DEFERRED PROSECUTION AGREEMENTS TAKE OFF ABROAD: AIRBUS PENALTIES EXCEED $5 BILLION

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Canadian organizations and prosecutors continue to wait to see how Canada's deferred prosecution regime will play out (see our July 2018 bulletin for an overview of the legislation). Although Canada has yet to conclude a deferred prosecution agreement ("**DPA**"), in earlier bulletins we contrasted the French and Canadian approaches to DPAs (September 2019 bulletin) and highlighted the relative lack of guidance from Canadian authorities regarding Canada's regime (February 2020 bulletin). We also discussed Canada's statutory prohibition on considering the "national economic interest" in relation to foreign corruption offences (June 2019 bulletin), and highlighted an inherent tension that may ultimately affect the success of Canada's DPA regime. Earlier this year, that tension was underscored.

Airbus DPAs

On January 31, 2020, Airbus SE ("**Airbus**"), an aircraft-manufacturing firm headquartered in the Netherlands, with a main office in France, made history with the announcement that it had entered into DPAs under which it will pay combined penalties exceeding C$5.18 billion to American, French, and British authorities in order to resolve foreign bribery charges.[1] Collectively, the Airbus DPAs represent the largest global foreign bribery resolution to date.

According to admissions and court documents, from as early as 2008 continuing until 2015, Airbus offered and paid bribes to agents including foreign officials to obtain improper business advantages.[2] Under the UK DPA,[3] Airbus agreed to a statement of facts and agreed that if it fails to fulfil any DPA terms, the UK Serious Fraud Office ("**SFO**") is free to resume criminal proceedings. The UK DPA also outlined the considerations explaining why deferred prosecution was appropriate for Airbus. These factors include the self-disclosure by Airbus, past and future cooperation, disgorgement of profits, payment of a financial penalty, payment of reasonable investigation costs, substantial remediation, and ongoing improvements to its ethics and compliance policies/procedures.

The UK Airbus DPA surpassed the prior record-holding fine paid by Rolls-Royce Holdings ("**Rolls-Royce**") to the SFO in 2017.

Rolls-Royce DPA

The £500 million (C$861 million) Rolls-Royce UK DPA arose out of 12 counts of conspiracy to corrupt, false accounting and failure to prevent bribery. The impugned conduct spanned three decades and seven jurisdictions.[4] In the UK DPA judgment, Sir Brian Leveson reiterated that DPAs are not an escape from sanction. Rather,

> [Rolls-Royce] will have to suffer the undeniably adverse publicity that will flow from the facts of its business practices which will be exposed by the DPA so that the way in which it has done business will be obvious … Neither will the conduct of Rolls-Royce escape sanction: it could only ever be fined and the DPA has to be approached on the basis that it must be broadly comparable to the fine that a court would have imposed on conviction following a guilty plea.[5]

Like Airbus, the Rolls-Royce DPA was agreed to in conjunction with a Leniency Agreement with Brazil's Ministério Público Federal valued at US$25 million (C$33 million) and a United States DPA valued at US$170 million (C$226 million).

OECD Article 5 – Prohibition on Considerations of National Economic Interest

Article 5 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("**OECD Convention**") establishes legally binding standards to criminalize bribery of foreign officials. The U.S., UK, France and Canada (among others) are all parties to the convention. Article 5 of the OECD Convention specifically provides as follows:

> Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

To some, the resolution of the Airbus enforcement action by a DPA may be in violation of Article 5. This is because the decision to offer a DPA seems to have been influenced (at least in part) by considerations of national economic interest and the identity of the wrongdoer involved – namely, Airbus.

On January 31, 2020, the Royal Courts of Justice declared that the DPA was in the public interest and that its terms were fair, reasonable and proportionate.[6] A "critical feature" of the UK DPA regime is the requirement that the court examine, and approve any DPA agreed to by the SFO.[7] In this regard, the court's decision to approve the Airbus UK DPA recognized Article 5 considerations by noting that "no company is too big to prosecute" and that "national economic interest is irrelevant to the analysis of the question whether or not a DPA is in the interest of justice".[8] However, the decision also appears to have been influenced by national

economic interests and the identity of the offending party. That is, in approving the UK DPA, the court observed that a conviction would have disproportionate consequences, including materially adverse consequences resulting from discretionary debarment from tendering for UK public sector contracts, and in many other jurisdictions (including Canada).[9] The court observed that a conviction would also result in mandatory debarment in certain countries such as the Netherlands (notably, the headquarters of Airbus) and India.[10] Debarment would have negative effects on the company financially, including its financing arrangements, the loss of key revenue streams, and the loss of market presence. Additionally, the court highlighted the thousands of innocent employees that would be affected as well as innocent shareholders, pensioners, and thousands of companies that are part of the Airbus supply chain.[11] A further collateral effect would be a reduction in competition of future tenders leading to additional public spending of many billions of euros.[12] By referencing such considerations, the UK decision to offer a DPA seems plainly influenced by considerations of national economic interest and the identity of the party involved.

In a similar vein, in approving the Rolls-Royce UK DPA it was observed, "Rolls-Royce Holdings plc (listed on the London Stock Exchange and forming part of the FTSE 100 index) is properly considered to be a company of central importance to the United Kingdom". Again, a consideration seemingly in violation of Article 5.[13]

The SNC-Lavalin Example

In Canada, subsection 715.32(3) of the *Criminal Code* enshrines the Article 5 prohibition on considering the "national economic interest".[14] *Criminal Code* subsection 715.32(3) mirrors Article 5, and provides, in part, as follows:

> ...if the organization is alleged to have committed an offence under section 3 or 4 of the *Corruption of Foreign Public Officials Act*, the prosecutor must not consider the national economic interest, the potential effect on relations with a state other than Canada or the identity of the organization or individual involved.

While other signatory parties acknowledge Article 5, Canada seems to have taken a much stricter approach in its application. Former Secretary General of the OECD, Donald Johnson, recently emphasized this point. Mr. Johnson was Secretary General of the OECD when the Convention was introduced in 1997. In the wake of the SNC-Lavalin Group Inc. ("**SNC-Lavalin**") controversy (see our June 2019 bulletin for further details), he commented that the crux of the matter appeared to be whether the impact on domestic jobs was a valid or prohibited consideration when the Director was deciding to negotiate a DPA with SNC-Lavalin.[15] Mr. Johnson went on to observe that if Canadian jobs were the heart of the issue, then the "national economic interest" was not a concern.[16] Rather, Mr. Johnson noted,

> I actively participated in the signing of the [Convention] in December 1997. I can tell you that in this

> meaning, the phrase ["national economic interest"] was intended to prevent exporters in OECD countries from avoiding prosecution under the convention by arguing that exports were in the national economic interest – and that bribery was therefore required to protect their export markets. That is what the word "national" was put in there to mean. I do not recall jobs ever being discussed as relating to the national economic interest as defined in the convention, nor were DPAs ever considered in the convention.
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> In other words, at least as far as the meaning of the original wording used in the convention (that would later be imported to Canada's Criminal Code section covering DPAs) goes, there was no "national economic interest" exclusion contemplated that would have automatically disqualified SNC-Lavalin from a deal.[17]

Until recently, the exact reason why the Director declined to negotiate a DPA with SNC-Lavalin was unknown. However, on February 28, 2020, it was made public that a DPA was not negotiated with SNC-Lavalin, because of the seriousness of the offences at issue. While that may be the case, similar offences have not barred DPAs in other countries, as evidenced by the Airbus and Rolls-Royce examples, among others. Indeed, the United States has negotiated dozens of DPAs in the last four years for "serious" foreign bribery and like offences. As noted in our recent bulletin (February 2020 bulletin), the American DPA regime is one of the oldest and broadest regimes of its kind, with individual prosecutors entering approximately 20 to 40 DPAs each year. Although some commentators suggest that the lucrative nature of DPA enforcement has driven an increase in FCPA resolutions in the United States,[18] it is odd that the bribery offences in the SNC-Lavalin case would have been a bar to negotiating a DPA.

Ultimately, the SNC-Lavalin prosecution came to a halt on December 18, 2019 after the Court of Quebec accepted a guilty plea by one of SNC-Lavalin's subsidiary companies to a single charge of fraud.[19] Under the settlement, SNC-Lavalin will pay a C$280 million fine, be subject to a three-year probation order, be independently monitored throughout this probationary period, and implement changes to its ethics and compliance program.[20] The settlement also allows SNC-Lavalin to avoid conviction, as all the charges against the company were withdrawn – thus avoiding debarment from public contracts.

Ironically, the outcome would probably have been similar if the Director had permitted SNC-Lavalin to negotiate a DPA. The mandatory content of a Canadian DPA includes, in part, an admission of responsibility, ongoing cooperation, payment of a penalty and other reparations, and compliance with DPA terms for a specified period.[21] Optional content of a Canadian DPA includes enhanced compliance, reimbursement of prosecutorial costs, and an independent monitor.[22]

The SNC-Lavalin example therefore suggests that Canada's minefield of DPA considerations might create a distinction without a difference. Irrespective of why decision-makers refused to negotiate a DPA with SNC-

Lavalin, the point remains that DPA negotiations can reap substantial efficiencies. After all, the outcome of a DPA would have been largely identical to that of the SNC-Lavalin settlement – but it could have happened far more quickly, and with fewer negative optics.

Takeaways

While the SNC-Lavalin example provides a model of what not to do, the Airbus and Rolls-Royce DPAs reveal key takeaways for a Canadian audience: (1) the role of international cooperation in tackling corruption, and (2) the upside of factoring economic considerations into a DPA scheme.

Insofar as international cooperation, as put by SFO Director Lisa Osofsky with respect to the Airbus DPAs, "[a] resolution of this scope would not have been possible without the commitment, determination and hard work of SFO staff and our French and American colleagues."[23] Assistant Attorney General Brian A. Benczkowski of the United States Justice Department's Criminal Division similarly stated, "[t]his coordinated resolution was possible thanks to the dedicated efforts of our foreign partners…"[24] In coordinating their efforts, the three nations found an economically and procedurally efficient way to bring corporate wrongdoers to justice.

The Airbus DPAs equally make clear that economic considerations do not necessarily result in flawed DPA outcomes. As put by Marc-André Feffer, Chair of Transparency International France, DPAs hold accountable parties that previously evaded conviction and the scheme as a *whole* requires continuous reevaluation:

> Before the CJIP [Convention judiciaire d'intérêt public, or Judicial Public Interest Agreement – the French equivalent to the DPA] was implemented in France in 2016, no company had been convicted for corruption, leading to an unacceptable state a near-impunity in the last 15 years. The Airbus case is a good example of how this new judicial procedure is a powerful leverage … Huge fines are a quick and effective way to hit companies where it hurts while avoiding the long, complex and highly uncertain process of trials. However, the CJIP now needs to be evaluated and maybe improved to make sure it contains no potential loopholes and avoid to be a tool for companies to 'buy their way out of trouble'.[25]

In sum, *Criminal Code* section 715.32 is a complicated provision. Its subsection (1) mandates that a DPA is available only if it is in the public interest. Yet, subsection (3) bars a prosecutor from considering the national economic interest, which seemingly excludes a fundamental aspect of the public interest. To that end, Canada might reconsider whether its approach towards the "national economic interest" should evolve to match that of its fellow OECD signatories.

by Guy Pinsonnault, Jamieson Virgin, and Eleanor Rock, Articled Student[i]

[1] United States Department of Justice, Office of Public Affairs, Airbus Agrees to Pay over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case (January 31, 2020) [Airbus Agrees].

[2] Ibid.
[3] Serious Fraud Office, R v Airbus SE – Deferred Prosecution Agreement (last updated March 2, 2020) [UK Airbus DPA].
[4] Serious Fraud Office, Deferred Prosecution Agreement – SFO v Rolls Royce PLC (last updated January 17, 2017).
[5] United Kingdom Serious Fraud Office, SFO completes £497.25m Deferred Prosecution Agreement with Rolls-Royce PLC (January 17, 2017).
[6] UK Airbus DPA, supra note 3, at para 1.
[7] Ibid, at para 8.
[8] Ibid, at para 83.
[9] Ibid, at para 84.
[10] Ibid.
[11] Ibid, at para 86.
[12] Ibid.
[13] See the Rolls-Royce Approved Judgment at para 2.
[14] Criminal Code, RSC 1985, c C-46 [Criminal Code] s 715.32(3).
[15] Johnson, Donald, Was SNC-Lavalin denied a deal all because of three simple but misunderstood words? Financial Post (March 22, 2019).
[16] Ibid.
[17] Ibid.
[18] FCPA Professor, "Total"ly Milking The FCPA Cash Cow? (June 3, 2013).
[19] SNC-Lavalin, SNC-Lavalin Group Settles Federal Charges (December 18, 2019).
[20] Ibid.
[21] See generally, Criminal Code, supra note 14 at s 715.34(1).
[22] Ibid, s 715.34(3).
[23] UK Serious Fraud Office, SFO enters into €991m Deferred Prosecution Agreement with Airbus as part of a €3.6bn global resolution (January 31, 2020).
[24] Airbus Agrees, supra note 1.
[25] Transparency International UK, Airbus Bribery Investigation Highlights Power of International Cooperation in Tackling Corruption (February 3, 2020).

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.