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**BRIBERY**

Two attorneys from Shearman & Sterling LLP examine the U.S. Foreign Corrupt Practices Act case of the Ukrainian oligarch, Dymtro Firtash, and how the Justice Department’s approach to the case may shed light on the Trump Administration’s disposition towards future FCPA matters.

**The Firtash Case May Present Jeff Sessions’ Department Of Justice With Its First Real Test on FCPA Enforcement**



BY PHILIP UROFSKY & R. ZACHARY TORRES-FOWLER

**A**n Austrian court may have just handed Jeff Sessions’ Department of Justice its first real test on how the newly minted Attorney General will enforce the Foreign Corrupt Practices Act. On Feb. 22, 2017, an Austrian court of appeals cleared the way for Dymtro Firtash, a powerful Ukrainian oligarch with deep ties to pro-Russian sympathizers, to be extradited

to the U.S. to face charges on, *inter alia*, alleged violations of the FCPA. If Austrian authorities follow through on the U.S. request to extradite Firtash, the case could, among other things, pit the DOJ’s interest in enforcing the FCPA against the Trump Administration’s pro-Russian posture.

**Background**

Firtash, one of Ukraine’s wealthiest individuals, made his fortune in the natural gas industry by working alongside Gazprom, the Russian state-owned gas company, to sell gas to Ukraine and Europe. Over time, as the owner of a myriad of companies, Firtash became among the most influential political power brokers in Ukraine, allegedly serving as a close confidant of the former Ukrainian president and Russian ally, Victor Yanukovich.

The Firtash saga began in 2012 when the DOJ initiated a grand jury investigation into Firtash’s activities. More than a year later, on June 20, 2013, the DOJ obtained a sealed grand jury indictment against Firtash and five other individuals. According to the indictment, Firtash and his co-conspirators engaged in a scheme to pay Indian government officials approximately \$18.5 million in bribes to secure mining licenses in the Indian state of Andhra Pradesh in violation of the Racketeer Influenced and Corrupt Organizations Act, the federal money laundering statute, and the FCPA. The licenses were allegedly needed to enable Firtash to access minerals that could be converted into titanium and sold to an unnamed company based in Chicago.

On March 12, 2014, nearly a year after filing the indictment, Firtash was arrested in Vienna after the U.S. filed an extradition request with Austrian authorities.

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The timing of Firtash's arrest was striking in light of the increasingly tumultuous political environment in Ukraine. Indeed, within approximately a month of Firtash's arrest, Yanukovich was ousted from power following widespread public demonstrations, Russia annexed the Crimean peninsula, skirmishes between Ukrainian and pro-Russian separatists in the Ukrainian region of Donetsk began, and the U.S., EU, and Canada announced targeted sanctions against Russia in response to Russia's activities in Ukraine.

For more than a year after Firtash's arrest, Austrian prosecutors, supported by the DOJ and Department of State, argued for Firtash's extradition to the U.S. before the Austrian courts. In his defense, Firtash's counsel, which included former U.S. Homeland Security Secretary Michael Chertoff and former special counsel to Bill Clinton, Lanny Davis, argued that no crime had actually been committed and that the U.S. had no legitimate interest in pursuing charges against Firtash because the alleged mining project was entirely outside of and had no effect in the U.S. As a result, Firtash argued that the U.S. authorities' case was in pursuit of broader U.S. foreign policy goals aimed at punishing Firtash for his ties to Yanukovich and Russia rather than enforcing U.S. criminal laws.

On April 30, 2014, Austrian Judge Christoph Bauer sided with Firtash and rejected the U.S. authorities' extradition request on the grounds that it was "politically motivated." In issuing his decision, Judge Bauer stated: "America obviously saw Firtash as somebody who was threatening their economic interests" and that the U.S. had not provided "sufficient proof" that Firtash had committed any crime. Judge Bauer's decision was, at the time, yet another blow to the DOJ that had continually struggled to successfully prosecute high-profile individuals for acts of bribery.

Following another year of legal hurdles, Austrian and U.S. authorities initiated their appeal of Judge Bauer's decision in roughly August 2016. Several months later, on Feb. 22, 2017, the Austrian court of appeals overruled Judge Bauer, stating that "[t]he crimes alleged against Mr. Firtash have no political character," leaving the decision to extradite Firtash to the Austrian justice minister.

## Takeaways

As alluded to above, the charges against Firtash could come to define the DOJ's approach to enforcing the FCPA in the coming years in a number of ways.

First, assuming that Firtash is extradited to the U.S., the *Firtash* case may force Attorney General Sessions to balance the DOJ's interest in enforcing the FCPA against the Trump Administration's pro-Russian stance. Moreover, press reports have connected Firtash to the White House through his past business dealings with President Trump's former campaign manager, Paul Manafort. Although it would be highly improper for a sitting president to interfere with an ongoing prosecution, given the Trump Administration's desire to improve relations with Russia, it may not be out of the realm of possibility for the DOJ to be encouraged by the White House to dial back the charges against Firtash. If so, we may see how independent Jeff Sessions's DOJ will be during the Trump presidency and whether cases involving the FCPA—a statute which Trump has publicly attacked—will give way to political interests.

Second, assuming the DOJ moves forward with the charges, the *Firtash* case will be another opportunity for the Department of Justice to secure a somewhat elusive conviction of a high-profile individual. Indeed, given Firtash's approach to the Austrian extradition proceedings, engaging some heavy hitters to represent him, there appears to be little doubt that Firtash plans to test the DOJ and put prosecutors to their burden.

Third, depending on how the proceedings evolve, it is possible that additional revelations regarding Firtash's alleged bribery scheme could come to light. Specifically, "Company A," the Chicago-based purchaser of the titanium sponge (identified in the media as Boeing) that entered into various agreements with Firtash's companies, is not alleged in the indictment to be a co-conspirator. Nevertheless, if Firtash divulges additional information related to the alleged bribery scheme, it is possible that yet another FCPA enforcement action could be in the offing.

## Conclusion

Despite some reassurances from Attorney General Sessions during his confirmation, we still have relatively limited insight into precisely how the DOJ and the Trump Administration will approach FCPA enforcement. While the Firtash saga remains ongoing, the case may provide a small window into the White House's relationship with the DOJ and could demonstrate just how serious the new administration is about enforcing the FCPA in the future.