
February 26, 2016

VimpelCom Agrees to Landmark \$795 Million FCPA Resolution

I. Introduction

On February 18, 2016, U.S. authorities announced a landmark resolution concerning violations of the Foreign Corrupt Practices Act. The Department of Justice and the Securities and Exchange Commission, together with the Public Prosecution Service of the Netherlands, entered into a \$795 million global settlement with the world's sixth-largest telecommunications company, Amsterdam-based VimpelCom Limited, a foreign issuer of publicly traded securities in the U.S., and its wholly-owned Uzbek subsidiary, Unitel LLC. The settlement resolves allegations that VimpelCom and Unitel violated the FCPA and certain Dutch laws by funneling over \$114 million in bribe payments to a shell company beneficially owned by a government official in Uzbekistan. The U.S. authorities' charges do not reveal the identity of the government official, but the news media presumes that person to be Gulnara Karimova, the eldest daughter of Uzbek President Islam Karimov.

The settlement represents the second largest global FCPA resolution to date and the sixth-largest in terms of penalty payments made to U.S. regulators. VimpelCom agreed to pay a \$230.2 million criminal penalty to the DOJ, of which \$40 million was a criminal forfeiture payment, a \$230.2 million criminal penalty to Dutch prosecutors and a separate payment of \$375 million in disgorgement of profits and prejudgment interest divided evenly between the SEC and Dutch prosecutors. The SEC credited VimpelCom with the \$40 million forfeiture payment to the DOJ.

VimpelCom entered into a deferred prosecution agreement with the DOJ in connection with a criminal information charging the company with conspiracy to violate the FCPA's anti-bribery and books and records provisions, and a separate count of violating the FCPA's internal controls provisions. Unitel pleaded guilty to a conspiracy to violate the anti-bribery provisions. The SEC charged VimpelCom with civil violations of the FCPA's anti-bribery, books and records and internal controls provisions. The agreements with the DOJ and the SEC provide that VimpelCom will implement improved internal controls, install a compliance monitor for a three-year period and fully cooperate with the agencies' ongoing investigations.

On February 18, the DOJ also filed a civil forfeiture action seeking to recover approximately \$550 million from Swiss bank accounts alleged to hold improper payments made by VimpelCom and two other telecommunications companies, or funds used to launder those payments. A related DOJ forfeiture action seeking to recover \$300 million from bank accounts in Belgium, Luxembourg and Ireland was filed in June 2015. The DOJ alleged that the bribe payments at issue were executed through transactions that

were transferred into and out of bank accounts at several large New York-based financial institutions. These actions represent the largest forfeiture effort commenced under the DOJ's Kleptocracy Asset Recovery Initiative, which was established to recover, for the benefit of victim countries, proceeds of corruption involving foreign officials that are laundered through the U.S. financial system.

The VimpelCom settlement is noteworthy not just for the magnitude of the financial penalties imposed and the amount of civil forfeiture sought, but also for the extraordinary international cooperation that led to it. The DOJ and the SEC report that they were assisted in their investigation by law enforcement agencies from 18 different countries.

II. Factual Background

The DOJ and the SEC had jurisdiction over VimpelCom as an issuer of publicly traded securities in the U.S. The DOJ asserted jurisdiction over Unitel on the basis that Unitel, as an affiliated entity of VimpelCom, furthered the corruption scheme by using U.S.-based email accounts and making numerous corrupt payments that were executed through bank accounts at financial institutions in the U.S.

VimpelCom and Unitel admitted to engaging in a broad corruption scheme from 2006 through 2012, under which the companies paid over \$114 million to Takilant Ltd., a Gibraltar-based shell company apparently beneficially owned by Gulnara Karimova, in exchange for her influence over decisions made by the Uzbek Agency for Communications and Information ("UzACI"), the agency responsible for telecommunications regulation in Uzbekistan. It does not appear that Karimova held a position at UzACI nor any other Uzbek agency with authority over the telecommunications sector, although she served in a variety of diplomatic positions from 2006 to 2012, including as Deputy Foreign Minister for International Cooperation in Cultural and Humanitarian Affairs, Uzbekistan's Ambassador to Spain and its Representative to the United Nations in Geneva, Switzerland. The DOJ and the SEC alleged that Karimova, who was once considered to be the most powerful woman in Uzbekistan and a possible successor to the presidency, represented to foreign telecommunications companies that she could influence licensing decisions on their behalf. Reportedly, she has been under house arrest in Uzbekistan since 2014.

The bribery scheme here was orchestrated by senior company executives at VimpelCom and Unitel, who developed and approved methods of channeling payments to Takilant with the intent of benefiting Karimova. These methods include tactics commonly seen in international bribery cases, such as entering into partnerships with companies owned by government officials, entering into phony consulting deals and making payments to sham vendors. The government alleges that Karimova required these payments from foreign companies as a condition of entry into the country's telecommunications sector.

The DOJ and SEC alleged that VimpelCom, in coordination with Unitel, funneled payments to Takilant by:

- acquiring a local telecommunications company called Buztel, which VimpelCom management knew had no particular business value to the company other than the fact that it was indirectly owned by Takilant;
- entering into a lucrative partnership with Takilant through which Takilant obtained an indirect ownership interest in Unitel that VimpelCom later repurchased at an inflated price, giving Takilant a \$37.5 million profit;
- paying Takilant \$25 million to exert improper influence over UzACI so Unitel could obtain telecommunications licenses;
- entering into phony consulting contracts worth \$2 million and \$30 million with Takilant;
- using sham vendors to funnel \$20 million in payments to Takilant; and
- making over \$500,000 in payments to a charity directly related to Karimova.¹

All of the bribes were falsely recorded in VimpelCom's and Unitel's consolidated books and records as legitimate expenses related to the companies' business in Uzbekistan.

According to the DOJ and the SEC, members of VimpelCom's senior management were aware that VimpelCom's dealing with Takilant would raise significant red flags. On multiple occasions, VimpelCom's board of directors inquired about potential FCPA risks associated with Takilant and Karimova. In such instances, VimpelCom management sought to conceal the bribery scheme by having outside counsel provide FCPA advice during the due diligence process for several transactions while knowingly withholding information relevant to the lawyers' assessment of the corruption risks involved in the transactions. For example, during VimpelCom's acquisition of Buztel and its sale of an interest in Unitel to Takilant, VimpelCom senior managers hid Karimova's control over Takilant from outside counsel. Later, when Unitel sought to enter into sham consultancy agreements with Takilant, VimpelCom senior managers again hid Karimova's control of Takilant. They specifically requested that outside counsel refrain from analyzing the nature and high dollar value of the consulting arrangement and focus its opinion solely on the risks of transacting with a third party.

¹ See Deferred Prosecution Agreement, Attachment A ¶¶ 11-13, *U.S. v. VimpelCom Ltd.*, No. 1:16-CR-00137 (S.D.N.Y. Feb. 18, 2016); Information ¶¶ 13-15, *U.S. v. Unitel LLC*, No. 1:16-CR-00137 (S.D.N.Y. Feb. 18, 2016); Complaint ¶¶ 18-37, *SEC v. VimpelCom Ltd.*, No. 1:16-CV-01266 (S.D.N.Y. Feb. 18, 2016).

In addition, certain members of VimpelCom senior management ignored concerns about relationships with Takilant expressed by Unitel and VimpelCom employees. For example, when a consultant functionally serving as a VimpelCom senior executive expressed anti-corruption concerns about a \$30 million payment to Takilant under a dubious consulting agreement, VimpelCom's in-house counsel promised to monitor Takilant to ensure that it would perform meaningful work, but failed to do so.

VimpelCom falsely recorded payments and expenses related to the bribery scheme as consulting services, the receipt of loan proceeds, acquisition of intangible assets, and submission and support for document packages related to assignment of telecommunications channels to Unitel. Because such improper record keeping and accounting went undetected, the DOJ and SEC concluded that VimpelCom failed to implement adequate internal controls and enforce its existing internal controls to detect and prevent bribery. Specifically, VimpelCom failed to develop or enforce: (1) a system for conducting due diligence on third parties, (2) procedures for the selection of vendors, (3) procedures regarding payments to bank accounts located in places different from where a partner was located, (4) procedures to identify conflicts of interest, and (5) a sufficient audit function capable of identifying corruption risks. In addition, VimpelCom knowingly failed to implement and maintain controls for transactions with "reseller companies," thereby allowing bribe payments to proceed without detection. VimpelCom's internal legal department provided no internal review of transactions, and outside counsel was denied access to information that would have exposed the corrupt payment scheme. Finally, the DOJ and SEC specifically noted that VimpelCom did not have a dedicated compliance function until 2013 and did not have a compliance officer acting in a senior management position until 2014.

VimpelCom's deferred prosecution agreement states that the Sentencing Guidelines fine range for the company's misconduct is \$836 million to \$1.67 billion. The DOJ explained that VimpelCom received a 25% discount off the bottom of that range for its substantial cooperation, which included undertaking significant efforts to provide the DOJ with foreign evidence while complying with foreign data privacy and security laws; conducting a further independent investigation; making foreign employees available for interviews and assisting the DOJ with those interviews; and collecting, analyzing, translating and organizing a voluminous amount of evidence for the government. VimpelCom received an additional 20% discount for its prompt acknowledgment of wrongdoing by its personnel and its willingness to resolve its criminal liability on an expedited basis. VimpelCom would have been eligible for an even more significant discount or a different, less punitive resolution if it had voluntarily self-disclosed its misconduct to the government after uncovering wrongdoing during an internal investigation, but the company did not begin to cooperate until it was approached by the authorities.

The DOJ also recognized that VimpelCom took significant steps to remediate, including terminating employees who were complicit in making unlawful payments, substantially upgrading its anti-corruption compliance program and hiring new leaders of its legal, compliance and financial functions. Due to the

scope of the bribery scheme and VimpelCom's previous failure to implement adequate internal controls, however, the DOJ imposed an independent compliance monitor for a three-year period.

III. Key Takeaways and Analysis

The magnitude of the VimpelCom settlement amount—\$795 million—underscores that the government continues to pursue large-scale corporate bribery cases, including in the telecommunications sector, an area known to have a high risk for corruption. As many commentators have noted, 2015 was a quiet year for corporate FCPA cases, with the DOJ announcing only two such resolutions and collecting only \$24 million in penalties. In contrast, in 2014 the DOJ entered into seven corporate FCPA settlements and collected \$1.25 billion.

Last fall, the DOJ “attributed the decline in its 2015 FCPA enforcement activity to a slowdown in corporate self-reports and a strategic shift away from investigating smaller cases to investigating more complicated cases and prosecuting individuals.”² In addition, the dip in DOJ enforcement was also likely due to the normal rhythm of complex, long term investigations. For these reasons, in our view last year's slowdown says little about the future of criminal FCPA enforcement. The DOJ's efforts to bolster its anti-corruption resources in multiple ways are probably a more reliable predictor of future levels of criminal enforcement. Last year, the DOJ announced that it would triple the number of FBI agents devoted to foreign bribery cases; establish two additional dedicated FBI anti-corruption squads in New York and Los Angeles; add 10 to 15 prosecutors to the Fraud Section's FCPA unit, bringing that unit up to approximately 30 prosecutors; and hire a permanent compliance counsel to advise the Criminal Division's Fraud Section on corporate resolutions.³ This dramatic increase in enforcement resources suggests that the pronounced shift towards more complicated cases may be real.

The VimpelCom settlement also provides a concrete example of the increased coordination between the Fraud Section's FCPA Unit and the Criminal Division's Asset Forfeiture and Money Laundering Section, which is spearheading the DOJ's Kleptocracy Asset Recovery Initiative. Although the Kleptocracy Initiative was unveiled in 2010, the VimpelCom case represents the first instance in which a major FCPA criminal resolution was announced alongside a related civil forfeiture action to recover bribe money that was laundered through the U.S. financial system. Given that the DOJ views its FCPA enforcement program and Kleptocracy Initiative as “two sides of the same anti-corruption coin,” we are likely to see

² Hank Walther, *Downturn in FCPA Enforcement Only Temporary*, Nat'l L.J., Feb. 22, 2016, available at <http://www.nationallawjournal.com/id=1202750174776/Downturn-in-FCPA-Enforcement-Only-Temporary>.

³ See Press Release, Fed. Bureau of Investigation, FBI Establishes International Corruption Squads: Targeting Foreign Bribery, Kleptocracy Crimes (March 30, 2015), <https://www.fbi.gov/news/stories/2015/march/fbi-establishes-international-corruption-squads/fbi-establishes-international-corruption-squads>; Press Release, Dep't of Justice, New Compliance Counsel Expert Retained by the DOJ Fraud Section (Nov. 3, 2015), <http://www.justice.gov/criminal-fraud/file/790236/download>; Leslie Caldwell, Assistant Attorney General, Dep't of Justice, Remarks at American Conference Institute's 32nd Annual International Conference on FCPA (Nov. 17, 2015), <http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-american-conference> [hereinafter Caldwell ACI Remarks].

more joint efforts to punish those who pay bribes overseas and at the same time seize assets linked to the corruption.⁴

The VimpelCom settlement was not only an example of extraordinary collaboration within the DOJ, the DOJ also proclaimed it “one of the most significant coordinated international and multi-agency resolutions in the history of the FCPA.”⁵ The Justice Department thanked law enforcement agencies in the Netherlands, Sweden, Switzerland and Latvia for providing “significant cooperation and assistance.” In addition, authorities in Belgium, Bermuda, the British Virgin Islands, the Cayman Islands, Estonia, France, Gibraltar, Ireland, Luxembourg, the Marshall Islands, Norway, Spain, the UAE and the U.K. also assisted the DOJ and the SEC.⁶ Notably, there was no mention of cooperation from law enforcement in Uzbekistan. Such extensive international cooperation is rapidly becoming the new normal. It is unclear how the bribery scheme came to the attention of U.S. authorities, but media reports suggest that Swiss, Swedish, and Dutch authorities may have been the first to open investigations into allegations that European telecommunications companies were involved in bribery in Uzbekistan.

It is significant that the Dutch prosecutors not only assisted the U.S. investigation but also imposed a penalty—\$397.5 million—equivalent to the total amount to be paid to the DOJ and SEC. The only analogous precedent for such corresponding penalties is the resolution with Siemens, in which that company settled a global corruption investigation by paying \$800 million to the U.S. government and \$854 million to German authorities. This Dutch enforcement action may help address the OECD Working Group on Bribery’s criticism of the Netherlands for failing to vigorously pursue and proactively investigate foreign bribery allegations. Whether it represents a lasting shift in approach remains to be seen.

The VimpelCom settlement is also noteworthy because the deferred prosecution agreement with the company provides some greater transparency into how the government calculates penalty amounts in corporate criminal resolutions. The agreement includes a detailed discussion of how the DOJ arrived at a 45% percent discount from the low end of the recommended penalty under the Sentencing Guidelines. Specifically, the DOJ explained that VimpelCom received a 25% discount for substantial cooperation and a 20% discount for promptly acknowledging wrongdoing and resolving the matter quickly. Settlement documents from prior FCPA cases reviewed the factors that affected discount calculations, but did not provide a breakdown of the relative weight assigned to particular factors. We suspect that the DOJ will continue to provide more insight into its calculation of fines in settlement documents, consistent with

⁴ Press Release, Dep’t of Justice, VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than \$795 Million; United States Seeks \$850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme (Feb. 18, 2016), <http://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million>.

⁵ *Id.*

⁶ *Id.*; Press Release, Sec. and Exchange Comm’n, VimpelCom to Pay \$795 Million in Global Settlement for FCPA Violations (Feb. 18, 2016), <https://www.sec.gov/news/pressrelease/2016-34.html>.

Assistant Attorney General Leslie Caldwell's recent statement that one of the Justice Department's top priorities is "to increase transparency regarding charging decisions in corporate prosecutions."⁷

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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⁷ Caldwell ACI Remarks, *supra* note 3.