

DEFERRED PROSECUTION AGREEMENTS: ROLLS-ROYCE PLC

Deferred Prosecution Agreements ('DPAs') became available in the United Kingdom on February 24, 2014. Some 18 months later, on November 30, 2015, Lord Justice Leveson (as he was then) approved the first agreement between the SFO and Standard Bank. On the 17th January 2017, Sir Brian Leveson concluded the third deferred prosecution agreement, this time an agreement having been reached between the SFO and Rolls-Royce PLC and its associate company, Rolls-Royce Energy Systems. As noted in his judgment, this agreement is to date 'by far, the largest' DPA to have been agreed, costing Rolls-Royce £509,943,399 by way of a disgorgement of profits, financial penalty, and costs.

What Is a Deferred Prosecution Agreement?

Deferred Prosecution Agreements in the UK were designed to be a new tool to tackle economic crime committed by organisations more effectively.

A DPA involves a company reaching an agreement with a prosecutor to settle allegations of economic criminal wrongdoing (for example, bribery or money laundering) without being prosecuted. Instead, an indictment is preferred but then immediately suspended to allow an organisation to comply fully with the terms and conditions of the DPA.

The Test

In deciding whether to enter into a DPA, the prosecutor must apply a two-stage test. The two stages are the evidential stage and the public interest stage.

When considering the public interest stage, the prosecution determines whether the public interest would be served by prosecution or by entering a DPA. The more serious the offence, the more likely a prosecution will be required in the public interest. Indicators of seriousness include not just the value of any gain or loss, but also the risk of harm to the public, unidentified victims, shareholders, employees and creditors and to the stability and integrity of financial

markets and international trade. The impact of the offending in other countries, and not just the consequences in the U.K., should be taken into account.

A variety of features may militate towards or away from prosecution, for example:

- whether the company has a history of similar conduct;
- whether the company had been warned before or if the relevant behavior was an isolated incident;
- whether the organisation had an ineffective corporate compliance programme and whether there is a genuinely proactive and effective programme in place now;
- whether the wrongdoing was reported within a reasonable time of the offending conduct coming to light and whether that reporting was full and frank;
- whether there was a genuinely proactive approach adopted by the corporate management team when the offending conduct was brought to their notice (such as self-reporting and remedial actions and the compensation of victims); and
- whether the offense was recent in nature, and whether the company is, in its current form, effectively a different body to that which committed the offences.

Full, frank and early self-reporting and full cooperation with the relevant authorities will militate against a prosecution being brought. In Rolls Royce as well as the Standard Bank case, that was one of the main factors that influenced a DPA being available.

The prosecution and organisation must agree to terms which are “fair, reasonable and proportionate.” This will of course vary from case to case and different terms will be appropriate in different circumstances. However typical terms will include:

- the payment of substantial penalties;
- making reparation to victims;
- undertaking reform to prevent that type of conduct occurring again; and
- submitting to regular reviews and monitoring.

Facts

The DPA concerns 'persistent offending' by Rolls-Royce between 1989 and 2003. The draft indictment contains 12 counts involving conspiracy to corrupt (in Indonesia, Thailand, India, and Russia), false accounting (in India), and failure to prevent bribery (in Indonesia, Nigeria, China, and Malaysia). The offending came to light in early 2012 by way of a number of internet posts, which caused the SFO to seek information from Rolls-Royce. This was immediately followed by an internal investigation by Rolls-Royce and the subsequent disclosure of information to the SFO.

This investigation and supply of information was described as 'extraordinary cooperation'. 30 million documents, spanning multiple jurisdictions, business lines, and timelines, were reviewed digitally. The review concluded that the offending was 'multi-jurisdictional, numerous' and spread across Rolls-Royce's business. It involved 'substantial funds being made available to fund bribe payments' and showed careful planning. Perhaps most disturbingly, the investigation appeared to disclose that the conduct implicated 'very senior' Rolls-Royce employees.

Terms

As has already been noted, the terms of the DPA require a sizeable financial settlement by Rolls-Royce, comprised of £258m in disgorgement of profits, £239m in financial penalty, together with the SFO's (not inconsiderable) £13m in costs. The terms of the agreement are, however, forward looking in that Rolls-Royce will have to continue a programme of compliance overseen by Lord Gold. In particular, the company must show how it intends to address risk of further offending. The programme will be monitored and enforced by the SFO.

It is clear that although the company has found terms agreeable to the SFO and the court the investigation still continues. The attention however has been to now focus on individuals. There does not exist in the UK a DPA for an individual indicted with economic

crime/bribery/corruption. The only way forward for an individual is to rigorously test the evidence, ensure full disclosure and argue the case before a jury. Regarding individuals spoken to regarding the Rolls Royce case, David Green, the SFO director, has said it intends to announce within the next few months whether it will bring charges against individuals.

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