

ROLLS-ROYCE AND THE SERIOUS FRAUD OFFICE AGREE A £500M DEFERRED PROSECUTION AGREEMENT

This note discusses the Deferred Prosecution Agreement (DPA), which Rolls-Royce recently agreed with the Serious Fraud Office (SFO) and which was approved by the Court on 17 January 2017. The DPA is the third and largest of its kind and is the result of the largest single investigation carried out by the SFO. The judgment of the Court provides invaluable further guidance on the offences under the Bribery Act 2010 and how to deal with the SFO when such conduct is discovered or suspected.

The conduct involved offences relating to bribery of foreign public officials, commercial bribery and false accounting of payments to intermediaries over the period 1989 to 2013. The offences were multi-jurisdictional, numerous and spread across Rolls-Royce's defence aerospace, civil aerospace and energy business.

The DPA involves payments of £497,252,645 (comprising disgorgement of profits of £258,170,000 and a financial penalty of £239,082,645) plus interest. Rolls-Royce is also reimbursing the SFO's costs of approximately £13,000,000 in full.

The case represents by far the most significant enforcement action by the SFO in the UK. There is no doubt that the consequences of the DPA for Royce-Rolls are extremely significant in financial terms, but the company can now draw a line under what the judge described as the most serious breaches of the criminal law in the areas of bribery and corruption. The message from the SFO and the Courts remains clear and consistent: engaging openly and fully with the SFO from an early stage will significantly improve the outcome for companies that may be engaged in bribery and corruption, at home or overseas.

WHAT IS A DPA?

A DPA is an agreement between an organisation and a public prosecutor which results in criminal proceedings being suspended (and subsequently discontinued) on condition that the relevant organisation complies with the agreed terms. These may include the payment of a financial penalty, compensation, co-operation with future prosecutions of individuals and the implementation of a corporate compliance programme. This enables an organisation to avoid the full impact of a criminal conviction. DPAs must be approved by the Court. They are available to bodies corporate, partnerships and unincorporated associations, but not to individuals.

WHAT HAPPENED IN THIS CASE?

In early 2012, internet postings which raised concerns about the operation of Rolls-Royce's civil business in China and Indonesia came to the attention of the SFO. A subsequent investigation revealed, in the judge's words, "*the most serious breaches of the*

criminal law in the areas of bribery and corruption (some of which implicated senior management and, on the face of it, controlling minds of the company)". The relevant conduct related to contracts in Indonesia, China, Thailand, Russia, Nigeria and Malaysia that together earned Rolls-Royce over £250m of gross profit.

Rolls-Royce co-operated with the SFO throughout their investigation and this was an important factor in the SFO agreeing to enter into a DPA. That DPA was approved by the Court on 17 January 2017. As noted above, the DPA required Rolls-Royce to pay £497.25m in financial penalties plus interest and the SFO's costs (£13m). In addition, Rolls-Royce was required to continue to co-operate with prosecuting authorities' investigations and, at its own expense, to complete a compliance programme in accordance with the recommendations of an independent expert.

The judge also noted that Rolls-Royce's own costs incurred in connection with its investigation and work with prosecutors in multiple jurisdictions amounted to over £123m as at December 2016 and this figure will increase in the future.

KEY POINTS

Co-operation by Rolls-Royce

The extent to which Rolls-Royce co-operated with the SFO investigation was, in the SFO's own words, "extraordinary". This included:

- ◆ Co-operating with the SFO in the conduct of Rolls-Royce's own investigations, for example, by deferring interviews until after the SFO had first completed its own interviews and providing audio recordings of interviews where requested.
- ◆ Providing all material requested by the SFO voluntarily.
- ◆ Disclosing all interview memoranda (where relevant, on the basis of a limited waiver of privilege).
- ◆ Consulting with the SFO in respect of developments in media coverage and seeking the SFO's permission before winding up any companies that may have been implicated in the SFO's investigation.

The judge noted that this co-operation led to the uncovering of more wrongdoing than would otherwise have been possible. He said that he was satisfied that "*the company could not have done more to expose its own misconduct, limited neither by time, jurisdiction or area of business*".

Failure to self-report

Rolls-Royce may have felt the need to co-operate to such a degree because the SFO first became aware of these issues as a result of a posting on the internet, rather than a voluntary report by Rolls-Royce itself. Both DPAs previously agreed with the SFO followed self-reporting by the offending companies in circumstances where the SFO was otherwise unlikely to have become aware of the relevant misconduct. In this case, the judge accepted a submission that he should not distinguish between the assistance provided by Rolls-Royce and that of those who have self-reported from the outset.

This case should not be taken as an indication that companies wishing to avail themselves of DPAs in the future should do anything other than report misconduct to the SFO at the earliest possible opportunity. The judge made it clear that the question of whether there has been self-reporting will be a key factor in deciding whether a DPA should be approved. It remains vitally important and a core purpose of a DPA to incentivise self-reporting.

Change of culture and personnel

Another consideration that persuaded the judge to approve the DPA was that Rolls-Royce is now a "*dramatically changed organisation*". It has a new Board and executive team that have "*deliberately sought to clear out all the disreputable practices that have gone before, creating new policies, practices and cultures*" (at a cost of over £15m so far), such that the judge expressed himself satisfied that the company "*could not have done more to address the issues that have now been exposed*".

The changes at Board and management level were extremely important in the judge's assessment of the availability of a DPA. The judge suggested that the outcome might have been different if any of the company's current senior management had been implicated or had been in a position where they should have been aware of the offending culture and practices.

Prosecution of individuals

The ability for companies to enter into DPAs offers no comfort to individuals involved in corrupt activities. The judge made it clear that SFO investigations into the conduct of individuals involved in wrongdoing continue and nothing in the DPA in any way affects the prospects of criminal prosecutions being initiated if the test for prosecution is met. If convicted, the relevant individuals are likely to face custodial sentences. It is a term of the DPA that Rolls-Royce will assist in the investigation and prosecution of individuals.

Liaison with other prosecutors

The SFO liaised with the Department of Justice in the US and the Brazilian Ministério Pùblico Federal to ensure a co-ordinated global resolution of the relevant conduct. The additional financial penalties and costs imposed in the US and Brazil amount to approximately US\$170m and US\$25.5m respectively.

COMMENT

An obvious lesson to be learnt from this case is the importance of businesses putting procedures in place which will prevent similar problems from arising. The levels of the penalties, the other costs incurred by Rolls-Royce and the flurry of adverse publicity generated by this case all speak for themselves. Whilst commending Rolls-Royce on the steps that it has put in place since these issues came to light, the judge said that it was a "*real tragedy*" that this had not happened earlier.

This case also demonstrates the importance of self-reporting to, and co-operating with, the SFO for companies who wish to avail themselves of DPAs. This will be a particularly important consideration for companies which, like Rolls-Royce, rely heavily on public sector contracts, because in many countries a conviction could result in a company being debarred from participating in such contracts. However, a decision to take these steps will not be an easy one because there are no guarantees that a DPA will be forthcoming on acceptable terms or at all. Nonetheless, the judge was clear as to the correct approach. He said:

"A cynic (or irresponsible company) might look at the costs which Rolls-Royce have incurred in their own investigation and wonder whether it be more sensible to keep quiet and hope that its conduct does not fall under the eye of the authorities. Quite apart from the total failure to acknowledge the difference between right and wrong, that is to fail to understand that such an approach carries with it cataclysmic risks. Whatever the costs Rolls-Royce have incurred, they are modest compared to the cost of seeking to brazen out an investigation which commences; absent self-disclosure and full co-operation, prosecution would require the attention of the company to be entirely focused on litigation at the expense of whatever business it is trying to conduct and conviction would almost inevitably spell a far greater disaster than has befallen Rolls-Royce."

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This note is intended to provide general information about some recent and anticipated developments which may be of interest.

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