BOIES SCHILLER FLEXNER

Insights: Airbus's Groundbreaking Regulatory Settlement

Airbus, the world's largest aircraft manufacturer, has entered into settlements with the UK, US and French authorities in relation to bribes it admitted to having paid in numerous countries to gain commercial and military aircraft orders. Airbus will pay global fines of €3.6 billion, which include the largest fines ever levied by authorities in the UK and France.

In the UK, the form of the settlement is a deferred prosecution agreement ("DPA") with the Serious Fraud Office (the "SFO"). This is the agency's seventh DPA – larger than all previous DPAs combined. Airbus will pay a total sanction to the Treasury of €990 million, roughly 60% of which is disgorgement of profits, in respect of multiple charges of failure to prevent bribery under the Bribery Act. Airbus has agreed to cooperate with the SFO and other regulators, and enhance its compliance and ethics programmes. The DPA received approval from the Crown Court on 31 January 2020 and is to last until 31 January 2023.

In France, Airbus entered into Judicial Public Interest Agreement (Convention Judiciaire d'Intérêt Public or "CJIP") with the Parquet National Financier ("PNF") and agreed to pay fines of nearly €2.08 billion. In the US, Airbus entered into agreements with the US Department of Justice and State Department to pay over $525 million to resolve violations of the Foreign Corrupt Practices Act and International Traffic in Arms Regulations (through failing to disclose third-party payments to State).

The SFO Investigation

The SFO started its investigation into Airbus in July 2016, after Airbus and UK Export Finance ("**UKEF**"), the UK's export credit agency, simultaneously reported various corruption-related issues. In January 2017, the SFO entered into a joint investigation agreement with the PNF, which had also been investigating bribery and corruption allegations at Airbus.

The joint investigation revealed that from 2011 to 2015 senior officials and employees in Airbus engaged in and permitted endemic corrupt practices of using agents, including individual and corporate intermediaries, to channel bribes to third parties in positions of power in more than a dozen countries, primarily intending to secure the purchase of Airbus aircrafts.

Each authority focused on different countries. The SFO alleged that, contrary to section 7 of the Bribery Act, Airbus failed to prevent persons associated with the company from bribing individuals in the Government of Ghana and at commercial airlines in Malaysia, Sri Lanka, Taiwan and Indonesia to convince them to buy Airbus commercial and military aircraft. The US resolution focused on state-owned and state-controlled airlines in China. The French resolution related to bribery and corruption offences in China, Colombia, Nepal, South Korea, the UAE, Saudi Arabia, Taiwan and Russia.

Cooperation

While there is a question mark as to whether Airbus self-reported – given when knowledge of the bribery was acquired and the fact that Airbus reported to the SFO only after UKEF had informed Airbus that it would need to contact the SFO, as explained further below – it is clear that it cooperated fully with the joint investigation. In approving the DPA, Dame Victoria Sharp stated that Airbus cooperated "*to the fullest extent possible*" and provided evidence to the SFO which might not otherwise have come to its attention, including evidence of corruption and red flags across its business. Airbus accepted that the Bribery Act 2010 provided the SFO with extended extraterritorial powers and reported conduct that took place almost exclusively overseas, which is unprecedented for a non-UK domiciled company. Dame Sharp specifically noted that Airbus adopted a co-operative position in respect of privilege and French professional secrecy. Airbus has also changed its management team, implemented new compliance procedures and stopped the use of consultants in sales of commercial aircraft. It also commissioned a three-member Independent Compliance Review Panel consisting of heavyweight monitors: one member (Theo Waigel) previously acted as the monitor for Siemens, another (Lord Gold) acted in a similar role for Rolls-Royce.

Because the Airbus criminality was grave and widespread – gross profits from the criminal activities amounted to billions – there were a number of factors tending towards prosecution and away from a DPA. Ultimately, however, the Court agreed with the SFO that a DPA would be in the interests of justice. The main factors appeared to be Airbus's "*exemplary*" cooperation, combined with the collateral damage that a prosecution and conviction might bring. This included potential debarment in multiple jurisdictions, risking estimated future revenue of more than €200 billion, leading to massive employment losses and a fall in GDP in the UK, US, France, Germany and Spain of more than €100 billion (according to Deloitte). The broader impact on the economy rarely plays such a pivotal role in the resolution and sentencing of criminal offenders, but in the case of Airbus, Dame Sharp rightly took into account the "*potentially disproportionate consequences of a conviction.*"

Similar factors motivated the simultaneous resolutions in the US and France.

Other DPAs and the Future of Airbus

This is the SFO's seventh DPA. The first six related not only to bribery/corruption, but also to fraud and false accounting, with resolutions as follows:

i. Standard Bank in the sum of $32 million in November 2015;
ii. XYZ Limited in the sum of £6.5 million in July 2016;
iii. Rolls-Royce in the sum of £497 million in January 2017;
iv. Tesco Plc in the sum of £129 million in April 2017;
v. Serco Geografix in the sum of £19.2 million in July 2019; and
vi. Guralp Systems in the sum of £2.1 million in October 2019.

While each of these was significant in its own way, it is a remarkable fact that the sum paid under the Airbus DPA is greater than the sums paid under all previous DPAs put together, and indeed, as Dame Sharp pointed out, it is "*more than double the total of fines paid in respect of all criminal conduct in England and Wales in 2018.*"

Airbus is not quite out of the woods yet. It is subject to a monitor imposed by the Agence Francaise Anticorruption, the French anti-corruption agency, which is no doubt a significant factor as to why the SFO did not recommend the appointment of a monitor. The SFO is still pursuing an eight-year investigation into Airbus subsidiary GPT (Special Project Management) Ltd, which is accused of making illicit payments to secure a £2 billion UK government contract to provide services to Saudi Arabia's internal security forces. The investigation is reportedly awaiting a decision from the attorney-general – and new attorney-general Suella Braverman was appointed only on 13 February 2020, so may

take some time to get her head around the matter. Airbus remains under investigation in Austria in respect of sales of the Eurofighter to Austria. Late last year, Airbus self-reported concerns about the improper receipt of customer information to the German authorities. And in France, Airbus is an assisted witness in an investigation relating to Kazakhstan.

Too Big to Self-Report?

There are two striking aspects of this settlement: the size and the failure to self-report.

The size speaks for itself: 13 countries and orders worth billions procured in part through corrupt practices will surely lead to a massive fine, and €3.6 billion does not seem too large in a world where the US authorities have levied 11-digit fines (more than $10 billion) on more than one occasion. What is more striking is the potential cost of prosecution and conviction, as found by Dame Sharp: mandatory and discretionary debarment, leading to the losses of many thousands of jobs and revenue of €200 billion, a hit to global GDP of €100 billion, and the creation of a monopolistic behemoth in Boeing. Dame Sharp may have explicitly stated "*No company is too big to prosecute*" – but these numbers call that into doubt.

The self-reporting aspect is somewhat more subtle. By law, prosecutors are required to consider a number of public interest factors when deciding whether to offer a company a DPA or to prosecute it, and judges are similarly required to consider whether a DPA, as opposed to prosecution, is in the interests of justice.

Though the factors prosecutors consider are not strictly set out in order of importance, it is significant that the first such factor (section 2.8.2(i) of the Deferred Prosecution Agreements Code of Practice) is "*co-operation*", and that it begins "*Considerable weight may be given to a genuinely proactive approach adopted by [the company's] management team when the offending is brought to their notice, involving within a reasonable time of the offending coming to light reporting [the company's] offending otherwise unknown to the prosecutor…*"

Airbus did not do that. As noted above, it reported to the SFO in April 2016, along with UKEF. But look at what took place in the years before:

- In 2012, Rolls-Royce, another big player in the aerospace sector, announced that it had passed information to the SFO relating to concerns about bribery and corruption involving intermediaries in overseas markets. This should have put Airbus on notice that there were potential issues in the sector.
- In 2013, the SFO announced that it had opened a criminal investigation into Rolls-Royce.
- In 2014, a senior Airbus committee discovered payments to third parties it was not aware of, and an internal report found significant breaches of compliance policies, leading to a freeze on some third party payments.
- In 2015, UKEF told Airbus it had concerns about the information Airbus had provided about its business partners, and reminded Airbus that UKEF was obliged to report suspicious circumstances to the SFO. Further payments were frozen.
- In early 2016, following internal investigation, Airbus sought to correct inaccurate information provided to UKEF. UKEF then told Airbus it would need to report to the SFO – and that it wanted Airbus to make a report at the same time.

In other words, as Dame Sharp said, the "*true catalyst*" for the SFO learning of these issues was "*the watchfulness of UKEF*" – not a self-report by Airbus, or indeed a genuinely proactive approach. Dame Sharp was very mild – and no doubt influenced by Airbus's exemplary cooperation – when she stated: "*Airbus could have moved more quickly*."

But this is not the first time a DPA has been awarded where there was no self-reporting: it happened with Rolls-Royce, the previous record-holder. (Arguably, even the first DPA, in respect of Standard Bank, did not involve true self-reporting, since the catalyst there was compelled disclosure to the National Crime Agency.)

So does that mean self-reporting is unnecessary, and the Code of Practice language quoted above a dead letter? To an extent, the answer must be yes. Where a company responds quickly to the SFO's approaches (as Rolls-Royce did) and cooperates extensively and openly, allowing the authorities to learn facts they truly would not have otherwise (as both Rolls-Royce and Airbus did), it seems that lack of self-reporting is no obstacle to a DPA. But there may well be limits on which companies this applies to, and potentially only the really big ones, those which are particularly difficult to prosecute, can rely on this exception – and to be sure, they need to be prepared to open up fully in order to get the benefits, with all the costs in time and money that implies. For the rest, it may still be prudent to self-report, but companies large and small now have further precedent and data points to take into account when making such momentous decisions. ■

CONTACT

Matt Getz
Partner, London
+44 203 908 0722
mgetz@bsfllp.com

Tracey Dovaston
Partner, London
+44 203 908 0726
tdovaston@bsfllp.com

Irene Ding
Associate, London
+44 203 908 0800
iding@bsfllp.com