BRIBERY AND CORRUPTION

DPAs – the story so far

» The terms of the deferred prosecution agreement (DPA) entered into by Rolls-Royce with the Serious Fraud Office on 17 January included payment of a record financial penalty of more than £500m in respect of bribery offences from 1989 to 2013, *writes Khawar Qureshi QC.*

What merits close attention is the increasing potential for allegations of wrongdoing to feature in commercial litigation and arbitration, as well as the likely use of 'reporting' by commercial competitors to smear rivals.

Bribery Act 2010

The Bribery Act 2010 took effect in July 2011 in the face of considerable scepticism. Many took the view that the Blair government's termination of the BAE 'arms to Saudi Arabia' investigation in 2006 signalled an inability or unwillingness to tackle anything other than small-scale or non-UK corrupt practices.

The absence of any prosecution or conviction under the act led to calls for change. As of 24 February 2014, by virtue of section 45 and schedule 17 of the Crime and Courts Act 2013, a DPA can be approved by the court in respect of entities (not individuals) and designated crimes (which include offences under the act).

DPAs have been used by the US authorities for some time, as have 'plea bargaining' and incentivised 'self-reporting'. A pragmatic approach has been adopted, recognising that commercial entities are ultimately driven by profit and will seek to limit damage. The concept of 'self-reporting' effectively displaces the investigative burden on to the self- reporting/suspected entity. Of course, the risks inherent in relying upon an entity and its external law firm supplying a selected 'dossier' of materials are not insignificant. DPAs can be set aside if material non-disclosure comes to light.

By contrast, an English court must approve a DPA and may do so if it is 'in the interests of justice' and has terms which are 'fair, reasonable and proportionate'.

There have been three instances of DPAs, all of which have in some respect engaged provisions of the act, principally section 7 which requires commercial organisations to have 'adequate measures' in place to prevent bribery by associated persons.

1. Standard Bank Plc (30/11/15)

The UK bank was charged with an offence of failing to prevent bribery contrary to section 7(1) of the Bribery Act 2010. In the course of securing $600m project financing by the government of Tanzania from the respondent bank and its sister company, an additional 1% fee was paid to a 'local partner', a Tanzanian company of which two of three directors and shareholders were current and former Tanzanian government officials. There was no evidence that the 'local partner' had provided any services related to the transaction. The withdrawal of the $6m in cash from an account at the sister company led to a report by staff which generated a self-report to the SFO within three weeks, full disclosure of the internal investigation to the SFO and full cooperation.

Leveson LJ approved the terms of the DPA, which included: (a) payment of $6m compensation to the Tanzanian state plus interest; (b) disgorgement of profit on the transaction of $8.4m; (c) payment of a financial penalty of $16.8m; (d) past and future cooperation with relevant authorities in all matters relating to the conduct arising out of the circumstances of the draft indictment; (e) at the respondent's expense, commissioning and submitting to an independent review of its internal anti-bribery and corruption controls, policies and procedures regarding compliance with the act and other anti-corruption laws; and (f) payment of the SFO's costs.

2. *SFO v XYZ Ltd* (11/7/16)

As a result of a takeover by a US company, in late-2011 a compliance upgrade was instituted in a UK SME which revealed systematic payments by intermediaries for the procurement of export contacts in Asia from 2004-2013. The company was anonymised as there are criminal matters pending against former employees.

Leveson reiterated the principles to be applied in considering the terms of a DPA. The self-report by the entity identified 28 contracts which reflected 15.8% of turnover and £6.5m gross profit. The court approved the DPA which required, *inter alia*, disgorgement of profit and a much-reduced financial penalty of £352,000 payable over three years. The judge stated that 'it is important to send a clear message, reflecting a policy change… that a company's shareholders, customers and employees… are far better served by self-reporting and putting in place effective compliance structures. When it does so, that openness must be rewarded and be seen to be worthwhile'.

3. Rolls-Royce Plc (17/1/17)

Following internet postings in 2012 raising concerns as to business operations in several countries, the SFO began investigating Rolls-Royce. It emerged that an internal investigation had been carried out which drew the attention of senior management to serious impropriety, but no action was taken in 2010.

Once the SFO intervened, Rolls-Royce also began its own internal investigation (providing the results to the SFO). The SFO's investigation lasted four years and gave rise to an SFO prosecution for 12 counts of bribery, corruption and fraud spanning 1989 to 2013 – including making corrupt payments in India and Russia, and failing to prevent bribery in Nigeria and Indonesia. In approving the DPA, Leveson noted Rolls-Royce's 'extraordinary cooperation', and change of senior management and culture.

Concluding observation

There is no doubt that corruption/bribery has hitherto been seen by some as an 'unavoidable' transactional element for doing business. They continue to do so at their increasing peril.

Recent commercial disputes indicate that states, as well as commercial parties, are becoming more willing to expose the payment of bribes if this can 'knock out' a competitor or investor claim – see for example *BSG Resources Limited v Guinea,* where lucrative mining concessions were cancelled on the basis of alleged payment of bribes to former public officials. While the claimant company disputes the allegation, simultaneous criminal investigations are taking place in jurisdictions including Israel and the US.

Indeed, in *Soma Oil v SFO* (October 2016) the unsuccessful claimant for judicial review sought an order requiring the SFO to conclude its bribery investigation expeditiously, contending (withouth criticising the SFO itself) that it had been started as a result of a report 'motivated by competitive factors' to derail its ability to meet a deadline to sign an oil contract in Somalia.

As Rolls-Royce has learned, bribery can be very costly. However, the need to ensure compliance and the effectiveness of the SFO can only be enhanced by recent DPAs.

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