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Court approves €1bn DPA in Airbus bribery case (SFO v Airbus SE)

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Corporate Crime analysis: Southwark Crown Court has approved a deferred prosecution agreement (DPA) requiring the respondent aircraft manufacturer (Airbus SE) to pay a total financial sanction of €983,974,311 to the applicant Serious Fraud Office (SFO) after it was charged with five counts under section 7 of the Bribery Act 2010 (BA 2010) of failing to prevent persons associated with it from bribing third parties in order to secure the purchase of its aircraft. The court found that entering into the DPA would be in the interests of justice and its proposed terms were fair, reasonable and proportionate. Pam Shearing, solicitor and director at Fulcrum Chambers Ltd, Farheen Ishtiaq, solicitor, and Emily Lewis, solicitor, examine the judgment and the DPA.

Director of the Serious Fraud Office v Airbus SE [2020] Lexis Citation 56

What was the background to the approval of the DPA?

Airbus was investigated by the SFO following a communication to Airbus in April 2015 from UK Export Finance (UKEF), a government body, regarding UKEF's anti-bribery due diligence procedures in respect of agents. The communication also made specific reference to the UKEF's obligation to report all suspicious circumstances to the SFO. Subsequently, Airbus conducted an internal investigation and a review of the accuracy and completeness of the declarations made to UKEF concerning its use of its business partners (otherwise referred to as its intermediaries or agents) and provided a more detailed report acknowledging that the information would be communicated to other UK agencies. Following receipt of the updated information, UKEF informed Airbus that it considered it necessary and appropriate to make a notification to the SFO and so, both UKEF and Airbus reported the matter to the SFO on 1 April 2016. On 15 July 2016, the SFO announced that it was opening a criminal investigation into Airbus and its associated persons.

Airbus was also investigated by the French Parquet National Financier (PNF), the United States Department of Justice (DOJ) and the United States Department of State (DOS). As part of the SFO's co-operation with the French and US prosecuting authorities, each took responsibility for a number of geographical areas. The SFO's investigation focused upon Airbus and its divisions' conduct in Colombia, Ghana, Indonesia, Malaysia, Mexico, South Korea, Sri Lanka and Taiwan.

It was demonstrated that in order to increase sales, individuals who performed services for and on behalf of Airbus had offered, promised or given financial advantages to others, with the intention of obtaining or retaining business or an advantage in the conduct of business for Airbus.

The SFO preferred a draft indictment containing five counts of failing to prevent persons associated with it from bribing third parties. The indictment was suspended by Airbus entering into a DPA with the SFO which was approved by Dame Victoria Sharp on 31 January 2020. It is the seventh DPA that has been agreed since DPAs were first introduced seven years ago. It requires Airbus to pay a financial sanction of €983,974,311 (approximately £840m) in the UK. The penalty dwarfs the previous highest SFO penalty of £497.25m imposed on Rolls-Royce in 2017. As noted by the judge, the record-breaking penalty reflects the gravity of Airbus's conduct, but also its full co-operation throughout the investigation.

Airbus also reached a settlement with the French and US authorities. Globally, it had to pay a total penalty of €3.6bn (approximately £3bn) plus interest and costs. This is the largest global bribery resolution to date. The resolution also includes penalties in respect of Airbus's violation of the US legislation: the Arms Export Control Act, its implementing regulations, and the International Traffic in Arms Regulation.

What conduct is covered and how did it come to light?

The indictment, which has been suspended for the three-year agreed term of the DPA, related to five counts of failing to prevent bribery.

Most of the illegal conduct covered by the DPA was carried out by business partners and persons associated with Airbus (not exclusively its employees) who had offered substantial amounts of funds as bribes to encourage the purchase of aircraft from Airbus in a number of jurisdictions and also to raise Airbus's international profile. The five counts on the indictment concerned the conduct of Airbus' commercial division and its defence and space division between 2011 and 2015. Each count charged Airbus with failing to prevent bribery by persons associated with it:

- the first count related to Malaysia and the bribery of directors and/or employees of AirAsia and AirAsia X airlines. The improper payment consisted of $50m (approximately £38m) which had been paid as sponsorship for a sports team
- the second count related to Sri Lanka and the bribery of the wife of a SriLankan Airlines executive. Airbus engaged her as a consultant on the contract, albeit that she did not have any experience in aviation. Additionally, Airbus misled the UK's export credit agency about her identity when applying for assistance in funding the deal
- the third count related to Taiwan and the bribery of a director and employee of TransAsia Airways. The arrangements involved bribes of more than $12m (approximately £10m) and were referenced in emails adopting coded language
- the fourth count related to Indonesia and the bribery of employees of PT Garuda Indonesia and Citilink Indonesia. A business partner of Airbus paid bribes in excess of $3.3m (approximately £2.5m) to or for the personal benefit of the employees, who had significant decision-making control
- the fifth count related to Ghana and the bribery of a close relative of a high-ranking Ghanaian government official, in the amount of about €5m (approximately £3.8m). The official was a key decision-maker in the potential purchase by the Ghanaian government of three military transport aircraft produced by Airbus

What are the key terms of the DPA?

The term of the DPA is three years, which took into account the 'extensive remedial measures' already adopted by Airbus. The DPA will therefore be in force until 31 January 2023.

Airbus will pay a financial sanction to the SFO of €983,974,311, which is part of the international total of approximately €3.6bn. The financial penalty reflects a 50% discount on account of Airbus's co-operation throughout the investigation.

Airbus agreed to:

- disgorge the gross profit of €585,939,740 (approximately £495m) it made from the conduct covered by the five counts on the indictment
- pay a fine of €398,034,571 (approximately £336m)
- pay the SFO's legal and investigative costs of €6,989,401 (approximately £6m)

It is of note that the SFO elected not to seek compensation, citing the difficulties in identifying a quantifiable loss arising from the criminal conduct and the lack of evidence that any of the products or services which Airbus sold to customers were defective or unwanted. It is clear, however, that the DPA does not prevent victims from claiming compensation in the future, should they wish to do so.

The international settlements also include a payment of €2,083m (approximately £1.7bn) to the PNF, €526m (approximately £444m) to the DOJ, and €9m (approximately £7.6m) to the DOS in respect of related conduct, of which €4.5m (approximately £3.8m) may be used for approved remedial compliance measures.

In addition, Airbus has committed to continuing to improve its ethics and compliance policies and procedures, and to be subject to ongoing co-operation and self-reporting. Further, it will be subject to ongoing monitoring by Agence Française Anticorruption under the terms of the Convention Judiciaire d'Intérêt Public between it and PNF.

The DPA judgment also states that there are ongoing investigations in respect of a number of individual suspects and that some of the individuals reside in jurisdictions where the death penalty exists for corruption, giving rise to human rights implications.

Why was the DPA in the interests of justice?

The court acknowledged Airbus's criminality as ‘grave’: it took place over a number of years and across multiple jurisdictions, ‘extending into every continent in which Airbus operates’. The bribery was described in the judgment as 'endemic in two core business areas within Airbus'. While recognising that Airbus did have policies in place to prevent bribery, the court noted that these policies were 'easily bypassed or breached and there existed a corporate culture which permitted bribery by Airbus's business partners and/or employees to be committed throughout the world'.

Further, the wrongdoing involved a number of very senior executives and senior employees, some of whom exercised compliance functions. The question was, therefore, whether in light of the extremely high level of seriousness, the interests of justice were served by a DPA rather than a prosecution.

The judgment, while acknowledging that Airbus got off to a 'slow start', recognised that thereafter it had co-operated with the authorities to the fullest extent possible. The action it had taken in freezing all payments to business partners and third parties was said to have been indicative of its serious internal concerns as to the propriety of payments and the integrity of its oversight processes. The judgment also acknowledged Airbus’s commencement of an internal investigation.

Notably, however, the judgment observed that the true catalyst for matters being reported to the SFO in April 2016 was the 'watchfulness of the UKEF', referencing the body’s communications with Airbus, the latter’s subsequent follow-up review and its subsequent responses to UKEF, and the notification to Airbus of UKEF’s obligations to disclose to the SFO, which led to direct engagement with the SFO from 1 April 2016.

In further evaluating the DPA in the context of the interests of justice, the judgment reflected upon the 'exemplary' co-operation of Airbus and the numerous steps that it had taken which included, but were not limited to, the following:

- comprehensively confirming the existence of corruption concerns across its commercial division, defence and space division, and helicopter division
- identifying red flag cases across divisions of which the joint investigation team was not already aware
- recognising that owing to BA 2010, the SFO had extended extraterritorial powers and potential interest in the facts post-2011
- reporting conduct that had taken place almost exclusively overseas
- performing and presenting analysis of all business partner relationships in its records
- collating more than 30.5 million documents from more than 200 custodians
- signalling via its new board and its ethics and compliance committee its clear commitment to fully co-operate with the investigation and maintain a direct dialogue with the investigation team
- providing all contemporaneous documents requested (subject to applicable laws) and adopting a co-operative approach in respect of privilege
- providing key information and documents relating to bank accounts into which its monies flowed
- revising its top management and exiting relations with a significant number of individuals either through dismissals, voluntary arrangements, or in compromised circumstances permitted by French law
- maintaining an ongoing dialogue with the investigation team as regards its new compliance programme

Another factor noted in the judgment was the collateral effect on Airbus of a prosecution. The court stated: 'It is plainly not the case that the fact that a company is a large one, or that the collateral consequences are accordingly severe, means it is immune to prosecution. No company is too big to prosecute.' It took into account the effect of disbarment on the finances of Airbus and its innocent employees. It was submitted to the court that, in a worst-case scenario, the future revenue risk to Airbus could exceed €200bn (approximately £169bn).

It is interesting to note the primacy given by the judge to the effect of disbarment in the context of the public interest factors justifying the DPA. While the collateral damage of a prosecution clearly warrants consideration, Airbus's situation is not the same as that contemplated in *Serious Fraud Office v Serco Geografix Ltd* [2019] Lexis Citation 67, ie automatic debarment, but rather a question of discretionary debarment. The government holds the same discretionary power in circumstances where a company agrees to a DPA, and so in this case, the

question of whether a debarment will be sought is ancillary to the question of whether a prosecution or DPA best serves the public interest.

Nevertheless, taking all the relevant factors into account, the court considered that the public interest factors against prosecution outweighed those in favour.

What sets this DPA apart from those agreed previously?

The DPA marks the end of a high-profile investigation and achieves the largest ever global financial resolution for bribery, dwarfing previous penalties.

It also presents the SFO with a much-needed good news story, and highlights a successful outcome for the international co-operation between prosecuting authorities. As the DPA draws a line under the enquiries into Airbus's conduct, it leaves three principal questions for consideration.

The first is to what extent other jurisdictions will seek to investigate the other entities referred to in the DPA—the second is whether any civil claims and/or claims for compensation will flow from competitors and any other alleged victims of Airbus's conduct—and third, whether the prosecuting authorities will now turn their attention to pursue investigations against employees and related individuals.

Dealing with the first question, following publication of the DPA, a number of governmental organisations have already vowed to probe allegations of corruption against parties named in the DPA. For instance, the government of Sri Lanka has announced that it will be conducting a comprehensive investigation into reports concerning allegations of financial irregularities. In addition, shares in AirAsia and AirAsia X quickly fell by more than 10% as a result of the DPA's express reference to both companies, prompting the Malaysian Anti-Corruption Commission to issue a statement indicating that it would be contacting the UK authorities for assistance in its own investigation.

Regarding the prospect of civil claims and/or claims for compensation, the exposure to this would principally come from Airbus's shareholders and competitors, in addition to conceivably any individuals or groups of individuals who had suffered loss or harm. While the nature of the offences in the draft indictment (being failure to prevent rather than substantive offences) might present a challenge to potential claimants, it seems likely that careful consideration will be given to such claims.

With regard to the third question, while the DPA did not name specific individuals and instead adopted pseudonyms, the judgment did also note that a number of individuals operated in jurisdictions where the death penalty exists for corruption, giving rise to potential human rights implications. In its statement about the DPA published on its website, the SFO has confirmed that its 'investigation remains active and the position in relation to individuals is being considered'. It is, however, of note that there is no proper mechanism for individuals, through which companies wish to accept their guilt, to participate in the DPA process, posing the question whether this area needs reforming.

Historically, the SFO has faced some difficulties in bringing successful prosecutions against individuals, as exemplified by the individual prosecutions brought in the Rolls-Royce and Tesco cases (which also both resulted in DPAs). As a result, white-collar crime lawyers will be watching with great interest the SFO's investigation and the position adopted against individuals.

It is also noteworthy that the 'exemplary co-operation and remediation' undertaken by Airbus encouraged acceptance of a 50% discount on the financial penalty that would have otherwise been imposed. The inclusion of the details of Airbus's co-operative behaviour within the judgment demonstrates both the scale and depth of what the SFO regards as full co-operation. This does not present a composite list for companies seeking DPAs in the future but it does reflect the breadth of issues that a company will need to consider when seeking to prove that it is fully co-operating.

Following the SFO's publication of its internal guidance on evaluating compliance programmes on 17 January 2020, it is clear that the praise Airbus received for 'stepping up' when wrongdoing was exposed has gone a long way to securing a settlement via a DPA. Its significant remedial work, including overhauling its compliance practices, reducing its engagement of third parties, and a number of high-profile personnel changes, has reflected a deep-rooted re-appraisal of its operations. Such changes reflect the behaviours outlined in the SFO's guidance when assessing whether to offer a DPA, and demonstrates that showing a strong commitment to reforming compliance policies and procedures will be seen favourably by both the SFO and the court.

What is the significance of the SFO's use of BA 2010, s 7?

Putting aside the significance of the use of a DPA, the SFO's reliance on BA 2010, s 7 in this case is noteworthy in light of the fact that the offences involved not only instances of corruption perpetrated by external associated

persons and junior employees, but circumstances where the corruption was perpetrated by senior employees of Airbus.

Given the well-publicised failings of the SFO in successfully convicting corporates on the basis of the directing mind and will under the Prevention of Corruption Act 1906, it is hardly surprising that given the choice between BA 2010, ss 1 and 7, the SFO opted for the latter, avoiding the sticky issue of corporate attribution. Perhaps it is an indicator of the direction that the SFO is likely to take in other matters of this nature, and one which can be welcomed by both the SFO (which is more likely to achieve a successful conviction) and the corporate, whose reputation may remain somewhat intact, given that the company has avoided a conviction for direct involvement in corruption.

Certainly, when this DPA is seen in light of comments made by the director of the SFO when interviewed by the BBC immediately after the announcement of the Airbus DPA, during which she took an opportunity to suggest that the UK law on attributing criminal acts to companies was outdated and not fit for application to modern multinational companies, it perhaps gives some indication that the SFO's reliance on the BA 2010, s 7 offence might become a trend.

Case details

- Court: Southwark Crown Court
- Judge: Dame Victoria Sharp (President of the Queen's Bench Division)
- Date: 31 January 2020

Interviewed by Robert Matthews.

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