

## ENGLISH COURT APPROVES DEFERRED PROSECUTION AGREEMENT BETWEEN SERIOUS FRAUD OFFICE AND AIRBUS

*Director of the Serious Fraud Office v Airbus SE (31 January 2020)*

### INTRODUCTION

By a decision handed down on 31 January 2020 in *Director of the Serious Fraud Office v Airbus SE*, Dame Victoria Sharp (as President of the Queen’s Bench Division of the English High Court) (“the Judge”) gave judgment approving a Deferred Prosecution Agreement (“DPA”) entered into between the Serious Fraud Office and Airbus SE, the seventh such DPA that the Serious Fraud Office has entered into.

### BACKGROUND

In August 2016, the Serious Fraud Office announced an investigation into Airbus SE, a company registered in the Netherlands and domiciled in France and the Netherlands. That investigation was part of an international investigation involving the French and US authorities that concerned potential bribery and corruption offences in a large number of jurisdictions. The particular investigation of the Serious Fraud Office concerned bribery offences in Malaysia, Sri Lanka, Taiwan, Indonesia and Ghana.

According to the judgment (at paragraph 5):

*“The SFO’s investigation demonstrated that in order to increase sales, persons who performed services for and on behalf of Airbus offered, promised or gave financial advantages to others intending to obtain or retain business, or an advantage in the conduct of business, or Airbus SE”.*

Summarising the counts on the indictment against Airbus, the Judge stated (at paragraph 38) that:

*“In brief, persons associated with Airbus, not exclusively its employees, offered very substantial sums of money by way of bribes to third parties in order to secure the purchase of aircraft, by civil airline companies, in counts 1 to 4; and by the Government of Ghana, in count 5”.*

Once a DPA has been reached, the Serious Fraud Office must apply to the court in private for a declaration that the entering into of the DPA (on its particular terms) is in the circumstances likely to be in the interests of justice and that the proposed terms are fair, reasonable and proportionate.

## **DECISION**

The Judge concluded that the DPA was in the interests of justice, and that its terms were fair, reasonable and proportionate.

### Interests of Justice

First, the Judge began by assessing the “*seriousness*” of the underlying conduct, outlining (at paragraph 63) the relevant factors at play:

*“the nature of the offending, including the harm caused, the duration of the conduct, the circumstances giving rise to it, the sophistication of the methods used, whether or not a cover-up was attempted, the seniority of the people involved, the payments wrongly made, whether public officials were involved and whether the offending was multi-jurisdictional are all relevant factors in the assessment of seriousness”.*

The Judge determined (at paragraph 64) that:

*“The seriousness of the criminality in this case hardly needs to be spelled out. As is acknowledged on all sides, it was grave. The conduct took place over many years. It is no exaggeration to describe the investigation it gave rise to as worldwide, extending into every continent in which Airbus operates. The number of countries subject to intense criminal investigation by the various agencies, and the scale and scope of the wrongdoing disclosed ... demonstrate that bribery was, to the extent indicated, endemic in two core business areas within Airbus”.*

Nevertheless, the Judge viewed the resolution of the matter by means of a DPA (rather than a criminal prosecution) as in the interest of justice, notwithstanding the seriousness of the underlying conduct.

In doing so, the Judge relied upon the fact that Airbus had (eventually) self-reported and had given “*exemplary*” cooperation to the prosecuting authorities. The Judge also drew attention to various measures implemented by Airbus starting from late 2014 to improve its compliance weaknesses, including management changes and the commissioning of an independent compliance review panel. In addition, the Judge was mindful of the effects a criminal prosecution would have “*on Airbus and the collateral effects on thousands of innocent third parties, corporate and individual*”.

Overall, therefore, the Judge was satisfied that the resolution of the matter through a DPA, rather than a criminal prosecution, was in the interests of justice, notwithstanding the seriousness of the impugned underlying conduct.

### Terms: Fair, Reasonable and Proportionate

The Judge summarised the terms (at paragraph 88) as follows:

*“The DPA will come to an end three years from the date of the declaration which I have made today. Airbus will pay a total financial sanction of €983,974,311 to the SFO for onward transmission to the Consolidated Fund, within 30 days of this declaration. Airbus will continue to make improvements to its ethics and compliance policies and procedures. There will be ongoing co-operation and self-reporting by Airbus and Airbus will pay the reasonable costs of the SFO’s investigation in relation to the alleged offences and the DPA (€6,989,401)”.*

The DPA’s financial sanction included a provision for the disgorgement of €585,939,740, which represented the gross profit of conduct covered by the five counts on the indictment and one which *“fairly reflects the gross profit made by the wrongdoing reflected by those counts”* – the figure was arrived at through a process whereby Airbus instructed external specialist financial consultants to analyse gross profit, whose work was then reviewed by further external specialist financial consultants instructed by the Serious Fraud Office.

After having assessed culpability, the Judge applied a multiplier – leading to a harm penalty of €715,750,545 in respect of counts 1-4 and €80,318,596 in respect of count 5.

However, the Judge applied a level of discount *“so as to reflect the fine that would likely be imposed upon a conviction after a guilty plea”* and also to *“take account of Airbus’ exemplary cooperation and remediation”*.

The DPA also brought an end to the Serious Fraud Office’s investigation into Airbus and its controlled subsidiaries.

Overall, the Judge concluded that:

*“The DPA requires Airbus to pay a significant financial penalty, thereby sending an important deterrent message to corporate wrongdoers. It also recognises and rewards what Airbus has now done to address the problem by discounting that financial penalty by 50 percent. The DPA has, in addition, given Airbus the opportunity to demonstrate its corporate rehabilitation and commitment to effective compliance over the period of the DPA, without facing the potential consequences of a criminal conviction. This ensures a major UK employer continues to operate according to high ethical and compliance standards. By entering into the DPA, the SFO avoids the significant expenditure in time and money inherent in any prosecution of Airbus, and it can use its limited resources in other important work. The DPA is likely to provide an incentive for the exposure and self-reporting of organisations in similar situations to Airbus. As the SFO submits, this is of vital importance in the context of complex corporate crime”.*

The instant DPA took place in the broader context of what the Serious Fraud Office has termed *“the world’s largest global resolution for bribery”*. On the same day as the DPA was approved by the Judge, Airbus SE also entered into agreements with the French authorities

(which required Airbus to pay €2,083,137,455) and with the US authorities (which required Airbus to pay €525,655,000).

## **CONCLUDING REMARKS**

As the Serious Fraud Office reported on its website in relation to this judgment, the instant matter marks the seventh DPA entered into between the Serious Fraud Office and companies since their introduction in 2013. Across those seven DPAs, the total value is approximately £1.53 billion.

A link to our mailings on judgments concerning some of the DPAs previously entered into can be found [\[here\]](#) and [\[here\]](#).

The judgment serves as a stark reminder of the benefits available, in terms of the treatment likely to be received from the Serious Fraud Office and from the Court, through self-reporting (as early as possible) and through full co-operation with the investigative process.