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Serious Fraud Office concludes its most significant corporate bribery settlement to date

On 17 January, the UK Serious Fraud Office ("SFO") agreed a deferred prosecution agreement ("DPA") with Rolls-Royce PLC and a subsidiary operating in the energy industry ("Rolls-Royce"). This is the third such agreement to be agreed between the SFO and a cooperating corporate entity. The DPA marks the conclusion of the largest investigation ever undertaken by the SFO and provides further important indications about when it and the courts will entertain such settlements and how they will be concluded.

The facts

The DPA is concerned with payments made to intermediaries in seven countries in connection with Rolls-Royce's civil and defence aerospace and energy businesses between 1989 and 2013. The charges now laid but not proceeded with refer to payments being made to employees of airlines and state owned enterprises and to public officials to induce them to act favourably towards Rolls-Royce,

The Rolls-Royce DPA: Key points for corporate organisations

1. Timely and fulsome cooperation pays dividends – the SFO and courts have now agreed to a 50 per cent reduction for "extraordinary" cooperation in two cases.
2. Corporates may be deemed to be cooperative even if they have not self-reported – providing detail not already known to SFO and which would only otherwise be yielded by substantial investigation can facilitate negotiated settlements.
3. The extent to which underlying documents in relation to internal investigations (including interview memoranda) have been provided and whether in its view the SFO has been provided with sufficient opportunities to influence the course of such investigations will remain key areas of discussion during DPA negotiations.
4. DPAs are unlikely to be an option where wrongdoers remain involved in management of the company.
5. Collateral impact of prosecution is a relevant consideration – SFO and courts will not shy away from prosecuting ensuring that corporates committing egregious acts or which are not sufficiently cooperative are prosecuted, but are prepared to recognise the potential adverse consequences of a prosecution for innocent third parties and employees and (and the strain a prosecution places on their own resources).
6. Putting in place and documenting meaningful changes to compliance arrangements may avoid imposition of costly monitors – traditional scepticism amongst judges and prosecutors about imposing monitors seems to be diminishing.
7. Courts will not always look to the US as the benchmark for penalty calculation.
8. No further guidance on what amounts to "adequate procedures" for the purposes of the corporate offence of failure to prevent bribery.

failures to accurately record the nature of commission payments and failures to prevent intermediaries from paying bribes.

Much of the conduct with which the DPA is concerned predated the introduction of the Bribery Act 2010. The offences referred to in the DPA reflect this. Conduct occurring before 1 July 2011 has formed the basis of seven counts of conspiracy to corrupt and false accounting. The remaining five counts relate to offences under section 7 of the Bribery Act 2010 (corporate failure to prevent bribery) in respect of conduct occurring after that date.

The DPA

Under the DPA, Rolls-Royce has been ordered to pay a total of £497,252,645, comprising a financial penalty of £239,082,645 and disgorgement of £258,170,000. It must pay these sums to the SFO (plus the SFO's full costs of almost £13 million) in instalments over the next four years. In addition, as has been a feature of previous DPAs, it requires Rolls-Royce to continue to cooperate with the SFO and other agencies and authorities in connection with their investigations and any proceedings which may arise from the same conduct and to maintain and implement the recommendations of a compliance programme that has been in place since 2013. Provided Rolls-Royce makes all required payments and abides by its other obligations under the DPA, the prosecution will be discontinued at some point between 18 January 2021 and 17 January 2022. Exactly when this will occur depends upon when the SFO confirms that it is satisfied that all conditions have been complied with.

The SFO coordinated its action with the US Department of Justice and the Brazilian Ministério Público Federal. Under parallel settlements covering conduct in the US, Brazil, Thailand and Kazakhstan, penalties amounting to US$169,917,710 (US) and US$25,579,645 (Brazil) have also been imposed.

DPAs in the UK

DPAs provide for criminal charges to be laid but not proceeded with provided the corporate organisation concerned complies with a set of agreed conditions. Under the Crime and Courts Act 2013, in order for a DPA to be approved, a judge must be satisfied that it is in the interests of justice for the matter to be the subject of a DPA rather than an immediate prosecution and that the proposed terms are fair, reasonable and proportionate.

The investigation

Although the proceedings leading to the approval of the DPA have been concluded swiftly (within a month, expedited in part by the apparent need for matters to be concluded before the change of US administration), the investigations and negotiations leading up to them were lengthy.

Matters were brought to the attention of the SFO by Rolls-Royce in 2013. Although the SFO was aware of allegations of wrongdoing referred to in press reports prior to this date and had commenced preliminary enquiries, Rolls-Royce provided the SFO with significant amounts of additional detail. An internal investigation, stated to involve interviews with over 200 individuals and the capture and preservation of multiple categories of documents, followed. The report setting out its findings of this investigation and underlying material eventually amounting to over 30 million documents, including memoranda of interviews, were then made available to the SFO in full. Legal professional privilege was not claimed over any of this material, but rather it was provided on a limited waiver basis, with a mechanism put in place for disputes as to whether privilege applied to particular documents to be resolved by independent counsel.

The "interests of justice test"

Cooperation

In his judgment, Sir Brian Leveson has acknowledged that the scale and duration of the conduct now covered by the DPA led him initially to doubt whether any company would ever be prosecuted were he to approve a DPA in this case. Both he and the SFO have reiterated that, but for the fulsome cooperation provided by Rolls-Royce, described by the SFO as "extraordinary" and, during the hearing, as "beyond exemplary", the Court could not have concluded that the interests of justice would be served by entering into a DPA and prosecution would have followed.

The case provides the clearest indication yet of the markers of cooperation which will lead the SFO and judges to consider that cases will be suitable for DPAs. Messages previously conveyed about the importance of timely and full disclosure of suspected wrongdoing have been reiterated. Crucially though, the case makes clear that DPAs are not reserved for cases where corporate entities come forward to self-report matters of which the SFO has no prior knowledge. In this case, the SFO was already aware of alleged wrongdoing, but was notified by Rolls-Royce of matters which would have only come to light after very substantial further investigation.

Senior figures at the SFO have repeatedly made it clear in other public forums that they view waiving legal professional privilege over witnesses' first accounts and allowing the SFO an opportunity to influence the timing of such interviews conducted as part of an internal investigation as crucial features of cooperation facilitating a DPA. This is though the first example of a DPA where the fact that legal professional privilege has been waived, where interview memoranda (and other underlying documents) have been provided and where interviews have been deferred at the SFO's request have been specifically identified in the proceedings as features of cooperation provided. It appears likely that the SFO will use this DPA as the benchmark against which cooperation is measured in future cases.

Both the SFO and the Court have held this case up as a clear indication that DPAs provide opportunities for a line to be drawn under historic misconduct. Both have emphasised that the fact that no members of the the management team involved in disclosing matters and working with the SFO to investigate and conclude them were involved in the wrongdoing, was a matter of real significance. The prompt notification of matters to the SFO immediately upon the current management team becoming aware of them excused the fact that their predecessor directors had been aware of relevant matters for several years and had elected not to do so, and has been highlighted as an indicator of genuine cooperation.

Practical considerations

Proposing and approving the DPA, the SFO and the Court also acknowledged the likely impact a prosecution in a case of this magnitude would have had on Rolls-Royce, the many innocent third parties dependent upon it, the SFO and the court system. Both have been careful to restate clear messages from previous cases (most recently the SFO's second DPA agreed in July 2016 with the company currently known as XYZ) that prosecution and in some cases enforced insolvency will be appropriate consequences in cases involving egregious conduct and/or inadequate cooperation. Both have also acknowledged though that their resources are finite and subject to numerous competing and pressing demands. The SFO has stated that its investigation has involved 70 of its staff. The conclusion of this case may well lead to the acceleration of other investigations.

Whether proposed terms are "fair, reasonable and proportionate"

Penalty calculation

The penalty imposed is notable not only because of its overall size, but also as it was calculated using a flexible and complex methodology, including the application of a substantial discount for cooperation.

A key feature of the DPA is the repetition of the approach adopted in the previous DPA of providing an "extraordinary cooperation discount" to reflect the timeliness and extent of assistance provided, and to encourage other corporate entities to behave in a similar way in future cases. The Court decided again to give a discount of 50 per cent on the financial penalty imposed (but not on the disgorgement element), acknowledging that the one third discount for pleading guilty at the earliest opportunity provided for by the relevant Sentencing Council guideline (which is designed principally for use in cases where corporate organisations have been prosecuted and convicted rather than DPAs, where they will have demonstrated additional cooperation) to which regard must be had under the DPA Code of Practice[1] is unlikely to provide an adequate incentive to provide the type of cooperation expected in order to make a DPA a realistic option.

One other unusual feature of the sentencing exercise was the decision to take averages of the individual multipliers assigned to each of the groups of counts of failing to prevent bribery under section 7 of the Bribery Act 2010 relating to particular divisions of Rolls-Royce's business, on

[1] "Any financial penalty is to be broadly comparable to a fine that the court would have imposed upon P following a guilty plea." DPA Code of Practice at paragraph 8.3.

the basis that offences were committed through general failures of corporate governance. Similarly, "harm" figures in respect of these offences committed by each division were decided by averaging the gross profit made by each of relevant divisions in connection with the particular conduct.

Sir Brian Leveson concluded that the complexity of the sentencing exercise in this instance, and in particular the need to ensure proportionality and to reflect the size of the disgorgement figure, made it appropriate to deviate from the previous approach of looking at the size of penalty that may be imposed in similar proceedings in the US as a starting point. This approach was suggested by Lord Justice Thomas in *R v Innospec* (which was decided in 2010, substantially before the introduction of DPAs in the UK and the relevant sentencing guideline) and was adopted in respect of the first DPA agreed in the UK (between Standard Bank and the SFO in December 2015).

Non-monetary elements

Although Rolls-Royce has not been required to appoint a monitor under the DPA, it has been required to maintain a compliance programme which has been in place since 2013, and to implement various recommendations arising from it. This is the closest that any of the three UK DPAs concluded to date have come to a requirement for a monitor to be installed, a common feature of US DPAs. This feature of the DPA perhaps illustrates that the SFO and the courts are beginning to take a less sceptical view towards such requirements than has historically been taken in the UK.

"Adequate procedures"

After three concluded DPAs in the UK, some key questions remain unanswered. In particular, no light has yet been shed on when a corporate will be taken to have had in place "adequate procedures" to prevent bribery, thus avoiding committing offences under section 7 of the Bribery Act 2010.

No further formal guidance on the "adequate procedures" defence has been issued since that published by the Ministry of Justice in March 2011. None of the corporate entities involved in DPAs to date (nor the one company prosecuted for breaches of the section 7 offence) have publicly contested the SFO's assessments that their procedures at the relevant times have been inadequate. In particular, the proposition that bribery occurred and that arrangements were therefore *de facto* deficient remains untested and will, it appears, remain so until a corporate and its representatives are prepared to raise the issue during the course of DPA negotiations with the SFO or until the matter is decided in a contested case.

The enforcement landscape

The DPA has been concluded against the backdrop of ongoing discussions about the future of corporate criminal liability in the UK.

In this case, Rolls-Royce has fully accepted that it committed offences predating the introduction of the Bribery Act 2010 through the actions of individuals. However, under the law of corporate criminal liability as it currently stands, had the case been contested, it is likely that the SFO would have faced some substantial hurdles to prosecuting seven of the 12 counts on the indictment requiring the application of the identification principle.

Several days before the approval of the DPA, the UK government published an open call for evidence concerning the extent to which the law of corporate criminal liability needs reform. The paper set out various options, including a suggestion that difficulties with the application of the identification principle could be avoided by the introduction of an offence similar to that under section 7 of the Bribery Act 2010 covering a wider range of economic crime. Discussions in relation to this and other suggested options, discussed in detail in a separate **Clifford Chance briefing**, are at a very early stage. The outcome of these discussions may have a substantial effect on the way in which corporate wrongdoing is dealt with in future similar cases.

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