Lessons learned from the Rolls-Royce Deferred Prosecution Agreement

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On 17 January 2017, Sir Brian Leveson, the President of the Queen's Bench Division, declared that the proposed Deferred Prosecution Agreement ("**DPA**") between the SFO and Rolls-Royce plc and Rolls-Royce Energy Systems Inc (together, "**Rolls-Royce**") was in the interests of justice and that its terms were fair, reasonable, and proportionate. It is only the UK's third DPA and, whilst the body of law remains nascent, there do appear to be some useful lessons and emerging trends that can be gleaned from its study.

This article reflects on the:

I. level of cooperation;
II. scale of financial penalty;
III. global enforcement dynamic; and
IV. risk of companies viewing a DPA as the default option.

Extraordinary cooperation

Sir Brian Leveson P referred in his judgment to Rolls-Royce having demonstrated 'extraordinary cooperation' on four separate occasions. This, notwithstanding that Rolls-Royce did not initially self-report. In contrast to the two previous concluded DPAs (in which self-reports were made at a time when the SFO neither had knowledge of, nor means of finding out about, the conduct that led to the DPA) in this case the SFO was first alerted by, and commenced its own inquiry following, public internet postings which raised concerns about Rolls-Royce's business in China and Indonesia.

Given that Sir Brian Leveson P, by dint of the nature and extent of Rolls-Royce's cooperation, chose not to distinguish between its assistance and that of companies who have self-reported from the outset, it is helpful to see what such 'extraordinary cooperation' looks like in practice:

- Voluntary disclosure of all internal investigation findings on a rolling basis (without the SFO seeking recourse to its powers of compulsion);
- Disclosing, on a limited waiver basis, all memoranda of interviews undertaken during the

internal investigation. This, despite Rolls-Royce's belief that the material was capable of benefiting from legal professional privilege ("**LPP**");
- Agreeing to use digital methods to identify material benefitting from LPP;
- Deferring interviews until the SFO had first completed its own;
- Audio recording interviews where requested by the SFO;
- Providing complete digital repositories for key employees without first filtering the material for potential LPP but, instead, permitting LPP issues to be resolved by independent counsel;
- Consulting the SFO in respect of developments in media coverage; and
- Not winding up companies of interest.

Taken together, these steps satisfied Sir Brian Leveson P that, from the moment the SFO began asking questions of Rolls-Royce because of the internet postings, Rolls-Royce, "*could not have done more to expose its own misconduct, limited neither by time, jurisdiction or area of business*".

A financial sanction sufficient to punish and deter

Those worried, following the relatively modest financial sanctions levied in the Standard Bank and XYZ Limited DPAs, that the UK's DPA regime was little more than an anaemic simulacrum of its US progenitor can rest easy, following the financial sanctions imposed on Rolls-Royce (detailed below):

- Disgorgement of profit of £258,170,000;
- Financial penalty of £239,082,645;
- Payment of the SFO's costs of £12,960,754; and
- Completing, at its own expense, an anti-bribery and corruption compliance programme following recommendations made by Lord Gold.

This is in addition to payments of $169,917,710 to the US Department of Justice ("**DoJ**") and $25,579,645 to the Brazilian authorities and the £123 million in costs incurred by Rolls-Royce in investigating its conduct in multiple jurisdictions.

Sir Brian Leveson P held that the financial sanction was, "*substantial enough to have a real economic impact*" and, "*bring home to both management and shareholders the need to operate within the law*". It is submitted that the impact of the financial sanction goes beyond the economics of the case at hand. Combined financial orders, including costs, of around £671 million, imposed on the bluest of blue chip UK companies, reflect a level of materiality not seen before in UK corporate criminal justice and propel the SFO to the top table of global enforcement. Whether the Rolls-Royce DPA heralds a watershed moment in the scale of fines levied as part of UK corporate criminal resolutions remains to be seen, but what is certain is that the ripples of significance emanating from Southwark Crown Court on 17 January will be felt by companies and enforcement agencies around the world.

That Rolls-Royce's financial penalty reflected a 50% total discount is also a welcome development, regardless of the overall £671 million financial sanction referred to above. First, it re-affirms Sir Brian Leveson P's use, first seen in XYZ Limited, of the discretion available to the court under the

Sentencing Guidelines to "*step back*" and consider any financial penalty in the round; granting a further discount of 16.7% on top of the one-third afforded by an early guilty plea. This should help further incentivise corporate self-reporting. Second, it ensures that the level of discount available in the UK matches the maximum 50% reduction off the fine range which is available under the DoJ's Enforcement Plan and Guidance that was published last year.

Global enforcement dynamic

The international nature of the Rolls-Royce DPA (encompassing resolutions in the UK, the US and Brazil) serves to underscore the increasingly global nature of the decisions that companies and their advisers must make when faced with allegations of wrongdoing. This is particularly relevant when deciding whether to voluntarily self-report and, if the wrongdoing is multi-jurisdictional, coordinating the timing and content of any self-report to multiple overseas authorities.

Of the four largest international anti-corruption resolutions to date (of which the Rolls-Royce DPA is the third largest) all involve at least two different international enforcement agencies. The trend is clearly toward the global coordination of investigation, enforcement and settlement of bribery and corruption cases. The full extent of this growing international inter-dependency is perhaps best illustrated by the remarkable fact that, in the Rolls-Royce DPA, Sir Brian Leveson P was willing to abridge the arranged court schedule to accommodate, "*the change in administration in the United States*".

The only way is DPA?

Looking beyond the dazzling size of the financial sanction levied against a company considered, "*of central importance to the United Kingdom*", does the fact that Rolls-Royce avoided trial and a possible criminal conviction despite its admissions mean that looking to secure a DPA becomes the default option for companies and their advisers when faced with allegations of wrongdoing? Such a decision is by no means a straightforward one and ought to be weighed carefully against the merits of alternative courses of action.

The facts and evidence of each case will clearly guide the strategic response (including such seemingly prosaic considerations as the nature of the company’s business and its customer base), as indeed they appear to have done with Rolls-Royce. A strong argument could be made that the key incentive for Rolls-Royce to secure a DPA was to avoid debarment from participating in public tenders that may have resulted from a criminal conviction. Sir Brian Leveson P made clear in his assessment of the impact of prosecution that, as at December 2014, approximately 30% of the Rolls-Royce order book was from entities subject to public procurement rules in countries with either mandatory or discretionary debarment. The potential impact of any debarment on Rolls-Royce was described as, "*significant, and potentially business critical*". Companies whose client base is not drawn so heavily from the public sector, however, are not similarly incentivised and may, quite properly, form a different view as to merits of pursuing a similar course of 'extraordinary cooperation'.

The three agreements concluded to date suggest that the UK's DPA regime is developing into a well-reasoned and, in the right case, attractive alternative means of disposal of corporate criminal

wrongdoing. Companies would be well advised, however, to remember that seeking a DPA is only one way, and not the only way, of responding to allegations of corporate wrongdoing.

Authors

Lloyd Firth

COUNSEL

lloyd.firth@wilmerhale.com

+44 (0)20 7872 1014