hard assets, Telia refused. This is further evidence that no bribes were paid.

Fourth, even if Telia had intentionally paid Gulnara directly for these assets, it could not have done so with "corrupt" intent because nobody within the company believed that Gulnara had any official or unofficial influence over anyone within the Uzbek government who was relevant to Telia's business.[323] Nor is there any evidence that Gulnara did in fact have any such influence.[324] And even if there were evidence that Telia wanted to pay Gulnara to lobby the government on its behalf, Congress specifically stated that the "corruptly" ele-

321. Mannheimer Report, *supra* note 56, at 67–69.

322. Drew Fitzgerald, *5G Auction Shatters Record as Bidding Tops $69 Billion*, WALL ST. J. (Dec. 23, 2020, 12:06 PM), https://www.wsj.com/articles/5g-auction-shatters-record-as-bidding-tops-66-billion-11608731335.

323. *See* Mannheimer Report, *supra* note 56, at 65.

324. *See* Stockholm District Court Judgment, *supra* note 251, at 62–63.

ment should not "be construed so broadly as to include lobbying."[325]

D. *Element 4: In Order to Obtain or Retain Business*

Since the requirement that Telia acted with corrupt intent is far from established, this final element is essentially irrelevant. Obviously, purchases of assets that are critical to a business can be considered done "in order to obtain or retain business." But if the purchases are not accompanied by an intent to "corrupt" the seller by inducing them to act counter to their official duties or to otherwise improperly influence a foreign government, there can be no FCPA violation.[326]

* * *

Per the above, the evidence against Telia either weakly supports, or directly contradicts, the DOJ's allegations in purported support of each FCPA element. Although Gulnara was certainly a bad actor, there is no evidence that her crimes included receiving intentionally "corrupt" payments from Telia in exchange for an improper use of her government role or influence. The DPA's stipulation that it is "beyond a reasonable doubt" that Telia committed an FCPA violation therefore has little, if any, evidentiary or legal basis.

VIII.
IMPLICATIONS

It is easy to see why this case drew the DOJ's attention, since all of the hallmarks of an actual FCPA violation appear to be present: large payments to an offshore shell company that was revealed by secret documents to belong to the daughter of a totalitarian leader; a highly corrupt country and decisions made within an opaque government ministry for the benefit of a large multinational company who once listed shares in the United States; and complicated financial structures and money flowing to a person with an official sounding title. But the FCPA does not make it illegal to do business with a politically connected person, or even an outright politician. Nor is it a strict liability statute. Rather, it only prohibits business deal-

325. H.R. REP. NO. 100-576, at 918–19 (1988).
326. *See* 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a).

ings done with "corrupt" intent, that is, with an "evil motive and purpose."[327]

And yet, as Mannheimer Swartling and the Swedish District Court both found, a careful review of the evidence establishes, at most, (1) a business decision to expand into a politically treacherous country that, in retrospect, appeared unwise, and (2) a "very low" "level of ambition" on the part of Telia's deal team and their lawyers to not dig further into Takilant's true owner.[328] But even if Telia's due diligence could have been more thorough, the only documents that definitively linked Gulnara to Takilant were locked in a safe in Geneva until 2013. As such, it is unlikely that even the most robust possible investigation would have discovered the connection. And to the extent Telia knew or should have known there was a chance that its arm's-length, negotiated asset purchases were indirectly benefiting Gulnara, this issue was assessed and ultimately determined not problematic since she was understood to be a business mogul without any real influence over Uzbek telecom regulators. Moreover, the transactions in question were not backroom deals: they were transparent, properly approved, and involved large numbers of sophisticated businesspeople and top-shelf legal counsel. Even if there were corners cut or errors in judgment, there is simply no support for the contention that Telia or its agents acted "corruptly."

Telia's decision to make numerous admissions that directly contradicted the findings of its own lawyers, enter into a DPA, and pay the U.S. government $550 million therefore seems like a prime example of the "façade" of FCPA enforcement described by Professor Koehler. Which is not to say that this decision was incorrect or irrational. A federal trial in Manhattan would have been an enormous disruption to Telia's business, not only because it would have likely required many key executives and Board members to prepare for and deliver testimony in a court fourteen hours away from Stockholm by plane. It would also have been massively expensive and would have absorbed a significant amount of internal resources for an extended time period. There would also have been a negative impact on Telia's stock price and a cloud of uncertainty hanging over its business.

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327. S. Rep. No. 95-114, at 10 (1977).
328. Mannheimer Report *supra* note 56, at 6.

By entering into the DPA, Telia avoided all of this. And as a bonus, it received a $181 million discount off the low end of the otherwise applicable penalty range under the Guidelines, generated goodwill with the DOJ, and was able to tout its cooperative posture to investors. When these factors are weighed, the DPA is the obvious choice.

Despite this, it is important to acknowledge the glaring weaknesses in the DOJ's case that it almost surely would not have been able to overcome in a contested proceeding (as was put on display in Stockholm District Court). It is also important to take note of the broader implications. Fundamentally, this case involved a Swedish/Finnish company engaging in business transactions in Uzbekistan. Any connection to the United States was incidental and extremely tenuous. The $550 million fine was, in effect, a transfer of wealth from Telia's shareholders (including the governments of Sweden and Finland) to the U.S. treasury. Considering that the large majority of the biggest FCPA cases have been directed against non-American companies,[329] the DOJ's aggressive extraterritorial use of the FCPA to wring huge settlements from foreign companies has (not unreasonably) been described as essentially an extension of U.S. foreign policy.[330]

As the Telia case shows, there is little doubt that Professor Koehler's "carrots and sticks" continue to strongly incentivize companies to more or less admit to whatever version of the facts the DOJ proposes in order to make an investigation go away. Whether this will allow the U.S. government to indefinitely extend its extraordinary win streak in corporate FCPA cases depends on how long the foreign companies that are most often targeted choose to accept it.

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329. *See Foreign Corrupt Practices Act Clearinghouse*, STAN. LAW SCH., https://fcpa.stanford.edu/statistics-top-ten.html (last visited June 1, 2021) (showing nine of the ten largest FCPA penalties imposed on foreign entities).

330. *See, e.g.*, FREDERIC PIERUCCI, THE AMERICAN TRAP: MY BATTLE TO EXPOSE AMERICA'S SECRET ECONOMIC WAR AGAINST THE REST OF THE WORLD, 301–8 (2019); Tiffany Chung, *FCPA and Foreign Policy: A Brief Analysis of the China Initiative, and Why FCPA Enforcement is a Poor Foreign Policy Stick*, MICH. J. INT'L L. BLOG (Nov. 9, 2020), http://www.mjilonline.org/fcpa-and-foreign-policy-a-brief-analysis-of-the-china-initiative-and-why-fcpa-enforcement-is-a-poor-foreign-policy-stick.