

Longstanding Rolls-Royce Investigation Leads To Coordinated Settlement In U.K., U.S. and Brazil

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On 16 January 2017, Rolls-Royce plc announced that it had reached resolutions with the U.K. Serious Fraud Office (“SFO”), U.S. Department of Justice (“DOJ”), and Brazil’s Ministério Público Federal, ending long-running investigations of corruption and bribery involving nine countries over nearly a quarter-century.

The resolutions are an important example of coordinated international investigations of bribery and corruption, and are notable for the size of the financial penalty imposed by the SFO.

Deferred Prosecution Agreement with the Serious Fraud Office

During a hearing on 17 January 2017, the President of the Queen’s Bench Division, Sir Brian Leveson P, approved a Deferred Prosecution Agreement between Rolls-Royce and the SFO involving Rolls-Royce paying financial penalties totaling £497 million. This is the third such agreement that the SFO has entered into and by far the most significant in terms of financial penalty.

Underlying facts

The Judge described the conduct as involving “*the most serious breaches of the criminal law in the areas of bribery and corruption (some of which implicated senior management and, on the face of it, controlling minds of the company)*”. In particular:

- Rolls-Royce agreed, over a period of 24 years (1989 to 2013) to make corrupt payments in Indonesia, Thailand, India and Russia, and failed to prevent bribery in Nigeria, China and Malaysia. The Judge also referred to misconduct in other countries that has been the subject of separate enforcement action by US and Brazilian authorities (referred to below).
- Between 2000 and 2013, \$35 million was paid in bribes to foreign officials.

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- Rolls-Royce played a “*leading role in organised, planned unlawful activity over a very substantial period of time*” and engaged in “*many and varied attempts to conceal misconduct and obstruct detection*”.
- As a result of the conduct, the DPA covers: (i) four charges relating to agreements to make corrupt payments to agents in Indonesia and Thailand, (ii) a charge arising from concealment or obfuscation of the use of intermediaries to business in India when the use of intermediaries was restricted, (iii) a charge relating to a corrupt payment to recover a list of intermediaries that had been taken from Rolls-Royce by an Indian tax inspector, (iv) a charge arising from agreements to make corrupt payments to agents in Russia, and (v) five charges relating to failures to prevent business in Nigeria, Indonesia, China and Malaysia.

The SFO investigation began in 2012 after it obtained information on the internet. Rolls-Royce had known about the issues and had written reports revealing corruption indications going back to 2010 and decided not to disclose the position to the SFO. In 2013, Rolls-Royce began to co-operate with the SFO and, since that time, gave what the Judge described as “*extraordinary co-operation*”.

This included voluntary production of documents without reviewing them, agreeing for third party counsel to conduct a privilege review including using “digital methods”, carrying out 229 interviews and giving the notes to the SFO on limited waiver of privilege basis, and reviewing 250 intermediary relationships. The Judge said that Rolls-Royce “*could not have done more to expose its own misconduct*”. The costs of these steps was put at £123 million.

The SFO’s investigation was also wide-ranging. It collected 30 million documents, obtained the emails of over 100 employees, made requests for mutual legal assistance, made arrests, carried out interviews and searched the homes of individuals. The SFO’s costs of the investigation were £13 million.

Key legal points

Leveson P was required to determine whether the DPA was in the interests of justice, applying the criteria set out in SFO v XYZ Ltd. The Judge’s analysis is notable because he emphasised that he considered the misconduct to be so serious that he had to be persuaded that a DPA rather than prosecution was in the interests of justice. This was also in light of the fact that Rolls-Royce had not voluntarily disclosed its conduct.

The Judge ultimately concluded that the DPA was in the interests of justice, particularly given Rolls-Royce’s co-operation which the SFO argued was sufficiently “*extraordinary*” that it should not be distinguished from a self-reporting case. Among other factors, he also considered that changes in senior management were important and said that his approach may have been affected if any member of the current senior management team had been implicated. He also noted that Rolls-Royce had taken significant remedial steps including appointing a compliance monitor.

The penalty comprised £258m representing disgorgement of profits, a financial penalty of £239m and payment of the SFO’s costs of £13m. The financial penalty element was reduced by 33% for early admission of wrongdoing and by a further 1/6th for cooperation giving a total discount of 50%. It would otherwise have been £478m (or £749m in total).

The judgment, statement of facts and DPA are available here: <https://www.sfo.gov.uk/cases/rolls-royce-plc/>.

Deferred Prosecution Agreement With The Department of Justice

On 17 January 2017, Rolls-Royce’s DPA with the Department of Justice in the United States also became public. That agreement was entered and filed with the United States District Court for the Southern District of Ohio on 20 December 2016, under seal. Unlike under the U.K. procedure, DPAs in the United States are not subject to the same type of judicial scrutiny, and no hearing regarding the merits of the agreement was required.

Underlying Facts

The facts relevant to the DOJ's specific allegations against Rolls-Royce are, in essence, the same as those on which the SFO relied, although the DOJ's charges focus on the narrower relevant time period between 2000 and 2013. During that period, Rolls-Royce admitted to paying more than \$35 million in bribes through third parties to foreign officials in exchange for their assistance in providing confidential information and awarding contracts to Rolls-Royce and its affiliates. Among other examples, the DOJ referenced:

- Payments of approximately \$11 million in bribes to Thai state-owned and state-controlled oil and gas companies in exchange for an award of approximately seven contracts.
- Payments of approximately \$9.3 million to foreign officials at a state-owned petroleum company in Brazil.
- Furnishing commissions of approximately \$5.4 million to advisors in Kazakhstan between 2009 and 2012 with knowledge that those commission payments would be used to bribe foreign officials.
- Payments of approximately \$7.8 million in bribes through an intermediary to foreign officials in Azerbaijan between 2000 and 2009.
- Payments of approximately \$2.4 million in bribes to officials at a state-owned and controlled oil company in Angola, which in turn awarded three contracts to Rolls-Royce during the period 2008 to 2012.
- Payment of bribes to Iraqi officials through an intermediary in exchange for a state-owned oil company's agreement to permit Rolls-Royce to continue to supply gas turbines.

As part of the DPA, Rolls-Royce also acknowledged paying bribes in seven other countries between 1989 and 2013.

Terms of the Agreement

Under the terms of its DPA with the DOJ, Rolls-Royce agreed to the filing of a criminal information charging one count of conspiracy to violate the U.S. Foreign Corrupt Practice Act, 15 U.S.C. § 78dd-2 & 78dd-3, and admitted to the allegations set forth therein. Prosecution on that charge is deferred in accordance with the DPA for a period of three years, after which (barring any violation of the agreement), the charge will be dismissed.

Rolls-Royce also agreed to pay a financial penalty of \$169,917,710. This represents approximately 75% of the lowest applicable financial penalty under the U.S. Sentencing Guidelines, in consideration of a balancing of the nature of Rolls-Royce's conduct and the following factors, among others:

- Rolls-Royce "*did not voluntarily or timely disclose*" the relevant conduct, instead self-reporting "*only after media reports first alleging corruption by the Company and the U.K. Serious Fraud Office initiated an inquiry.*"
- Rolls-Royce received "*full credit for its cooperation,*" which included "*numerous factual presentations,*" "*facilitating witness interviews,*" "*producing documents ... proactively and in a timely fashion,*" and "*providing facts learned during witness interviews conducted by the company.*"
- The company disclosed "*all relevant facts known to it, including information about individuals involved in the misconduct.*"
- "[S]ignificant remedial measures" had been implemented, including termination of 6 employees and accepting resignations from 11 others.
- The company agreed to pay significant financial penalties to the SFO and Brazilian authorities. Notably, the DOJ treated the amount paid by Rolls-Royce to resolve the investigation by Brazil's Ministério Público

Federal as a credit against the penalty assessed in the U.S.

Rolls-Royce also agreed to provide further cooperation to the DOJ in future matters, to continue implementation of an effective corporate compliance programme, refrain from committing any felony under U.S. federal law, and provide periodic reporting to the DOJ. Unlike in some other recent DPAs entered in the U.S., the DPA with Rolls-Royce does not require the appointment of an independent corporate compliance monitor (though the company's retention of an outside compliance advisor was noted among the "significant remedial measures" and the continuation of these arrangements is a condition of the UK DPA).

The Information and DPA are available here:

<https://www.justice.gov/opa/pr/rolls-royce-plc-agrees-pay-170-million-criminal-penalty-resolve-foreign-corrupt-practices-act>.

Leniency Agreement with the Ministério Público Federal

Also on 16 January 2017, Rolls-Royce announced that it had entered into an agreement to pay approximately \$25.58 million in fines to Brazil's Ministério Público Federal in connection with alleged payments of bribes connected to contracts for gas turbines that Rolls-Royce supplied to a state-owned oil company. Under the terms of the leniency agreement, the payment by Rolls-Royce will be made directly to the company as an award of disgorgement of profits gained from the transactions.

Key Points On Investigations and Practice

Among the key points coming out of the Rolls-Royce case are these :

- For organisations to which a DPA is attractive (either in the U.S. or the U.K.), it is not necessarily too late to self-report and co-operate with the SFO or DOJ once an investigation has been opened by these authorities. However, by leaving it to this stage the level of co-operation required to qualify for a DPA is extremely high.

Moreover, the more serious the wrongdoing, the steeper the road to a DPA.

- The penalty imposed by the SFO is many times higher than in previous SFO cases, and eclipses even the FCA's penalties during the LIBOR and FX cases. It is more in line with the level of fines one sees in cases brought by the DOJ and other U.S. authorities. We expect that the SFO will continue to seek very high financial penalties in appropriate cases.
- In order to achieve a DPA in the U.K., a company must accept significant scrutiny of its conduct and the fairness of the agreement. Here, the terms of the SFO's DPA and the nature of Rolls-Royce's conduct are subjected to significant scrutiny in the Court's judgment. The Judge said that "*there is no question of the parties having reached a private compromise without appropriate independent judicial consideration of the public interest*". The DOJ continues to enjoy much greater latitude than the SFO in determining the scope of what constitutes an appropriate resolution.
- Individual liability can be expected to remain a high priority for both the SFO and the DOJ. The judgment approving the SFO DPA makes a number of references to potential criminal prosecutions against individuals. Likewise, consistent with standing policy regarding the prosecution of corporate entities, the DOJ can be expected to pursue charges against individuals who were involved in the conduct at issue.

In approving Rolls-Royce's DPA with the SFO, the Judge also commented on other companies who may be aware of past conduct similar to that of Rolls-Royce and said: "*A responsible company will engage openly in the way that Rolls-Royce [sic] and so contribute to an increasing recognition of the vice that bribery and corruption constitutes and provide impetus to preventing businesses from operating in this way*".

He also warned against running the "*cataclysmic risks*" of staying quiet and hoping the authorities do not detect the conduct: "*Whatever the costs Rolls-*

Royce have incurred, they are modest compared to the cost of seeking to brazen out an investigation which commences; absent self-disclosure and full co-operation, prosecution would require the attention of the company to be entirely focused on litigation at the expense of whatever business it is trying to conduct and conviction would almost inevitably spell a far greater disaster than has befallen Rolls-Royce”.

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