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UK BRIBERY ACT 2010 – KEY EVENTS IN 2017

Introduction

On 27 September 2016, we published an ['Update on the Bribery Act 2010'](#), which contained an explanation of the provisions of the Bribery Act 2010 (“the 2010 Act”) before providing an update regarding certain prosecutions, investigations and Deferred Prosecution Agreements (“DPAs”) utilised in furtherance of the UK anti-corruption regime.

Here, we provide a further update on English court judgments in 2017 concerning bribery/corruption and DPAs, as well as an update on selected publically known developments in ongoing bribery prosecutions and investigations.

Judgments

Serious Fraud Office v Rolls-Royce plc [2017] Lloyd’s Rep FC 249 (17 January 2017) (Sir Brian Leveson)

The UK Serious Fraud Office (“SFO”), following a four-year investigation into criminal conduct committed by Rolls-Royce, filed an application for the approval of a DPA. Under the proposed terms of the DPA, Rolls-Royce would: (1) continue to co-operate with the authorities; (2) disgorge profits of £258,170,000; (3) pay a financial penalty of £239,082,645 plus the SFO’s costs; and (4) at their own expense complete a corporate compliance programme.

The terms of the DPA were approved by the President of the Queen’s Bench Division, Sir Brian Leveson.

In his judgment, the Judge set out certain important principles concerning DPAs, including:

(1) that a DPA was potentially available in respect of certain economic/financial offences committed by an entity where the only available criminal sanctions were financial;

(2) a proposed DPA required a declaration from the English court that: (a) it was in the interests of justice; and (b) that its terms were fair, reasonable and proportionate;

(3) even after such a declaration, the courts nevertheless retained control and it was open to the court to decline to approve a DPA if there had been a material change of circumstances between the granting of a provisional declaration and an approval hearing.

The Judge held that a declaration that a DPA was in the interests of justice was less likely to be granted when the underlying conduct was extremely serious. In the instant case, certain aggravating aspects of Rolls-Royce's conduct were identified, including: (1) the number of offences; (2) the multi-jurisdictional nature of the offences; (3) the fact that the offences involved commercial bribery and careful planning; (4) the scale and persistence of the offending; and (5) the involvement of very senior employees.

However, there were also a number of countervailing considerations, including: (1) lack of previous relevant convictions; (2) the fact that Rolls-Royce's co-operation with the SFO's investigation had been extensive; (3) changes of culture and personnel on the part of Rolls-Royce since the offending; and (4) the impact of prosecution on innocent employees and third parties.

On balance, the Judge concluded that it was in the interests of justice that the matter be resolved through a DPA and that the proposed sums were fair, reasonable and proportionate (on the basis that they had been agreed by accountants acting for both the SFO and Rolls-Royce).

For more details, please [click here](#) to see our previous mailing on this decision.

R (McLean) v (1) First Secretary of State; (2) Her Majesty's Attorney General [2017] EWHC 3174 (Admin) (26 October 2017) (Sales LJ)

In the UK General Election held in June 2017, the Conservative Party were returned as the party with the largest number of MPs but without an overall majority and therefore had to seek political support from another party. The Conservative Party and the Democratic Unionist Party ("DUP") jointly signed a "confidence and supply agreement" which set out the terms on which the DUP would be willing to provide its support in Parliament for the government on motions of confidence and motions for supply of funds for carrying on the business of government.

The Northern Irish politician Ciaran McClean sought permission for judicial review claiming that the "confidence and supply agreement" was unlawful, *inter alia*, because it was made in violation of the Bribery Act 2010. The claimant contended that the government had offered or promised or provided a financial or other incentive to DUP MPs intended to influence the way in which they voted in Parliament.

The High Court refused permission for judicial review. Sales LJ held that there was "no arguable case here that MPs would be acting improperly by reference to any one of the three conditions set out in section 3 of the 2010 Act".

Selected Developments in SFO Investigations and Prosecutions

Rolls-Royce

- On 17 January 2017, Sir Brian Leveson approved the terms of a DPA between the SFO and Rolls-Royce (see above).
- On 8 November 2017, it was reported that three former employees of Rolls-Royce's former energy division had pleaded guilty to charges of bribery and corruption-related offences filed in the US District Court for the Southern District of Ohio Eastern Division.

Tesco

- Following an accounting scandal related to alleged overstatement of profits by Tesco, on 10 April 2017 the SFO issued a press release confirming that it had entered into a DPA with Tesco Stores Ltd.
- The SFO's press release made it clear that reporting restrictions had been imposed, save only for the facts that: (a) Tesco Stores Limited has entered into a DPA with the Serious Fraud Office as described in the RNS announcement made by Tesco plc on 28 March 2017; (b) subject to compliance with the terms of the DPA, the investigation by the SFO into Tesco plc and Tesco Stores Ltd is concluded; (c) the DPA only relates to the potential criminal liability of Tesco Stores Limited and does not address whether liability of any sort attaches to Tesco plc or any employee, agent, former employee or former agent of Tesco plc or Tesco Stores Ltd; (d) Tesco plc will take a total exceptional charge of £235m in respect of the DPA of £129m, the expected costs of an FCA compensation scheme of £85m, and related costs.
- The trial of three individuals on charges of fraud and false accounting in relation to the conduct of Tesco Stores Ltd's business took place on 4 September 2017 at Southwark Crown Court.

F.H. Bertling Ltd (Angola operations) and F.H. Bertling Ltd (Project Jasmine)

Two SFO investigations were commenced concerning F.H. Bertling Ltd: (1) *F.H. Bertling Ltd (Angola operations)* – allegedly corrupt payments made by F.H. Bertling Ltd and individuals connected with it to agents of the Angolan state oil company Sonangol; and (2) *F.H. Bertling Ltd (Project Jasmine)* – allegedly corrupt payments made by F.H. Bertling Ltd and individuals connected with it in exchange for assistance in F.H. Bertling Ltd being awarded or retaining contracts relating to a North Sea oil exploration project known as Project Jasmine.

- In connection with the *F.H. Bertling Ltd (Angola operations)* investigation/prosecution, in May 2017 the SFO stated that it had charged F.H. Bertling Ltd and five individuals with charges of conspiracy to give or accept corrupt payments contrary to Section 1 of the Prevention of Corruption Act 1906 and Section 1 of the Criminal Law Act 1977.
- On 20 October 2017, the SFO issued a press release stating that three former senior employees of the F.H. Bertling group had been sentenced at Southwark Crown Court. Each was given a 20-month prison sentence (suspended for 2 years), a £20,000 fine (payable within 3 months with a default sentence for non-payment of 1 year in prison) and disqualified from being company directors for 5 years.
- F.H. Bertling Ltd and two individuals pleaded guilty and are due to be sentenced following the conclusion of a trial scheduled for September 2018 relating to the *F.H. Bertling Ltd (Project Jasmine)* investigation/prosecution.

Rio Tinto

- On 24 July 2017, the SFO issued a press release stating that it was investigating suspected corruption in the conduct of business in Guinea by Rio Tinto, its subsidiaries and associated persons.
- According to *The Financial Times*, Rio Tinto self-reported to the SFO, the US Justice Department and the Australian Federal Police in November 2016 in connection with its discovery of a \$10.5 million payment made by it in 2011 to a former banker for his consultancy work relating to an iron ore deposit in Guinea.

British American Tobacco PLC

- On 1 August 2017, the SFO issued a press release confirming that it is investigating suspicions of corruption in the conduct of the business of BAT PLC, its subsidiaries and associated persons.
- According to *The Financial Times*, a former employee of BAT told the BBC's *Panorama* programme in 2015 that he had paid bribes on behalf of BAT to undermine Kenya's anti-smoking laws and that he had provided documentation to the SFO in December 2015. In 2016, BAT announced that it had hired Linklaters to investigate the allegations of corruption and bribery.

Unaoil

- The SFO is currently running several investigations relating to Unaoil in connection with suspected offences of bribery, corruption and money laundering.
- Four individuals have been charged with conspiracy to make corrupt payments to secure the award of contracts in Iraq to one of Unaoil's clients, SBM Offshore. The four individuals were scheduled to appear before Southwark Crown Court on 4 January 2017.
- On 29 March 2017, Gross LJ dismissed a judicial review application in respect of the content of a Letter of Request made by the SFO to the Monegasque authorities (see *R (Unaenergy Group Holding Pte Ltd) v Director of the Serious Fraud Office* [2017] EWHC 600 (Admin)).
- On 16 November 2017, the SFO issued a press release stating that two of the aforementioned individuals had been charged with further counts of conspiracy to make corrupt payments. The two individuals in question were scheduled to appear before Westminster Magistrates' Court on 7 December 2017. The SFO also stated that a third individual was the subject of an extradition request to Monaco on related charges.
- On 30 November 2017, the SFO issued a press release confirming that further charges of conspiracy to make corrupt payments had been brought.
- A series of investigations related to the Unaoil investigation are being undertaken by the SFO, including investigations into ABB Ltd, KBR Inc, Petrofac PLC and Kellogg Brown & Root.

Concluding Remarks

Perhaps the most significant development in 2017 in this context was the judgment in *Serious Fraud Office v Rolls-Royce plc* [2017] Lloyd's Rep FC 249. This DPA was an order of magnitude greater in terms of the financial amounts involved than any of the previous DPAs concluded by the SFO. Sir Brian Leveson's judgment set out important issues concerning the court's treatment of DPAs and when they will be considered to be in the interests of justice. In particular, the emphasis placed by Sir Brian Leveson on the extent of the impugned entity's co-operation with the SFO (Rolls-Royce's co-operation was described as

“extraordinary”) illustrates that this is likely to prove a fundamentally important factor in the court’s consideration of future DPAs.

30 January 2018