

## Tesco: The Serious Fraud Office secures its fourth Deferred Prosecution Agreement

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On 10 April 2017, the Serious Fraud Office (“SFO”) entered into a Deferred Prosecution Agreement (“DPA”) with Tesco Stores Limited (“**Tesco Limited**”), as part of which Tesco Limited will pay a £129 million financial penalty and the SFO’s costs.<sup>1</sup> It is the fourth DPA entered into by the SFO and its second this year, following the Rolls-Royce DPA which was agreed in January (considered in detail in this previous [post](#)).

Whilst all the DPAs agreed to date have in common that they were approved as being in the interests of justice and their terms deemed fair, reasonable and proportionate by Sir Brian Leveson, the President of the Queen’s Bench Division, they nevertheless form a heterogeneous body of law. This post teases out five threads for consideration.

### *A mixed bag*

The four DPAs concluded to date evidence a diverse assortment of:

- Company type: (i) a listed multinational bank; (ii) a modestly resourced private UK exporter; (iii) a listed blue chip manufacturer of central importance to the UK; and (iv) a UK subsidiary of a listed multinational retailer.
- Nature, location and duration of the underlying conduct: (i) a single, nine month long transaction in Tanzania which amounted to failure to prevent bribery; (ii) conspiracy to corrupt and bribe, as well as failure to prevent bribery in foreign jurisdictions, taken collectively, over a nine year period; (iii) conspiracy to corrupt, failure to prevent bribery and false accounting spanning seven countries and, taken collectively, over 24 years; and (iv) false accounting over a single four month period which occurred in the UK.
- Scale of financial penalty imposed (including fine, compensation, disgorgement of profit and costs): (i) \$32.3 million; (ii) £6.5 million; (iii) £500 million; and (iv) £129 million.<sup>2</sup>

### *‘Extraordinary’ and ‘exemplary’ cooperation*

Sir Brian Leveson, in his Rolls-Royce DPA judgment, referred to Rolls-Royce having demonstrated ‘extraordinary cooperation’ on four separate occasions. He noted that the hallmarks of such cooperation, amongst others, included the voluntary disclosure of all Rolls-Royce’s internal

investigation findings (without the SFO seeking recourse to its powers of compulsion) and deferring interviews until the SFO had first completed its own. Whilst we have no window into the detail of the Tesco Limited DPA (the DPA itself, the supporting statement of facts and any report of the final public hearing are all subject to reporting restrictions pending the conclusion of the SFO's criminal proceedings in relation to other parties in respect of the same issues), it is worth noting the similarity in both form and content of the Financial Conduct Authority's ("FCA") acknowledgment of Tesco plc's and Tesco Limited's cooperation to that of Sir Brian Leveson in the Rolls-Royce DPA. The FCA's [Final Notice](#) twice describes the level cooperation shown as being "*exemplary*" and goes on to explain that both companies "*refrained, at the FCA's request, from interviewing witnesses or taking statements*" and, "*disclosed voluntarily material which appeared to them to be significant to the FCA's enquiries.*"

#### *Novel criminal and regulatory interplay*

The in-principle agreement reached between the SFO and Tesco Limited to enter into a DPA was made public following a Regulatory News Service announcement by Tesco plc (Tesco Limited's publicly listed parent company) on 28 March 2017. On the same day, the FCA [announced](#) that Tesco plc and Tesco Limited agreed with the FCA that they had committed market abuse in relation to a trading update which gave a false or misleading impression about the value of Tesco plc shares and Tesco group bonds. The FCA's Final Notice makes clear that Tesco Limited's in-principle DPA related to false accounting and, "*substantially similar conduct...to that described in this Final Notice.*"

Notably, considering the DPA agreed between Tesco Limited and the SFO in respect of the potential criminal offence of false accounting, the FCA chose not to impose any financial penalty on Tesco Limited or Tesco plc for the civil offence of market abuse. Instead, and for the first time, the FCA used its powers under section 384 of the Financial Services and Markets Act to require Tesco plc and Tesco Limited to establish a scheme to compensate certain net purchasers of Tesco plc shares and Tesco group bonds. Whilst financially significant - the total amount of compensation payable under the scheme is estimated by the FCA to be approximately £85 million plus interest—the compensation scheme is likely to go some way to protecting Tesco plc against those civil claims already issued against it by investors seeking compensation for relying on misleading statements and any prospective claims which it may have anticipated would be issued in reliance on certain of the agreed facts contained in the DPA, once made public.

Tesco Limited's agreement represents the first DPA in which the underlying conduct touches on both the criminal and regulatory spheres. The coordinated and creative response of the SFO and the FCA is to be applauded. By ensuring that the criminal and regulatory resolutions were reached in time for a joint market announcement and that the Tesco group was not effectively punished twice for substantially similar conduct, the SFO (in conjunction with the Court) and the FCA, have reached what appears, from the company's perspective, to be a fair and just outcome.

#### *An inconsistent and unfair approach or a flexible tool for all seasons?*

Three of the four DPAs agreed to date (XYZ Limited, Rolls-Royce and Tesco Limited) envisage the

subsequent prosecution of related individuals. The Court's approach in each has been markedly different.

XYZ Limited, and its parent, benefitted from full anonymity and the making public of only redacted preliminary and final judgments, pending the conclusion of ongoing related proceedings. By contrast, Rolls-Royce was afforded no anonymity: with the publishing of a full, non-redacted approved judgment and statement of facts (albeit with the names of individuals anonymised). Tesco Limited falls somewhere between the two. It did not benefit from anonymity, and the existence and total financial cost of its DPA have been announced. However, the DPA itself, the statement of facts and any reporting of the public approval hearing are subject to reporting restrictions pending the conclusion of the trial of three former employees in September.

It can be inferred that the key drivers for the differences in approach are (i) whether the company is itself (as was the case in Rolls-Royce), or a company related to it is (as was the case in Tesco Limited) a public company and a named announcement must therefore be made, given that the in-principle approval to enter into a DPA likely amounts to price-sensitive inside information for the purposes of a listed company's market disclosure obligations; and (ii) whether criminal proceedings have been commenced against related individuals at the time that the DPA is agreed (as was the case in Tesco Limited and XYZ Limited but not in Rolls-Royce).

For a public company that is determining whether a DPA is an attractive option, this flexibility in approach is undoubtedly appealing, particularly in ensuring that its obligations of disclosure are not prejudiced. Significant question marks remain, however, around the potential prejudice to individuals who are yet to stand trial, when the existence of an agreed DPA, as part of which a related company has paid a heavy financial penalty to avoid prosecution, is made public.

#### *Signposts or weathervanes? Where next for DPAs?*

One thing appears certain: we will continue to see more DPAs agreed in the coming months. Speaking recently, the SFO's Joint Head of Bribery and Corruption described the resolution of corporate criminality by way of DPAs as, "*the new normal*"<sup>3</sup> and given the scale of the financial penalties that have been levied under these resolutions—more than £650 million in a little over 17 months—the direction of travel seems set. That said, companies remain well-advised to remember that, regardless of the increasing frequency and scale of such resolutions, seeking a DPA ought never to be regarded as the default response to allegations of corporate criminal wrongdoing.

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<sup>1</sup> The DPA concerns only the potential criminal liability of Tesco Limited. It does not address whether liability of any sort attaches to Tesco plc or any employee or agent of Tesco plc or Tesco Limited.

<sup>2</sup> This figure does not include the estimated costs of £85 million of the Tesco Limited and Tesco plc FCA compensation scheme. The precise makeup of the total GBP129 million penalty for the DPA is unknown due to the imposition of reporting restrictions.

<sup>3</sup> [www.sfo.gov.uk/2017/03/08/the-future-of-deferred-prosecution-agreements-after-rolls-royce/](http://www.sfo.gov.uk/2017/03/08/the-future-of-deferred-prosecution-agreements-after-rolls-royce/)

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## *Authors*



**Lloyd Firth**

COUNSEL

✉ [lloyd.firth@wilmerhale.com](mailto:lloyd.firth@wilmerhale.com)

☎ +44 (0)20 7872 1014