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Is the SFO serious about Airbus settlement?

The SFO has finalised four deferred prosecution deals, including the Rolls-Royce and Tesco deals

by Shereen Ali | Deputy Editor - September 28, 2017

Chris Daw QC of Serjeants' Inn Chambers discusses whether the Serious Fraud Office really is serious about fraud

It has been widely reported that the Serious Fraud Office is negotiating a potential £1 billion financial settlement with Airbus over allegations of corruption and bribery.

The deals involved the use of "fixers" to pay bribes to secure huge contracts in countries such as China and Indonesia. A separate investigation is said to be looking into similar deals in Kazakhstan, Tunisia and Saudi Arabia.

These negotiations follow on from the largest ever financial settlement, between the SFO and Rolls-Royce, valued at £497 million, and a similar £129 million arrangement with Tesco.

What makes Deferred Prosecution Agreements possible?

These settlements can be made using a relatively new and little used procedure called a Deferred Prosecution Agreement or "DPA", brought into existence by the Crime and Courts Act 2013 and governed by a joint 2014 SFO / CPS Code of Practice.

Under a DPA,prosecutors charge a company with one of the scheduled offences, which include fraud, bribery, false accounting and other economic crime. The prosecution is then suspended for a defined period, provided that the company meets certain conditions, including financial terms.

DPAs are only available to companies which cooperate fully and transparently with the criminal investigation. They must be approved by a senior judge as being "fair and reasonable" and "in the interests of justice".

To date the SFO has finalised just four DPAs, including the Rolls-Royce and Tesco deals, a $25 million settlement with Standard Bank in 2015 and a much smaller £6.5 million arrangement with an SME in 2016. Both were approved by senior Court of Appeal judge, Lord Justice Leveson, who expressed "serious doubts" about the Rolls-Royce DPA, given the nature of the crimes involved.

How DPAs work

In straightforward terms, a DPA allows a corporation to buy its way out of criminal prosecution, by making agreed payments to HM Treasury and, in some cases, to third parties such as victims and foreign governments. As well as financial settlements, a DPA can impose other conditions on the operation of the business, to ensure future legal and regulatory compliance. Individuals as opposed to organisations cannot enter into a DPA.

The SFO explains the rationale of DPAs in the following way:

- *They enable a corporate body to make full reparation for criminal behaviour without the collateral damage of a conviction (for example sanctions or reputational damage that could put the company out of business and destroy the jobs and investments of innocent people).*
- *They are concluded under the supervision of a judge, who must be convinced that the DPA is 'in the interests of justice' and that the terms are 'fair, reasonable and proportionate'*
- *They avoid lengthy and costly trials*
- *They are transparent, public events*

Why DPAs are attractive to corporations

The attraction of a DPA to a corporate defendant is obvious and can perhaps best be illustrated by the Rolls-Royce deal itself. On the face of it, the payment of such a large penalty looks like a major financial hit for the company. However, the real effect of the deal was to provide a huge uplift in shareholder value, because it effectively allowed Rolls-Royce to take a one-off charge and remove uncertainty over potential future liability.

Shortly before its DPA was announced, in January 2017, Rolls-Royce's share price was sitting at 639.50. Just seven months later it hit 979.00, a rise of over 50%, representing an increase in market capitalisation of over £5 billion; over ten times the penalty paid under the DPA.

Tesco's share price took a short-term hit following the DPA announcement but quickly recovered to the levels seen immediately before the deal became public.

Major issues with the focus of the SFO

The SFO has made no secret of its belief that its pursuit of the three DPAs to date, and the others in the pipeline, represent a success for the organisation. In purely budgetary terms, that appears to be the case, with the penalties negotiated exceeding the total SFO operating budget of £473 million, over a 10 year period.

This led the organisation to claim that "we remain uniquely well-placed to investigate and prosecute the top-tier of serious and complex economic crime and our operating model underpins our success".

It is worth looking however at what sorts of cases the SFO is supposed to take on. Its criteria include:

- whether the apparent criminality undermines UK PLC commercial or financial interests in general and in the City of London in particular,
- whether the actual or potential financial loss involved is high,
- whether actual or potential economic harm is significant,
- whether there is a significant public interest element, and
- whether there is new species of fraud

It is difficult to see how the tiny number of DPAs finalised to date have had any disruptive impact on the activities of major fraudsters. Perhaps most fundamentally of all, the SFO has singularly failed to successfully prosecute any of those whose criminal behaviour caused the economic and financial crisis from 2007 onwards.

There has been a proliferation of industrial-scale fraud, perpetrated online in particular, which causes serious economic harm to millions, most notably through identity theft and other forms of hacking. The SFO has been largely ineffective in addressing this fraud epidemic.

It would be wrong not to mention one statistic, to be gleaned from the SFO's public statements for last full financial year. During that period, the organisation managed to prosecute just 13 people, who actually went to prison, mostly for fairly low level offending.

The real message which can be gleaned from the SFO's recent record is that, for corporations, the likelihood of an SFO investigation, let alone a prosecution, is slim indeed. For individuals involved in serious fraud, causing untold economic misery, the odds of being locked up are as low as ever.

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