

Airbus: the flight path for future DPAs?

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In the largest deferred prosecution agreement to date, Dame Victoria Sharp has given judgment declaring approval for the DPA agreed between the Serious Fraud Office and Airbus SE. Airbus must pay just over €990 million including costs. The amount is only part of what makes this DPA interesting. Arguably of greater importance is that it demonstrates what can be achieved when countries co-operate in the investigation of serious international financial crime.

In the largest deferred prosecution agreement (DPA) to date, Dame Victoria Sharp has given judgment declaring approval for the DPA agreed between the Serious Fraud Office (SFO) and Airbus SE. Airbus must pay just over €990 million including costs. As Dame Victoria Sharp observed, the financial sanction is greater than the total of all the sums paid under previous DPAs and more than double the total amount paid in fines resulting from criminal conduct in England and Wales for the entirety of 2018.

The amount is only part of what makes this DPA interesting. Airbus has also reached a Convention Judiciaire d'Intérêt Public (CJIP) (the French equivalent of a DPA) with the Parquet National Financier (PNF) and a DPA with the US Departments of Justice and State. In total, Airbus is required to pay approximately €3.6 billion. This demonstrates in clear and stark financial terms the impact of these measures. Arguably of greater importance, however, is that it demonstrates what can be achieved when countries co-operate in the investigation of serious international financial crime.

Advantages of DPAs

DPAs allow the investigation of serious criminal offending to be resolved without the costs of long and complex trials (see box "[Background to DPAs](#)"). Yet the public interest in the identification and punishment of serious crime is fulfilled by the transparent nature of the proceedings. The judgment issued by the court to approve the DPA provides the factual context. DPAs also allow for large financial sums to be paid to the government.

DPAs enable organisations to make full reparation for criminal behaviour without experiencing the damage of a criminal conviction, which could threaten the jobs and investments of innocent people. However, the criticisms that have been levelled at DPAs are that there have been too few of them and that they do not hold individuals to account for the wrongdoing behind the DPA.

Prevalence of DPAs

Since their introduction in 2014, there have only been six DPAs:

- In 2015, Standard Bank plc was ordered to pay financial orders of just over \$25 million plus an extra \$7 million in compensation (see [News brief "Bribery Act 2010: SFO concludes first deferred prosecution agreement"](#)).
- In 2016, Sarclad Ltd agreed to pay over £6.5 million.

- In 2017, Rolls-Royce Holdings plc agreed to pay nearly £500 million (see *News brief “Rolls-Royce deferred prosecution agreement: the SFO gains traction”*).
- In 2017, Tesco Stores Limited agreed to pay just shy of £129 million (see *News brief “Tesco deferred prosecution agreement and final notice: breaking new ground”*).
- In 2019, Serco Geografix Ltd agreed to pay a financial penalty of £19.2 million.
- In 2019, Guralp Systems Ltd agreed to disgorge relevant profit of over £2 million.

The facts

The essence of the allegations against Airbus was that it had failed to prevent persons associated with the company from bribing prominent people around the world. A number of airlines were cajoled into buying aircraft from Airbus. The indictment focused on Malaysia, Sri Lanka, Taiwan, Indonesia and Ghana.

The judgment states that there existed at Airbus a corporate culture that permitted bribery by Airbus business partners or employees to be committed throughout the world. The wrongdoing involved several employees, some very senior, including those with compliance responsibilities. The conduct included the creation of false invoices, false payments and other compliance material, as well as the deliberate circumvention of Airbus’s internal and external compliance procedures.

The conduct took place over a number of years and occurred on a global scale. The real issue was whether the interests of justice were best served by a DPA rather than a prosecution. Dame Sharp decided that it was the exemplary co-operation that Airbus had shown, along with the measures it had taken to transform its corporate culture, that justified the DPA.

International co-operation

This is not the first DPA where separate agreements were also made with foreign prosecutors: Rolls Royce also came to agreements with US and Brazilian prosecutors. What is notable about the Airbus case is the nature and extent of the co-operation between the French and English authorities.

The Joint Investigation Team agreement between the SFO and the PNF was made on 31 January 2017. It covered all of the 1,750 business partners engaged by Airbus globally until 2016. It required that each organisation would focus on the conduct of Airbus and its divisions in different jurisdictions.

The case demonstrates the importance of international co-operation when dealing with a worldwide investigation. This was a huge investigation with over 30 million documents. The ability of the SFO and the PNF to divide the investigation and co-operate in relation to their findings was plainly the key factor behind the DPA and sets an important template for any future worldwide investigation.

One of the particular issues in the Airbus case was that France controlled the information. It controlled what documents were supplied to the SFO by the French. Although this had the potential to hinder the process, in practice it did not do so. In the future, that flow of information will be an important element to any international co-operation.

An imperfect but useful tool

The criticism around DPAs relates to their inability to hold individuals to account. This is exemplified by the acquittal of the three Tesco executives and the three Sarclad employees who were prosecuted (*see Opinion “Deferred prosecution agreements after Tesco: whither are we bound?”*).

The SFO has confirmed that the Airbus investigation remains alive and that it is considering the position in relation to individuals. The Airbus DPA does not offer an answer to this issue, which requires consideration of the way in which current DPAs operate and the fact that individuals are not permitted to participate in the process. Until that issue is addressed, it is likely that the DPAs will continue to attract criticism. Part of the problem is a tendency to view one measure as an all-encompassing solution.

DPAs offer no guarantee of a subsequent conviction of any individual. However, they do offer an alternative to lengthy and costly corporate prosecutions, and the Airbus case seems to suggest that they are here to stay.

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Background to DPAs

Deferred prosecution agreements (DPAs) are a mechanism by which an organisation can avoid prosecution by means of an agreement between it and the designated prosecuting authority (*section 45 and schedule 17, Crime and Courts Act 2013*) (*see feature article “Deferred prosecution agreements: moving into the unknown”*).

The DPA is made under the supervision of a judge and the court retains control over the outcome. It allows the prosecution to be suspended for a defined period provided that the organisation meets certain specified conditions. These conditions can include the payment of a financial penalty, compensation, disgorgement of profit, the implementation of a compliance programme or alteration of an existing one, co-operation with the investigation and payment of costs.

DPAs apply to organisations and not to individuals, and can be used for fraud, bribery and other financial crime.

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